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December 18, 2002

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska, North Dakota, Montana, Utah, Washington, and Wyoming, WC Docket No. 02-314.

Dear Ms. Dortch:

This letter responds to the remarkable series of *ex parte* filings made by Qwest regarding its compliance with the accounting safeguards of section 272 of the Act and the competitive checklist requirement that Qwest provide competitive carriers with nondiscriminatory access to unbundled network elements. In each instance, these letters confirm that Qwest's application fails to satisfy the requirements of section 271.

The Section 272 Accounting Safeguards Ex Partes. In its recent filings, Qwest has belatedly sought to limit the fallout from the November 22, 2002 letter submitted by its accountants, KPMG.¹ There, without explanation, KPMG stated that it was withdrawing its prior report in which it attested that transactions between Qwest's BOC, QC, and its 272 affiliate, QCC, were, for the most part, be accounted for properly. Apparently at Qwest's urging, KPMG subsequently filed yet another letter clarifying why KPMG was withdrawing its report. But in its second letter, KPMG candidly acknowledges that its prior report violated basic accounting standards because KPMG's analysis was not sufficiently rigorous to support the opinion that it had given.²

Ultimately recognizing that there is no way to give these facts a positive spin, Qwest in its filings now tries to minimize the relevance of the KPMG fiasco by saying that Qwest never intended to rely on the KPMG report in this proceeding because that document concerned

¹ See December 13, 2002 *Ex Parte* Letter from Melissa Newman to Marlene Dortch; December 11, 2002 *Ex Parte* Letter from John Munn to Marlene Dortch ("December 11 Qwest *Ex Parte*").

² See December 11, 2002 *Ex Parte* Letter from Daniel Mageras to Marlene Dortch, at 1.

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transactions involving the “old” 272 affiliate, QCC, not the “new” 272 affiliate, QLDC.³ Although Qwest is correct that the KPMG report pertained to QC-QCC transactions, it is wrong that the withdrawal of that report has no consequences in the current proceeding.

First, as AT&T has explained,⁴ QLDC will clearly not be the entity “providing” long distance in the nine state Qwest region. It is a mere paper company without the resources to undertake the massive long distance entry that Qwest is clearly contemplating. Rather, the evidence of record demonstrates that Qwest will be providing long distance through a combination of entities, including QCC. Thus, Qwest must not only demonstrate that QLDC complies with section 272, but that QCC does so. Qwest has not even attempted such a showing, and in light of the about face by its auditors, it clearly could not do so.

Second, the retraction of KPMG review highlights that the *only* piece of evidence offered by Qwest to with respect to its compliance with section 272(c)(2) is a single sentence of testimony from Ms. Schwartz, a Qwest employee. Although not a certified public accountant, Ms. Schwartz states: “The accounting policies and practices that give rise to QC’s inability to certify its financial statements have been revised such that instances of material noncompliance with GAAP are not continuing and further do not affect GAAP compliance for transactions between QC and QLDC.”⁵

This *ipsi dixit* cannot be credited. Even assuming that she were qualified, Ms. Schwartz does not purport to have undertaken an examination of QC’s accounting practices with respect to QLDC. Nor does she provide any explanation as to how she could reach the conclusion that QC’s pervasive accounting problems have not impacted the way it accounts for transactions with QLDC in light of the fact that: i) Qwest’s accounting problems extend beyond “capacity swaps” and include even “routine” transactions; ii) Qwest’s internal review is still ongoing, and Qwest has been unable to say when the full extent of its accounting problems will be fully known; iii) Qwest’s review of its internal accounting controls is incomplete; and iv) new controls that are now being put into place have not been adequately reviewed and tested by KPMG.⁶ Of course, in both the *Qwest I* and *Qwest II* proceedings, Ms. Schwartz also stated that QC “follows

³ December 11 Qwest *Ex Parte* at 1.

⁴ Qwest III, AT&T at 18-23; November 11, 2002 *Ex Parte* Letter from C. Frederick Beckner III to Marlene Dortch, at 4-5.

⁵ Qwest III, Schwartz Reply Dec. ¶ 7.

⁶ See generally Qwest November 14, 2002 8-K. In this regard, Qwest has acknowledged that effective internal controls are a pre-condition to finding compliance with section 272. Qwest III Reply at 14 (“The relevant question is whether a Section 272 affiliate has implemented internal control mechanisms reasonably designed to prevent, as well as detect and correct, any noncompliance with section 272.”).

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Generally Accepted Accounting Principles,”⁷ – a statement that she never retracted even after it was clear to all that it was not true.⁸

Ms. Schwartz’s testimony is also entitled to no weight as a matter of basic accounting practices. Professor William Holder, one of the nation’s most foremost accounting experts, has explained that the authoritative accounting literature provides that mere management representations are patently inadequate support for any reasoned finding of GAAP compliance. Instead, such determinations can be made only by accounting professionals, after undertaking investigations consistent with the standards of the profession. It is now clear that the Commission can expect no such probative evidence from KPMG, the accounting firm that is actually conducting the investigation of Qwest’s concededly flawed accounting policies and concededly inadequate internal controls.⁹

Thus, in light of the evidence of record, only one conclusion is possible – Qwest does not satisfy section 272(c)(2). As Professor Holder has explained, until “Qwest . . . finish[es] its investigation, establishes and tests the functioning of adequate controls, and provides sufficient evidence of GAAP-compliance that goes beyond mere representations,”¹⁰ there can be no finding that QC is accounting for transactions with QLDC in compliance with GAAP as required by section 272(c)(2).

The MLT Ex Partes. Qwest’s most recent *ex parte* filings likewise confirm that it is violating Checklist Item 2. Qwest no longer disputes that it performs mechanized loop testing (“MLT”) and that Qwest maintains the MLT information in databases that are available to some Qwest employees, but not to employees of competitive carriers.¹¹ These undisputed facts establish a violation of Checklist Item 2. The Commission has repeatedly stressed that nondiscriminatory access to OSS means, among other things, “provide[ing] competitors with

⁷ See Qwest I, Schwartz Dec. ¶ 48; Qwest II, Schwartz Dec. ¶ 47.

⁸ Compare Qwest I & II, *Ex Parte* Letter from Peter A. Rohrbach to Marlene Dortch (August 27, 2002) (attaching revised Brunsting and Schwartz Declarations that continued to state unqualifiedly that QCC and QC “follow[] Generally Accepted Accounting Principles”) with Qwest I & II, *Ex Parte* Letter from Oren Shaffer to Marlene Dortch, at 1 (August 20, 2002) (“QCII’s internal investigations have now identified, with respect to the QC and QCC financial statements, (1) accounting transactions for QCC that did not comply with the requirements of GAAP, and (2) certain potential adjustments to the financial statements of QC that may be necessary to comply with GAAP.”)

⁹ See Qwest III, *Ex Parte* Letter from C. Frederick Beckner III to Marlene Dortch (Nov. 7, 2002) (attaching Declaration of William Holder (“Holder *Ex Parte* Dec.”)).

¹⁰ *Id.* ¶ 22.

¹¹ See generally November 22, 2002 *Ex Parte* Letter from R. Hance Haney to Marlene H. Dortch.

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access to *all* loop qualification information in [the applicant's] databases."¹² The obligation extends to data that "exists *anywhere* in a BOC's back office,"¹³ as long as that information "is available to *any* of the incumbent's personnel."¹⁴ The obligation also applies regardless of whether the BOC's personnel have "manual[] or electronic[]" access to the information.¹⁵

Qwest has now acknowledged that there is no technical barrier to providing competitive carriers access to this MLT data. Specifically, Commission Staff asked Qwest whether it is feasible to provide MLT data at the time the loop is unbundled and provided to competitive carriers. Qwest answered that such information could, in fact, be provided.¹⁶ Although Qwest claims that this option has not been fully "evaluate[d],"¹⁷ the fact that Qwest has not yet figured out precisely how MLT data could be provided to competitive carriers plainly does not excuse it from complying with core nondiscrimination obligations.

Sincerely,

/s/ C. Frederick Beckner, III

C. Frederick Beckner, III

¹² *Alabama 271 Order* at n.483.

¹³ *Id.* ¶ 35.

¹⁴ *Massachusetts 271 Order* ¶ 54 ("[t]he relevant inquiry . . . is not whether [a BOC's] . . . retail arm or advanced services affiliate has access to such underlying information but whether such information exists *anywhere* in [the incumbent's] back office and can be accessed by *any* of the incumbent's personnel.").

¹⁵ *Vermont 271 Order* ¶ 35.

¹⁶ December 12, 2002 *Ex Parte* Letter from Hance Haney to Marlene Dortch, at 1.

¹⁷ *Id.*