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VIA E-MAIL AND HAND DELIVERY

Maureen F. Del Duca
Deputy Chief
Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: EB-02-IH-0674

Touch America's Comments on Qwest's Response to Letter of Inquiry; Notice of Intent to File Application for Admission of Relevant Evidence Produced in Related Proceedings; Petition to Deny Qwest's Request for Confidential Treatment of TA Customer Information; and Notice of Apparent Violation of Merger and Divestiture Orders by Failure to Promptly Designate and/or Seek Approval of Replacement 271-Compliance Auditor

Dear Ms. Del Duca:

On September 10, 2002, Qwest Communications International Inc. ("Qwest") responded to the August 7, 2002 Letter of Inquiry ("LOI") from the Enforcement Bureau's Investigations and Hearings Division ("IHD"). Per the LOI, Qwest served a copy of its response on Touch America, Inc. ("Touch America").

By these comments, Touch America first notes its objection to the narrow focus of the IHD's inquiry, stemming as it does from a compliance audit that is demonstrably inadequate and flawed. In addition, based on its initial review of Qwest's response, Touch America files these comments to immediately set forth for the record that Qwest's disclaimer of any participation in the audit work process conducted by Arthur Andersen,

LLP (“Andersen”) is contrary to recorded facts and to object to Qwest’s attempt to hide behind the collapse of Andersen as a possible basis for not responding, fully and candidly, to the Commission’s questions.

Touch America also asks the Commission to order the release of information contained in Qwest’s response that relates to and is the rightful property of Touch America and its customers. Finally, Touch America directs the Commission’s attention to the apparent violation of the Commission’s *Merger and Divestiture Orders*¹ resulting from Qwest’s failure to promptly designate and/or seek Commission approval for a replacement 271-compliance auditor following the dismissal of Andersen in June of 2002

Touch America reserves its right to submit supplemental comments in this proceeding, EB-02-IH-0674, following a more thorough evaluation and analysis of Qwest’s responses.

I. The Division’s investigation is too narrow, as its sole basis is two flawed and unreliable audits

While it applauds the IHD for instituting the instant investigation into Qwest’s compliance with Section 271, Touch America believes that the basis for the investigation was too narrow, overlooked critical factors, and lacked substance. In numerous filings, pleadings, and presentations to the Commission since the submission of Andersen’s first audit report on Qwest’s compliance with Section 271, Touch America has provided the Commission with substantial evidence that the compliance audits conducted by Andersen are defective and unreliable, even as to the proof of Qwest’s violations they do contain. *See e.g.*, October 29, 2001 Letter from Charles H. Helein and Jonathan S. Marashlian to Dorothy Attwood, Chief, Common Carrier Bureau, and David Solomon, Chief, Enforcement Bureau, Federal Communications Commission, *Comments on Qwest Communications International – Reports of Independent Public Accountants, Statement of Management Assertions, and Executive Certification of Compliance*, CC Docket No. 99-272 (“October 29th Letter”); *see also*, *Touch America, Inc. v. Qwest Communications International, Inc., et al.*, Touch America’s Reply to Qwest’s Answer (“TA Reply”), File No. EB-02-MD-004 at ¶¶ 38-60. In short, the record, in Touch America’s view, already demonstrates that the Andersen audits simply cannot form the basis of a thorough and

¹ *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd. 5376 (2000) (“Merger Order”) at para. 27, 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”) at para. 42.

reliable investigation into Qwest's compliance with Section 271 and the Commission's orders.

In its *Merger and Divestiture Orders*, the Commission recognized that the buyer of Qwest's divested business would be a rich source of information regarding Qwest's post-merger compliance with Section 271. Therefore, the Commission specifically granted Andersen access to the business operations and records of both Qwest and Touch America.² Despite this authority, Touch America's unique qualification to comment on Qwest's compliance was ignored. No Andersen employee independently called Touch America seeking information, went to Touch America's business offices, tested its operations, or attempted to examine Touch America's records. The evidence of Qwest's non-compliance in those records was therefore not incorporated into either of the Audit Reports (or their work papers).

After the first annual audit, Andersen was provided direct evidence of Qwest's non-compliance. In Touch America's October 29th Letter, Touch America identified and elaborated upon numerous areas of Qwest's non-compliance, including Qwest's blocking Touch America's access to its customer and circuit information, engaging in improper billing, providing unlawful interLATA services in-region, limiting access to in-region switches, abusing access to Touch America's systems and manipulating customer and circuit data. *See* October 29th Letter. Instead of independently investigating the information provided by Touch America, Andersen either ignored it or accepted Qwest's version of events.

Andersen's inaction and disregard corrupted its methodologies used to evaluate Qwest's compliance. The Audit Reports and supporting work papers are therefore unreliable and raise many more questions than they answer.

These uncontroverted facts require the IHD to disregard the Andersen audits in their entirety and conduct its own investigation of Qwest's compliance. In the event the IHD continues to rely upon Andersen's Audit Reports as the sole foundation for its investigation, the IHD should nonetheless consider the record evidence previously presented by Touch America, the instant comments, and, as requested in Section V, should call Touch America as a material witness.

II. Qwest's disclaimers are at odds with the facts

In its response to the LOI, Qwest disavows involvement in the Commission-mandated audits of its compliance with Section 271.³ The IHD cannot accept this assertion as it is demonstrably contrary to facts of record.

² *Id.*

³ In its response to the IHD's LOI, Qwest states that:

As the IHD is aware, Touch America filed two formal complaints against Qwest that are now pending before the Commission's Market Disputes Resolution Division.⁴ Touch America is also involved in "related proceedings"⁵ with Qwest in other venues. Through discovery conducted in these proceedings, Touch America has substantial record evidence that contradicts Qwest's claims. This evidence shows, without a doubt, that Qwest was deeply involved in the audit process – from start to finish. In order to alert the IHD as quickly as possible to the existence of evidence that contradicts Qwest's assertions, Touch America will provide only a brief overview here.⁶

A. Qwest's Involvement in the Audit Process was Pervasive

"[Its] ability to respond to the Commission's letter has been hampered by circumstances beyond its control arising from the audit process itself, as well as developments related to Arthur Andersen. Qwest has been provided access to the Andersen audit work papers. However, Qwest properly *was not a participant in the audit work process* at the time, and *has not always been able to interpret the Andersen documentation* it now has been provided. Because of the subsequent dissolution of Andersen, Qwest has not had access to the Andersen personnel who conducted the audit to help interpret the work papers and the decisions reflected in those papers."

⁴ See *In the Matter of Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-003 (filed Feb. 8, 2002) ("*IRU Complaint*"); see also *In the Matter of Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-004 ("*Divestiture Complaint*") (filed Feb. 11, 2002).

⁵ See *Qwest Communications Corp. v. Touch America*, AAA No. 74Y 181 013 0901 JEC ("*AAA Arbitration*") and *Qwest Communications Int'l Inc., et al. v. Touch America, Inc., et al.*, C.A. No. 01-B-1696 ("*Colorado litigation*") (D. Colo. filed Aug. 2001).

⁶ Referenced herein as Exhibits A and B are excerpts taken from the depositions of two auditors formally employed by Arthur Andersen, LLP - Michael G. Stoltz and Brad R. McQueen. Each participated, in different capacities and with varying responsibilities, on the year 2000 and 2001 Qwest 271-compliance audit engagements. Also included in each Exhibit are the documents produced in discovery in related proceedings that were introduced and discussed during the depositions of the aforementioned Andersen witnesses. Touch America hereby notices Qwest that, pursuant to paragraph 11 of the Protective Orders adopted by the Commission in File Nos. EB-02-MD-003 and EB-02-MD-004, which have been adopted by the IHD for purposes of this investigation, it intends to file an Application with the IHD seeking admission of the depositions and documents introduced at said depositions, referenced herein as Exhibits A and B, within three (3) days of filing the instant comments unless directed to do so earlier by the IHD.

Touch America reviewed Andersen's work papers and audit-related correspondence with Qwest from the past two annual compliance audit periods. In addition, Touch America deposed key members of Andersen's audit team assigned to the Qwest 271-compliance audit.

In sharp contrast to Qwest's disavowal of any participation in the 271-compliance audit work process, the documentary and testimonial evidence demonstrates that Qwest and its outside counsel were deeply involved in nearly all audit processes, including –

- * conceiving the 2000 and 2001 audit work plans;
- * compiling all materials and data to be tested;
- * conducting all initial testing of its systems;
- * “representing” the results of those tests to Andersen;
- * reviewing and commenting on the results of follow-up testing; and
- * reviewing, making “suggestions,” and revising the actual Audit Reports.

The fact that Andersen relied so heavily on Qwest before, during and after the audit work process is demonstrated by evidence showing that Andersen did not always understand the results it reported to the Commission, but instead simply reported what Qwest told it. *See e.g.*, Exhibit A (Deposition of Michael G. Stoltz) at 139, 141-142 and Exhibit B (Deposition of Brad R. McQueen) at 33-35, 65-66, 91-92, 184. Even when the audits did detect areas of non-compliance, the evidence shows Andersen did not act independently, but cooperated with Qwest to produce audit reports that minimized and justified Qwest's assertions of compliance. *See* Exhibit B at 120-122 and 181-184.

In addition, Qwest's attorneys (its in-house counsel, outside FCC counsel and outside litigation counsel) routinely reviewed, revised, made suggestions and commented on Andersen's draft audit reports and supplemental filings prior to these reports being filed with the Commission. *See* Exhibit A at 191-193, 195-197, 201-204, and 206-208 and Exhibit B at 27-31, 34-36, 40-42, 61-64, 66-68, 91-92, 94-96, 99-101, 112-115. In other words, the reports this Commission has relied on to ascertain whether Qwest has complied with section 271 and the *Merger* and *Divestiture Orders* were prepared in part, and reviewed in full by Qwest and its team of lawyers. Record evidence documents not only Qwest's substantial and direct participation in the Andersen compliance audit work process, but also Qwest's control and manipulation of the process itself and the auditors' “conducting” it. Qwest was not only involved in the compliance audits, it appears to have fully controlled them.

B. Qwest's Pervasive Involvement in the Audit Process Belies its Claimed Inability to “Interpret” the Andersen Documentation

Given Qwest's direct and apparently controlling involvement in the audit process, Qwest's excuse that it has not always been able to “interpret” the audit reports and Andersen work papers is disingenuous.

Evidence shows that Qwest was not only the source of much of Andersen's work papers and reported conclusions, it also shows that Qwest reviewed and revised Andersen's Audit Reports to ensure "factual and contextual" accuracy. *See e.g.*, Exhibit B at 28. Record evidence further demonstrates Andersen's near-total reliance on Qwest's "representations" as the basis for many of the conclusions reported in both the 2000 and 2001 audit reports. *See e.g.*, Exhibit A at 141 and Exhibit B at 91. The truth is Andersen did little more than report the results of tests conceived and executed entirely by Qwest.

Qwest's claim that it is unable to "access" Andersen personnel who conducted the audit is also untrue. Former Andersen personnel qualified to "interpret the work papers and decisions reflected in those work papers" include Michael G. Stoltz and Brad R. McQueen, both of whose depositions were taken in the AAA Arbitration proceeding conducted well after Qwest's dismissal of Andersen and its subsequent dissolution.

III. The Commission should order the release of confidential information related to Touch America's customers

In an April 8, 2002 Letter to David Soloman, Chief of the Enforcement Bureau, (subsequently filed in the Qwest Merger Docket, CC Docket No. 99-272), Touch America asked the Commission to issue a mandatory order directing Qwest and/or Andersen to provide Touch America with all customer, circuit and other customer proprietary network information (CPNI) associated with the customer accounts identified as Touch America customers in the 2000 and 2001 audit reports.⁷ To date, the Commission has not officially responded to Touch America's request.

In response to the IHD's LOI, Qwest provided a great deal of the customer and circuit information (TA Customer Information) long sought by Touch America. Qwest did so, however, only pursuant to Protective Orders issued in related proceedings. By designating the TA Customer Information as "Confidential" and filing it under seal, Qwest continues to deprive Touch America from using the information to assume control over and provide adequate services to its own customers.⁸ As previously explained to the Commission, the TA Customer Information Qwest now seeks to designate as

⁷ *See* May 3, 2002 Letter from Jonathan S. Marashlian, Counsel to Touch America, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, *Re: Qwest Communications International – Reports of Independent Public Accountants, Statement of Management Assertions, and Executive Certification of Compliance*, CC Docket No. 99-272.

⁸ Under the Protective Orders pursuant to which Qwest submitted its Response to the LOI, Touch America may only utilize the TA Customer Information contained therein for litigation-related matters. *See* Protective Order adopted in File Nos. EB-02-MD-003 and EB-02-MD-004 at paras. 5-7.

“Confidential” is the rightful property of Touch America⁹ and must be made available to the appropriate people within Touch America to ensure that adequate services are being provided to its customers.

Pursuant to paragraph 2 of the Protective Order¹⁰ adopted by the IHD for purposes of governing submissions in the instant investigation, EB-02-IH-0674, Touch America hereby petitions to deny Qwest’s request for confidential treatment of the TA Customer Information contained in its September 10, 2002 response to the IHD’s LOI to the extent necessary to authorize Touch America’s use of such information to serve its customers and to assure that its customer records are accurate.

IV. Qwest’s apparent failure to promptly designate an independent 271-compliance auditor following its dismissal of Andersen is a violation of Commission orders

In order to ensure Section 271 compliance, the Commission required in its March 10, 2000 *Merger Order* that Qwest hire an independent auditor, acceptable to the Chief of the Common Carrier Bureau, to perform an annual examination engagement regarding the merged company’s *on-going* compliance with Section 271 (“271-compliance audit”).¹¹ In its June 26, 2000 *Divestiture Order*, the Commission imposed the additional requirement that Qwest hire the independent auditor prior to the divestiture of its in-region, interLATA businesses to Touch America.¹² In addition to requiring the annual 271-compliance audit, the Commission required the auditor to *immediately* report any

⁹ *Id.* at page 3 (“The TA Customer Information belongs to Touch America because it pertains to Touch America customers that were improperly retained by Qwest following Merger and Divestiture... The subscriber list is Touch America’s property through its purchase of Qwest’s divested customers and the associated federal prohibition on Qwest’s provision of in-region, interLATA services. The CPNI related thereto is owned and controlled by Touch America’s customers. And as Touch America customers, the information relating thereto rightfully belongs to Touch America through its carrier-customer relationship. *See* 47 U.S.C. § 222(f)(1)(A)...”).

¹⁰ *See* File Nos. EB-02-MD-003 and EB-02-MD-004, Protective Order at para. 2 (“*Claim of Confidentiality.* The Submitting Party may designate information as “Confidential Information” consistent with the definition of these terms in Paragraph 1 of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R §§ 0.459 & 0.461, determine that all or part of the information and/or material claimed as “Confidential Information” is not entitled to such treatment.”).

¹¹ *See Merger Order* at para. 27.

¹² *See Divestiture Order* at para. 42.

information that may suggest a Section 271 violation, as well as any corrective action taken, to the Chief of the Common Carrier Bureau.¹³

To the best of Touch America's knowledge, Qwest has been without an actively engaged, Commission-approved 271-compliance auditor from March 11, 2002, the date Andersen informed the Commission it had effectively ceased overseeing Qwest's compliance with Section 271,¹⁴ until at least July 19, 2002.¹⁵ Touch America is unaware of any publicly available or other information that Qwest has formally designated a replacement 271-compliance auditor at any time since July 19, 2002. Qwest's failure to appoint and/or seek Commission approval of a replacement for Andersen places Qwest in clear violation of the independent audit requirements of the Commission's *Merger and Divestiture Orders* since at least March 11, 2002. The IHD should take notice of this apparent continuing violation and initiate such enforcement actions it deems necessary to ensure Qwest's compliance with Commission orders and the continued protection of the public's interests in a Merger that complies with Section 271.

V. Touch America must have the opportunity to fully participate in the Commission's investigation

Touch America appreciates being kept apprised of the matters currently under investigation. It is clear the IHD understands the importance of this investigation to Touch America as well as to the public interest and the sanctity of the Commission's rules and authority. Touch America therefore will remain involved in the Division's investigation to the fullest extent permitted. Moreover, as Touch America is the repository of a great deal of information that may be pertinent to the IHD's investigation, the IHD is invited to utilize the information Touch America has in furtherance of the investigation. As earlier indicated, within two days of this submission, Touch America will file its Application for Admission of Relevant Evidence to complete this submission.

¹³ See *Merger Order*, paras. 27, 70 and 71, and accompanying footnotes for a detailed description of the certification and auditing requirements.

¹⁴ See June 3, 2002 Letter from Arthur Andersen, LLP to Dorothy Attwood, Chief, Wireline Competition Bureau and David Soloman, Chief, Enforcement Bureau ("We have not performed any audit work subsequent to March 11, 2002 and, accordingly, we are unable to express, and we do not express, any opinion on Qwest's compliance as of any date or for any period subsequent to March 11, 2002.").

¹⁵ On July 19, 2002, prior to the issuance of the LOI, Touch America's counsel, Jonathan S. Marshlian, spoke with Enforcement Bureau staff regarding the status of Touch America's April 8, 2002 letter (*see supra*, Fn. 6). During this conversation, staff confirmed that Andersen stopped performing its 271-compliance audit functions on March 11, 2002 and indicated that as of July 19, 2002, Qwest had yet to formally present the Commission with a replacement 271-compliance auditor.

Touch America intends to conclude an in depth analysis of Qwest's response to the LOI as soon as possible and will submit its additional findings at that time for IHD consideration.

Respectfully submitted,

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EXHIBIT A

WITHHELD PENDING APPLICATION SEEKING ADMISSION OF RELEVANT
EVIDENCE PRODUCED IN RELATED PROCEEDINGS PURSUANT TO
PROTECTIVE ORDERS ADOPTED IN FILE Nos. EB-02-MD-003 and EB-02-MD-004

EXHIBIT B

WITHHELD PENDING APPLICATION SEEKING ADMISSION OF RELEVANT
EVIDENCE PRODUCED IN RELATED PROCEEDINGS PURSUANT TO
PROTECTIVE ORDERS ADOPTED IN FILE Nos. EB-02-MD-003 and EB-02-MD-004