Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

TOUCH AMERICA, INC., a Montana Corporation.

Complainant,

v.

QWEST COMMUNICATIONS INTERNATIONAL INC.,

QWEST CORPORATION, and

QWEST COMMUNICATIONS CORPORATION,

Respondents.

TO: The Enforcement Bureau

BRIEF

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SUMMARY OF ARGUMENT

On February 8th of this year, Touch America filed its formal complaint against Qwest.¹ Touch America complained that Qwest’s in-region offerings and provisioning of its “Lit Capacity IRUs” are direct violations of the explicit prohibitions contained in Section 271 of the Communications Act. Touch America complained that the direct violations produced derivative violations of the prohibitions in the Commission’s Teaming Order.² However, Qwest’s disregards for its statutory and regulatory obligations were even more extensive. Touch America’s Complaint, therefore, pointed out that Qwest was also engaged in selling in-region dark fiber in such ways as to violate Section 271. Touch America’s Complaint also brought to the Commission’s attention how Qwest intentionally gamed the Commission processes by making representations based on vague generalities, by compromising and manipulating the compliance audit process and by falsely claiming that the Commission and/or its staff had approved its misconduct and duplicity. For example, in seeking Commission approvals, Qwest only addressed and the Commission only approved the pre-merger in-region provision of dark fiber. Although Qwest never addressed nor did the Commission approve Qwest’s post-merger provision of in-region Lit Capacity IRUs or dark fiber, Qwest claims it did.

Despite the limited discovery permitted Touch America to obtain evidence in support of its claims, Touch America submits that there exists on this abbreviated record incontrovertible facts, documentary evidence and Qwest admissions that prove Qwest’s unlawful behavior, deliberate duplicity and disingenuousness. The Lit Capacity IRU agreements and other evidence

1 All named defendants are collectively referred to as “Qwest” throughout this brief.
produced by Qwest and the practical reality of how Qwest’s Lit Capacity IRUs function and operate leave no doubt that Qwest’s Lit Capacity IRUs are transmission services offered as “sales” of “capacity,” and that the purpose of these IRU “sales” arose from Qwest’s management’s intent to inflate its financial position and to simultaneously continue marketing and selling to, and maintaining ties with, in-region, interLATA customers (while knowingly violating Section 271 in doing so). As will be shown herein, these dispositive conclusions are incontrovertible despite the limitations of narrow discovery policies, and the limited and incomplete disclosures in response to discovery requests, which, however, are supported by a watershed of public disclosures of Qwest activities directly relating to the issues raised in the Complaint.

In Sections I and II of this brief, the evidence supporting and proving Touch America’s claims is set forth, showing that Qwest’s provisioning of Lit Capacity IRUs in-region is an

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3 Consistent with the Commission’s oral instructions, Touch America’s counsel held a meet and confer with Qwest’s counsel on July 22nd to discuss additional discovery, based on the preliminary discovery provided by Qwest. In addition to numerous requests relating to and seeking to obtain clarification on documents already produced, Touch America specifically sought any and all internal Qwest communications and Qwest to customer communications relating to the 51 IRU agreements produced. Qwest’s counsel indicated that it would take, at a minimum, 30 to 60 days to produce the additional information. So as to avoid further delaying the Commission ruling on its Complaint, Touch America has elected to proceed at this time without this additional information, reserving its right to seek permission to propound additional discovery at a later date, if necessary.

4 In light of the dynamic nature of the facts involved in this Complaint and the continual public revelations of additional information concerning Qwest’s irregular accounting practices, the disgrace of the auditors conducting the compliance audits, the misuse of the IRU concept not only to disguise improper in-region interLATA operations, but to engage in “facilities-swaps” whose purpose was to game standard accounting practices, and the on-going investigations of Qwest by sister government agencies, and pursuant to Commission Rule 1.720(g), Touch America reserves the right to submit additional documentation, statements against interest, and other materials that constitute relevant evidence bearing on the issues in this matter and on the deliberate nature of Qwest’s misconduct and its efforts to mislead and misuse the Commission and its offices. Touch America will further note instances in which Qwest has woefully failed to comply with its obligations under Rule 1.720(g).
unlawful transmission of prohibited in-region, interLATA services in violation of Section 271. Also set forth is a showing how this core of unlawful conduct has rippled into a wider sea of public harm by creating and maintaining the anti-competitive and market distorting conditions the Commission’s Teaming Order pointedly prohibited.

Except to the extent expounded upon in response to Question No. 7, see Section III, infra, Touch America is satisfied that its Complaint establishes the illegality of Qwest’s post-merger dark fiber activities under MFJ precedent left unchanged by the 1996 Act and therefore Section 271.5

Section III of the brief will specifically address the questions raised in the Commission’s July 12, 2002 Letter, to the extent that those questions were not expressly directed at Qwest.

Touch America submits that it has shown herein, by more than the preponderance of the evidence, that the matters complained of in its Complaint are true. Indeed as Qwest itself conceded early on, an IRU is nothing more than

. This candid description was reaffirmed only this past April when Qwest conceded in its 2001 Annual Report that, “[it] will not enter into such leases [referring to capacity IRUs] involving routes with an end-point in a state in Qwest’s local service area until Qwest has obtained permission to offer interLATA services in that state.” Appendix 2, Exhibit B (Qwest 2001 Annual Report).

5 Touch America also rests on its Complaint and prior pleadings with regard to Qwest’s failure to raise the issue of Lit Capacity IRUs and provisioning of post-merger Dark Fiber in the merger and divestiture proceedings, except to the extent these issues are addressed in the context of Section I herein.
Qwest’s wrongdoing having been so clearly and unequivocally established, the Commission is required to acquit its statutory enforcement duties in a way that fits the promise of vigorous enforcement when wrongdoing is found as promised to Congress by Chairman Powell.
THE ABBREVIATED RECORD

The Commission needs no instructions on the rules governing the standard of proof that applies or on the appropriate requirements for drawing inferences from the evidence presented on the record. Nevertheless, the limited discovery permitted and the lack of time to conduct additional discovery clearly warranted in less time sensitive circumstances requires a brief statement of Touch America’s position on the evidentiary value of the abbreviated record and what inferences must be made based thereon. Further, should standards of proof be used or inferences drawn that differ from what the precedents establish as Touch America understands them, a basis will be set for Touch America to pursue other avenues as required to establish its case, including the introduction of additional evidence, the right to do so being reserved and the rules of the Commission so permitting.

The standard of proof here is a preponderance of the evidence. In the Matter of Revocation of the License of Sea Island Broadcasting Corporation of S.C. (WSIB), 69 F.C.C.2d 1796, ¶ 2 (1978). In order to satisfy this threshold burden, evidence must be presented and the Commission’s decision must be based on “reliable, probative and substantial evidence.” 5 U.S.C. § 556(d). “Substantial evidence” means that the “weight” of the evidence need not even support Touch America’s claims (though it overwhelmingly does), but only that the record reflect “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Superior Trucking Co. v. United States, 306 F. Supp. 872, 875 (N.D. Ga. 1969) (citation omitted); see also Kephart v. Wilson, 219 F. Supp. 801, 811 (W.D. Tex. 1963). The conclusions here, of course, would be that Qwest has violated Section 271 and the Teaming Order through the provision of in-region transmission services disguised as Lit Capacity IRUs.
Importantly, substantial evidence exists although two inconsistent conclusions may be drawn from the evidence submitted. *Superior Trucking*, 306 F. Supp. at 875.

The Commission must consider the totality of the evidence presented, *Kephart*, 219 F. Supp. at 811, including circumstantial evidence. Although a substantial amount of “smoking gun” evidence has been entered into the record, that degree of evidence is not required to sustain the burden of proof. It is well-established that “in many instances ultimate facts can be proved only through circumstantial evidence,”¹ and that circumstantial evidence may “be more certain, satisfying and persuasive than direct evidence.”² Proper decision-making requires only that the cumulative effect of the circumstantial evidence submitted be considered. It is not proper then that each document, statement or exhibit be considered in isolation if the result is to ignore the cumulative effect of all documents, statements and exhibits. Nearly 240 years ago, it was established that “circumstances altogether inconclusive, if separately considered, may, b[y] their number and joint operation . . . be sufficient to constitute conclusive proof.” *The Slavers (Reindeer)*, 69 U.S. 383 (1864).

Of no less importance, the Commission, as “an administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred[,] may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven.” *In re: Application of Ned N. Butler*, 5 F.C.C.2d 601, ¶ 8 (1966), citing *Radio Officers’ Union v. NLRB*, 316 U.S. 17, 48-49 (1954). Given the time and discovery constraints faced by Touch America, the following factors should weigh dispositively on the Commission’s evaluation of the evidence and the inferences

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² *L&J Energy Co., Inc. v. Secretary of Labor*, 57 F.3d 1086, n. 4 (DC Cir. 1995)
drawn therefrom and lead to findings and conclusions that fully support granting Touch America’s Complaint: (1) Qwest as the repository of all records concerning its operations had ample opportunity to produce records that would prove its case, but did not, (2) rather, Qwest resisted any disclosures and required it be ordered to provide each bit of information, (3) Qwest obviously must have reviewed all the documentation it produced and in that process would have noted items that would be construed against its interest, and (4) having noted such items that may warrant negative inferences, elected not to supply explanatory or justifying documentation to counter the negative inferences that clearly exist. The Commission should infer from Qwest’s choice not to defend itself with concrete rebuttal evidence that Qwest has no such evidence to present. Consequently, the Commission must draw its inferences from the evidence that is presented, and that evidence, much of it begrudgingly and reluctantly produced by Qwest, overwhelmingly demonstrates the validity of Touch America’s complaint and warrants inferences supportive of its claims. The cumulative weight of the documentary evidence outlined in this brief and the inferences to be drawn from that evidence fully support the conclusion that Qwest violated Section 271 and the Teaming Order by its sale, marketing and provision of in-region Lit Capacity IRUs.

ARGUMENT

I. LIT CAPACITY IRUs ARE TRANSMISSION SERVICES BEING OFFERED IN VIOLATION OF SECTION 271

The record supports the finding that as alleged, Qwest’s Lit Capacity IRUs are transmission services functionally identical to dedicated private line transmission services, and hence the conclusion of law that Qwest’s in-region marketing, sale and provisioning of these
IRUs violate Section 271.\textsuperscript{3} See Complaint at ¶¶ 95-154, Reply at Exhibit C, Declaration of Mark Maroney. By way of contrast, but equally persuasive, such findings and conclusion of law are further supported by the lack of any rebuttal evidence in the record. On the contrary, part of the record leading to such findings and conclusion is based on Qwest’s own admissions.

A. The Agreements Prove Lit Capacity IRUs are Transmission Services

The plain language of the Lit Capacity IRU agreements produced by Qwest pursuant to the limited discovery conducted in this proceeding establishes that Lit Capacity IRUs are transmission services. These agreements, having been drafted by Qwest upon careful consideration of the purposes of its offering and the protection of its interest, must be interpreted against Qwest’s interest and, as such, as an \textit{admission} against Qwest’s interest. See \textit{Rest. 2d Contracts} § 206.

Touch America has addressed these agreements in great substance in its “Chart on Qwest IRU Agreements” filed in this matter on June 14, 2002 and incorporated herein by this reference. The following eleven key elements and provisions from these agreements, taken as a whole, confirm that Qwest’s Lit Capacity IRUs are nothing more than plain transmission services:

1) The agreements define the “capacity” provided as “the dedicated transmission capability of a given portion of the Qwest Network designed to transmit digital signals at a stated rate . . . .”

2) The agreements require that Qwest supply all the means by which an IRU customer’s traffic is inputted into Qwest’s network, that is, Qwest must supply all of the optronics

\textsuperscript{3} All documents referenced herein and previously produced by Qwest are attached hereto in Appendix 1 for ease of reference, and are subject to the Protective Order entered in this proceeding.

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and other electronic equipment necessary to light the fiber (i.e., to originate the transmissions) in order to transmit the digital signals conveying the customers’ communications;

3) The agreements prohibit the customer from installing any additional optronic or electronic equipment or from replacing existing Qwest equipment used to light the fiber at any point along Qwest’s network;

4) The agreements expressly deny the IRU customer from obtaining any

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5) The agreements expressly deny the IRU customer any interest in or rights to the “physical access to, control of, modification of, encumbrance in any manner of, or other use of the Qwest Network” except as expressly allowed in the agreement. See, e.g., Touch America, Inc. Agreement at § 1.7. Notably, there is nothing in the agreement that “expressly allows” an IRU customer to obtain any physical access, control, ability to modify, to encumber or to use the Qwest Network, facilities, plan or circuits. Stated differently, Qwest retains its traditional carrier ownership and management control over all physical facilities and network components used to provide the “capacity” for the IRU with the IRU customer getting no more than any leased dedicated private line customer gets. That is, use of Qwest’s network to transmit, “between or among points specified by the [IRU customer], of information of the [IRU customer’s] choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43);

6) The agreements require that Qwest not only control all operations necessary to carry the IRU customer’s traffic, but also that Qwest provide all maintenance to the network. The sole function of the IRU “acquirer” is to have communications that need to be transmitted, the same function that any customer of a leased dedicated private line performs;

7) Like any leased dedicated private line user the IRU customer may have Qwest alter the transmission capabilities provided to meet the customer’s changing communications transmission requirements. Despite the agreements’ allusion to a lengthy fixed term during which the IRU customer purportedly obtains an “indefeasible right” to use the allegedly specific capacity allocated to it, that capacity may nonetheless be reallocated to another user, and its specifications may be modified or upgraded, thus ensuring that the user is not contractually bound to retain for the fixed term the original capacity in which it is purported to have an indefeasible right of use;
8) The agreements, like leased dedicated private line service arrangements, provide performance standards for the operation of the Qwest Network and outage credits when those performance standards are not maintained;

9) Some of the agreements identify specific circuits, which specification is nothing other than a fundamental requirement of network management indistinguishable from the fundamental network management requirements applied in leasing dedicated private lines;

10) The agreements ensure Qwest’s ability to perform other fundamental network management tasks such as: (a) without notice or consent by the customer, substituting circuit capacity by rerouting the IRU customers’ transmission paths or (b) deactivating the capacity even though the IRU fee has been fully paid. Both of these tasks once again demonstrate Qwest’s retention of basic network management functions as any carrier does when providing leased dedicated private lines or any other communications service; and

11) The agreements provide the same or similar limitations on an IRU customer’s rights to assign, sell or transfer its use of the capacity as do leased dedicated private line and other dedicated service arrangements.

As if these standard elements of Qwest’s Lit Capacity IRU agreements were not sufficient to prove that the Lit Capacity IRU is a transmission service, another nail in Qwest’s IRU coffin, the Lease Rollover option, can be found in at least one IRU agreement.

proves that Lit Capacity IRUs are leased dedicated private line services offered under different payment arrangements.

Thus, the plain language of the IRU agreements drafted by Qwest, standing alone, proves Touch America’s claim that the Lit Capacity IRU is merely an alternative means of providing dedicated transmission services to Qwest’s customers. As such, Qwest’s offering of such transmission services through the vehicle of Lit Capacity IRUs in-region prior to obtaining its 271 authority is a clear, prima facie violation of Section 271.
B. **Qwest’s Internal Documents Prove IRUs are Transmission Services**

Without contradiction, several available Qwest internal documents that address capacity IRUs confirm that the explicit language in each Lit Capacity IRU agreement was intended to provide and be interpreted as providing that Qwest retain sole access to, exclusive management and control over, and ownership of the hardware facilities (optronics and other equipment) and operations (maintenance and report) required to activate a customer’s digital signals (originate), transmit those signals and terminate those signals in accordance with the address protocols inputted by the customer. Stated simply, Qwest’s internal documentation, which can be seen as no less than admissions against interest, confirm the intended and practical purpose of Lit Capacity IRUs as functioning and operating like traditional transmission services (e.g., private lines). The following examples highlight this conclusion.

1) .
that it is Qwest, and only Qwest, that uses this capacity paid for by the customer to actually transmit the customer's signals.

The page marked Bates # Q-FCC-030611 further demonstrates that Qwest's Metro IRUs arose out of Qwest's pre-merger use of its long haul IRUs, because in both cases the same limitations and conditions on the IRU user's right of use apply. Hence, the capacity of an IRU once designated by the user cannot be reconfigured unless to the advantage of Qwest; the agreement expressly establishes that no ownership transfer of an asset is being made, nor is any right to alter the facility; and the IRU capacity cannot be encumbered in any way by the user.

2) May [?] 2001 additional presentation on In-Region Metro IRUs [Bates # Q-FCC-0029701-0029710].

Within this document, the terms and conditions normally incident to leased dedicated private line service offerings are listed. For example, (1) changes in capacity requirements must be consented to by Qwest, (2) changes are made only by Qwest's agreement to (a) substitute new for existing capacity (Bates # Q-FCC-0029705) or (b) alter sizing of capacities (Bates # Q-FCC-0029706), (3) tariffed services are combined with capacity sales (Bates # Q-FCC-0029707), (4) pricing is based on network configuration, switching sites, switch ports and mileage (Bates # Q-FCC-0029708), (5) routine maintenance and repair service is billed on a monthly basis (Bates # Q-FCC-0029709) and (6) credit allowances are made for outages (Bates # Q-FCC-0029709).

3) Another May [?] 2001 slide presentation on In-Region Metro IRUs [Bates # Q-FCC-0029694-0029700]. One page of this presentation [Bates # Q-FCC-0029697] compares in-region Metro IRUs with long haul or out-of-region IRUs. Qwest issues a warning that constitutes an admission that Lit Capacity IRUs implicate 271 obligations, cautioning that its Metro IRU cannot cross LATAs. The Commission should infer from Qwest's own warning that Lit Capacity IRUs operate in a
way prohibited by Section 271, i.e., they are telecommunications services. Qwest, nevertheless, goes on to list long haul IRUs as being available both inside and outside of the 14-state region.

In another page from this presentation [Bates # Q-FCC-0029699], Qwest describes “What can be IRU'd.” Its description includes “Any end to end telecom facility.” In this context, the inference can be drawn that Qwest was ready, willing and able to sell IRUs in -region to provide (a) end-to-end telecommunications originating on its customer's premises connecting to a Qwest Central Office (CO) and then to a Qwest POP and (b) end-to-end telecommunications transport originating on its customer's premises connecting to a collocation site in Qwest's CO for transport to a Qwest POP.

4) May 18, 2000 Qwest internal draft presentation detailing development of internal processes/procedures for handling all aspects of IRU sales, provisioning and treatment [Bates # Q-FCC-0029726-0029737].

First, Touch America comments that the comprehensive structure created to process Qwest's IRU sales, evidenced by this presentation, shows that Qwest possesses copious documentation relevant to the issues raised in this complaint that it has not disclosed.

Second, with regard to the content of the presentation, Touch America notes that Qwest's taking of a secured interest in the IRU'd capacity, as evidenced by Appendix B [Bates # Q-FCC-0029734], is a red herring that, when explained, further demonstrates that Lit Capacity IRUs are the equivalent of leased dedicated private line services. If, as Qwest has claimed, its Lit Capacity IRUs are indeed “sales of facilities” for which Qwest is paid up front and in whole, then there is no legitimate business reason nor any reason for Qwest to take a security interest. If a true sale is made by which the buyer pays the full price in one upfront payment to use the "asset" for its useful life, Qwest has no exposure to a financial risk that supports its taking a security interest. While Qwest may certainly seek as much protection as it can negotiate in any
In this "proposal," the customer is given three options - an IRU Capacity Option, a Leased Capacity Option and "Combined Offers". The proper inference from this document is that the substance of these transactions is to provide the customer with transmission services for which the customer has an option as to how to pay for those services. It can further be inferred that Qwest made no distinctions based on divestment of its physical network facilities or components, but only offered pricing options for the use of circuitry and capacity - "existing circuits may be rolled into IRU's [sic] immediately or priced at the incidental lease rate" and "the lease and IRU options can be combined without price change. . ." These representations also show that there are no technical or financial repercussions resulting from conversions from leased circuits to IRU capacity, the mixing of such circuits and capacity, nor any change in how Qwest's role is perceived by the customer – that is as a provider of choice for communications needs.

February 4, 2002 e-mail from Tom Cogan to Gerry McGrane entitled "FW: Metro-IRU Customer Collateral" [Bates # Q-FCC-0029641 ]

This e-mail states that, "IRUs are merely capacity from Point A to Point B at an ICB price." It confirms, once again, that no physical network components are involved in these IRU transactions, that these IRUs simply connect two points for communications and that they are subject to special individual case basis (ICB) pricing. In this latter regard, by describing the pricing as ICB pricing, it is clear that traditional telecommunications service offerings are the
7) **Qwest’s 2001 10-K Annual Report** [see Appendix 2, Exhibit B]

In this annual report, released in April of 2002, Qwest states:

“Company concludes IRUs are sales-type leases for accounting purposes and recognizes revenue at the time delivery and acceptance of the fiber or capacity takes place so long as: (1) Qwest receives sufficient consideration; (2) (x) Qwest has passed substantially all risks and rewards of ownership to the fiber or capacity, including responsibility for operation and maintenance cost and risk of technological or economic obsolescence, to the customer, (y) Qwest does not have substantial continuing involvement with the capacity sold, and (z) ownership has passed or will pass by the end of the agreement; and (3) the customer receives a specific fiber or channel on the Qwest network that only the customer can utilize. . . As previously announced, the Company does not plan on any sales of optical capacity in 2002 that would be treated as sales-type leases and require recognition of revenue up front. In order to meet continuing demand for optical capacity Qwest may enter into operating leases for fiber or capacity. **Qwest will not enter into such leases involving routes with an end-point in a state in Qwest’s local service area**
until Qwest has obtained permission to offer interLATA services in that state.” (emphasis added).

By this statement, Qwest concedes that in-region Lit Capacity IRUs, like those involved in this case, would violate the prohibitions of Section 271.

C. **Qwest Internal Documents Prove IRUs are Financial Transactions**

The business case disclosed by the evidentiary record establishes that Lit Capacity IRUs are not sales of network facilities, but routine transmission services packaged in a different financial wrapping that has now been determined to be unacceptable under GAAP standards, subject to Security Exchange Commission investigation and repudiated by Qwest’s own executive management (*see* Section I.E, *infra*). Once again, internal documents produced by Qwest speak for themselves on these points.

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This document also demonstrates that Qwest's motivation behind these IRUs is purely financial, viz., revenue enhancement, and has nothing to do with selling facilities. The document shows that Qwest compared and analyzed the financial benefits from using IRUs versus lease arrangements. To obtain its goal of booking revenues in current quarters to enhance its earnings reports, Qwest recognized that under some accounting standards it had to use a lengthy term in order to claim that it was making a "sale of a facility." These disclosures constitute admissions that Qwest's selection of a 20-year term for these IRUs is not based on a reasonable estimate of the useful life of a supposed facility being "sold," but was selected because without this aspect, Qwest could not comply with the accounting rules it then considered to govern these transactions.

This internal Qwest document deals with Qwest's profitability analysis of IRUs. It rests on numerous comparisons between IRUs and 'traditional' services or "standard product offerings." These comparisons are not, however, based on the economic consequences of multiple sales of physical portions of Qwest's network facilities, but solely on a "numbers" comparison which showed that (1) the total revenues realized from either transaction were closely aligned or not significantly different, albeit somewhat more favorable to Qwest, but (2) the IRU approach allowed Qwest to make the accounting entries it desired to make in order to book large amounts of revenues on a current basis.
The bottom line is that Qwest’s Lit Capacity IRUs are motivated strictly by accounting manipulations to enhance the revenues it could report. The facts in the record do not lend any support to Qwest’s proposition and defense that these IRUs are sales of network facilities or even directed at satisfying a specific customer need. Qwest used these IRUs to satisfy its own financial goals, knowing that they implicated 271, as shown above. When Touch America brought Qwest to task, Qwest attempted to reverse its rationalization by arguing these are “sales of network facilities.” However, Qwest cannot escape what its own documents show.

D. **Qwest Always Understood IRUs as Providing Private Line Service**

A series of documents disclose Qwest’s scienter that IRUs as originally conceived pre-merger were dedicated private line services offered with a difference only in financial packaging. These documents also disclose Qwest’s post-merger exploitation of IRUs to engage in in-region dedicated private line transactions. At no time, either pre-merger or post-merger, is there any discussion of these IRUs as sales of actual network facilities. The lack of any mention of such a concept as selling off physical network assets belies Qwest’s current attempts to justify these transactions as such sales and demonstrates that Qwest never disclosed any of these surrounding circumstances or historical development of its use of Lit Capacity IRUs to the Commission either pre-merger or post-merger until after this Complaint was filed. These documents further discredit Qwest’s attempts to implicate various FCC staff members as having “approved” its use of IRUs in-region and warrant the inference that Qwest’s defense of its activities is deliberately misleading and disingenuous.

1)
In this pre-merger document, Qwest personnel discuss the typical "customer profile" for an IRU as having "a clear need for long-term use of broadband private line services." In explaining the IRU concept, this document admits that an IRU is nothing more than "a financial alternative to a term rental or lease agreement which is used to provide customers broadband private line services. The underlying private line products themselves are not different." (emphasis added). The document further emphasizes the private line character of IRUs when it advises that an IRU "must be for broadband private line services (DS3 & above)," making this a non-negotiable requirement for the sale of an IRU. Further admitting that at the heart of these IRU transactions is a Qwest financial goal, the document records that "The sale locks in a fixed price for the private line at the equivalent [or] substantially lower monthly rates than a term agreement." That this pre-merger understanding and treatment of IRUs as dedicated private line services continued in the post-merger world is shown by several documents, such as a February 21, 2001 document entitled "Private Line Solutions: Metro IRU Overview" [Bates # Q-FCC-030608-030615]. Additionally, Bates # Q-FCC-029607, which is an undated chart listing information on various circuit pairs for "OC 3 Private Line IRU, 20 years," confirms Qwest's understanding that IRUs are dedicated private line services.

2) November 17, 2000 document entitled "'Metro' Indefeasible Rights of Use (IRUs)" [Bates # Q-FCC-30569-30572]

This document further demonstrates the financial focus underlying Qwest's use of IRUs and their relation to leased dedicated private line services - "IRU pricing will approximate the Net Present Value of 5 year [lease] rates spread over 20 years." Several other documents are of a similar nature, such as Bates #s Q-FCC-0029644-0029647, Q-FCC-020963 and Q-FCC-0029642-0029643 following.
This post-merger white paper confirms that Qwest considers its IRUs a mere financing arrangement for private line services and that no matter how the service is financed (i.e., buying an asset or leasing a service), Qwest remains the "service provider."

In this document, Qwest makes a comparison between lease standard pricing and IRU standard pricing for OC48 and OC192 service. This document shows once again Qwest's post-merger scienter that an IRU is simply a financing arrangement for leased dedicated private line services.

In this e-mail, an advisory is issued that cautions Qwest sales representatives as follows: "Please be mindful that IRUs are not products or services. Instead, IRUs are financing options to allow carriers the right to use facilities for at least 20 years." Even more telling of Qwest's purpose and intent with regard to its Lit Capacity IRU activities, perhaps, are the titles and positions of the Directors authoring the e-mail. Deb Johnson is Director of Private Line Transport Services and Perry Hooks is Director of Wholesale Switching, Interconnection, Transport & Signaling Marketing. If Qwest really believed it was selling "facilities," as it has attempted to convince this Commission, it is truly vexing then that its high-level management responsible for marketing and selling these IRUs are Directors of "transport services" and the like.
February 18, 2001 e-mail from the Director of Private Line Solutions at Qwest, attaching a Metro IRU overview to be discussed with Qwest Regional Vice Presidents. This document is proof that members of Qwest's high-ranking management were informed and knowledgeable that IRUs were leased dedicated private line services sold under a different name and with different financial terms. As already shown, Qwest's top management's scienter on the true nature of IRUs, as sold and marketed by Qwest, pre-dated the merger.

See also Bates # Q-FCC-016813 following. Moreover, Touch America submits that numerous e-mails, internal memos, correspondence and other internal communications would confirm in no uncertain terms these same facts. It is only because of the most limited discovery thus far obtained that Touch America has been unable to place additional documentation along these lines, the prime example being the e-mails, correspondence, etc., connected to the 51 IRU Agreements Qwest was made to disclose on the record.

September 22, 1999 e-mail from Roger Hoaglund (currently Vice President of Engineering) to Augie Cruciotti (currently Vice President of National Networks) re: America Online. In this e-mail, Mr. Hoaglund discusses the need to "provide an offer for dark fiber for AOL... to be sold in conjunction with a $11.9M interstate private line lit IRU." This e-mail shows that at the highest level of Qwest management, pre-merger, they understood lit fiber IRUs were indeed "interstate private lines." Another example of top management's understanding of IRUs as private lines follows.

January 7, 2000 presentation by Qwest's Vice President of Advanced Internet Services.
The presentation concerns the Abilene project and in discussing Qwest's contribution to this project, what is described in the referenced page is Qwest's "Dedicated Private Line Lit Capacity".

9) Undated Qwest internal document on IRU profitability [Bates # Q-FCC-010734-010739]

This document makes numerous profitability comparisons between IRUs and 'traditional' services or "standard product offerings" and establishes that IRU profitability derives from its use to provide "services." No mention or comparison is made of the profitability of "selling facilities." The document further establishes that Qwest used and uses IRUs to provide "services," not "facilities."

10) October 30, 2000 presentation entitled "IRUs on Tariffed Services: Local Private Line Products Offered under Indefeasible Right of Use Contracts" [Bates # Q-FCC-30530-30542]

This document provides additional proof that IRUs are offers of dedicated private line services. Because of Qwest's scienter disclosed here, the document also warns that IRUs "cannot cross LATA boundaries (271 restriction – still researching options)."

11) May 2000 Qwest internal E-mail String re: MFN/Abovenet IRU Opportunities [Bates # QW0053552.00001-QW0053552.00003]

This string of e-mails, alone, shows the egregiousness of Qwest's actions and its disdain of the Commission and its Section 271 restrictions. First, according to this document, six weeks before divestiture, while Qwest was making promises to the Commission to divest all in-region services, it was negotiating a huge capacity deal (referred to as "ltbc" or "long term broadband commitment") with MFN/Abovenet, involving an in-region link, viz., Seattle. Second, not only was Qwest negotiating this deal pre-divestiture, it was negotiating it as a two-year deal. The inference is that Qwest knew that the contract's performance would extend beyond divestiture.
The above-referenced documents and the statements contained therein are admissions by Qwest that, pre-merger, it knew that IRUs did not qualify for an exemption from 271 as network facilities sales because IRUs are leased dedicated private line services, not sales of facilities, and that nothing changed in the post-merger world.

E. **Qwest’s Admissions of Improper Accounting Further Demonstrate That its IRU Transactions Violate Section 271**

Qwest began its defense of this Complaint by incessantly claiming that its IRU agreements are entitled to exemption from 271 because they constituted “sales of network facilities” and with equal repetitiveness denied their identity as leases of telecommunications services. See, e.g., Qwest Answer at pgs. 6-10 and ¶¶ 79-81, 83-84, 86, 88, 91, 105, 108, 112, 114, 127, 134, 179, 183, 188, 194, 210, 214, 218. The on rush of events that have caught other corporate misdeeds also has reached Qwest’s doors. Two recent announcements obliterate the thin veneer of plausibility Qwest has clung to in this proceeding and confirm without further question that Qwest’s IRUs are transactions to furnish transmission “services” and in no way involve the sell off of pieces of Qwest’s network. Qwest’s admissions, coming as they do after Qwest has filled this record with semantic distortions, half-truths, a failed audit, and unsupported
assertions, including its claim of Commission complicity in its IRU schemes, create an even more ominous environment in which the Commission is duty bound to exercise its enforcement powers. By revealing its misdeeds before other agencies, yet continuing its charade before this Commission, Qwest sends a chilling message that it believes that the authority and powers of this Commission are not to be compared to those of the SEC and the Department of Justice (“DOJ”).

1. **Qwest’s Recent IRU Announcement Refutes Qwest’s Prior Statements to the Commission That its IRUs are “Facilities”**

Under investigation by several powerful governmental agencies, Qwest has unequivocally conceded that its sales of network capacity were improperly booked as IRUs when they should have been booked as services.\(^4\) In its *IRU Announcement*, Qwest discloses that it has “in some cases applied its accounting policies incorrectly with respect to certain optical capacity asset sale transactions in 1999, 2000 and 2001.”\(^5\) More particularly, Qwest states that, in some instances, the “optical capacity asset sales” should have been “instead treated as operating leases or services contracts.”\(^6\) Faced with the SEC and DOJ investigations, the gravaman of which are civil and criminal fraud, Qwest obviously determined that it had no choice but to admit that its IRU transactions do not involve sales of facilities, indeed not even sales-type leases, but at best only operating leases, and, in all likelihood, only the rendering of traditional communications services. In short, Qwest has admitted, albeit to another agency using terms outside the

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\(^5\) Id. at 1. Qwest made clear that the analysis of its accounting policies and practices include those with respect to revenue recognition of sales of optical capacity assets (i.e., IRUs).

\(^6\) Id. at 2.
communications context, that it has been providing in-region, interLATA services. (See next section).

2. Qwest’s April 1, 2002 Annual Report Filed With the SEC, But Until Now Not Disclosed to the FCC, Confirms Qwest’s IRUs are Sales of “Services,” Not of “Facilities”

As noted in Section C, above, Qwest conceded as far back as April 1, 2002, that its sales of optical capacity in the form of IRUs from June 1999 through July 2001 amounted to sales of “services,” not assets or facilities. See Appendix 2, Exhibit B at pg. 41 (Qwest 2001 Annual Report). Qwest cannot seriously contend any longer that the “characteristics” of its Lit Capacity IRU agreements (that it now concedes require accounting treatment as a “lease” in order to meet its financial statement disclosure requirements) support its claim in this proceeding that its IRUs are “facilities.” Each IRU sold by Qwest to in-region customers therefore clearly violated Section 271.

Qwest’s SEC disclosures contain other concessions relevant to this inquiry. For accounting purposes, Qwest states that it treats sales of optical capacity in the form of IRUs as a “lease.” Id. ("Qwest accounts for its sales of optical capacity in accordance with SFAS No. 13, "Accounting for Leases" based on the characteristics of these arrangements."). Qwest then concedes that the elements required to establish an IRU as a sales-type lease do not apply to its IRUs and thereby also admits that its IRU transaction between 1999 and 2001 do not involve sales of facilities. Specifically, Qwest states:

“...The Company concludes IRUs are sales-type leases for accounting purposes and recognizes revenue at the time delivery and acceptance of the fiber or capacity takes place so long as: (1) Qwest receives sufficient consideration; (2) (x) Qwest has passed substantially all risks and rewards of ownership to the fiber or capacity, including responsibility for operation and maintenance cost and risk of technological or economic obsolescence, to the customer, (y) Qwest does not have substantial continuing involvement with the capacity sold, and (z) ownership has passed or will pass by the end
of the agreement; and (3) the customer receives a specific fiber or channel on the Qwest network that only the customer can utilize. During 2001 and 2000, the Company recognized revenues from optical capacity asset sales in the amount of $1.013 billion and $468 million, respectively. This represented approximately 5.1% and 2.8% of total As Reported revenues in 2001 and 2000, respectively. As previously announced, the Company does not plan on any sales of optical capacity in 2002 that would be treated as sales-type leases and require recognition of revenue up front. In order to meet continuing demand for optical capacity Qwest may enter into operating leases for fiber or capacity. Qwest will not enter into such leases involving routes with an end-point in a state in Qwest's local service area until Qwest has obtained permission to offer interLATA services in that state. (Emphasis added.)

Id.

As shown by Touch America in its Chart on Qwest IRU Agreements, the elements listed as 2(x)-(z), above, do not now nor have they ever existed in the Lit Capacity IRU agreements produced by Qwest. The failure, as such, of Qwest’s IRUs to satisfy its own requirements means that Qwest’s IRUs are not even sales-type leases, but are instead either operating leases or plain old service agreements. Regardless, for 271 purposes, the distinctions between sales-type leases, operating leases or service agreements are matters of accounting practices and do not add to or diminish the fact that, no matter the name or the accounting treatment, by Lit Capacity IRUs, Qwest provides “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” When Qwest does so in-region, it does so in prima facie violation of Section 271’s prohibition on BOC provision of “in-region, interLATA services.”

Qwest’s IRUs “sold” between 1999 and 2001 are not “sales” at all. They certainly are not the sale of network facilities the Commission has recognized do not involve transmission services.
3. Qwest Cannot Divorce Treatment of IRUs in Other Regulatory Contexts From Its Obligations Under 271 and Commission Orders

Despite its confessions before the SEC, in its most recent filing in this proceeding, see Qwest IRU Chart and Analysis at pg. 2, Qwest argues (without supporting citations) that only two factors are used to determine that a particular IRU qualifies as a “facility,” and not “telecommunications.” Those two factors are said to be (1) that “specific capacity or fiber between two specific geographic points” are being conveyed and (2) “those rights are for an extended period of time.” *Id.* Qwest contradicts itself in this same filing, noting, “[t]he distinction between a ‘facility’ and ‘telecommunications’ need not turn on the size of the facility, the length of time that the acquiring party may use the facility, or the structure of the transaction by which rights to use the facility are conveyed.” (Emphasis added). Qwest IRU Chart and Analysis at pg. 4. When Qwest’s argument in support of its IRUs is stripped to its core therefore, really the only thing Qwest argues is that the Commission recognizes a Lit IRU as a “facility,” thereby removing it from the Section 271 context, when the customer obtains the right to use “specific capacity [] between two specific geographic points.” There is then, according to Qwest’s own argument, absolutely no difference between what its Lit Capacity IRUs and dedicated leased private line services. For when a customer purchases a dedicated leased private line service, that customer, exactly like a Qwest Lit Capacity IRU customer, obtains the right to use “specific capacity between two specific geographic points” on a carrier’s network.

In recent weeks, Qwest’s ability to maneuver behind its meaningless semantics and unsupported defenses has just about disappeared. Caught between both SEC and DOJ investigations, Qwest has “come clean” with these agencies and has all but admitted it engaged
in improper accounting practices because its IRUs are nothing more than leased service arrangements.

In the context then of the securities fraud investigation, Qwest was required to disavow the right to book revenues upfront. In the context of the investigation of 271 violations, Qwest’s admissions here require it to disavow its “sales of facilities” assertion and recognize that its IRUs are dedicated private line transmission services. The “assignment of specific capacity” and the right to use that capacity for an “extended period of time” grants a Qwest Lit Capacity IRU purchaser no more rights than such purchaser would acquire under a conventional long-term leased dedicated private line services arrangement. Qwest’s bald and unsupportable statements to the contrary cannot alter the conclusion that its Lit Capacity IRUs are violations of 271 and the Teaming Order.

4. Recent Disclosures and Admissions Make Claims that the Commission Approved Qwest’s Post-Merger Sales of IRUs Indefensible

The facts and Qwest’s own admissions speak for themselves – Qwest’s IRUs are not telecommunications facilities, but are instead telecommunications “services.” This is true not only from a technical and operational perspective, but based on Qwest’s admissions alone from an accounting perspective, as well. See Section II.E.1 and 2, supra. Any notion, therefore, that the Commission approved of Qwest’s post-merger marketing and sales of in-region, interLATA “telecommunications facilities” in the form of IRUs in both Dark Fiber and Lit Fiber Capacity, as Qwest has repeatedly claimed, must be dismissed. See e.g., Qwest Answer at pg. 5-7 ¶¶ 14-15, 19-20, 37, 85, 87, 95, 110, 112, 114, 122, 125, 140, 143, 145-146, 148, 154, 161, 165, 171, 174, 187; see also Qwest IRU Chart and Analysis at pgs. 6, 11. For as Qwest concedes, its
IRUs, both for the conveyance of dark and lit fiber, that it claimed were “facilities,” were in fact, at the time they were disclosed to the Commission, nothing more than service agreements.

II. LIT CAPACITY IRU OFFERINGS VIOLATE THE TEAMING ORDER

Although less comprehensive a record has been compiled than would clearly be created with normal discovery, the existing record solidly supports the Complaint’s allegations that the totality of circumstances surrounding Qwest’s post-merger in-region lit capacity IRU transactions and operations violate the Teaming Order and, thereby, Section 271.

Qwest’s principal purpose in using its IRUs in-region was to obtain material financial benefits by employing two main strategies: first, to artificially enhance its revenue realization and gains and, second, to avoid the consequences of its required divestiture of in-region assets and customers. The first strategy involved two strategies. One was the use of what has been publicly reported as “facilities-swaps” and the other was the “sale” of Lit Capacity IRUs. The goal of this first strategy was to report larger quarterly earnings (revenues) on a current basis and thereby obtain financial statement support for its publicly traded stock price. The first strategy has only recently been shown to have failed, principally because the strategy was based on improper accounting practices that will require the restatement of $1.16 billion in revenues over the past two years (not coincidently, the first two years after divestiture). See Appendix 2, Exhibit A.

The second strategy of avoiding the major consequences of divestiture and blunting its revenue impact resulted in Qwest’s (1) continuing to extract from in-region customers revenues from private line services, (2) maintaining its presence and image as the “provider of choice” in-region to high-profit large end user customers, (3) offering in-region customers bundled local and long distance services through the use of IRU transmission services for both local access and
long haul transport, (4) handicapping its competitors by keeping them from obtaining the business of in-region customers that took Qwest’s IRU services and (5) warehousing the IRU service customers by using such lengthy service term commitments as to virtually assure that Qwest would obtain its 271 approval before those service terms expired, enabling it to convert these customers to its post-271 approval offerings. Both in the documents and its record submissions in this proceeding, Qwest has admitted it has obtained material financial benefits from its in-region operations post-divestiture. These financial benefits were not secured by happenstance but were deliberate and done with scienter. The record unequivocally demonstrates that Qwest’s sole motivation and purpose behind its use of IRUs was financial.

explained in Section I.C above; see also Appendix 2, Exhibit A (noting that between 1999 and 2001 Qwest recognized $1.16 billion in revenues, $569 million of which was pre-merger and confirming the continuity of Qwest’s corporate policy and goals).

Through its IRUs, Qwest holds itself out as a provider of both long distance and local services, in and out of region. This gives Qwest a jump-start on the long distance market, strengthens its existing relationship with in-region customers and necessarily strengthens its position in the marketplace.

One specific piece of documentary evidence the limited discovery produced on this point and worth separate mention
service in a bundled agreement. So far we've been able to sell the local service as lit capacity. However, AOL states that E.spire is offering dark fiber. To win, we must provide an offer for dark fiber for AOL . . . to be sold in conjunction with a $11.9M interstate private line lit IRU.”

This proves that Qwest highest ranking executives were aware of the need for and benefits of being able to bundle local and long distance services and that it intended to accomplish this through the use of IRUs.

Moreover, all of Qwest's IRU agreements with end-users (e.g., AOL, E.Jones, EMC, HP, Lucent and Microsoft) were executed after merger and divestiture. See Bates #s Q-FCC-003724-003753 (America Online, Inc. Agreement, March 23, 2001), Q-FCC-004357-004381 (Edward D. Jones & Co., L.P. Agreement, Jan. 31, 2001), Q-FCC-004415-004436 (EMC Corp. Agreement, June 29, 2001), Q-FCC-005553-005590 (Hewlett-Packard Co., Inc. Agreement, Dec. 29, 2000), Q-FCC-005785-005803 (Lucent Technologies Agreement, March 2001) and Q-FCC-005878-005908 (Microsoft Corp. Agreement, March 8, 2001). It is particularly incriminating that all of these IRU agreements with large corporate end users occurred after merger and divestiture. Not only did these IRUs retain Qwest's presence in the in-region long distance market and its contact with in-region customers, they stand in sharp contrast with the pre-merger dark fiber IRUs with GTE, WorldCom and Frontier (major competitors) that Qwest uses to support its claims that: (1) it disclosed its intent to sell IRUs post-merger and (2) that the Commission Staff knew of this intent and approved it. Casting aside other facts and interpretations for the moment, one fact is irrefutable. Qwest never disclosed any specific sales of IRUs to large end users to the Commission prior to the Divestiture Order. The conclusion is clear that Qwest used its Lit Capacity IRUs to unlawfully capture in-region end user customers and supplant the competitive services being offered by Touch America and other carriers.
The available discovery precludes at this stage any testing of an actual customer’s perception of Qwest’s role as an IRU provider or an understanding of what Qwest is providing. But the record does reveal what any customer must perceive from the inherent facts of the transactions themselves and the subsequent performance of the agreements produced by those transactions. Any IRU customer would perceive and understand that (1) it continues to deal with Qwest for its in-region communications needs; (2) Qwest provides all facilities and equipment, provides all maintenance and repairs, and handles all IRU customer service inquiries and complaints; (3) no other carrier but Qwest is involved either before or after the IRU agreement is executed; (4) it cannot access, control or operate any of Qwest’s facilities used to provide the IRU services; (5) if upgrades, changes or other changed needs arise, the customer contacts Qwest and only Qwest; (6) Qwest provides all local access connections needed for the IRU; (7) Qwest, of course, continues to provide all local services which it provided prior to merger and divestiture and which it continues to provide post-merger/divestiture; (8) payment and any changes in payment terms are made through and with Qwest; (9) customers continue to deal with the same departments (billing, provisioning, maintenance) of Qwest as they did previously and (10) the customer has no different requirements to originate and complete its in-region and out-of-region communications than it had when leasing private lines or taking other services from Qwest.

To the above inherent perceptions (operational realities) can be added the following facts and inferences from the documents that were produced through the limited discovery process.
Q-FCC-015223-015229 provide IRU models prepared for Star, Primus and Williams and contain the same information with the same result as in the case of CAIS.

2) The sales documents, presentations and other internal communications discussed in detail in Section I above also disclose that Qwest marketing staff and executive management were told and trained that IRUs are private line services priced differently to reach Qwest's corporate financial goals, that IRUs were in fact private line services, and that IRUs could be combined with tariff leased services. In terms of explaining IRUs and the IRU concept to customers, Qwest consistently analogized to leased private lines services to explain everything from pricing to functionality and operational parameters. See, e.g., Bates #s Q-FCC-026129-026130, Q-FCC-0029701-0029710, Q-FCC-0029644-0029647, Q-FCC-010734-010739, Q-FCC-029597-029598, and Q-FCC-30569-30572. These documents warrant the inference that customers were told and perceived that they were acquiring traditional private line services under a different name, IRUs, and that the only differences were that they had to pay upfront for the service and that that payment would cover a lengthy term of up to 20 years. However, even with the limited discovery available, documents produced show that not only did Qwest recognize that the 20 year terms were a marketing fiction and an accounting ploy created to book the IRU revenues in a single entry as opposed to spreading those revenues over time, see, e.g., Bates # Q-FCC-0029644-0029647, other documents show that the 20 year terms lacked true technological substance and reality.

3) Additional documentation shows that Qwest was concerned with how to deal with the need for refurbishment identifying the need to do so as early as 6 years after the IRU "sale." These documents warrant the inference that Qwest IRU service customers were reassured that the 20 year term was explained to them as an accounting necessity or explained in some other
euphemistic terms to relieve customer concern about buying a technological capability for such a long term when all parties to the transaction realized that customer need and technological advancement would obsolete that technology to the point that the customer's need could no longer be satisfied. Indeed, documents produced show that Qwest had prepared an answer for this concern by offering upgrades to the IRU capacity provided, albeit attempting to structure such enhancements to its own maximum benefit by requiring customers to substitute equal or greater capacity for their obsoleted capacity.

See, e.g., Cais, Inc. Agreement at § 9.1 [Bates # Q-FCC-004132], Verio, Inc. Agreement at § 5.3 [Q-FCC-006305], Lucent Technologies, Inc. Agreement at § 5.4 [Bates # Q-FCC-005788] and Hewlett-Packard Co., Inc. Agreement at § 5.4 [Bates # Q-005557]. Taken together, the inference is inescapable that the 20-year term was and is a fiction created to serve other business purposes that most assuredly do not qualify as an inherent component of a network facilities sale.

4) Finally, the language and terms of the IRU agreements themselves underscore how and why they violate the Teaming Order. First, the customer's option to upgrade, sell-back, exchange, etc. its IRU capacity undercuts any reality to the 20-year term, requires Qwest's continuous involvement with the customer indistinguishable from its involvement as a stand-alone IXC pre-merger, and captures the customer for an indefinite period because having paid up front the customer no longer can switch to another carrier unless it wishes to forfeit its upfront payment. These factors provide Qwest an immense advantage when it seeks to reenter the in-region marketplace after having obtained approval. Creating such an advantage violates the Teaming Order. Moreover, the IRU agreements' fee and O&M charges provide Qwest with on-going financial benefits from in-region sources.
Thus, there is substantial evidence in the record proving, by a preponderance of the evidence, that Qwest’s post-merger offering of in-region Lit Capacity IRUs not only directly violates Section 271, it flies in the face of the *Teaming Order* and the specific BOC activities the *Teaming Order* is meant to ensure against.

### III. TOUCH AMERICA’S RESPONSES TO FCC QUESTIONS REGARDING IRUs

**Question No. 1**

This question appears directed, in its entirety, to Qwest. Touch America reserves the opportunity to respond to Qwest’s answer in its Responsive Brief.

**Question No. 2**

Touch America will reserve comment until Qwest provides its answer to the questions propounded.

**Question No. 3**

This question appears directed, in its entirety, to Qwest. Touch America reserves the opportunity to respond to Qwest’s answer in its Responsive Brief.

**Question No. 4**

First, the record demonstrates that Qwest’s Lit Capacity IRU is not a “facility” within the meaning of the Communications Act, Commission rule or precedent, industry usage and practice, and, most importantly, in the context of qualifying for an exception to the prohibitions of Section 271.

Second, in answer to the Commission’s hypothetical question, whether the purchaser of the “capacity” uses the “facility” (which it is not) to provide service to itself or others is an irrelevant inquiry. As discussed in response to Question No. 8, infra, neither the Communications Act, Commission rule nor Commission precedent make such a distinction.
The “IRU as facility” concept in Commission jurisprudence makes clear that it is recognized sparingly and under unique circumstances - circumstances that do not exist here. In fact, existing Commission pronouncements on traditional IRUs is generally disfavorable to the concept of “IRU as facility.” See American Telephone and Telegraph Company and Associated Bell System Companies, offer of facilities for use by other Common Carriers, 70 F.C.C. 2d 1905, 1914 (Feb. 14, 1979) (“We have previously found… that IRUs are not in the public interest per se, All America, 15 FCC at 12; Communications Satellite Corp., 23 FCC 2d at 855, and therefore will not grant an IRU interest here without a finding that it would be in the public interest to do so.”). Further, truly informed understanding of the proper place for the “IRU as facility” concept in communications regulations will recognize that they apply in contexts and arise out of policy considerations that are wholly-foreign to the context and policy considerations surrounding Qwest’s in-region, interLATA Lit Capacity IRUs. To the extent necessary, Touch America will expand on these points in its responsive brief.

**Question No. 5**

Touch America will reserve comment until Qwest provides its answer to the questions propounded.

**Question No. 6**

As demonstrated by the IRU contracts themselves, confirmed by Qwest documents produced in discovery, and by the application of simple logic and understanding of the technology involved (see Section I, *supra*), it is Qwest and only Qwest that is engaged in the “transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received” within the meaning of 47 U.S.C. Sec. 153(43), by and through its Lit Capacity IRUs.
Touch America reserves additional comment on the Commission’s questions pending receipt of Qwest’s answers.

**Question No. 7**


Touch America’s position is also correct because Qwest’s post-merger, dark fiber activities violate the *Teaming Order*. Through such activities, Qwest obtains substantial “material benefits” from in-region activities, both financially and by creating another means by which it gains a significant “jumpstart” into the in-region, interLATA market. Complaint at ¶¶ 324-329. Qwest’s efforts to distort Touch America’s position with regard to the illegality of its post-merger, dark fiber activities should be disregarded by the Commission. See Qwest IRU Chart and Analysis at pg. 7.

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7 As a result of recent disclosures by Qwest regarding its accounting for sales of optical capacity, Touch America submits that even Qwest’s pre-merger dark fiber agreements with GTE, WorldCom and Frontier, as well as all other similarly drafted dark fiber agreements, previously thought to be inoffensive to Section 271 on the basis that substantially all of the risks and rewards of “ownership” were adequately passed to the purchasers, may now fail in this regard. As admitted by Qwest in its 2001 Annual Report, to be considered a “sales-type lease” for...
It is not Touch America’s position that the actual disposal by legitimate IRU sale of in-region, interLATA dark fiber facilities establishes a *prima facie* violation of Section 271 in the same manner Qwest’s Lit Capacity IRU activities violate Section 271. With the latter, Qwest activates its fiber plant, puts the fiber into operation, and then controls, owns, and manages those lit fiber operations. Stated another way, Touch America recognizes that in Qwest’s dealings with dark fibers that it does not activate or control the actual “transmission” of “telecommunications.” Only when Qwest installs, controls, and operates the optronics and other electronic equipment needed to transmit communications using the fiber, as it does with Lit Capacity IRUs, is Qwest engaged in the transmission of prohibited in-region, interLATA services.

Touch America does not intend, therefore, to draw strict parallels between Qwest’s Dark Fiber and Lit Capacity IRU activities in-region. It must nonetheless be recognized that both activities violate the *Teaming Order* and therefore Section 271, but only the Lit IRUs constitute an unmistakable *prima facie* violation of Section 271, involving as they do the in-region transmission of communications across LATA boundaries.

accounting purposes, it is necessary for title to the IRU’d property to pass to the IRU holder. *See* Appendix 2, Exhibit B at pg. 41 (“Under SFAS No. 13, in order to meet the requirements for sales-type lease accounting for real property, ownership of the property must be transferred. Prior to July 2001 when the FASB’s Emerging Issues Task Force (“EITF”) provided guidance that transfer of ownership must occur automatically at or before the end of the lease to qualify as a sales-type lease, Qwest’s IRUs included a nominal purchase option at the end of the term. Commencing July 2001, Qwest modified its IRU terms to provide for the automatic transfer of title at the end of the term.”). Qwest failed to include terms in its Dark Fiber Agreements with GTE, WorldCom, and Frontier to ensure the automatic transfer of title. *See* Touch America’s Chart on Qwest IRUs, Group 1 at Issue H. Thus, Qwest’s pre-merger Dark Fiber IRU Agreements with GTE, WorldCom, and Frontier, as well as others, previously believed to be legitimate, traditional IRUs, may in fact be only long-term leases of dark fiber. As such, these too constitute prohibited, interLATA services. *See, e.g.*, Dark Fiber Order and Global Naps Decision.
Question No. 8

Touch America will reserve comment until Qwest provides its answer to the questions propounded. In the meantime, the following is submitted for the record.

The question may be misconstrued as suggesting that the use to which an IRU is put or the category of user (retail/wholesale or voice/data, e.g., backbone network or ISP) may have some interest. The law suggests otherwise. Neither Section 271 of the 1996 Act nor Commission precedent governing Qwest’s post-merger activities permits such distinctions between the type of communications transmissions carried or for whom. See e.g., 47 U.S.C. §271 (“[n]either a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section” - nothing in the language of Section 271 suggests distinctions such as the wholesale/retail or voice/data distinction); see also Divestiture Order at ¶13 (“Qwest will sell all of its interLATA and intraLATA originating switched long distance within the U S WEST region. Additionally, Qwest will sell to Touch America all retail and wholesale private line voice and data services where a circuit provided to a customer crosses a US WEST LATA boundary, and will receive no revenues from these in-region interLATA services.”) (emphasis added).

Qwest has been and is prohibited from providing in-region interLATA services including the services Qwest has provided to each of the aforementioned “categories” of users through Lit Capacity IRUs. Therefore, regardless of who each customer was or what type of traffic each customer ultimately had Qwest carry over its network, the only relevant fact the Commission may concern itself with in resolving this complaint is that Qwest carried interLATA transmissions in-region.
Question No. 9

Section 271 of the Act was created to ensure that BOCs open their local markets to competition. The primary incentive underlying section 271 is the authority to provide interLATA services in-region. As Touch America has maintained and demonstrated throughout this proceeding, Qwest’s Lit Capacity IRU is simply an alternative method of paying for a Qwest dedicated private line service. See Section I, supra. If a purchaser obtains dedicated private line services from Qwest (regardless whether it pays for such services under a Lit Capacity IRU arrangement or otherwise), and then uses those dedicated private line services to provide interLATA services to in-region end user customers, then that purchaser is simply a reseller of Qwest’s services. Through the sale of the Lit Capacity IRU, Qwest derives revenues and maintains its position in the in-region, interLATA marketplace. This obviates any incentive to open, and keep open, its local markets or otherwise to comply with Section 271.

Section 271 provides incentives to Qwest to open its local exchange market to competition in primarily two respects: (1) by forcing Qwest to remain at a competitive disadvantage in the national interexchange marketplace; and (2) by forcing Qwest to incur the increased opportunity cost of maintaining a network infrastructure it is prohibited from utilizing for certain services that such infrastructure is perfectly capable of providing – for example, the provisioning of wholesale (resale) services to other carriers and ISPs.

Qwest’s provisioning of Lit Capacity IRUs to purchasers who resell the capacity to provide interLATA services to in-region end user customers obviates the incentives embodied in Section 271. When a purchaser of Qwest’s Lit Capacity IRUs uses the purchased transmissions to provide in-region, interLATA services to end user customers, Qwest overcomes its
competitive disadvantage by maintaining its foothold in the national interexchange market through such derivative operations.

Section 271 prohibitions properly applied would add incentives based on opportunity costs. As the monopoly provider in the local exchange market, absent Section 271 restrictions, Qwest would have the ability to utilize both its in-region and out-of-region infrastructure to the fullest extent possible. Since certain costs are not tied to utilization measures (for example, O&M services), these costs will be incurred by Qwest regardless of how much of the network is utilized and revenue bearing. Therefore, absent Section 271 restrictions, Qwest would be able to greatly reduce the incremental costs of providing such fixed cost services by spreading the costs over the fullest revenue stream possible. Section 271 comes into play by carving out an entire section of the potential revenue stream (i.e., the in region interLATA services), thereby increasing Qwest’s opportunity costs while the section 271 restrictions remain in place.

In its merger and divestiture filings, Qwest itself provided the rationale for how the incentives underlying section 271 are intended to affect the monopoly BOC. See Appendix 2, Exhibit C (Qwest Response to Comments on Applications for Transfer of Control and Attachment B thereto, Declaration of Bruce M. Owen, CC Docket No. 99-272 (Oct. 18, 1999)). Qwest spoke repeatedly during the merger and divestiture proceedings of having to reluctantly divest its in-region, interLATA businesses, thus creating a great big “hole in the doughnut,” referring, of course, to its 14-state local monopoly territory. Qwest emphasized that the divestiture was the greatest incentive of all to its opening the local monopoly to competition because Qwest wanted to “fill the hole in the doughnut” and return to the in-region long distance market as quickly as possible. Id. at pg. 20. Qwest stated that, because it would be removing its long distance services from use in the hole in the doughnut area, it could not spread the cost of
fixed cost services (such as O&M services) across the optimal number of service offerings, and thus, the incremental cost for such fixed cost services would increase significantly until Qwest was able to get out from under 271 prohibitions. *Id.* at pgs. 19-20. But Qwest’s fixed cost services, such as O&M services, are also offered and provided under the Lit Capacity IRU arrangements. Thus, by offering transmissions via Lit Capacity IRUs, which, in turn are used by the purchaser to provide interexchange services to end users in-region, Qwest offsets and spreads out the incremental costs of providing O&M services and other fixed cost services by increasing the number of revenue sources potentially serviced by its fixed cost service operations. Thus, under Qwest's own logic, its incentives to comply with 271 are reduced.

As Qwest further pointed out in its merger and divestiture filings, “the Qwest network also has a tremendous amount of excess capacity. As time goes by and the combined company cannot make maximum use of that network due to the interLATA prohibition, it will be losing the ability to earn the highest return on its capital investment. In this sense, the network is a ‘wasting asset.’” *Id.* at pg. 23. By offering Lit Capacity IRUs to purchasers who, in turn, resell the services to end user customers, Qwest reduces its idle network capacity and generates incremental revenues from in-region operations.

In the *Teaming Order* the Commission addresses the issue of how a BOC’s involvement in the long distance market affects its incentives to open its local monopoly. As demonstrated in Section II of this brief, application of the *Teaming Order* analysis to Qwest’s IRU activities are damning. Qwest’s IRU offerings of lit fiber capacity clearly give it the type of competitive advantage over other providers of telecommunications services that Section 271 was designed to prevent.
As noted previously, throughout its merger and divestiture filings, Qwest maintained the theme that, until such time as it received section 271 authority, Qwest would “have a doughnut-shaped footprint with a 14-state hole,” a “hole” in which Qwest would “be unable to provide originating long distance, terminating 800, private line, and other prohibited interLATA services.” Id. at pg. 18. Qwest used this “hole in the doughnut” image to refute legitimate concerns raised by Commenters to the proposed merger, and to attempt to persuade the Commission that the existence of the “hole” would actually create even greater incentives to the post-merger company to achieve Section 271 compliance sooner.

“In particular, commenters disregard the important new incentives the merger will create for the combined company to satisfy Section 271 as soon as possible. Pending 271 relief, Qwest will face significant competitive disadvantages in the national interexchange market due to the hole in its service territory created by divestiture. Meanwhile, the combined company already will own a state of the art network asset it could use for in-region interLATA service, and the opportunity cost of leaving that wasting asset idle will be large. Together these business problems will significantly increase incentives for the combined company to re-enter the interLATA market in the U S WEST region.” Id. at pg. 2.

As shown herein, Qwest’s own elaborate and detailed statements demonstrate that Qwest concealed from the Commission its knowledge of the uses to which it intended to put its in-region network, a network it told the Commission would lie fallow (a “hole in the doughnut”) as a sunk investment of “wasting assets” until such time as it obtained 271 approval. Qwest’s “hole in the doughnut” was pure fiction. Qwest’s provision of private line services for resale to in-region end-user customers under the guise of IRUs allows Qwest to negate the purposes and intent of Section 271. By and through the use of IRUs, both in Lit Capacity and Dark Fiber, the hole in Qwest’s doughnut never existed, making Qwest’s purported incentives to close the non-existent “hole” meaningless.
Qwest’s Lit Capacity IRUs, when provided to entities serving in-region end-users, permit Qwest to continue to compete with all other carriers, take substantial interLATA revenues out of the in-region market, and permit Qwest to remain visible, in contact with and actually serving in-region entities that require interLATA communications capabilities. It is patently clear that through its Lit Capacity IRUs and Dark Fiber IRUs, Qwest retained significant prohibited in-region revenues and customers. In reality, all Qwest really ever divested on June 30, 2000, were residential and low-end retail customers. The Commission is well aware that obtaining Section 271 authority for the sole purpose of serving the low margin, fickle residential long distance marketplace is no incentive at all for Qwest to open its local market to competition.

**CONCLUSION**

The premises considered and based on record evidence, Touch America’s Complaint must be granted in its entirety. Thereafter, the appropriate remedies may be addressed.

Respectfully submitted,

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