

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the investigation into)
U S WEST COMMUNICATIONS, INC.'s) Docket No. UT-003022
Compliance with Section 271 of the)
Telecommunications Act of 1996)

In the Matter of U S WEST)
COMMUNICATIONS, INC.'s)
Statement of Generally Available Terms) Docket No. UT-003040
Pursuant to Section 252(f) of the)
Telecommunications Act of 1996)

**REPLY BRIEF OF QWEST CORPORATION IN SUPPORT OF ITS COMPLIANCE
WITH THE REQUIREMENTS OF 47 U.S.C. § 272**

Qwest Corporation ("QC") respectfully submits this brief in reply to the opening brief filed by AT&T Communications of the Pacific Northwest, Inc., TCG Seattle and TCG Oregon (collectively, "AT&T"), concerning QC's demonstration that it will comply with the separate affiliate requirements of Section 272 of the Act following receipt of Section 271 approvals from the FCC.

Introduction

In its opening brief, QC demonstrated that it has established an affiliate, Qwest Communications Corp. (“QCC”), that will comply with Section 272’s separation requirements. No party other than AT&T has opposed QC’s Section 272 showing, and AT&T itself has now abandoned a variety of its original objections.¹ Ultimately, AT&T’s largely repetitive objections reduce to only four. First, AT&T claims that *before QCC became QC’s Section 272 affiliate on March 26, 2001, QCC “fail[ed] to accrue and timely pay for services.”* AT&T Br. 6.² Second, AT&T criticizes QCC’s Internet postings of affiliate transactions as untimely, and it claims that FCC precedents require more “detail” in those postings. *Id.* at 14-15, 20-22. This latter argument centers upon the definition of the term “transaction.”³ Third, AT&T continues to object to the employment by QCC of former QC employees (or vice-versa), and the performance of non-OI&M services by one for the other. *Id.* at 12-13. Finally, AT&T raises two new discrimination claims that are not even on the multistate workshop issues list: that QC might discriminate against information service providers seeking to market telephone exchange

¹ For example, AT&T now acknowledges that QC and QCC have separate charts of accounts. AT&T Br. 12. And it no longer contends that QC and QCC do not have separate accounting software (although Section 272 does not require that they do so). *See* In the Matter of Investigation into U S WEST Communications, Inc.’s Compliance with Section 271 of the Telecommunications Act of 1996, Seven State Collaborative Section 271 Workshop, 6/7/01 Transcript, Public Version, June 7, 2001 (“6/7/01 MS Tr.”) at 189, 191 (separate software and operating locations, one in Virginia and one in Colorado).

² This single argument is dressed up in multiple guises throughout AT&T’s brief – as a violation of GAAP (AT&T Br. 5-6), “a lack of internal controls” (*id.* at 10), an alleged form of discrimination (*id.* at 26-27), and a failure to follow FCC accounting rules (*id.* at 27).

³ AT&T’s desire for a more extensive “audit trail” appears to be a restatement of this same complaint, *i.e.*, that postings do not include “the details of individual transactions.” AT&T Br. 9. AT&T’s supporting citation to *SBC Texas*, however, is wholly unrelated. That citation is to an FCC reference to maintenance of records of past Internet postings as an “audit trail” to demonstrate compliance with the posting requirements. *See* Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18,354 ¶ 404 & n.1173 (2000) (“*SBC Texas Order*”). QC maintains such records, both on its website and in paper copy. Marie E. Schwartz Supplemental Direct Testimony (filed May 16, 2001), Exh. 1125T (MES-9T) (“Schwartz Wash. Direct”), at 26-31; In the Matter of the investigation into U S WEST Communications, Inc.’s Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. UT-003022, Transcript, July 17, 2001 (“Wash. Tr.”), at 05127, 05131-35.

services, and that services provided to QCC by its parent, Qwest Services Corporation (“QSC”), amount to an attempt to circumvent the Section 272 nondiscrimination rules applicable to QC as the BOC. *Id.* at 26-27.⁴

AT&T concedes that “[m]any of the issues raised in [its] testimony may appear insignificant alone.” AT&T Br. 12. They fare no better in combination. First, as shown below, virtually all of these claims should be foreclosed as efforts to relitigate arguments that AT&T has already made and lost before the FCC. Second, AT&T’s remaining claims concerning “numerous” delays in accrual and booking of QC transactions are wholly unsupported as to Qwest LD. More fundamentally, however, they amount to a misuse of the FCC’s instruction to “look to past and present behavior” to assess a BOC’s likelihood of complying with Section 272 in the future.⁵ They ignore the fact that Qwest determined in January 2001 to transition to QCC, a substantial company of over 2,000 employees, as a new 272 affiliate following the merger between Qwest Communications International, Inc. and U S WEST, Inc. As AT&T has conceded, if the relevant inquiry is how QCC has actually performed *as a Section 272 affiliate*, the inquiry would “eliminate a lot of the issues” it raises. *See* QC Br. 6.

Contrary to AT&T’s unsupported suggestions, the transition to QCC as a Section 272 affiliate was not borne of “a cavalier attitude to the requirements of section 272.” AT&T Br. 11.

⁴ AT&T argues that in evaluating QC’s readiness to comply with Section 272, the Commission should consider instances in which the FCC concluded that QC’s predecessor – U S WEST – had engaged in practices that the FCC found to constitute the provision of in-region interLATA services. AT&T Br. 3-5. As QC explained in its opening brief, the three cases cited by AT&T shed no light on QC’s willingness or ability to comply with Section 272 following receipt of Section 271 approval. QC Br. 35-38. Indeed, AT&T’s own representative conceded at the multistate workshop that consideration of such issues is “not relevant to [a Section] 272 [analysis].” In the Matter of Investigation into U S WEST Communications, Inc.’s Compliance with Section 271 of the Telecommunications Act of 1996, Seven State Collaborative Section 271 Workshop, 6/8/01 Transcript, Public Version, June 8, 2001 (“6/8/01 MS Tr.”) at 172. None of the cases cited by AT&T, involving a good faith view by QC’s predecessor that a service or product offering did not involve it in the provision of interLATA service, should serve to undermine QC’s straightforward demonstration that QCC satisfies all of the legal requirements set forth in Section 272.

⁵ Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20,543 ¶ 347 (1997) (“*Ameritech Michigan Order*”).

Quite the contrary. It reflected a response to a merger with a leading long distance carrier. In the wake of that unprecedented merger, QC made a rational business judgment to rely on a more experienced facilities-based long distance affiliate in place of Qwest (formerly U S WEST) LD. And it did so in far less time than Congress contemplated in the analogous one-year provision of Section 272(h).⁶

Nor did that judgment permit QC to evade the requirements of Section 272 by “hav[ing] two long distance companies . . . with only one company being subject to the requirements of the Act.” AT&T Br. 18.⁷ First, QC intends to provide all of its in-region interLATA service through QCC.⁸ Second, it has in any event preserved its Section 272 compliance requirements for Qwest LD.⁹ Third, QCC has posted all of its affiliate transactions back to the date of the merger in any event.¹⁰ This was not because QCC was operating as a Section 272 affiliate as of the date of the merger; QCC was no longer permitted to provide any in-region interLATA services after that date. Rather, it was in order to address any concern that other interexchange

⁶ AT&T makes the unsupported suggestion that QC “was contemplating making QCC the section 272 affiliate as early as September 2000.” AT&T Br. 25. The record is clear that, while QC began to revisit the use of Qwest LD shortly after the merger, in the fall of 2000, it did not determine that QCC would be its section 272 affiliate of the future until January 2001. QC Br. 9-11. *See also* Judith L. Brunsting Supplemental Direct Testimony (filed May 16, 2001), Exh. 1095T (JLB-15T) (“Brunsting Wash. Direct”) at 8. The only evidence AT&T has ever proffered to the contrary is a September 2000 e-mail, which did not identify any particular entity as a possible Qwest LD replacement. *See* Before the Public Utilities Commission of the State of Colorado, In the Matter of the Investigation into U S WEST Communications, Inc.’s Compliance with § 271 of the Telecommunications Act of 1996, Cory Skluzak Affidavit (filed June 25, 2001) 7 ATT 15 ¶ 108 (citing E-mail from Andrew Crain to 271superlist@psclist.state.mt.us (Sept. 15, 2000)). This e-mail simply stated that “Qwest is in the process of developing a transition plan for another subsidiary to become Section 272 compliant.” It would have been a waste of everyone’s time to conduct workshops on an issue – whether Qwest LD is 272 compliant – while QC was not certain which company would be the section 272 affiliate. QC’s effort to be forthcoming on this point is hardly evidence that it knew in September 2000 that it would use QCC as its 272 Affiliate.

⁷ Nor does it amount to a five-year transition period. AT&T Br. 26. Prior to March 26, 2001, QC relied on Qwest LD for compliance with the requirements of Section 272.

⁸ Brunsting Wash. Direct at 8.

⁹ *Id.*; Marie E. Schwartz Rebuttal Testimony (filed June 21, 2001) Exh. 1139T (MES-23T) (“Schwartz Wash. Rebuttal”) at 3.

¹⁰ Schwartz Wash. Direct at 27.

carriers might not have access to this data.¹¹ In doing so, QC demonstrated that it has taken its Section 272 responsibilities seriously, and that it has established a series of controls that will help to ensure Section 272 compliance once QCC is permitted to provide in-region interLATA service. In these circumstances, QC has plainly met its burden of demonstrating that its Section 271 authorization “will be carried out in accordance with the requirements of Section 272.” 47 U.S.C. § 271(d)(3)(B).

1. The Timeliness of QCC’s and Qwest LD’s Accruals and Billings for Affiliate Transactions

The predominant theme of AT&T’s brief with respect to affiliate transactions is to assert that AT&T found “numerous instances” in which Qwest entities failed to book affiliate transactions as promptly as required by GAAP. AT&T Br. 5, 6. These claims are substantially overstated, and do not warrant a finding that QC and its two Section 272 affiliates are not timely booking such transactions, much less that they will not do so upon Section 271 approval.

In its opening brief, QC demonstrated that AT&T has presented no real evidence of any failure to bill or accrue expenses on a timely basis for QC transactions involving Qwest LD. QC Br. 27-29. Nothing in AT&T’s opening brief provides any evidence to the contrary. All of AT&T’s references on this point as to Qwest LD (AT&T Br. 5 n.18, 6 n.23, 10 n.40) are either references to the same erroneous assertions previously addressed in QC’s opening brief, or references to wholly unrelated issues (e.g., posting rather than booking transactions). Likewise, AT&T has not identified any untimely QCC accruals or billings following the overlay of Section 272 controls on QCC, which was completed on March 26, 2001.

QC has further demonstrated that QCC, like its predecessor Qwest LD, will timely bill and accrue transactions upon Section 271 approval. In the process of establishing QCC as its

¹¹ 6/8/01 MS Tr. at 43, 46.

Section 272 affiliate, QC did identify instances of untimely booking of transactions with QCC following the Qwest – U S WEST merger. QC Br. 25-26. But the steps it took during the three-month transition period to bring its newly designated Section 272 affiliate into compliance with these requirements demonstrate both its ability and intention to comply with Section 272's requirements now that QCC has become its designated Section 272 affiliate. In this regard, QC has “demonstrat[ed] that it has implemented internal control mechanisms reasonably designed to prevent, as well as detect and correct, any noncompliance with Section 272.”¹²

There is no dispute that QC took comprehensive steps to identify all of QCC's affiliate transactions and to implement a system of controls designed to account for such transactions on a timely basis. QC Br. 24-25. During that process, outside accounting professionals from Arthur Andersen along with QC staff identified and reviewed every transaction between QC and QCC following the merger. QC Br. 10-11. QC and QCC are timely posting and billing these transactions following the transition, and there is no reason to believe that they will not continue to do so. The QC and QCC directors responsible for future 272 compliance are both seasoned professionals with accounting backgrounds and extensive experience. Judith L. Brunsting, Senior Director, 272 Business Development, is responsible for implementing the Section 272 compliance requirements for QCC. Ms. Brunsting holds a degree in accounting, and has over 30 years' experience in the telecommunications industry.¹³ Marie E. Schwartz, Director in FCC Regulatory Accounting for QC, is responsible for ensuring QC's regulatory accounting compliance with Section 272. Ms. Schwartz holds a degree in Business Administration and a Certified Management Accountant certificate, and has more than 13 years' experience in the

¹² *SBC Texas Order* ¶ 398.

¹³ Brunsting Wash. Direct at 1.

telecommunications and high tech industries, concentrating in regulatory compliance, finance, and accounting.¹⁴

Ms. Brunsting and Ms. Schwartz have established a system of controls designed to ensure timely booking of transactions, just as they did when U S WEST (later Qwest) LD was the Section 272 affiliate. As Ms. Schwartz explained, “all new agreements with the 272 [affiliate] are reviewed by the 272 oversight compliance team.” QC Br. 26 (quoting Wash. Tr. at 05138). QCC’s compliance with GAAP has also been confirmed by independent outside auditors.¹⁵ QC accordingly has submitted ample evidence that QCC timely accrues and books its transactions with QC, and that it has sufficient controls in place to ensure that it will continue to comply with the Section 272(b)(2) requirements upon QC’s receipt of Section 271 authority, just as Qwest LD did. As the FCC has noted, the 272(d) biennial audit will further ensure continued compliance with these requirements, and the FCC has placed significant reliance on the existence of the audit in its 271 approval orders.¹⁶

As QC has noted, this demonstration of compliance and the institution of controls to ensure continued compliance is the “past and present behavior” that is most probative of the question of QCC’s future compliance with Section 272, because that question is “in essence a predictive judgment regarding the future behavior of the BOC.”¹⁷ Whether QCC met the extensive requirements of Section 272 before it was ever designed to do so sheds no light on that question. This includes the question of whether, prior to service as QC’s Section 272 affiliate,

¹⁴ Schwartz Wash. Direct at 1.

¹⁵ See Report of Independent Public Accountants, Exh. 1141.

¹⁶ Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 416 (1999), *aff’d sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) (“BANY Order”); *SBC Texas Order* ¶ 406; Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶ 262 (2001).

QCC's delay in booking transactions with QC was or was not "material" under GAAP. AT&T Br. 6-8. What is most "relevan[t]" and "reliab[le]" (*id.* at 8) as to whether Section 271 "authorization will be carried out in accordance with the requirements of section 272" (47 U.S.C. § 271(d)(3)) is whether QCC has complied with GAAP since it became a Section 272 affiliate.

Ameritech Michigan, upon which AT&T purports to rely, is not to the contrary. That case involved Ameritech's effort to demonstrate that ACI met the requirements of Section 272(b). The FCC held that ACI had not met those requirements. But even in that context, the FCC did not then proceed to adopt the view that AT&T is taking here – that this fact "raises into question [the BOC's] willingness and ability to comply with section 272 in the future." AT&T Br. 3. The FCC simply instructed Ameritech and ACI to address the issue "in order to demonstrate compliance . . . in a future application."¹⁸ Here, that is what QCC has done in its comprehensive three-month review of all of its prior transactions with QC back to the date of the merger. That comprehensive review process, Qwest LD's past -- and continuing -- record of timely booking QC transactions, and QC's overlay of Section 272 controls on QCC during the transition are far more "material" and "relevant" to a determination whether QC will comply with Section 272. In light of this evidence, AT&T's claims are certainly "not sufficient to show systemic flaws,"¹⁹ and therefore do not undermine QC's showing that it will comply with the affiliate transaction requirements of Section 272 following receipt of 271 approval.²⁰

¹⁷ *Ameritech Michigan Order* ¶ 347.

¹⁸ *Id.* ¶ 371.

¹⁹ *See BANY Order* ¶ 412.

²⁰ AT&T also claims that Mr. Skluzak cited instances of intercompany "interest free loans." AT&T Br. 10. QC demonstrated in its opening brief that, contrary to AT&T's suggestion, QCC did not benefit from any such "float" due to untimely billing. QC Br. 24-25. AT&T itself concedes that "Qwest calculated interest back to the merger date." AT&T Br. 10 (citing 6/8/01 MS Tr. at 66-67). And the Master Services Agreement between QC and QCC has been revised to reflect QC's practice (Schwartz Wash. Rebuttal at 11) of calculating interest from the point in time at which the QC invoice should have been issued. QC Br. 25.

2. The Timeliness and Sufficiency of Qwest LD's and QCC's Internet Postings.

There has been no claim by AT&T that, while Qwest LD was the Section 272 affiliate, or after QCC replaced it as such on March 26, 2001, the required affiliate transactions were not posted on a timely basis. As of that date, AT&T essentially concedes the absence of any delays in posting (as with booking) these transactions. In fact, the record demonstrates that both Qwest LD and QCC have posted such transactions on their respective websites in far less than the ten days required by the FCC. In addition, QC has demonstrated that its controls have ensured not only the timeliness, but also the accuracy, of its Internet postings. QC Br. 20-22.

AT&T argues, however, that “Not one work order for services provided by QC to QCC was posted to the Internet *prior to March 27, 2001.*” AT&T Br. 15 (emphasis added). It is true that no work orders or task orders for QCC were posted prior to March 26, 2001 – because QCC did not turn up its website until then. The absence of such an Internet site for QCC before that date reflects nothing more than the fact that it had not been retooled as a Section 272 affiliate before that date. AT&T’s quibbling about whether the effective date of that retooling was in January or March 2001, and its reliance on the confusing language on QCC’s website, are beside the point. As noted above, the best evidence of whether QCC will comply with Section 272 when it ultimately begins to provide interLATA service in the future is whether it is doing so now, after it has been restructured to do so – not whether it was doing so before that restructuring was completed. Moreover, QC’s demonstration that it has made publicly available all 272 affiliate transactions since the passage of the Telecommunications Act of 1996²¹ is precisely what the FCC directed ACI to do in *Ameritech Michigan* “in order to demonstrate compliance . . . in a future [section 271] application.”²²

²¹ Schwartz Wash. Direct at 30.

²² *Ameritech Michigan Order* ¶ 371.

AT&T also continues to relitigate the question of how much detail a Section 272 website must contain with respect to posted transactions. QC has demonstrated in its opening brief that it has modeled its website after those approved by the FCC in other 271 cases, and that its postings contain all of the information required by the FCC. QC Br. 22-24. We will not repeat that showing here, but confine our reply to the additional points raised by AT&T in its brief.

a. AT&T quarrels with the posting of certain completion dates as “indefinite.” AT&T Br. 19. This is nothing more than a reflection of the fact that the underlying agreement for services continues in effect until terminated by either party to the agreement.²³ There is no “completion date,” for example, on a lease of office space that may be canceled by either party at any time. In this respect, the description is plainly accurate – and similar to that employed by other BOCs.²⁴ And once again, these services would be available to third parties under the same rates, terms and conditions.²⁵ Therefore, these services would be available for indefinite time periods.

b. AT&T complains that interested parties will have to “go to Qwest’s principal place of business to see confidential information” as to posted transactions AT&T Br. 20. To AT&T, the “issue is not access” (*id.*), but apparently purely one of convenience. Its position is untenable. The FCC has made clear that while transactions must be available for public

²³ Master Services Agreement, Article 2, *available at* http://www.qwest.com/about/policy/docs/msa_3.html (“This Agreement shall become effective as of April 1, 1996 and will remain in full force and effect until either party provides sixty (60) calendar days written notice of termination to the other party.”)

²⁴ See Coordination Agreement, effective 02/01/01, provided by BellSouth Telecommunications, Inc. to BellSouth Long Distance, Inc., *available at* <http://bellsouthcorp.com/policy/transactions/coordinationsum.vtml> (no expiration date for the contract; thirty days’ written notice required for termination of the agreement); Mutual Services Agreement by and between Illinois Bell Telephone Company and Ameritech Communications, Inc., *available at* <http://www1.Ameritech.com/corporate/regulatory/contract12.html> (“This Agreement may be terminated by either party by giving reasonable written notice to the other party in advance of the effective date of termination.”); General Services Agreement between Michigan Bell Telephone Company and SBC Advanced Solutions, *available at* <http://www.sbc.com/PublicAffairs/PublicPolicy/Regulatory/affdocs/GSA-MI.doc> (“This agreement will become effective when executed by both parties and will continue in full force and effect until terminated by either party upon thirty (30) days’ prior written notice.”).

inspection, it would “continue to protect the confidential information of BOCs.”²⁶ Indeed, the FCC has already rejected AT&T’s identical complaint in *SBC Texas*. In that case, SBC stated that it would not post “the billing details about individual occurrences of services provided pursuant to its agreements,” such as “periodic billing,” in light of the competitively sensitive nature of such details.²⁷ Instead, SBC made such information available “under a non-disclosure agreement to interested parties at the headquarters locations” of the BOCs.²⁸ AT&T claimed that this “headquarters only” disclosure did not satisfy Section 272(b)(5).²⁹ The FCC rejected AT&T’s concerns, finding that the “nondisclosure agreement has not adversely affected [SBC’s] ability to comply with section 272(b)(5) to date because all transactions were properly posted on the Internet.”³⁰ QC has demonstrated that its Internet postings comply with the FCC’s public disclosure requirements, and its willingness to provide access to additional confidential information at its principal place of business is fully consistent with FCC requirements.³¹

c. AT&T also argues that *SBC Texas* “does not state that the BOC need not post the detail or volume of transactions,” but only generally that the postings at issue there “were sufficiently detailed.” AT&T Br. 21-22. This argument is completely disingenuous. Here again, as noted above, the FCC rejected *precisely the same claim by AT&T* that it raises here, challenging precisely the same policy by SBC. Thus, what the FCC found to be “sufficiently detailed” is exactly what AT&T is complaining about again here. AT&T’s witness

²⁵ Schwartz Wash. Direct at 28-29.

²⁶ See Report and Order, *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd 17,539 ¶ 122 (1996) (“*Accounting Safeguards Order*”).

²⁷ SBC Brief in Support of Application by Southwestern Bell for Provision of In-Region, InterLATA Services in Texas (filed Jan. 10, 2000) at 66; Tom Weckel Affidavit (filed Jan. 10, 2000) at ¶ 54 (“*Weckel Aff.*”).

²⁸ Weckel Aff. ¶ 54.

²⁹ Robert E. Kargoll Declaration (filed Jan. 10, 2000) at n.29.

³⁰ *SBC Texas Order* ¶ 407.

³¹ *Id.* See also *Accounting Safeguards Order* ¶ 122.

acknowledges that he did not even review the SBC website to determine what level of detail the FCC had deemed adequate.³²

3. QCC's Use of Former QC Employees or Services Provided by QC.

AT&T also claims that QC and QCC engage in “wide-spread employee sharing” and that “[t]here is a revolving door atmosphere.” AT&T Br. 12. This argument is a gross exaggeration and in any event has no basis in the Act or the FCC orders implementing the Section 272(b)(3) separate employee requirement.

As QC has shown, neither Section 272(b)(3) nor the FCC orders prevent the hiring by QCC of former employees of QC, or vice versa; this requirement “simply dictates that the same person may not *simultaneously* serve as an officer, director, or employee” of both. QC Br. 14 (quoting *Non-Accounting Safeguards Order* (emphasis added)). AT&T acknowledges as much.³³ But here the movement of employees between QC and QCC was not at all widespread. During the transition creating QCC as the new 272 affiliate, the predominant movement of employees was from QC to QSC (not QCC) because the employees’ functions could support the entire Qwest family of companies.³⁴ Some functions such as payroll remained in QC, because they involved union employees, who enjoyed protections against such transfers.³⁵ Approximately 100 employees moved between QC and QCC, out of a total of about 2,000 employees in QCC and about 49,000 more in QC. QC Br. 19. And these companies have imposed appropriate safeguards to limit the flow of information between employees who make such transfers. QC Br. 17-18.

³² 6/8/01 MS Tr. at 53-54.

³³ 6/7/01 MS Tr. at 293-94.

³⁴ *Id.* at 196.

³⁵ *Id.* at 197-98.

AT&T also claims that when QC provides *services* to QCC, it “subverts the purpose of section 272(b)(3).” AT&T Br. 12. Once again, the FCC has rejected this specific contention that *shared services* violate the “separate employee” requirement; indeed, it has endorsed the economic benefits to consumers inherent in such economies of scale and scope. QC Br. 19-20. All such services are provided pursuant to a written agreement that is posted on the Internet,³⁶ and made available to other carriers at the same rates, terms and conditions under the non-discrimination safeguards of Section 272(c).³⁷ That agreement requires such services to be performed as an independent contractor and not as an agent or employee of QCC.³⁸ These arrangements fully comport with FCC standards.³⁹

AT&T’s remaining Section 272(b)(3) arguments require only a brief response. They are either legally irrelevant, factually wrong, or both:

a. AT&T “thinks” – without supporting citation – that employees of QCC should not be allowed to participate in a QC awards program. AT&T Br. 13. In fact, the argument that AT&T is advancing goes even further – that ex-employees of Qwest LD who have *transferred* to and are now employed by QC should not be allowed to participate in the awards programs available to their fellow employees.⁴⁰ Here again, AT&T is seeking to relitigate an issue it has already lost. The FCC has determined that even providing compensation to a present employee

³⁶ *Id.* at 300.

³⁷ 6/7/01 MS Tr. at 301.

³⁸ Schwartz Wash. Direct at 21.

³⁹ AT&T also contends that QC subsidized QCC by paying rates for management services that “appear excessive.” AT&T Br. 14 n.58 (citing Skluzak Aff. ¶109(a) and (b)). On the contrary, QC has demonstrated that the bill rates of the two examples raised by AT&T were reasonable considering the direct costs included in the rates and the level of experience and seniority of the employees performing the work. *See* Schwartz Wash. Rebuttal at 13-14.

⁴⁰ *See* Cory W. Skluzak Affidavit (filed June 7, 2001) Exh. 1155T (CWS-1TC) ¶ 47(f), cited in AT&T Br. 13.

of a 272 affiliate based on the performance of the BOC is not prohibited by Section 272(b)(3).⁴¹

In doing so, it specifically rejected AT&T's argument that it "should prohibit the BOCs from using any compensation system that directly or indirectly bases any part of the compensation of BOC officers, directors, or employees on the performance of the affiliate, or vice versa."⁴²

b. AT&T suggests that Section 272(b)(3) requires that payroll register comparisons be conducted "on a regular basis," and that a single payroll comparison for purposes of demonstrating compliance with Section 272(b)(3) is insufficient. AT&T Br. 13. AT&T does not deny that QC and QCC currently have no overlapping employees.⁴³ And QC has demonstrated that it has safeguards in place to prevent such overlap in the future, such as separate offices and distinguishing employee badges.⁴⁴ QC's recent payroll comparison verified that there is no overlap of employees,⁴⁵ and that evidence is all that the FCC requires.⁴⁶ Moreover, a payroll register comparison will be conducted as part of each 272(d) biennial audit to ensure future continued compliance with the separate employee requirement.⁴⁷

c. AT&T suggests that QC "knowingly disregarded the rule" that a certification statement be signed by an officer of the BOC. AT&T Br. 23 n.99. When Robin Szeliga initially signed the certification statement on behalf of the BOC, there was no BOC controller. QC Br. 14 n.50. She signed in error, because "she did not realize that she had to be an officer of the BOC to

⁴¹ See First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21,905 ¶186 (1996) ("Non-Accounting Safeguards Order").

⁴² *Id.* ¶ 177.

⁴³ AT&T admitted that it had found no instance "where I saw employees on both payroll registers." 6/7/01 MS Tr. at 295.

⁴⁴ Brunsting Wash. Direct at 14-15.

⁴⁵ Schwartz Wash. Direct at 20.

⁴⁶ Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20,599 ¶¶ 329-330 & n.1032 (1998).

⁴⁷ Schwartz Wash. Direct at Exh. MES-18.

make the certification.”⁴⁸ As QC has demonstrated, QC replaced her signature with the signed certification of the new QC controller in May 2001. *Id.*⁴⁹

4. QC’s Compliance with Other Nondiscrimination Safeguards

AT&T also raises two new issues that were not designated on the multistate workshop issues list. They lack merit in any event.

a. AT&T suggests that QSC’s provision of product design, planning or development services for QC and QCC is an example of QC’s attempt to “circumvent” the 272(c) nondiscrimination safeguards. AT&T Br. 26-27.⁵⁰ The FCC has made clear that Section 272(b)(3) does not prohibit a parent company or an affiliate of a BOC from providing services to both a BOC and a section 272 affiliate.⁵¹ Thus, Congress and the FCC clearly contemplate that non-BOC affiliates will provide services to 272 affiliates. Those services are subject to the protections of the FCC’s affiliate transaction rules,⁵² but they are not required to be made available to competitors. As AT&T recognizes, the nondiscrimination safeguards of Section 272(c) only apply to discrimination by a BOC in “its” dealings with the Section 272 affiliate, not to transactions between another BOC affiliate and the Section 272 affiliate. QC Br. 29-30. Whether these services had previously been provided by the BOC itself is not the issue. The underlying purpose of this provision is “to ensure that BOCs do not use their control over local exchange bottlenecks to undermine competition in the new markets they are entering – interLATA services and manufacturing.”⁵³ Product design, planning or development services of

⁴⁸ 6/7/01 MS Tr. at 254.

⁴⁹ Schwartz Wash. Rebuttal at Exh. MES-24.

⁵⁰ AT&T also suggests that the provision of these services by QSC rather than QC was not identified in QC’s written testimony. It was. Schwartz Wash. Direct at 34 & Exh. MES-16 (BOC purchases product planning and other listed services from QSC).

⁵¹ *Non-Accounting Safeguards Order* ¶ 182.

⁵² *Id.*

⁵³ *Id.* ¶ 206.

the kind provided by QC prior to QCC's service as the Section 272 affiliate⁵⁴ and now provided by QSC do not implicate any such control over bottleneck facilities. Thus, there is nothing being "circumvented" here.

b. AT&T argues that QC does not show that it will comply with Section 272(g)(1) because it does not "state whether QCC intends to market information services and whether QC will also permit other information service providers to market and sell telephone exchange services." AT&T Br. 27. QC has already stated that it understands the requirements of Section 272(g) and will comply with these provisions.⁵⁵ QC has also committed that it "will not engage in joint marketing except through an agreement that is reached on an arm's length basis, reduced to writing, and made publicly available on the Internet as required by Section 272(b)(5) . . . [S]uch a posting would allow others the opportunity to similarly market and sell the BOC's telephone exchange services."⁵⁶ The FCC has also held, and QC agrees, that "[QCC] may not market or sell information services and [QC] telephone exchange services unless [QC] permits other information service providers to market and sell telephone exchange services."⁵⁷ Thus, this issue should be resolved in QC's favor.

Conclusion

For the reasons stated above and in QC's opening brief, the Commission should conclude that QC has demonstrated that it will comply with the requirements of Section 272 upon receipt of FCC approval under Section 271.

⁵⁴ Before the Public Utilities Commission of the State of Colorado, In the Matter of the Investigation of U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996, Docket No. 97I-198T, Transcript, Public Version, July 24, 2001, at 89-90.

⁵⁵ Schwartz Wash. Direct at 44-45.

⁵⁶ Judith L. Brunsting Rebuttal Testimony (filed June 21, 2001), Exh. 1105T (JLB-25T) at 28.

⁵⁷ *Non-Accounting Safeguards Order* ¶ 287.

RESPECTFULLY SUBMITTED this 14th day of September, 2001.

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