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May 1, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room Number TWB-204
445 12th Street, S.W.
Washington, DC, 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc.
and U S West Inc., Docket CC-99-272

Dear Ms. Salas:

On behalf of AT&T Corp., the attached letter addressed to Dorothy Attwood and David Solomon was hand-delivered to all addressees today. Please direct any questions to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Joan Marsh", written over a circular stamp.

Joan Marsh

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FEDERAL COMMUNICATIONS COMMISSION
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May 1, 2001

VIA HAND DELIVERY

Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

David Solomon
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc. and U S West Inc., CC Docket No. 99-272

Dear Ms. Attwood and Mr. Solomon:

AT&T Corp. ("AT&T") has reviewed the April 16, 2001 Report of Independent Public Accountants ("Auditor's Report") prepared by Arthur Anderson LLP and the April 16, 2001 certification by Qwest ("Qwest Certification") submitted pursuant to the Commission's orders conditionally approving the Qwest-US WEST merger.¹ Although the Auditor's Report asserts that Qwest has fully complied with

¹ Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 5376, ¶¶ 27, 70, 71 (March 10,

(footnote continued on following page)

the divestiture requirements specified in those Commission orders, the report actually confirms that Qwest has been “providing” in-region, interLATA services in violation of section 271 of the Communications Act, 47 U.S.C. § 271. In addition, the Auditor’s Report is incomplete because certain contracts – including Qwest’s teaming agreements with other carriers under which Qwest provides nationwide long distance services to federal agencies – have not been made available to the auditors.² In these circumstances, and as described more fully below, the Commission should act promptly to impose appropriate sanctions on Qwest for conduct that demonstrably violates the merger obligations; and should require that Qwest and its auditors withdraw the purported conclusions of compliance recited in their certification and report, respectively, and conduct a more complete audit.

The Auditor’s Report Establishes That Qwest Has Violated Section 271. Section 271 prohibits Qwest from “providing” in-region, interLATA services before it opens its local markets to competition. Qwest has not received authority to provide in-region long distance services in any state.

As the Commission has held, the term “providing” in section 271 is not limited to the physical transport of electrons across LATA boundaries. *See, e.g., AT&T Corp. v. Ameritech Corp.* 13 FCC Rcd. 21438, ¶ 34 (1998) (“*Qwest Teaming Order*”) (“Congress understood the prohibition [in Section 271] to be broader in scope than mere transmission”). Rather, a BOC “provides” interLATA service when it effectively holds itself out to the public as a provider of long distance service. *Id.* ¶¶ 45, 50. Thus, the Commission has held that a BOC may not “brand” in-region long distance

(footnote continued from previous page)

2000) (“*March 10 Merger Order*”); Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 11909, ¶ 42 (June 26, 2000) (“*June 26 Merger Order*”).

² See Auditor’s Report at 2.

services as its own prior to obtaining full section 271 authorization, even if another entity undertakes the actual transport of the interLATA traffic. *Id.* ¶¶ 34, 45, 50.

Here, the Auditor's Report and Qwest's Certification each confirm that Qwest has violated these standards. The Auditor's Report finds that in-region private line services for 266 customers were "billed and *branded* as Qwest services." Auditor's Report, Att. 1, at 1 (emphasis added). The auditors note that the revenues associated with these unlawful transactions from July 2000 through March 2001 were in excess of \$2.2 million. *Id.*

The Qwest Certification concedes that these services were billed and branded as Qwest services. Qwest's primary defense is that it did not actually transport any of this private line traffic. Qwest Certification ¶ 11. But, as noted above, the Commission has rejected that defense: a BOC "provides" long distance services when, as Qwest did, it brands transport services provided by a third party as its own. No other construction of Section 271 is possible, because the statutory prohibition does not distinguish between facilities-based and resold interLATA services. For that reason, the Qwest divestiture plan expressly required that, with respect to private line and data services, "Qwest will perform [only] a very limited set of support services (with the retail service *always branded* as Touch America) for a limited group of in-region customers." *June 26 Merger Order* ¶ 14 (emphasis added). *See also id.* ¶ 28, n.81 (discussing limited dual branding during the transition period).

Qwest suggests in the alternative that the Commission can overlook these violations of section 271 because the amounts are *de minimis*. Qwest Certification ¶ 10. There is, of course, no multi-million dollar, several hundred customer, *de minimis* exception to section 271. Furthermore, the anticompetitive effects of the conceded misbranding go well beyond the specific number of customers or dollars for which a violation is established, because such misbranding affects the perceptions of Qwest's most significant customers. As Qwest itself repeatedly emphasized throughout the

merger proceeding, the “branding issue” in this case at all times involved primarily this small but important segment of large business customers.³

Recognizing as much, Qwest also suggests that its violation was inadvertent, and that the “error” occurred because all of these private line customers entered into contracts at the time the order entry system went off line between June 26 and June 30, 2000. Qwest Certification ¶ 7. That excuse is irrelevant under section 271, which prohibits all unauthorized interLATA service, and under the merger conditions which demand strict compliance.⁴

In sum, the Qwest Certification is flawed insofar as Qwest incorrectly states therein that it “has operated its business in accordance with the Final Divestiture Plan and the FCC’s Orders in Docket No. 99-272” (Qwest Certification at 1, ¶2).⁵ Indeed, the Auditor’s Report shows on its face that Qwest’s conduct has plainly violated those Orders and Section 271.⁶

The Auditors Have Failed To Investigate Whether Qwest Is Engaging In An Impermissible Teaming Agreement With Touch America And Is Providing In-Region, InterLATA Services To The Federal Government. The auditors also failed to

³ See e.g., Qwest’s Reply to AT&T’s Comments on the Divestiture Compliance Report, at 6-8 (identifying the branding issues as applying to “[o]nly a limited category of limited customers”) and Qwest’s Point By Point Response to AT&T’s Comments on the Qwest Divestiture Compliance Report, appended thereto at 5-6 and 8.

⁴ It is also not clear that this excuse is consistent with the explanation Qwest apparently provided to the auditors. See Auditor’s Report Att. 1, at 1 (According to the Auditor’s Report, “Qwest is reviewing the detail of these 266 customer accounts to identify potential exempt services which may be included in the above estimates”).

⁵ Qwest’s certification, which qualifies this statement with “in all material respects” is in fact non-compliant with the Commission’s orders (see, paragraph 46 of the June 26 Merger Order and paragraph 70 of the March 10 Merger Order) not only because there is no provision in those orders for a “materiality” qualification, but also because Qwest failed to certify that “that it continues to comply with section 271.” In fact, its activities are clearly not in compliance with Section 271.

⁶ Indeed the Auditor’s Report, which contains a similar assertion of compliance must also be rejected in light of the showing, in the very same Report, that Qwest is not in compliance.

undertake an investigation into Qwest's provision of in-region interLATA calling to the federal government. In a recent filing made to the GAO protesting its exclusion from bidding on a contract to provide telecommunications services to multiple federal offices, Qwest stated that it "is *currently* performing a number of nationwide contracts with various federal agencies, including Treasury, in conjunction with Touch America."⁷ Although these contracts raise obvious and significant section 271 concerns, there is no mention of them in the Auditor's Report.

The Commission's orders place strict limits on the ability of Qwest to "team" with long distance providers to offer a bundled package of services. As the Commission stated in the *June 26 Merger Order* with respect to the issue of joint provisioning of long distance services, "Qwest's representation that there will be no such coordination for delivery of products or services [with Touch America] is one of the factors central to our finding that the divestiture agreement does not violate section 271." *Id.* ¶ 32 & n.90. Similarly, in rejecting Qwest and U S WEST's argument that their purported teaming arrangement complied with section 271 because it constituted "mere marketing," the Commission made clear that the scope of permissible joint marketing between a BOC and a long distance provider to in-region customers was limited to instances where the BOC "makes *no* representation that [any in-region long distance service] is associated with its name or services." *Qwest Teaming Order* ¶ 50 (emphasis added). The Commission held where the BOC "perform[s] various customer care functions in connection with the [in-region] long distances services," the BOC is "providing" long distance services in violation of section 271. *Id.*

Qwest's advocacy in the GAO proceeding raises substantial concern that Qwest has once again crossed the line and is impermissibly participating in another carrier's provision of in-region long distance services to the federal government. In an ongoing proceeding before the GAO, Qwest has protested the fact that it had been

⁷ Protest of Qwest Communications International, Inc., B-287495 Opposition to Motion for Summary Judgment at 7 (emphasis in the original) ("Qwest Protest").

denied a federal telecommunications contract on the ground that section 271 legally prevents Qwest from offering “ubiquitous nationwide telecommunications services” to federal offices. Qwest Protest at 1. Qwest argued that it could do so by teaming with another carrier (such as Intermedia) who would serve federal offices in Qwest’s 14-state region and that Qwest had undertaken such teaming arrangements to serve other federal agencies. *Id.* at 6. According to Qwest, these teaming arrangements satisfy section 271 because “Qwest and its teaming partner would be providing only long distance services . . . not a combined package of local and long distance services,” and because Qwest had disclosed to the government that it was teaming with another provider. *Id.* at 11-12.

However, the details of Qwest’s teaming arrangements paint a different picture. According to a contract that Qwest provided to the GAO as representative of its teaming agreements with other carriers: “Qwest is the single point of contact with Customer for ordering, billing, Service inquiry, Service Assurance and trouble reporting for the Service.” Qwest Protest, Exhibit 4. If Qwest were free to ignore Section 271, Qwest’s apparent practice of entering into such contractual arrangements to win contracts to serve multi-location federal offices would be unsurprising, because many federal agencies are understandably interested in obtaining a sole supplier with a single point of contact for all their telecommunications needs rather than connecting their various offices using multiple carriers.

Given the uncertainty as to the terms of these teaming arrangements, and inference of broader Qwest involvement in light of its GAO protest submission, it is, at the very least, incumbent on Qwest to justify, and the auditors to verify, that these teaming arrangements comport with Section 271.

The Commission has set forth in the Qwest merger orders the ground rules for such arrangements. Even before Qwest selected Touch America as the purchaser of its in-region assets in order that its merger with U S WEST would comply with Section 271, the Commission warned Qwest that the provision of anything beyond billing and collection services to Touch America (*i.e.*, the entity that ultimately purchased Qwest’s in-region long distance service) increased the likelihood of a

section 271 violation. *March 10 Merger Order* ¶ 19. Indeed, the *June 26 Merger Order* found that Qwest's plan to sell its in-region long distance facilities to Touch America satisfied section 271 only after Qwest represented to the Commission that it would not provide any customer care for Touch America's long distance customers other than those services allowed for a very limited transitional period. *Id.* ¶ 32. Qwest's assertion that Section 271 is only implicated when a BOC and its teaming partner offer "a combined package of local and long distance services," Qwest Protest at 11, flies in the face of the Commission's holding in paragraph 50 of the *Qwest Teaming Order* that associating the BOC's brand with the in-region long distance service is what makes the teaming arrangement impermissible, not its bundling with the local service.

Thus, Qwest cannot be deemed to be in compliance with the Commission's merger orders or Section 271 until the teaming contracts with other carriers to offer long distance service to federal agencies with offices in its in-region states and the federal contracts themselves have been made available for review to the auditors to determine whether Qwest in engaging in teaming agreements that violate section 271 and, if violations are established, appropriate remedial action is taken.⁸

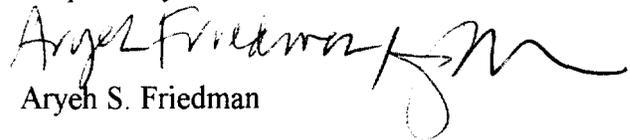
⁸ AT&T cannot comment at this time on the volume discount issue, because insufficient information has been provided. Despite the fact that an extension was granted to Qwest for the filing of the auditor's report due to this very issue, the auditor reported that: "all contracts requested for our review are *not yet available* and consequently, *we were unable to complete our procedures with respect to this requirement*," Auditor's Report at 2 (emphasis added). March 1, 2001 Letter from Carol E. Matthey, Deputy Chief, Common Carrier Bureau, to Mr. Peter Rohrbach, counsel for Qwest, at 1-2. The Qwest Certification explains that the issue of compliance with the volume discount obligation related to only two contracts, and to service bureau tapes for 47 customers and that they "fully expect that they will not show prohibited cross-discounting." *Id.* ¶ 12. Obviously, a contrary finding would establish clear violations of the *June 26 Merger Order*, in which the Commission held that such cross-discounting "appears tantamount to *joint marketing* of in-region interLATA service and out-of-region service" and "foster[s] the impression that Qwest can offer a "package" of in-region and out-of-region interLATA service." *Id.* ¶ 19.

* * *

In summary, in light of the deficiencies in the audit report and evidence of Section 271 violations, AT&T recommends that the Commission: (1) mandate a detailed analysis of the 266 accounts to determine when they were acquired, whether (and when) the revenue associated with those accounts has been handed over to Touch America, and whether customers have been notified of the violation; (2) levy a fine against Qwest at least equal to the amount of revenue it received from prohibited activities; and (3) mandate a detailed audit report of all Qwest teaming arrangements to ensure that they comply with prior Commission Orders.

Thank you for your attention to this matter. Please direct any questions to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Aryeh S. Friedman", with a stylized flourish at the end.

Aryeh S. Friedman

cc: Carol Matthey
Anthony Dale
Radhika Karmarkar