

The Helein Law Group, P.C.

Telecommunications
E Commerce
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Property Rights
Complex Litigation
General Business Law

8180 Greensboro Drive
Suite 700
McLean, VA 22102

(703) 714-1300 (Telephone)
(703) 714-1330 (Facsimile)
mail@thlglaw.com

Management Consulting Group
GTC Consultants, Inc.
(703) 714-1320 (Telephone)

Writer's Direct Dial Number
(703) 714-1300

Writer's E-mail Address
mail@thlglaw.com

December 11, 2002

VIA E-MAIL AND HAND DELIVERY

Mr. Christopher Olsen
Market Disputes and Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

Re: *Touch America, Inc. v. Qwest Communications International, Inc., et al.*, File Nos. EB-02-MD-003 and EB-02-MD-004

Dear Mr. Olsen:

On December 3, 2002, Qwest's Associate General Counsel, Sharon J. Devine, filed a letter with Mr. Anthony Dale of the Investigations and Hearing Division of the Enforcement Bureau ("IHD") and Ms. Michele Carey of the Competition Policy Division of the Wireline Competition Bureau ("CPD") (hereinafter, the "December 3rd Letter") in connection with the Application of Qwest Communications Inc. and U.S. WEST, Inc., CC Docket No. 99-272 (hereinafter, the "Merger Order"); and Qwest Communications International, Inc., Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming, WC Docket No. 02-314 (hereinafter, the "271 Proceeding").

On December 4, 2002, on behalf of the Market Disputes Resolution Division ("MDRD") you e-mailed Qwest's Washington counsel, Hogan & Hartson, inquiring whether the December 3rd Letter had been served on this firm as counsel to Touch America, Inc. ("Touch America"), the complainant in the above-captioned formal complaint proceedings. On that same date, Jonathan Marashlian, counsel to Touch America, informed you via e-mail that the December 3rd Letter had not been served on Touch America. On December 6th, the lack of service was confirmed by Mr. Peter Rohrbach, Qwest's Washington counsel, in an e-mail to MDRD staff, copied to this firm.

On December 9th, the undersigned sent an e-mail to MDRD staff and to counsel for Qwest that comments on the December 3rd Letter would be submitted on behalf of Touch America. These are those comments.

Touch America's comments begin with an explanation why Qwest's failure to serve Touch America a copy of the December 3rd Letter in the above-proceedings is procedurally infirm and an observation regarding the curious nature and timing of Qwest's letter.¹

First, there can be no argument that Touch America should have been served a copy of the December 3rd Letter. In his December 6th e-mail confirming that Qwest did not serve Touch America, Mr. Rohrbach explains that:

“[T]he letter to Mr. Dale and Ms. Carey was not submitted in the complaint dockets or served on Touch America because the letter does not concern either that company or the matters at issue in the two Touch America complaints. First, the letter references a transaction with Cable & Wireless in March 2002, long after the divestiture. That transaction involved over 120 private lines provided by Qwest to C&W, almost all of them out-of-region. Qwest has determined that four of the private lines are in-region interLATA. These have been terminated but, in any event, they do not implicate the divestiture nearly two years earlier. Second, the letter references two instances of leases of dark fiber. Although these leases were entered into before the divestiture, Qwest did not agree in its contracts with Touch America to divest any dark fiber leases that might exist as of divestiture to that company. Qwest's failure to terminate these particular leases, therefore, do not implicate Touch America's complaints in the two dockets.”

It is apparent from this response that Mr. Rohrbach and his client are confused as to a key element of Touch America's complaint in File No. EB-02-MD-004 (“Sham Divestiture Complaint”) and the statute, Section 208 of the Communications Act, pursuant to which the Sham Divestiture Complaint was brought. Section 208(a) provides that any person has standing to complain against a carrier for “anything done or omitted to be done by a common carrier subject to this Act, in contravention of the provisions thereof.” 47 U.S.C. § 208(a). Quite simply, by filing the Sham Divestiture Complaint under Section 208, Touch America has sought not only to vindicate its private rights, as they have been affected by Qwest's failure to fully divest, but also to prosecute the public's right to have Qwest comply with Section 271, the Commission's Merger Orders,² and other

¹ Even more curious is Qwest's filing the December 3rd letter in the 271 proceeding. See Letter from Dan L. Poole, Vice President – Regulatory Law, Qwest to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 3, 2002). Mr. Poole's letter is not only an admission of Qwest's illicit deeds but in terms of the 271 proceeding is irrelevant, self-serving and otherwise, a gratuitous spin on facts that attempt to transform bad acts into good ones.

² *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 F.C.C.R. 5376 (2000) [Merger Order], and

Commission rules & regulations (e.g., Rules 1.65 and 1.17). *See Touch America, Inc. v. Qwest Communications International, Inc., et al.*, File No. EB-02-MD-004. Therefore, Qwest's excuse for not serving Touch America is off the mark. Service is required because the issues being litigated in the Sham Divestiture Complaint do not arise exclusively out of Qwest's failure to implement divestiture-related contracts with Touch America and the claims are not just personal to Touch America, as Qwest would have the Commission believe. The issues being litigated also belong to the public. As explained in its Opposition to Qwest's Motion to Dismiss, to a large extent Touch America is acting as a "private" attorney general and is seeking to enforce the public's rights, pursuant to Section 208. *See Touch America's Supplemental Brief on Defendants Qwest Communications International Inc., Qwest Corporation and Qwest Communications Corporation's Motion to Dismiss*, File No. EB-02-MD-004 (filed May 20, 2002) at 9, 13-14 ("Touch America's Divestiture Complaint... asserts its private rights to be protected by the statutory mandates of the Act and the express orders issued by the Commission in furtherance of those statutory mandates. But further, Touch America's complaint rests soundly on the public's rights, those public interests embodied in the statutory mandates and the Commission Orders enforcing them.").

If the statutory purpose of Section 208 is understood and appreciated by Qwest, its excuse for not serving Touch America, once again, shows its unabashed willingness to ignore the clear Section 208 aspects of Touch America's Sham Divestiture Complaint in furtherance of its overall litigation strategy.

Second, with respect to the nature and timing of Qwest's letter, Touch America finds these to be curious. You are aware that, to the extent uncovered by the superficial annual 271 compliance audits conducted in 2001 and 2002 and reported in CC Docket No. 99-272 by the now defunct firm, Arthur Andersen, Qwest's failed divestiture is presently being investigated by your sister division, IHD, in File No. EB-02-IH-0674. One can surmise from Qwest's December 3rd Letter that the reported violations were the result of an internal audit conducted in anticipation of the 2003 annual 271-compliance audit mandated by the Commission. From an informed observer's perspective, it would appear that Qwest filed the December 3rd Letter in an 11th hour effort to demonstrate to various decision-makers at the Commission (IHD and WCB) that Qwest is being proactive in purging itself of existing 271 violations so as to ameliorate, to the extent possible, the repercussions of its having failed to effect a full divestiture as required by the Commission's Merger Orders and Section 271.

Qwest's December 3rd Letter, disclosing, as it does, violations "in anticipation" of the 2003 compliance audit violations, is also enough to make one pause and wonder what the March 2003 audit report will ultimately reveal. This is particularly so given Qwest's compliance audit history – the 2002 compliance audits reported more violations than the 2001 compliance audits. What is particularly interesting about the violations Qwest

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 F.C.C.R. 11909 (2000) [Divestiture Order] [hereinafter collectively referred to as the "Merger Orders").

chose to disclose in its December 3rd Letter is that they appear to have a relatively minor impact on Qwest and thus were fairly painless to disclose. The same might not be said about the undisclosed violations that await discovery and those already being investigated by two divisions within the Enforcement Bureau.

Following is additional analysis and commentary on the particular statements presented by Qwest in its December 3rd Letter.

Paragraph 2: As referenced earlier, Qwest states here that, “in advance of the [March 2003 compliance] audit” it “investigated certain matters relating to its compliance” with Section 271 and the Merger Orders.

Evidence developed in the arbitration between Qwest and Touch America confirms that Qwest conducted a similar pre-271 compliance “investigation” (audit performed by KPMG) prior to the inaugural 271-compliance audit conducted by Andersen in 2001.³ See Application of Touch America, Inc. for Admission of Relevant Discovery Produced in Related Proceedings, File No. EB-02-MD-004 (filed May 20, 2002) at Exhibit A. This investigation is known to have uncovered various instances of Qwest’s non-compliance. *Id.* However, Qwest did not disclose any of these violations prior to the formal audit occurring. Of course, times are different now and Qwest is hopeful that the Commission will grant its 271 application prior to the March 2003 audit report being filed. It appears that Qwest hopes that the disclosures in its December 3rd Letter will allay any concerns about Qwest’s ongoing compliance with its Merger and Divestiture Order obligations.

However, the only firm conclusions to be made from the facts disclosed in Qwest’s December 3rd Letter are that: (1) the first two compliance audits failed to disclose the dark fiber leases, and (2) Qwest has been marketing and providing prohibited telecommunications services in-region for over two years. In Qwest’s Answer in the Sham Divestiture Complaint proceeding, it argues that the Andersen Audits conclusively demonstrate Qwest’s compliance with the Final Divestiture Plan and the Commission’s Merger Orders. See Qwest Answer at ¶¶ 2-4, 19, 20, 22, 37-44, 97, 124, 125, 127, 130, 156, 181, 182, 417-423, 426, 430, 432, 435, 437-446, 452, 461, 463, 498-503, 506, 532, 556, 575, 587-588, 602-604, 626-628. Touch America, on the other hand, has repeatedly argued that the audits conducted by Andersen were incomplete, inadequate, unreliable and dispositive of Qwest’s compliance with nothing. See Touch America’s Reply to Qwest’s Answer at ¶¶ 38-50; see also Touch America’s Motion for Commission to Take Official Notice of Facts Pertaining to Respondents’ Auditors Arthur Andersen (filed March 28, 2002) and Touch America’s Motion to Update Record Pursuant to Rule 1.720(g) for Further and Consistent Actions and Proper Application of the Substantial Evidence Rule (filed Oct. 15, 2002) at ¶¶ 17-24. Qwest’s December 3rd Letter confirms Touch America’s position. It also places any further reliance by Qwest on the Andersen audits as a defense of Touch America’s claims in the Sham Divestiture Complaint in serious doubt.

³ Logic dictates that if Qwest conducted a pre-audit investigation prior to the 2001 compliance audit and another in anticipation of the 2003 audit, that it probably conducted one prior to the second annual audit, as well.

Qwest's representation that the December 3rd letter is an example of Qwest meeting its disclosure obligations is pure hypocrisy and blatantly self-serving given all the disclosures Qwest has not made in the Commission's various enforcement proceedings against it. For example, Qwest has not disclosed the numerous admissions it made in the recently concluded arbitration proceeding between Touch America and Qwest that support Touch America's allegations in the Sham Divestiture Complaint. In the arbitration proceeding Qwest admitted that it failed to remit GSP fees to Touch America far in excess of the \$2 million reported in the March 2002 compliance audit report. Qwest has not updated any record with that information. Also, Qwest admitted in the arbitration that it had failed to bill divested customers in excess of what both the 2001 and 2002 compliance audits disclosed. Further, until the MDRD ordered supplemental interrogatories in File No. EB-02-MD-003 ("IRU Complaint") to address the matter, Qwest failed to update the record of that proceeding with any of the company's disclosures over the past several months pertaining to its need to restate earnings and reclassify certain Indefeasible Rights of Use contracts as "leases." See Letter from Lisa J. Saks, Attorney, Market Disputes Resolution Division, to Charles H. Helein and Peter A. Rohrbach, et al., File No. EB-02-MD-003 (Oct. 16, 2002) (Concluding that "information regarding the accounting treatment of the IRU transactions that are the subject of Touch America's Complaint in this action is relevant to [FCC's] analysis of the merits of the parties' representative claims and defenses" and ordering Qwest to produce additional discovery).

Paragraph 3: This paragraph raises some questions.

It is irrelevant that Qwest claims it has not received and will not receive any payments from Cable & Wireless ("C&W") – Section 271 makes no exception to Bell Companies who give prohibited services away. Moreover, Qwest's claim is self-serving, makes no business sense, and is unsustainable absent documents to verify its assertions. Documents supplied by Qwest itself would be a starting point, but unless what these documents contain can be independently verified, the documents are not competent enough evidence to support Qwest's claims. What is needed are the contract, the accounting records, the billing records, and actual invoices to C&W. C&W should also be asked to provide the invoices it received from Qwest on the in-region circuits.

Qwest must also supply a copy of the circuit termination notification to C&W.

It appears that Qwest did not consult with C&W about the termination date of December 9, 2002, but simply decided that date was sufficient for C&W to turn down 4 private line circuits. This suggests that Qwest's entire explanation here is not based on actual facts, but totally contrived to disclose a known on-going violation before it was discovered. Qwest did not offer to file anything confirming that the in-region services had actually been terminated.

Paragraph 4: Qwest expresses here that it is "not aware of any other such circumstances."

Given the very narrow scope of the C&W disclosure and Qwest's admitted experience with record-keeping and administrative deficiencies, including database and

data integrity problems,⁴ Qwest's declaration that it is unaware of providing other private line services in-region should give no one comfort that Qwest is 271 compliant. What one should conclude from this disclosure is that a comprehensive and truly independent audit of Qwest's compliance with Section 271 and the Merger Orders is necessary (as requested in Touch America's Sham Divestiture Complaint). Such an audit should be at the direction and control of the Commission and must include an examination of Qwest's marketing practices (to determine whether or not Qwest's stated policy is actually implemented), its services contracts (for example, ATM/Frame Relay offerings), and any such audit should begin with a serious look at all of Qwest's databases.

Paragraphs 5 & 6: Qwest admits that it failed to divest itself of all dark fiber leases as it pledged to do. Qwest states that it credited the customers for the amounts of the lease payments, plus interest and that it sold the dark fiber to the customers instead. While Qwest appears to want to be applauded for its economic sacrifice, one wonders if such a sacrifice occurred. Likely, Qwest just credited the lease payment against the sale price, and has not suffered any real economic penalty. Of course, one would have to see the details behind the lease transactions and the sale transactions to understand what really occurred.

Paragraph 7: This paragraph raises more questions than it answers. A starting point to answering some of these questions is the original leases. Qwest must produce these.

With regard to the two dark fiber leases (with two distinct customers, Onvoy, Inc. (f/k/a MEANS, Inc.) and Timing Solutions Corporation ("TSC")), Qwest states that it has "terminated *both leases*" and "sold the dark fiber to the *customer*" (emphasis supplied). Qwest goes on to explain that it also "credited the *customer* for all amounts paid under the *lease* since the date of the merger, plus interest." (emphasis supplied). These statements require further examination.

Qwest should be asked to explain the significance, if any, of its use of the plural, *leases*, when explaining that the leases with both Onvoy and TSC were terminated, and its switch to the singular, *lease* and *customer*, when explaining subsequent actions taken in regard to the prohibited leases.

With regard to the lease with Onvoy, Qwest states that "it provided Onvoy with dark fiber from Owatanna, Minnesota to Minneapolis, Minnesota and that Onvoy installed its own electronics and related equipment in order to light the fiber." Given the representations made in the IRU Complaint proceeding, Qwest must explain the importance of this statement.

Further, Qwest must explain what appears to be an inconsistency between its admission that Section 271 prohibits the company from providing in-region, interLATA

⁴ See Letter from Sharon Devine, Associate General Counsel, Qwest, to Christopher Olsen, Assistant Chief, Market Disputes Resolution Division, *Re: Touch America, Inc. v. Qwest Communications International Inc.*, File No. EB-02-MD-004 (Dec. 3, 2002) at para. 7.

dark fiber “leases” to Onvoy and TSC and its continued maintenance of the argument that Section 271 does not prohibit the in-region, interLATA IRUs recently reclassified by Qwest as “leases.”

With regard to the second lease with TSC, executed March 16, 2000, Qwest explains that following the initial “six-month lease period,” TSC “requested and Qwest approved an extension.” This statement begs the inquiry, discussed earlier in the context of an independent audit, into whether Qwest has indeed fully implemented its “policy” against marketing and provisioning in-region interLATA services. For if such a policy were in place and being enforced, there is no way Qwest would have entertained TSC’s request, much less approved an illegal contract.

Other questions raised by this paragraph are as follows:

Why would a systems integrator lease dark fiber, rather than obtain services under tariff, particularly when the need was originally only for 6 months?

Why does Qwest say nothing here about who supplied the electronics to light the fiber? It must be presumed that Qwest provided the electronics at the outset.

When was the lease terminated? From whom is TSC obtaining service today?

Paragraph 8: As stated above, statements such as this should not give comfort that Qwest is 271 compliant now, particularly in light of the substantial evidence to the contrary that has been developed and is being developed in the various enforcement actions currently pending before this Commission. Not to mention Qwest’s admitted record-keeping and administrative deficiencies.

Touch America reserves the right to pursue by appropriate procedures the lines of inquiry created by the December 3rd Letter in support of its claims and requests for action by the Commission in the pending complaint proceedings.

Respectfully submitted,
Touch America, Inc.

By

Charles H. Helein
Jonathan S. Marashlian
Its Attorneys

Susan Callaghan
Senior Attorney
Touch America, Inc.
130 E. Main St.
Butte, Montana 59701

The Helein Law Group, P.C.
8180 Greensboro Drive, Suite 700
McLean, Virginia 22102
Ph: (703) 714-1300
Fx: (703) 714-1330

cc:

Mr. Anthony Dale
Investigation and Hearings Division
Enforcement Bureau

Ms. Michele Carey
Competition Policy Division
Wireline Competition Bureau

Lisa J. Saks
Alexander P. Starr
Market Disputes Resolution Division
Enforcement Bureau

Mark Stone
Maureen F. Del Duca
Investigation and Hearings Division
Enforcement Bureau