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December 6, 2002

### By ECFS

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
TW-B204  
Washington, DC 20554

Re: *Ex parte - 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:

The purpose of this letter is to address the December 3, 2002 letter filings by Qwest in this matter.<sup>1</sup> The letters serve to provide yet additional reasons to deny the instant Section 271 Application. They are not only a continuation of a long series of revelations by Qwest that will continue to occur<sup>2</sup> and have a material effect on the Application but they continue to demonstrate

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<sup>1</sup> Letter from Dan L. Poole, Vice President – Regulatory Law, Qwest to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Dec. 3, 2002) and letter from Sharon J. Devine, Associate General Counsel, Qwest to Anthony Dale, Enforcement Bureau and Michelle Carey, Wireline Competition Bureau, Federal Communications Commission (filed Dec. 3, 2002).

<sup>2</sup> In fact, the record in this matter is in a constant and continuing state of flux. It is inconceivable, therefore, that the Commission can decide upon Qwest's request for Section 271 authority until everything is finally understood and resolved.

Qwest's unacceptable behavior.<sup>3</sup> The letters also demonstrate the need to consider other proceedings pending before the Commission that are relevant and material to this docket.<sup>4</sup>

The December 3 letter from Ms. Devine admits, on behalf of Qwest, that Qwest has been providing prohibited in-region, interLATA services.<sup>5</sup> Considering that Touch America has claimed all along that Qwest has engaged in and continues to engage in the unlawful provision of prohibited in-region, interLATA services, it comes as no surprise. The December 3 letter from Mr. Poole, on the other hand, is not only another admission of Qwest's illicit deeds but is irrelevant, self-serving and otherwise, a gratuitous spin on facts that attempt to transform bad acts into good ones.<sup>6</sup>

Mr. Poole begins his letter by correctly stating that Touch America has raised its experience with Qwest in opposition to Qwest's Section 271 Application ("dissatisfaction with the performance of Qwest under commercial contracts"<sup>7</sup>) but then concludes that by doing so, Touch America is somehow attempting to "convert commercial disputes into Communications Act issues" which he claims are not relevant to Section 271. In an apparent effort to demonstrate the commercial nature of Touch America's Section 271 claims, he attaches a verbatim transcription of a letter filed by Qwest in one of the complaint proceedings before the

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<sup>3</sup> It must be remembered that the revelations contained in these letters go to the very heart of the Application and are made by an applicant that is under investigation by the Justice Department for criminal conduct and by the SEC for securities and accounting violations.

<sup>4</sup> In order to assist the Commission with such deliberation, listed in Attachment 1 to this letter is a sampling of documents from other such proceedings that are electronically included with this letter and confirm, for instance, that (i) Qwest, directly or through its affiliates, has been and is in violation of Section 271 and (ii) granting Section 271 authority to Qwest is therefore contrary to the public interest.

<sup>5</sup> Although this admission and revelation pertains to private lines, it should be recalled that Qwest has also provided and continues to provide prohibited in-region, interLATA services in the form of lit capacity "IRUs." Moreover, the Onvoy lease referred to in Ms. Devine's letter not only violates Section 271, but it also violates the Divestiture Order (*infra* note 12) which was predicated, in part, on Qwest's plan to divest itself of all such leases. In any event, it is hard to believe Ms. Devine's claim that Qwest, which is laden with debt and in constant search of means by which to service that debt, including circuit "swapping", has provided prohibited services to Cable & Wireless since March of this year but has not received any payments from them. Like most of Qwest's statements, including its testimony on Capitol Hill, it doesn't pass the smell test.

<sup>6</sup> Indeed, Mr. Poole's letter would be laughable were it not for the serious nature of this proceeding.

<sup>7</sup> Of course, dissatisfaction with Qwest's performance was only one of many grounds brought by Touch America in opposition to Qwest's Application for Section 271 authority. For instance, Touch America has demonstrated, and Qwest has admitted, that it has and is violating Section 271 by providing prohibited in-region, interLATA services in the form of lit capacity "IRUs" that are in addition to the in-region, interLATA private line circuits admitted to by Ms. Devine.

Commission that was initiated by Touch America (File No. EB-02-MD-004). In that letter, Qwest tries to paint a picture of benign neglect by admitting that through “record-keeping and administrative deficiencies,” Qwest improperly moved, cancelled or disconnected Touch America’s services.<sup>8</sup>

It is unclear how the letter demonstrates Qwest’s point that “the disputes between the parties do not belong in a Section 271 proceeding.” Indeed, Qwest continues to either miss the point or to purposely deflect the Commission from the issues in this docket. A complaint is a different matter from an opposition to a Section 271 application. Touch America’s Complaint referred to by Qwest was brought pursuant to Sections 206 through 209 of the Communications Act whereas Touch America’s Opposition in this matter is brought pursuant to the Commission’s 271 Public Notice. The Complaint proceeding is one party against another where the burden is generally on the complainant. In the 271 process, the burden is on the applicant. The Complaint also raises numerous other Qwest violations that are outside the context of Section 271, *e.g.*, violations of Sections 201(a), (b) and 202 (a) of the Communications Act.

In short, although a complaint may be a private matter, it does not mean that the parties are therefore prevented from raising the same facts in a Section 271 proceeding with different statutory requirements, burdens, showings of proof and prayers for relief.<sup>9</sup> Stated differently, the statutory requirements of Section 271 are not the same as the statutory requirements of complaints. They involve different questions of law because they are brought under different sections of the Communications Act even though the facts may be the same.

Ironically, both the Devine and Poole letters also underscore the need for the Commission to take into consideration all of the on-going proceedings involving Qwest, including the Complaints brought by Touch America before the Commission.<sup>10</sup> Among other things, the Complaints allege that Qwest has and is violating the prohibition against providing in-region, interLATA services prior to obtaining authority from the Commission pursuant to Section 271. While the substance of those Complaints differs from the substance of the Section 271 approval process, the Complaints nevertheless reveal serious factual matters relevant and material to the

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<sup>8</sup> Qwest also admits in the letter that it supplied Touch America “with more IRU capacity than was called for in the IRU Agreement” between Touch America and Qwest. What it fails to state, however, is that, in other instances, Qwest did not provide Touch America promised capacity but, instead, used it for itself or sold it to others and yet required Touch America to pay for it instead of paying Touch America for using it.

<sup>9</sup> For example, in the instance of a complaint, the filing party is asking for enforcement and, possibly, damages; in the instance of a Section 271 proceeding, the opposing party is seeking denial of an application.

<sup>10</sup> File Nos. EB-02-MD-003 and 004.

criteria the Commission is required to evaluate and independently consider in that process.<sup>11</sup> For instance, information regarding Qwest's accounting practices is being developed in the Complaint proceedings that have a direct bearing on the Commission's duty to evaluate and consider Qwest's compliance with Section 272 and, accordingly, Section 271.

The Commission also needs to take into consideration proceedings such as the on-going formal investigation of Qwest's compliance with the Commission's Merger and Divestiture Orders (File No. EB-02-IH-0674) that is pending before the Investigations and Hearings Division of the Enforcement Bureau ("IHD"). In particular, IHD is focusing on the annual Section 271 "compliance audits" the Commission mandated in its Merger and Divestiture Orders.<sup>12</sup> The investigation is relevant and material to this proceeding because it involves the issue of whether Qwest is complying with the Commission's merger and divestiture directives and, in the process, complying with the requirements of Section 271.<sup>13</sup>

Simply stated, the Commission must understand that this proceeding does not exist in a vacuum. Instead, other proceedings are currently pending before the Commission that are relevant and material to this docket because Section 271, albeit for different reasons, is the common denominator. As such, facts revealed by the other proceedings are instructive to what the Commission must decide in this proceeding. The Commission, therefore, must take those proceedings into account when considering Qwest's 271 Application. To do otherwise would be to ignore the facts underlying the Application in an environment where questionable or outright wrongful corporate activities have inflicted significant harm upon the public good over the last

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<sup>11</sup> The relevance and materiality of those matters did not justify the presence of Qwest at Touch America's *ex parte* meetings in this proceeding, as required by the Commission. See letter from Daniel Waggoner on behalf of Touch America to Jane E. Mago, General Counsel, Federal Communications Commission, WC Docket No. 02-148 (filed August 30, 2002).

<sup>12</sup> *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 5376 (2000) ("Merger Order") and *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 11909 (2000) ("Divestiture Order").

<sup>13</sup> It should be noted that, on three separate occasions, IHD has requested information from Qwest that is relevant to the issues the Commission must decide in the context of this proceeding. In response, Qwest filed information that Qwest previously claimed it could not produce in the Complaint proceedings. As a result, the Market Disputes Resolution Division of the Enforcement Bureau issued a Letter Order finding that Qwest had not been responsive and required Qwest to provide the information. This episode, one out of many, raises concerns about Qwest's credibility when it selectively discloses information in the context of one proceeding, yet withholds that same information in another proceeding, claiming that it cannot produce the information.

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year or so with Qwest being among the corporations under scrutiny. Because the long distance market is already a very competitive market, consumers will not be harmed by a denial of the Application until all of the facts surrounding Qwest's activities are investigated and Qwest has established a track record of decent corporate behavior.

Respectfully submitted,

Davis Wright Tremaine LLP

/s/

Randall B. Lowe  
Counsel for Touch America, Inc.

cc: Chairman Powell (by hand)  
Commissioner Abernathy (by hand)  
Commissioner Copps (by hand)  
Commissioner Martin (by hand)  
J. Mago (by hand)  
C. Libertelli (by hand)  
M. Brill (by hand)  
J. Goldstein (by hand)  
S. Feder (by hand)  
J. Myles (by e-mail)  
M. Carowitz (by e-mail)  
G. Remondino (by e-mail and hand)  
R. Harsh (by e-mail)  
J. Jewell (by e-mail)  
P. Baker (by e-mail)  
C. Post (by e-mail)  
P. Fahn (by e-mail)  
B. Smith (by e-mail)  
S. Vick (by e-mail)  
S. Oxley (by e-mail)  
Y. Dori (by facsimile)  
Peter Rohrbach (by e-mail)  
WUTC Records (by e-mail)  
Qualex International (by hand)

**Attachment 1**

<b>Exhibit</b>	<b>Document</b>	<b>Description</b>
<b>A</b>	<i>In the Matter of Touch America, Inc. v. Qwest Communications International Inc.</i> , File No. EB-02-MD-003, Touch America’s Brief (filed Aug. 2, 2002)(public version).	The Brief demonstrates that Qwest has been and currently is in violation of Section 271 through its “lit capacity IRU” and dark fiber IRU offerings.
<b>B</b>	<i>In the Matter of Touch America, Inc. v. Qwest Communications International Inc.</i> , File No. EB-02-MD-003, Touch America’s Reply Brief (filed Aug. 16, 2002)(public version).	The Reply Brief demonstrates that Qwest has been and currently is in violation of Section 271 through its “lit capacity IRU” and dark fiber IRU offerings.
<b>C</b>	<i>In the Matter of Touch America, Inc. v. Qwest Communications International Inc., Qwest Corporation and Qwest Communications Corporation</i> , Additional Discovery Request, File No. EB-02-MD-003 (issued Oct. 16, 2002).	On its own motion, the Market Disputes Resolution Division of the Commission’s Enforcement Bureau requests additional information from Qwest regarding its accounting treatment of the IRU transactions.
<b>D</b>	Letter from Charles H. Helein, on behalf of Touch America, Inc., to Maureen F. Del Duca, Deputy Chief, Investigations and Hearings Division of the Enforcement Bureau, Federal Communications Commission, Docket No. EB-02-IH-0674 (filed Sep. 20, 2002).	The letter demonstrates that Qwest has violated the Merger and Divestiture Orders by not designating a Commission-approved 271-compliance auditor from March 11, 2002 until at least July 19, 2002, if not longer, and thereby also calling into question whether Qwest has been and currently is in compliance with Section 271.
<b>E</b>	<i>In the Matter of the Merger of Qwest Communications International Inc. and U S WEST, Inc.</i> , Letter from Joan Marsh, Director, Federal Governmental Affairs, AT&T, to Magalie Romas Salas, Secretary, Federal Communications Commission, CC Docket No. 99-272 (filed May 1, 2002).	The letter shows that the April 16, 2001 Report of Independent Public Accountants (“Auditor’s Report) prepared by Arthur Andersen and the April 16, 2001 certification by Qwest, submitted pursuant to the Commission’s Merger Order, demonstrates that Qwest has violated Section 271.
<b>F</b>	<i>In the Matter of the Merger of Qwest Communications International Inc. and U S WEST, Inc.</i> , Letter from Lisa B. Smith, WorldCom, Inc. to Dorothy Attwood, Chief, Common Carrier Bureau, Federal Communications Commission and David Solomon, Chief, Enforcement Bureau, Federal Communications Commission, CC Docket No. 99-272 (filed May 14, 2001).	WorldCom requests immediate sanctions against Qwest for violating Section 271 and the Commission’s Merger Order, as demonstrated in the April 16 <sup>th</sup> Auditor’s Report.
<b>G</b>	<i>In the Matter of the Merger of Qwest Communications International Inc. and U S WEST, Inc.</i> , Letter from Jonathan D. Lee, Vice President Regulatory Affairs, CompTel, to Dorothy Attwood, Chief,	CompTel requests the imposition of appropriate penalties against Qwest related to Qwest’s violation of Section 271 and the Merger Order, as demonstrated in the April 16 <sup>th</sup> Auditor’s

Exhibit	Document	Description
	Common Carrier Bureau, Federal Communications Commission, and David Solomon, Chief, Enforcement Bureau, Federal Communications Commission, CC Docket No. 99-272 (filed May 16, 2001).	Report.
<b>H</b>	<i>In the Matter of Merger of Qwest Communications International Inc. and U S WEST, Inc. Application for Consent to Transfer Control to TeleDistance, Inc. from Qwest Communications International Inc. to Touch America, Inc.</i> , CC Docket No. 99-272, Comments of AT&T Corp. on the March 2002 Audit Report (filed May 2, 2002).	AT&T demonstrates that the March 2002 Audit of Qwest's compliance with the Merger Order and Section 271 shows that Qwest continues to deliberately provide services in violation of Section 271 through "lit capacity IRUs" and other artifices designed to mask its prohibited conduct.
<b>I</b>	<i>In the Matter of the Merger of Qwest Communications International Inc. and U S WEST, Inc.</i> , Letter from Aryeh S. Friedman, AT&T, to Maureen Del Duca, Deputy Chief, Investigations and Hearings Division of the Enforcement Bureau, Federal Communications Commission, CC Docket No. 99-272 (filed Oct. 28, 2002).	AT&T demonstrates that in a filing with the Securities and Exchange Commission, Qwest admits that Qwest has violated Section 271 and the Merger Order through its "lit capacity IRUs."
<b>J</b>	<i>In the Matter of the Merger of Qwest Communications International Inc. and U S WEST, Inc.</i> , Letter from Aryeh S. Friedman, AT&T, to Maureen Del Duca, Deputy Chief, Investigations and Hearings Division of the Enforcement Bureau, Federal Communications Commission, CC Docket No. 99-272 (filed Oct. 30, 2002).	AT&T shows that Qwest's Form 8K and related press release demonstrates that Qwest has violated Section 271 and the Merger Order through its "lit capacity IRUs."