Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
TOUCH AMERICA, INC., a Montana Corporation,	)	
	)	
Complainant,	)	
	)	**File No. _____**
v.	)	
	)	
QWEST COMMUNICATIONS INTERNATIONAL INC.,	)	
	)	
QWEST CORPORATION, and	)	
	)	
QWEST COMMUNICATIONS CORPORATION,	)	
	)	
Respondents.	)	

TO: The Enforcement Bureau

FORMAL COMPLAINT

TOUCH AMERICA, INC.

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Dated: February 11, 2002

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COMPLAINT

1. Complainant, Touch America, Inc. ("Touch America" or "Complainant"), by undersigned counsel, pursuant to sections 206-209 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (hereinafter, "the Act" or "Communications Act"), 47 U.S.C.A. §§ 206-209, Sections 1.720 *et. seq.* of the Federal Communications Commission's ("FCC" or "Commission") Rules and Regulations, and 47 C.F.R. §§ 1.720 *et. seq.*, hereby brings this Complaint against Qwest Communications International Inc., Qwest Communications Corporation and Qwest Corporation (formerly U S WEST, Inc.) (Collectively, "Qwest" or "Respondents").

SUMMARY OF THE ACTION

2. This is an action seeking to have the Commission invoke and apply its policy of non-tolerance of "the circumvention of section 271 by, …the partial divestiture of in-region interLATA assets." *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) (hereinafter "Merger Order") at ¶ 24, n. 80.

3. This is an action seeking to have the Commission exercise its "right to revisit" its "entire review of the merger" because the divestiture, the customer support services agreement, and certain "on-going post-divestiture relationship[s] between the buyer and the applicants" have resulted in a merger that does not comply with Section 271. *Id.* at ¶ 24.

4. This an action seeking to have the Commission enforce Qwest's compliance with Section 271 because the "failure of [Qwest] to ensure compliance [has] seriously undermine[d] the intent of Congress to promote competition in the telecommunications industry." *Id.* at ¶ 27.

5. This is an action seeking mandatory and remedial orders necessary or desirable to cure a failed divestiture, to stop on-going violations of Section 271 and other Title II provisions of the Communications Act, 47 U.S.C. §§ 201 and 202, to redress past violations of Section 271, to find, define and cure violations of Commission Orders interpreting the scope of the 271 requirements, and to award damages to Touch America resulting from a non-compliant merger, the failure to divest, and the violations of the Act and Commission Orders.

PRELIMINARY STATEMENT

6. Qwest Corporation, formerly U S WEST, Inc. ("U S WEST"), a Bell Operating Company ("BOC"), is prohibited from providing interLATA telecommunications services (referred to hereinafter as "interLATA service") originating in the 14 states in which the former U S WEST provided monopoly local exchange services (referred to hereinafter as "in-region").[1]

7. Qwest Corporation (U S WEST) may provide interLATA service in-region if and when authorized by the Commission.

8. To obtain such in-region authorization, Qwest Corporation (U S WEST) must file an application with the Commission that demonstrates its compliance with the fourteen point checklist set forth in Section 271(c)(2)(B) of the Act.

9. Neither Qwest Corporation nor the former U S WEST has filed or attempted to file an application to provide interLATA service ("271 Application").

10. In July 1999, Qwest and U S WEST agreed to merge.

11. As regulated carriers Qwest and U S WEST were required to and did file applications with the Commission for approval of their merger ("Merger").

12. To obtain Commission approval of the Merger, Qwest had to divest itself of all in-region, interLATA customers and services and cease using its in-region assets and facilities to provide in-region, interLATA service (referred to hereinafter, respectively as "Divestiture" and "in-region assets").

[1] The fourteen (14) states that comprise the former U S WEST local exchange operating territory ("in-region") are: Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

13. Qwest developed a plan by which to divest these in-region assets (referred to hereinafter as the "Divestiture Plan").[2]

14. Pursuant to the Divestiture Plan, Qwest purported to divest its in-region assets to Touch America.

15. Based on representations and commitments made by Qwest for itself and its merger partner, U S WEST, in applications and filings with the Commission, the Commission, by published orders, approved the Merger and the Divestiture Plan. *See 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) (hereinafter "Divestiture Order").

16. Pursuant to the Merger and Divestiture Orders, and in compliance with Section 271 of the Act, the Commission ordered Qwest to divest its ownership and control of certain in-region assets and to cease providing 271-prohibited interLATA services.

17. Prior to the Merger and Divestiture Orders, the Commission, by a separate order, had placed certain conditions on Qwest's dealings with BOCs to ensure compliance with Section 271.

18. This order is known as the "Qwest Teaming Order." *See In the Matter of AT&T Corp. v. Ameritech Corp. and Qwest Comms. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd (1998), *aff'd U.S. West Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999) (hereafter "*Qwest Teaming Order*").

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[2] Qwest's original Divestiture Plan was filed on October 18, 1999. *See* Qwest/U S WEST's Response to Comments on Application for Transfer of Control filed in CC Docket No. 99-272, at Attachment C (October 18, 1999). The Plan was later modified and resubmitted to the Commission by its incorporation into Qwest's Report on Divestiture ("Divestiture Report").

19. From and after the time the Merger was conceived, Qwest engaged in a concerted effort to minimize and avoid the restrictions and conditions that would result in the merged entity's ceasing to provide interLATA services in compliance with Section 271 of the Act.

20. After Touch America purchased the in-region assets of Qwest, and despite its having merged with U S WEST and purportedly having divested its in-region assets to Touch America, Qwest has continued to: (1) provide 271-prohibited in-region interLATA services; and (2) maintain control over significant portions of its in-region assets, including customers it was required to divest to Touch America.

21. In addition, Qwest has engaged in and continues to engage in a series of actions, practices and activities that are designed to have and are having the effect of damaging Touch America and its ability to assume control over and exploit the in-region assets it purchased from Qwest.

22. As will be documented by this Complaint, Qwest is operating and has operated in violation of Section 271 of the Act, the Merger and Divestiture Orders and the *Qwest Teaming Order*.

23. In this Complaint, it will also be shown that Qwest has violated and is presently violating Sections 201and 202 of the Act.

24. After learning about some of Qwest's more disturbing conduct, in November 2000, Touch America initiated several attempts to obtain Qwest's willingness to address and cure these problems and the damages they were causing Touch America and the public.

25. Despite the good faith efforts made by Touch America and the seriousness of the situation presented, Qwest refused to take any action.

26. The premises considered, Touch America seeks in this Complaint all available relief from Qwest's actions shown to be unlawful, including Commission issuance of a mandatory order directing Qwest to cease and desist from any and all conduct in violation of Sections 201, 202, and 271 of the Act, the Commission's Merger and Divestiture Orders and the *Qwest Teaming Order*.

JURISDICTION

Preface

27. The allegations made in this Complaint are based on a series of actions, practices and conduct that constitute violations of FCC Orders and specific provisions of the Communications Act.

28. As the Commission is aware, to effect Divestiture, Touch America and Qwest had to enter into a number of contracts.

29. Touch America is not asking the Commission to make any legal determinations with regard to the commercial or business issues to which those contracts may apply, violations of other federal statutes or the interpretation or enforcement of the commercial contracts. These issues are presented in pending litigation in the Federal Court before the District of Colorado and the American Arbitration Association.

30. Rather, Qwest's actions in performing these contracts, and actions in other related contexts are to be investigated and judged based on how those actions comply with Commission Orders and specific provisions of the Act.

Statutory Authority

31. The Commission has statutory jurisdiction over the issues raised in the instant complaint pursuant to Sections 201, 202, 208, and 271 of the Act.

32. The Commission's jurisdictional authority under each of these aforementioned statutes is discussed in the instant complaint, as and where appropriate.

General Authority to Enforce Orders of the Commission

33. The Commission also has jurisdiction over the issues raised in the instant complaint pursuant to its general authority to "enforce the provisions" of the Communications Act under Section 1 of the Act.

34. The Commission's enforcement authority under Section 1 extends to enforcing Orders issued by the Commission.

35. Finally, the Commission has specific jurisdiction to enforce and to ensure Qwest's compliance with the merger and divestiture conditions established by, respectively, the Merger and Divestiture Orders.

36. In approving other mergers involving BOCs, specific conditions were imposed to ensure that the public interest associated with such proposed mergers would outweigh any risk of harm. *See e.g., In re Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032 (June 16, 2000) ("Bell Atlantic/GTE Merger Order"); *see also In re Application of Ameritech Corp. and SBC Communications, Inc. For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (October 8, 1999) ("SBC/Ameritech Merger Order").

37. The Commission retained jurisdiction to enforce the conditions imposed in the Bell Atlantic/GTE and SBC/Ameritech Merger Orders and in the exercise of that continuing jurisdiction imposed annual compliance audit requirements. *See BellAtlantic/GTE Merger Order* at ¶ 336; *see also SBC/Ameritech Merger Order* at ¶ 410.

38. The two most fundamental conditions the Commission imposed when it approved the merger of Qwest and U S WEST were that Qwest divest its in-region, interLATA businesses and that it do so in a manner strictly consistent with the Divestiture Plan that Qwest presented to and had approved by the Commission.

39. The core aspect of the Divestiture Plan was that Qwest cease providing 271-prohibited services in-region until Qwest obtained 271 authority.

40. Similarly, the Commission's conclusion that the Merger was in the public interest rested squarely on the understanding that the Merger would comply with Section 271. *See* Merger Order at ¶ 62.

41. Clearly, the conditions imposed upon Qwest's merger are grounded on like-kinded public interest imperatives as those imposed on the mergers by the other BOCs and compliance with the merger conditions is deserving of the same degree of effort extended in other BOC mergers.

42. The significance of compliance is best stated by the Commission in relation to the SBC/Ameritech merger, when it advised:

> We expect that SBC/Ameritech will implement each of these conditions in full, in good faith and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefits of these conditions. If SBC/Ameritech does not fulfill its obligation to perform each of the conditions, pursuant to our public interest mandate under the Communications Act we must ensure that the merger remains beneficial to the public. We intend to utilize every available enforcement mechanism, including, if necessary, revocation of the

> merged firm's section 214 authority,[3] to ensure compliance with these conditions. To this end, should the merged entity systematically fail to meet its obligations, we can and will revoke relevant licenses, or require the divestiture of SBC/Ameritech into the current SBC and Ameritech companies.[4] Although such action would clearly be a last resort, it is one that would have to be taken if there is no other means for ensuring that the merger, on balance, benefits the public.
>
> *SBC/Ameritech Merger Order* at ¶ 360 (citations included).

43. The conditions precedent to Qwest's merger were reinforced by a condition subsequent that the merged company maintain its compliance with Section 271.

44. The Commission undoubtedly sees its obligation and duty to enforce the Qwest merger conditions to the same extent, and with the same vigor, as the Commission has demonstrated in enforcing the merger conditions imposed on the other BOCs. *See, e.g., In the Matter of SBC Communications, Inc., Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, File No. EB-01-IH-0339, 2001 FCC LEXIS 5581 (October 12, 2001) ("October 12, 2001 SBC Forfeiture Notice"); *In the Matter of SBC Communications, Inc., Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, File No. EB-01-IH-0030 (January 18, 2002) ("January 18, 2002 SBC Forfeiture Notice"); *In the matter of SBC Communications, Inc., Apparent Liability for Forfeiture*, Order on Review, File No. EB-00-IH-0432 (May 29, 2001).

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[3] *See CCN, Inc., et al.*, CC Docket No. 97-144, Order, 13 FCC Rcd 13599 (1998) (revoking the Fletcher Companies' section 214 operating authority for slamming and other violations of the Communications Act and Commission rules).

[4] *Cf. Application of General Telephone and Electronics Corporation to Acquire Control of Telenet Corporation and its Wholly-Owned Subsidiary Telenet Communications Corporation*, File Nos. W-P-C-2486, *et al.*, Memorandum Opinion and Order, 72 FCC 2d 111, 169, para. 170 (1979) (granting section 214 application of GTE to acquire Telenet subject to conditions that included structural separation but stating that the Commission would "take any necessary steps including divestiture" should GTE violate the order's requirements).

Jurisdiction Under Sections 310(d) and 312 of the Act

45. In approving the transfer of licenses from U S WEST to Qwest, the Commission was governed by and acted pursuant to Section 310(d) of the Act.

46. The Commission's approval of the license transfers under Section 310(d) was conditional and the continuing validity of the licenses depends on compliance with those conditions being maintained at all times.

47. Pursuant to its authority under Section 312, the Commission may revoke Qwest's FCC licenses for any willful or repeated violation of, or willful or repeated failure to observe any provision of the Communications Act or any rule or regulation of the Commission. *See* 47 U.S.C. § 312(a)(4).

PARTIES

I. COMPLAINANT

48. Touch America, Inc. ("Touch America"), is a Montana Corporation.

49. Touch America owns and operates a 22,000-mile, state-of-the-art, high-speed, fiber-optic network.

50. Touch America offers high-speed Internet access, long distance services including, by way of illustration, dedicated voice, data, video, ATM and frame relay.

51. Touch America's principal place of business is at 130 N. Main St., Butte, Montana 59701.

II. RESPONDENTS

52. Qwest Communications International Inc. ("QCII"), a Delaware Corporation, is the corporate holding company parent of several subsidiaries engaged in the delivery of telecommunications services to the public.

53. QCII's holdings include businesses engaged in interexchange, local exchange, data, and wireless services, among others.

54. Qwest Communications Corporation ("QCC"), a Delaware Corporation, is a subsidiary of QCII and operates as a non-dominant carrier providing interstate and international telecommunications services pursuant to authority granted under section 214 of the Act.

55. QCC provides facilities-based multimedia communications services, including bulk private line services to other providers, such as Internet services providers and other data service companies.

56. QCC also provides Internet Protocol-enabled services such as Internet access, collocation and remote access, as well as a full range of retail voice, data, video and related services.

57. Qwest Corporation ("QC"), a Delaware Corporation, is a subsidiary of QCII.

58. Prior to merging with QCII on June 30, 2000, QC was named U S WEST.

59. The principal place of business of QCII, QCC, and QC (collectively and hereinafter "Qwest") is 555 Seventeenth Street, Denver, Colorado 80202.

STATEMENT OF FACTS

I. MERGER AND DIVESTITURE

60. On July 18, 1999, Qwest and U S WEST entered into an Agreement and Plan of Merger ("Merger Agreement").

61. On August 19, 1999, the two companies jointly filed applications with the FCC seeking authority to transfer control of U S WEST's licenses to Qwest and to obtain Commission approval of their merger.

62. On March 10, 2000, by Memorandum Opinion and Order, the Commission approved Qwest's merger with U S WEST, conditioning such approval on compliance with Section 271. *See* Merger Order.

63. To comply with Section 271, a complete and irrevocable divestiture of Qwest's in-region interLATA assets was required.

64. To effect divestiture, Qwest negotiated a Stock Purchase Agreement ("SPA") with Touch America, by which Touch America agreed to purchase Qwest's in-region interLATA (and intraLATA) customer base and services, as well as certain in-region assets.

65. In addition, Qwest and Touch America negotiated twelve (12) separate commercial agreements, including a Transition Services Agreement ("TSA"), to facilitate the transition of customers. *See* Divestiture Agreements, Volume I-II, filed in CC Docket 99-272 (April 14, 2000) (hereinafter "Divestiture Agreements").

66. On April 14, 2000, Qwest filed its Divestiture Compliance Report, including as exhibits the SPA, TSA and the remaining commercial agreements existing at the time. *See* Divestiture Compliance Report of Qwest Communications International Inc., Volume I-II, filed in CC Docket 99-272 (April 14, 2000) (hereinafter "Divestiture Report") at Exhibit 1; *see also id*.

67. On June 26, 2000, by Memorandum Opinion and Order, the Commission approved Qwest's divestiture of its in-region assets to Touch America. *See* Divestiture Order.

68. The Commission's approval was based on Qwest's Divestiture Report, as well as the verbal and written *ex parte* representations and assurances made by the parties throughout the proceedings.

69. Four days later, on June 30, 2000, Qwest and U S WEST completed their merger.

II. PRE- AND POST-MERGER REGULATORY TREATMENT OF MERGER PARTNERS

70. Pursuant to the AT&T Consent Decree, all BOC territory in the continental U.S. was divided into local access transport areas ("LATAs").[5]

71. Post-AT&T Divestiture, the BOCs were permitted to: "(1) engage in exchange communications, that is, to transport traffic between telephones located within a LATA, and (2) to provide exchange access within a LATA, that is, to link a subscriber's telephone to the nearest transmission facility of AT&T or one of AT&T's long-haul competitors."[6]

72. BOCs were required to deliver traffic originating or terminating within a LATA to a point of presence ("POP") within the LATA designated by an interexchange carrier for the connection of its facilities with those of the BOC.

73. Post-AT&T Divestiture, BOCs were "allowed to transport communications only to and from telephones and other apparatuses located within the same LATA; because of their local monopoly position, the [consent] decree [did] not permit the Operating Companies to carry calls between different LATAs."[7]

74. Only AT&T and other non-BOC affiliated carriers are allowed to carry telecommunications traffic that originates in one LATA and terminates in another.

75. "A telephone call which originates in one LATA and terminates in another is an "interexchange telecommunication" under Section IV(K) [of the AT&T Consent Decree], and may not be handled by an Operating Company even if it performs services in both LATAs."[8]

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5 *United States v. Western Electric*, 569 F. Supp. 990, 994 (D.D.C. 1983) ("A LATA marks the boundaries beyond which a Bell Operating Company ("BOC") may not carry telephone calls").

6 *Id*.

7 *Id*. at 994

8 *Id.*

76. The Telecommunications Act of 1996 ("1996 Act") eliminated the outright prohibition on BOC provision of interLATA services that existed under the AT&T Consent Decree, but conditioned a BOC's ability to offer interLATA services originating in any of its in-region states upon satisfaction of Section 271's provisions.[9]

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[9] Section 271 of the 1996 Act states:

Section 271. [47 U.S.C. 271] Bell Operating Company Entry Into InterLATA Services.

(a) General Limitation – Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA Services to Which this Section Applies –

(1) In-Region Services – A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States if the Commission approves the application of such company for such state under subsection (d)(3).

(2) Out-of-Region Services – A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region states after the date of enactment of the Telecommunications Act of 1996, subject to subsection (j).

(3) Incidental InterLATA Services – A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g)) originating in any State after the date of enactment of the Telecommunications Act of 1996.

. . .

(g) DEFINITION OF INCIDENTAL INTERLATA SERVICE – For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate –

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to and from common carriers offering interLATA services at any location within the area in which such BOC provides service.

(h) LIMITATIONS – The provisions of subsection (g) are intended to be narrowly construed.

(j) CERTAIN SERVICE APPLICATIONS TREATED AS IN-REGION SERVICE APPLICATIONS. – For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that –

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the interLATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1). (emphasis added).

77. Sections 271 and 272 of the 1996 Act established a comprehensive framework governing BOC provision of "interLATA service."[10]

78. Under this framework, neither a BOC nor a BOC affiliate may provide in-region, interLATA service prior to receiving Section 271(d) authorization from the Commission.

79. The 1996 Act maintained the prohibition on BOC transmission and transport of telecommunications across LATA boundaries.

80. In addition, as a result of the *Qwest Teaming Order*, *1-800-AMERITECH*[11] and *1-800-4USWEST*[12] decisions, the Commission and the courts have defined what it means to "provide interLATA services" by including a balancing test of all factors relevant to this issue.

81. Prior to June 30, 2000, Qwest operated as a non-dominant carrier providing interstate and international telecommunications services pursuant to authority granted under Section 214 of the Act.

82. Until June 30, 2000, as a non-dominant carrier, Qwest was not encumbered by the restrictions of Section 271 of the Act.

83. Prior to June 30, 2000, U S WEST was one of the original Regional Bell Operating Companies created under the Modification of Final Judgment ("MFJ").[13]

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[10] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 at 21932 (1996) (Non-Accounting Safeguards Order) at ¶ 55.

[11] *See In the Matter of MCI Telecomms. Corp. v. Illinois Bell Telephone, et. al.*, Memorandum Opinion and Order, 15 FCC Rcd. 23184 (2000) ("*1-800- AMERITECH Order*").

[12] *See In the Matter of MCI Telecomms. Corp. v. U S WEST Comms., Inc.,* Memorandum Opinion and Order, E-97-28 and E-97-40A (Feb. 16, 2001) ("*1-800-4USWEST Order*").

[13] *United States v. Western Elec. Co. Inc.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Western Elec. Co., Inc.*, Civ. Action No. 82-0192 (D.D.C. Apr. 11, 1996) (terminating the MFJ as of Feb. 8, 1996).

84. As such, through subsidiaries, U S WEST provided local exchange telephone, intrastate intraLATA toll and enhanced communications services to approximately 25 million customers within the U S WEST region.

85. Due to Section 271's restriction, however, U S WEST units were prevented from providing in-region, interLATA long distance services until the Commission determined that U S WEST satisfied the local market-opening requirements of Section 271.

86. When Qwest merged with U S WEST, Qwest, as the merged entity became a BOC and became subject to Section 271's restriction on providing interLATA telecommunications services originating in-region.

III. QWEST'S ORIGINAL PLANS FOR DIVESTITURE AND POST-MERGER 271 COMPLIANCE

87. Touch America was not the first company identified as a possible purchaser of Qwest's in-region assets.

88. Ordinarily, the negotiations with potential purchasers of Qwest's in-region assets would be irrelevant to Touch America's experience as the actual purchaser.

89. However, the following facts make the experiences of at least one of the potential purchasers relevant to this Complaint.

90. On February 11, 2000, representatives of McLeodUSA ("McLeod") revealed to Commission staff conversations that took place on February 9, 2000, between senior Qwest and McLeod employees regarding the proposed divestiture of Qwest's in-region assets. *See* Merger Order at ¶ 20.

91. Following these conversations, McLeod submitted to the Commission sworn affidavits of the two McLeod employees in which they described their conversations with Qwest

executives "that disclosed Qwest's desire to sell the 271-implicated assets to a 'friendly' buyer so the assets could be reacquired in the future." *Id.*

92. Based on these conversations, McLeod argued that there was probable cause to suspect that Qwest intended to "park the assets for later reacquisition" and to "require" the buyer to purchase customer support functions. *Id.*

93. The FCC noted that McLeod's allegations "raise[d] the very serious possibility that Qwest ha[d] misrepresented its intentions with regard to its divestiture" and asked Qwest to address the issue. *Id.* at ¶ 21.

94. Qwest responded by dismissing McLeod's senior employees' statements as mere speculation. *Id.* at ¶ 21, n. 67.

95. The Commission relied on Qwest's assurances and did not further pursue McLeod's concerns. *Id.* at ¶ 21.

96. McLeod's concerns have, however, proved not to be speculation or conjecture.

97. Actual attempts to compromise the independence of the ultimate buyer of its divested in-region assets, suggest an intent, from the earliest efforts to effect the merger to "game" the regulatory process in order to avoid or ameliorate the requirements of Section 271 and the Commission's enforcement of that Section of the Act.

98. "Gaming" the regulatory process is neither new nor uncommon.

99. Such conduct betrays a strategy that is rooted in a cynical and contemptuous attitude toward the law, regulation and the Commission.

100. The palpable evidence of the prior intent to "game the merger and divestiture approval process requires strict scrutiny of Qwest's representations and express commitments to

determine whether they are credible when made and whether any present defense of those representations and commitments can now be given any weight.

IV. TOUCH AMERICA'S INVOLVEMENT

101. In February of 2000, Touch America began serious negotiations with Qwest to become the "buyer-in-divestiture" of Qwest's in-region assets. *See* Dennehy Affidavit, Exhibit 2 at 2.

102. Once begun, these negotiations continued, in earnest, not only between the two principal companies, but also with a Commission staff specially assigned to oversee the merger and divestiture process and implementation (referred to occasionally as "the special staff").[14]

103. Time was critically short to work out the details of the underlying business relationships of such a complex and enormous undertaking.

104. Added to that burden was the need to address and resolve each of the many business issues in the context of their passing regulatory muster with the FCC and each of the 14 states in U S WEST's territory.

105. The Commission's concerns focused on the 271 imperatives of the Merger and Divestiture.

106. To address those concerns, Touch America and Qwest met numerous times with the Commission's special staff on several issues critical to the fashioning of the terms and

[14] To the best of Touch America's recollection, the following staff of the Commission's Common Carrier Bureau ("CCB") comprised the "special staff" and played key roles in evaluating and approving the Divestiture: Larry Strickling, CCB Chief, Robert Atkinson, CCB Deputy Chief, Jim Byrd, Office of General Counsel, Michelle Carey, Chief of Policy and Program Planning Division ("PPD"), Margaret Egler, Assistant Chief, PPD, and Henry Thaggert, Attorney-Advisor, CCB.

conditions that had to be adopted to allow the Merger to close and Divestiture to occur consistent with Section 271 and other Commission imperatives.

107. In addition to these joint meetings, representatives of Qwest met individually numerous times with the Commission's special staff.

108. Representatives of Touch America also met individually with the Commission's special staff, but less frequently.

109. A key issue for the Commission's special staff during the period prior to the deadlines set for action on the Merger and Divestiture concerned the communications capabilities of Touch America.

110. Touch America's qualifications as a capable telecommunications carrier and network operator, including whether it possessed sufficient resources to assume the public interest obligations involved in acquiring Qwest's in-region assets and sufficient resources and know-how to act and operate independent of Qwest after acquiring these assets, were closely examined and challenged by the Commission's special staff.

111. Of key importance were Touch America's financials, network facilities, customer infrastructures, ability to enter the 14-state in-region territory and convey telecommunications services to the public (comprised of both divested customers and new customers), and Touch America management's assurances that it was a qualified and independent carrier. *See* Exhibit 1, Divestiture Report at 9-13.

112. Cumulatively, the special staff sought to ensure that Touch America was a carrier, qualified as such, and would be a viable competitor with the ability to operate as such a competitor and carrier on its own, without Qwest's long term or excessive involvement.

113. The rigorous examination of these attributes by the Commission's special staff was based on the recognition that any less degree of capability and independence would undercut the efficacy of the Merger and Divestiture in achieving the requirements of Section 271, as defined by its express provisions and as explained and interpreted by the Commission in the *Qwest Teaming Order*.

114. The pre-approval process and negotiations were, therefore, exacting.

V. THE MERGER ORDER

115. On March 10, 2000, by its Merger Order, the Commission conditionally approved Qwest's merger with U S WEST.

116. The Commission determined that the Merger would create "powerful new incentives" for U S WEST to honor the obligations set forth in section 251 of the Communications Act. Merger Order at ¶ 2.

117. The Commission expressly conditioned its merger approval on three events.

118. The first event was the Applicants' filing of a divestiture report detailing the manner in which the Applicant proposed to divest Qwest's interLATA services and customers in the U S WEST region in order to comply with section 271. *Id.* at ¶ 69.

119. The Commission required that the Divestiture Report be certified as totally complete and fully accurate. *Id.*

120. With regard to the Divestiture Report, the Commission required that the Applicants: (i) identify the buyer of the divested businesses; and (ii) provide "details on any and all activities provided by the merged entity on behalf of the buyer; the term sheets; and the contract of sale, including any agreements related to the support services." *Id.* at ¶ 3

121. The Commission specifically noted that the "Applicants must also provide information about any relationship between the Applicants and the buyer of the divested assets that do not involve the provision of support services, including but not limited to any joint or cooperative marketing or sourcing arrangements." *Id.*

122. The Commission stated that, "all ambiguity surrounding Qwest's provision of interLATA services must be resolved prior to the merger closing." *Id.* at ¶ 24

123. The Commission also indicated that it "would not tolerate the circumvention of section 271 by, for example, the partial divestiture of in-region interLATA assets." *Id.* at ¶ 24, n. 80.

124. The Commission specifically "reserved the right to revisit" its "entire review of the merger" if it finds that the divestiture, the customer support services agreement, or "any other on-going post-divestiture relationship between the buyer and the applicants," does not result in a merger that complies with section 271. *Id.* at ¶ 24.

125. The Commission stressed that Qwest's compliance with section 271 was critically important and that "any failure of the Applicants to ensure compliance would seriously undermine the intent of Congress to promote competition in the telecommunications industry." *Id.* at ¶ 27.

126. Following placement of the Divestiture Report on public notice to permit interested parties and the public the opportunity to comment, the second event upon which the merger was conditioned was the issuance of an order by the Commission stating whether the Applicants' divestiture would result in a merger that complies with section 271. *Id.* at ¶ 69.

127. The third and, for the dual purposes of ensuring Qwest's incentive to open its local market to competition while at the same time protecting Touch America and the public

interest, the most critical set of conditions upon which the Commission based its merger approval were the requirements that: (1) Qwest's post-merger activities on behalf of "the buyer" remain "consistent with its representations to the Commission"; and (2) that the merged entity "continues to comply with section 271," post-merger. *Id.* at ¶ 70.

128. The Merger Order further required Qwest to hire an independent auditor to perform an annual examination regarding the merged company's on-going compliance with section 271. *Id.* at ¶ 71.

129. The Commission mandated that the auditor have full access to the business operations and records of both the buyer (Touch America) and the merged entity. *Id.*

130. In addition, the Commission required a senior Qwest executive to annually certify, under oath, that Qwest's activities on behalf of the buyer were consistent with its representations to the Commission and that the merged company was in compliance with section 271. *Id.*

VI. THE DIVESTITURE ORDER

131. Following several months of negotiations between Qwest and Touch America, as the prospective buyer of its in-region businesses, and discussions with the Commission's special staff regarding the proposed divestiture, on April 14, 2000, Qwest submitted its Divestiture Report to the FCC. *See* Exhibit 1, Divestiture Report.

132. Qwest assured the Commission that the "report provides a complete discussion of Qwest's pending transactions with Touch America, Inc. ... [and] explains in detail: (i) the services to be assumed by Touch America; (ii) the network assets and employees it is acquiring; and (iii) all agreements and understandings between the parties." *See* Divestiture Order at ¶ 4.

133. Furthermore, Qwest assured the Commission that it was divesting "all prohibited in-region interLATA services and customers and will not be performing in-region interLATA transmission prohibited by section 271." *Id.* at ¶ 5.

134. Included as exhibits to Qwest's Divestiture Report filing were the thirteen (13) transaction agreements that, if approved by the FCC as being consistent with Section 271, the *Qwest Teaming Order* and its Merger Order, would effectuate the divestiture of Qwest's in-region businesses to Touch America. *See* Divestiture Agreements.

135. The Divestiture Agreements are comprised of the following: (i) Stock Purchase Agreement; (ii) Reorganization Agreement; (iii) Calling Card Agreement; (iv) Local Access Assignment and Assumption Agreement; (v) Operator Services Agreement; (vi) Prepaid Calling Card Services Agreement; (vii) Switch Functionality Access Right Agreement; (viii) Bilateral Wholesale Agreement; (ix) Collocation License Agreement; (x) Dark Fiber IRU Agreement; (xi) Transition Services Agreement; (xii) IP Router Functionality Access Right Agreement; and (xiii) Global Service Provider Agreement. *Id.*

136. A fourteenth transaction agreement was entered into between Qwest and Touch America, a lit "Capacity IRU" Agreement. *See* Exhibit 3.

137. This Agreement was executed, however, several weeks after the other agreements were filed with the Divestiture Report.

138. Qwest never submitted this fourteenth agreement to the Commission.

139. On April 14, 2000, the Commission issued a Public Notice establishing the pleading cycle for comment on Qwest's Divestiture Report and related transaction agreements. *See Pleading Cycle Established for Comments on Qwest Communications International Inc. and U.S. WEST, Inc.'s Proposed Divestiture Plans* [Public Notice], 14 FCC Rcd 17698 (1999).

140. AT&T was the sole party to file comments in response. *See* Comments of AT&T Corp. on the Applicant's Divestiture Report filed in CC Docket No. 99-272 (May 5, 2000) ("AT&T Comments").

141. In its comments, AT&T pointed out that Qwest proposed to retain its in-region fiber network and other facilities. *Id.* at 11-13.

142. In the Divestiture Report, however, Qwest stated it would not operate these facilities for services originating in-region before it obtained Section 271 authorization. *See* Divestiture Report at 28, 30.

143. AT&T also alleged in its comments that Qwest, through its provision of certain support services to Touch America, as described in the TSA, "effectively controls" Touch America's offerings. *See* AT&T Comments at 22.

144. In addition, AT&T argued that despite the fact that under the Divestiture Agreements Touch America supplies the underlying in-region, interLATA transmission, "Qwest effectively controls the offering, holds itself out as the provider of carrier services, controls the customer care channels and is pre-positioning itself for future long distance offerings when it can lawfully make those offerings directly to in-Region Customers." *Id.*

145. In Reply Comments filed to rebut AT&T, Touch America expressed its support of the Qwest Divestiture Plan and urged the FCC to approve the plan. *See* Reply Comments of Touch America filed in CC Docket No. 99-272 (April 14, 2000) ("TA Reply Comments").

146. Touch America's support was based on its understanding of the Divestiture Plan, as it had been negotiated by and between Touch America and Qwest with the input and advice of the Commission, as well as Qwest's express representations regarding the divestiture and support services.

147. Based on its then-existing understanding of how the divestiture and support services would be implemented and operate in practice after the merger, Touch America denied AT&T's allegations that the agreements enabled Qwest to control Touch America's offerings and that through the agreements Qwest "is providing everything except for in-region transport." *See* AT&T Comments at 5-12.

148. In particular, Touch America stated that it would: (i) ensure that customers see it as their service provider, e.g., "as the company to rely on"; and (ii) control its network, including its design and operation. *See* TA Reply Comments at 9.

149. Again, based on its then-existing understanding, Touch America stated that, pursuant to the divestiture and support services arrangements, it would fulfill "all the other core functions of a telecommunications service provider." *Id.*

150. In discussing its transitional need to use Qwest as its third-party supplier for certain services, Touch America indicated that, "[w]hen appropriate and practicable, Touch America will either bring the support service functions in-house or use alternative sources of supply for those services that it decides to outsource." *Id.* at 10.

151. Furthermore, Touch America indicated that, "if other suppliers are cheaper or better in quality than Qwest, then Touch America will switch to those suppliers." *Id.*

152. Touch America indicated that it would "allow the totality of facilities, pricing, reliability and customer need to dictate the ultimate provider of support services." *Id.* at 12.

153. In discussing its role as Qwest's Global Services Provider ("GSP"), Touch America revealed its understanding, at the time, that "its role as a GSP is no different from that of other interexchange carriers providing GSP service to other Bell operating companies" and

that, "Touch America, not Qwest, will set the prices for its GSP services, and its contracts with end users are fully enforceable by Touch America." *Id.* at 17.

154. In summation, Touch America stated in its Reply Comments that it was "committed to being a nationwide facilities-based carrier that will compete head-to-head with Qwest for national accounts." *See*, Exhibit 1, Divestiture Report at ¶ 14.

155. By Order issued June 26, 2000, the Commission approved Qwest's Divestiture Plan. *See* Divestiture Order.

156. Qwest's post-Divestiture Order actions towards Touch America and activities in the marketplace contradict the verbal and written representations made by Qwest to the Commission, Touch America, and to the public.

157. Qwest's post-Divestiture Order activities, as outlined in this Complaint, have adversely affected Touch America's ability to compete head-to-head with Qwest, and may have also pre-positioned Qwest for the rapid re-acquisition of its in-region interLATA customers and assets were it at some time in the future to obtain 271 approval.

VII. POST-DIVESTITURE ORDER, PRE-MERGER ACTIVITIES

158. In its Divestiture Report, Qwest represented to the Commission that prior to the divestiture closing date, "all in-region Qwest switched services will have been switched over to 0244…," the CIC code that Qwest assigned to Touch America Services, Inc. (formerly known as TeleDistance, Inc.).

159. Qwest also stated that "prior to divestiture, all interLATA dedicated circuits with one or both termination points in-region will be reprovisioned to Touch America network facilities (either pre-existing facilities or the new fiber facilities being acquired from Qwest as part of this transaction). *See* Exhibit 1, Divestiture Report at 29-30.

160. To effect divestiture, there was a need for Qwest to work closely with Touch America to ensure the migration of 100% of Qwest's in-region, interLATA customers and traffic to Touch America prior to effecting its merger with U S WEST. Anything less than 100% would not have met with the Commission's Merger and Divestiture Order conditions. *See* Merger Order at ¶ 69; *see also* Divestiture Order at ¶ 44.

161. Throughout the negotiations and FCC proceedings on the divestiture, Touch America made clear to Qwest and the Commission that, other than the dark fiber facilities it had agreed to purchase from Qwest, Touch America's plan for migration of traffic was to secure off-net leases from other carriers in large capacities in order to obtain the requisite capacity. *See* Maroney Affidavit, Exhibit 4 at ¶¶ 4-7.

162. Qwest had imposed June 30, 2000 as the deadline for completion of the divestiture. *Id.* at ¶ 6.

163. As the divestiture neared, Qwest unexpectedly began to question Touch America's ability to obtain the necessary capacity to assume the burdens of service for so many new customers through off-net leases. *Id*. at ¶¶ 5-10.

164. Qwest proposed a solution for this ostensible lack of capacity by offering the ability to provide Touch America with lit fiber facilities as a "Capacity IRU." *Id.* at ¶¶ 5-10; *see also* Meldahl Affidavit, Exhibit 5 at ¶¶ 3-7.

165. On the evening of June 29, 2000, the day before Qwest's self-imposed divestiture deadline, numerous Qwest representatives telephoned Mike Meldahl, the President of Touch America, to inform him that Touch America needed to purchase a number of Qwest lit fiber IRUs. *See* Exhibit 5 at ¶ 8.

166. Mr. Meldahl was told that Touch America had to purchase these "facilities" to carry Qwest traffic and that such traffic could not otherwise be transferred to Touch America's network before the divestiture deadline. *See Id.* at ¶¶ 5 and 8.

167. For Qwest, extending the June 30, 2000 date was not an option. During these phone calls, Qwest sought to have Touch America purchase these "Capacity IRUs" for a price of $1 million. *Id.* at ¶ 7.

168. Touch America refused.

169. Qwest then negotiated with Touch America to find mutually acceptable terms and conditions. *See Id.* at ¶ 8.

170. Based on Qwest's representations about the magnitude of the traffic involved, Touch America believed that it had no choice but to enter into the proffered lit Capacity IRU Agreement in order carry Qwest's traffic, purportedly already carried on these IRUs' circuits, by the designated deadline of June 30, 2000. *See* Exhibit 4 at ¶¶ 7-9 and 12.

171. Accordingly, Touch America agreed to Qwest's proposal and, the following day, June 30, 2000, Touch America and Qwest signed the Capacity IRU Agreement. *See Id.* at ¶ 12; *see also* Exhibit 3.

172. Given the hectic nature of the last minute negotiation and the purportedly urgent need for Touch America to sign the Capacity IRU Agreement to permit Qwest to close its merger, Touch America relied on and trusted that Qwest had considered and been assured of the legality of such Capacity IRUs. *See* Exhibit 5 at ¶ 9.

173. Touch America, of course, had no way of knowing at that time whether Qwest had presented these agreements to the Commission's special staff for consideration of their consistency with Section 271 and the Merger and Divestiture Orders because neither it nor its

representatives were present at all *ex parte* meetings Qwest held with the Commission's special staff.

174. Only much later did Touch America learn that Qwest had not submitted the Capacity IRU Agreement to the Commission, had not discussed it fully and candidly in its Divestiture Report, and presumably had never discussed details about Capacity IRUs to the special staff. *Id.*

175. Having learned, however, through experiences in the marketplace, that Qwest was actively marketing "Capacity IRUs" in-region, in November of 2000, Touch America contacted Qwest and challenged the legality of these devices. *See* November 8, 2000 Touch America Letter to Drake Tempest, Qwest General Counsel, Exhibit 6.

176. For many months thereafter, Touch America attempted to have Qwest cease its sales of Capacity IRUs via these agreements.

177. Correspondence and meetings over this issue, among others, continued until August of 2001.

178. At that time, Qwest broke off further discussions and simultaneously instituted litigation against Touch America in state court in Colorado and filed for arbitration before the American Arbitration Association. *See* Exhibits 7 and 8.

179. On February 4, 2002, Touch America filed a Formal Complaint against Qwest for its sales, marketing and provisioning of "Capacity IRUs" in-region.

VIII. QWEST'S POST-MERGER DERELICTION

180. Not long after Qwest completed its merger, Touch America experienced difficulties in its direct relationships with Qwest; relationships that arose out of the transaction agreements (including, but not limited to the TSA) that were reviewed and approved by the Commission in the Divestiture Order.

181. In addition, Touch America experienced or discovered other Qwest activities that interfered with Touch America's implementation, management and control of the in-region assets it had acquired from Qwest.

182. These difficulties and interferences have prevented and continue to prevent Touch America from controlling, managing and capitalizing on Qwest's in-region assets that it acquired through divestiture.

A. Denial of Access to Databases and Transferred Customer Information

183. Pursuant to the SPA and related divestiture agreements approved by the Commission in its Divestiture Order, Touch America relies on access to numerous Qwest data systems for any and all information regarding: (i) Transferred Customers (including Qwest, as a Touch America customer); (ii) Transferred Services; and (iii) all Internet transport customers, i.e., GSP customers. *See generally*, Divestiture Agreements (specifically, Attachment SO to the TSA in Vol. II, Exhibit III B-4 and attached as Exhibit 9, hereto), *see also* Divestiture Order at ¶ 26.

184. In its Divestiture Report, Qwest informed the Commission that, "Qwest has developed a number of proprietary database programs and information systems that enable it to bill and collect and provide customer care in connection with the telecommunications services it provides to its own customers." *See* Exhibit 1, Divestiture Report at 39.

185. Qwest went on to indicate that, "[g]iven the complexity of these systems, and the fact that all the information regarding the customers that Qwest will transfer to Touch America is included in these databases and information systems, Qwest has agreed to license Touch America to utilize the systems for a one-year period, with an option to renew for up to two successive six-month periods." *Id.* at 40.

186. Qwest further explained to the Commission that, "under this licensing arrangement Qwest will create security precautions in its information systems to ensure that sales staff and customer service representatives of Touch America have no access to information regarding services provided by Qwest, and sales staffs and customer service representatives of Qwest have no access to information regarding services provided by Touch America. *Id.* at 41.

187. Qwest noted the following exceptions to the "security rule": (i) back office systems to support personnel responsible for managing and maintaining these information systems would have access to the data of both carriers' customers; (ii) personnel involved in collections would have access to the invoices of both carriers; and (iii) certain customer service supervisors and managers would have "super-user" access to all data in the systems for training and quality control purposes. *Id.* at 41, n. 60.

188. The data systems and type of access that Qwest determined Touch America would need are listed in the TSA under Attachment SO. *See* Exhibits 9 and 10, respectively.

189. The Commission relied on Attachment SO of the TSA, Qwest's description of the licensed access, and its assurances that: (i) Touch America would thereby have access to systems it needed to operate independently (i.e., to validate billing and collection, as well as perform other matters relating to customer service); and, (ii) that Qwest personnel would be prevented from viewing, using or manipulating the database apportioned to Touch America, to approve Qwest's software and systems licensing proposal. *See* Divestiture Order at ¶26.

190. Touch America also relied on these factors as establishing its access to all necessary customer information as well as access to the requisite functionality needed to use the licensed databases and systems in a meaningful way, including the ability to run reports. *See* Giamona Affidavit, Exhibit 11; *see also* Shearer Affidavit, Exhibit 12 at ¶¶ 4-14.

191. The Commission's and Touch America's reliance were soon proved to be misplaced.

192. Immediately following the divestiture, Touch America experienced significant problems in obtaining access to information, including the customer proprietary network information ("CPNI") it had just purchased from Qwest.

1. Denial of Access to Historical CPNI

193. Qwest has exercised such control over the data systems and software as to prevent Touch America from independently operating or servicing Transferred Customers. *See* Giamona Affidavit, Exhibit 11.

194. Touch America has been forced to rely on Qwest for its own customers' information and for information and reports that should have been available directly to Touch America by accessing Qwest's underlying databases, pursuant to its license. *Id.*

195. Touch America had to rely on Qwest, not only to identify which systems Touch America would need to access, but also to determine what kind of access it would need to manage its business and service the Transferred Customers the same way Qwest utilizes these databases to manage its own business and service its own customers. *Id.*

196. In practice, and as shown by this Complaint, Qwest unjustly limited Touch America's access and ability to use its databases. *See* Exhibit 2 at ¶ 3.

197. The access to customer information of Transferred Customers that Qwest provided Touch America did not include access to historical customer information for the approximately 7,000 Common Existing Customers ("CECs") (customers with both in-region and out-of-region services who are customers of both Touch America and Qwest). *Id.*

198. These CECs are, for the most part, high-revenue customers. *Id.*

199. The limited access prevented Touch America from being able to answer even basic customer questions for the CECs and prevented Touch America from being able to perform basic customer care in a timely manner. *Id.* at ¶ 4.

200. Touch America repeatedly demanded that Qwest provide access to the customer information it needed and had a right to, but Qwest refused to respond to these demands. *Id*. at ¶ 5.

201. Qwest's efforts to impede Touch America from accessing customer information independently forced Touch America to rely on Qwest personnel to obtain customer information. *See* Exhibit 11.

202. This forced reliance on Qwest not only slowed Touch America's customer care process and increased its costs, it also allowed Qwest access to Touch America's day-to-day management of its customers and customer information. *See* Exhibit 2 at ¶ 6.

2. Denial of Access to Circuit Information

203. The customer and circuit information Qwest provided in the Touch America databases was either very incomplete or nonexistent with regard to the circuits Qwest purportedly transferred to Touch America as part of the transaction (hereinafter "circuit information"). *See* Exhibit 11 at ¶ 3.

204. A small sample of the problems experienced with the circuit information Qwest provided to Touch America are detailed in Exhibit 4, attached to this Complaint.

205. A single example here defines the scope of the problem Touch America has faced.

206. In a letter from Qwest responding to Touch America's request to extend a contractual deadline to resolve a circuit identification problem, Qwest admits that Touch America did not have access to the information it needed regarding these circuits. *See* Letter

from Qwest Responding to Touch America's Perry J. Cole's Request for Information, Exhibit 13 at 3.

207. In that same letter, Qwest admits that 12% of these circuits did not appear in the Touch America side of the Facilities & Equipment ("F&E") database. *Id.*

208. Rather, it appears from Qwest's letters that the information on these circuits was either in another database to which Touch America did not have access, or Qwest itself lacked the information. *Id.*

209. Although Qwest said that, "Touch America is now the customer of record for these circuits," *id.*, Touch America learned that, for a large number of circuits that Qwest purportedly "transferred" to Touch America, Touch America is not the customer of record. Exhibit 11 at ¶ 42.

3. Results of Touch America Investigation into Database and Information Access

210. As part of the Divestiture, Qwest licensed 35 of its key database systems to Touch America, each of which bears on billing capability. *See Id.* at ¶ 4.

211. Touch America conducted a preliminary review four of these systems – the Customer Account Service Profile with Enhanced Reporting ("CASPER") system, the Facilities & Equipment ("F&E") system, the Billing Account Management System ("BAM") and the Production Database ("PROD"), *id.* – and has learned the following about their scope and functionality:

CASPER

212. CASPER is an interface that provides access to billing and network inventory systems. *Id.* at ¶ 5. It contains the customer master record and all of the activity associated with

the customer account, including ANI's (Automatic Number Identifications), accounts payable and receivable for the account and contract terms. *Id.*

213. Qwest's CASPER system provides a "Report" pull down menu on its toolbar that allows reports to be generated on an ad hoc basis according to certain filter criteria, i.e., data elements that a user would like to view. *Id.* at ¶ 7.

214. This reporting capability exists for product history, credits, service detail, product promotions and circuit information, to name a few. *Id.*

215. Qwest did not provide this reporting capability for Touch America. *Id.* at ¶ 8.

216. Touch America, therefore, cannot generate reports such as the circuit inventory for a customer (should the customer have multiple accounts), or an ANI list for a customer or even the full list of accounts for a customer. *Id.*

217. Nor may Touch America obtain batch reports from CASPER, which it must request from Qwest. *Id.*

218. In March 2001, Touch America requested from Qwest a batch report listing of all the Touch America ANIs listed in its version of CASPER. *Id.* at ¶ 9.

219. When Qwest eventually provided the batch report file, Touch America attempted to validate the data within the report by comparing ANIs from the Qwest-provided information against the ANIs found in CASPER. *Id.* at ¶¶ 9-10.

220. Touch America found that there were ANIs in CASPER that were missing in the Qwest batch file. *Id.* at ¶ 10.

221. Other data integrity/accessibility issues exist within the Touch America version of CASPER, such as on circuit end points. *Id.* at ¶ 12.

222. For circuits with one end point in-region and the other out-of-region (generally CEC circuits), Touch America cannot "see" the Qwest end of the circuit, whereas Qwest can "see" and manipulate the information relating to the circuit for both Touch America and Qwest. *Id.* at 13.

223. Touch America users can only manipulate data for those circuit points in Touch America's version of CASPER. *Id.*

224. Another disparity in the functionality of these databases involves the print function. *Id.* at ¶ 14.

225. Qwest's customer detail can be printed using a single print command. *Id.*

226. For example, Qwest can print and review a customer account with 1,500 ANIs using a single print command to complete the task. *Id.*

227. This capability was modified so that Touch America can only print three (3) ANIS per print command, i.e., to accomplish the same task Touch America would have to issue 500 print commands. *Id.*

Facilities & Equipment Database

228. Touch America's side of the F&E system was to contain information about all of the Touch America facilities and equipment related to the Transferred Customers and Transferred Services. *Id.* at ¶ 15.

229. After Qwest partitioned the system, Touch America was not provided with the same information-reporting capability as Qwest. *Id.*

230. Touch America cannot run any summary reports out of the F&E database by circuit type, customers, network usage, geographic region, capacity, or utilization (except as to the Ad Hoc Query). *Id.*

231. Without these reports, which would allow Touch America to analyze and verify each bill Qwest or other vendors issue to Touch America, Touch America must individually identify and look up each circuit in the F&E database, one at a time. *Id.* at ¶ 16.

232. Additionally, Qwest did not provide Touch America a print function for F&E, compounding the difficulty in reviewing any information about a circuit. *Id.* at ¶ 17.

233. Qwest also limited Touch America's use of the Ad Hoc Query to reports that contain only 750 cells of information. *Id.* at ¶ 18.

234. Any information not contained in these cells is discarded and cannot be obtained and/or viewed by running subsequent reports, such that the usefulness of this reporting capability is severely diminished. *Id.*

235. Finally, Qwest maintains OC-48 circuits in a separate database to which Touch America has no access. *Id.* at ¶ 19.

236. As such, Touch America cannot monitor and maintain those circuits. *Id.*

Billing Account Management ("BAM") System

237. The BAM system is used to enter credit and debit information for customer accounts and to verify credits applied to customer accounts. *Id.* at ¶ 20.

238. All customer-affecting groups (i.e., sales, customer care, credit and collections, fraud management, etc.) use BAM. *Id.*

239. Touch America requires reports on the credits provided by individual customer name, their city and region, and their corporate affiliation on a daily, weekly, monthly and yearly basis. *Id.* at ¶ 21.

240. The BAM report function Qwest provides to itself generates 15 kinds of reports, each report function able to target various areas of concern. *Id.* at ¶ 22.

241. The BAM system functionality made available by Qwest to Touch America does not provide Touch America with these report-generating capabilities. *Id.* at ¶ 24.

242. Without these reports, Touch America is severely hampered in attempting to validate Qwest's billing of Touch America customers, Qwest's allocation between Touch America and Qwest of payments from customers, Qwest's allocation and billing of circuit costs to Touch America, and Qwest's billing of Touch America for certain access circuit and entrance facilities. *Id.*

243. Touch America now receives three (3) weekly reports from Qwest in a format specially customized for Touch America. *Id.* at ¶ 25.

244. However, because Touch America still cannot generate its own reports, it has had to develop manual processes, which do not achieve the purposes of the BAM systems, to track tickets by users and to assign tickets to the user with appropriate authorization. *Id.* at ¶ 26.

PROD Database

245. The PROD database plays a central role in Qwest's billing processes and Touch America's access thereto is essential to manage Touch America's business. *Id.* at 27. Qwest did not disclose the existence of the PROD database in the TSA. *Id.*

246. As such, Qwest provides Touch America with no direct access or reporting to the data contained in PROD. *Id.*

247. Qwest has stated that Touch America can accomplish the core function of reconciling circuit and revenue charges only by using data extracted directly from the PROD database. *Id.*

248. Qwest has failed to provide any meaningful access to the PROD database and therefore prevents Touch America's ability to conduct this core carrier function. *Id.*

4. Failure to Provide Information

249. As a direct result of Qwest's first annual 271-compliance audit, on May 31, 2001 and August 31, 2001, Touch America received payments from Qwest relating to revenues for customer traffic that Arthur Andersen determined Qwest had branded, billed and collected for itself, but which rightfully belonged to Touch America. *See Report of Independent Public Accountants*, Arthur Andersen ("*Report of Independent Public Accountants*") (April 16, 2001), Exhibit 15 at Attachment A and Qwest Communications International Inc., *Statement of Management Assertions*, Augustine M. Cruciotti, Executive Vice President of Qwest Communications International Inc. ("Statement of Management Assertions") (April 16, 2001), Exhibit 15 at Attachment B at ¶9; *see also* Giamona Affidavit, Exhibit 11 at ¶ 29.

250. With those payments, however, Qwest failed to provide any information whatsoever regarding the customers or circuits to which those revenues related. *See* Exhibit 11 at ¶ 29.

251. Without customer, circuit or service information, Touch America could not, and to this day cannot determine which customers were affected, verify that those customers are now in the Touch America databases, and verify that those customers are now being billed properly. *Id.*

252. Touch America has asked Qwest to provide this information several times, but Qwest will not provide it. *Id.* at ¶ 29.

253. Qwest represented to the Commission that, pursuant to the GSP arrangement, "Touch America will sell" to Qwest's in-region Internet customers all interLATA transport services and would thereby establish separate contractual relationships with such customers. *See*

Divestiture Report at 69; *see also* Divestiture Agreements, Vol. II at Exhibit IV-C ("GSP Agreement").

254. Despite having contracts with Qwest's in-region Internet customers for its GSP services, Qwest has refused to provide a complete list of Touch America's GSP customers and their contracts with Touch America. *See* Exhibit 11 at ¶ 71.

B. Failure to Transfer In-Region, InterLATA Customers

255. Pursuant to the Commission's Divestiture Order approval of the SPA, Transferred Customers and the network facilities and contracts necessary to provide in-region, interLATA and intraLATA telecommunications services to the Transferred Customers were to be transferred to Touch America prior to Qwest's merger with U S WEST. *See* Divestiture Order at ¶¶ 8-13.

256. As stated in paragraph 160, supra, Qwest represented to the Commission that "all in-region Qwest switched services will have been switched over to 244 [CIC] prior to sale of TeleDistance to Touch America."

257. To effectuate the federally required divestiture, Qwest established a new wholly owned direct subsidiary, TeleDistance Holdings ("TD Holdings"), which had one, wholly owned, subsidiary -TeleDistance. *Id.* at 25-28.

258. TeleDistance obtained the requisite authority to provide competitive telecommunications services from the FCC and each of the 14 in-region states. *Id.* at 26.

259. To accomplish the divestiture, Qwest transferred the customers and in-region assets to be divested to TeleDistance. *Id.*

260. The Carrier Identification Code ("CIC") assigned to TeleDistance was 0244 ("244 CIC"). *Id.*

261. Prior to consummation of the Merger, Qwest sold the stock of TD Holdings to Touch America (the "Stock Transfer"), thereby transferring control over TeleDistance (and the exclusive right to use the 244 CIC) to Touch America. *Id.* at 27.

262. When the stock of TD Holdings was sold to Touch America, the corporate name of TD Holdings was changed to Touch America Services Holdings, Inc., and the corporate name of TeleDistance was changed to Touch America Services, Inc. *See* July 28, 2000 Notice of Consummation and Name Changes, CC Docket No. 99-272.[15]

263. However, Qwest failed to transfer all metered customers and services to the 244 CIC that should have been transferred to the 244 CIC because it did not take all steps necessary to complete the transfer with third party vendors. *See* Exhibit 11 at ¶ 30.

264. Touch America has received charges from Qwest and from other vendors (approximately $14 million) for underlying costs for services associated with non-244 CICs that are not associated with Touch America, Inc. or Touch America Services, Inc. *Id.*

265. Further, assuming that the non-244 CIC charges relate to services for customers that were transferred to Touch America, Touch America cannot confirm that Qwest billed these customers on Touch America's behalf or that Qwest remitted any customer revenues to Touch America that were associated with the non-244 CICs. *Id.* at ¶ 31.

266. All of these non-244 CIC charges that are being billed to Touch America are charges associated with CICs assigned to Qwest. *Id.* at ¶ 32.

267. Touch America has notified Qwest that Qwest: (i) had failed to transfer customers and services to the 244 CIC, (ii) was assessing Touch America the costs associated

[15] As of January 22, 2002 Touch America Services no longer exists; on that date, Touch America Services merged into Touch America Holdings Group, Inc. ("TAHG")(formerly "TA Holdings") in Delaware, then on December January 30, 2002, TAHG merged into Touch America in Montana.

with non-244 CICs, and/or (iii) had failed to remit the customer revenues to Touch America generated by the non-244 CIC customers. *Id.* at ¶ 33.

268. Until recently, Qwest has refused to work with Touch America to resolve this issue. *Id.*

269. Over one year after the issue was first brought to Qwest's attention, in January of 2002, Qwest informed Touch America that it would "look into" the issue. *Id.*

270. Because of the inappropriate access Qwest gave Touch America to the licensed databases and the poor quality of information Qwest provided in those databases, as well as Qwest's refusal to supply reasonably adequate billing support information, Touch America has been forced to refuse to pay non-244 CIC charges from other vendors in an attempt to obtain a resolution of the manner. *Id.* at ¶ 34.

271. As a result, some vendors have threatened to disconnect these services for nonpayment. *Id.* at ¶ 36.

C. Denial of Operational Control Over Switches

272. Voice switches are network assets.

273. Qwest had offered to sell the voice switches referenced in paragraph 279, *infra*, to Touch America. *See* Exhibit 2 at ¶ 7.

274. However, Touch America did not want to purchase the switches at that time and so Qwest and Touch America agreed that Touch America would lease the switches with an option to buy the switches later. *Id.*

275. Between the filing of the Divestiture Report and the Commission's approval of the Divestiture, Qwest requested that the structure of the conveyance of these network assets be

changed from a lease to a grant to Touch America of "exclusive access to 100% functionality" of the switches. *Id.* at ¶ 8.

276. In the Divestiture Report, Qwest represented to the Commission that "[Q]west will not perform for Touch America any of the core functions or activities that interexchange carriers typically perform for themselves." *See* Exhibit 1, Divestiture Report at 4.

277. In addition, Qwest represented that "Touch America will always perform the core functions of carriers, including…retaining ultimate control over its own network facilities." *Id.* at 45.

278. Through the divestiture, Qwest granted to Touch America exclusive access to 100% of the functionality of the following four (4) in-region voice switches:

(1) Denver, CO – DMS250
(2) Salt Lake City, UT – DMS250
(3) Seattle, WA – DEC600; and
(4) Tukwila, WA – DMS250

See Exhibit 1, Divestiture Report at 19.

279. Qwest represented to the Commission that its only role with regard to these switches was to provide monitoring and maintenance for them, as well as to maintain the multiplexers and digital cross-connect systems associated with the switches. *See* Exhibit 1, Divestiture Report at 4, 38, 42 and 45; *see also* Divestiture Order at ¶ 26; Exhibit 14, Qwest Reply to AT&T Comments On the Divestiture Compliance Report ("Qwest Reply Comments") at 32 and Attachment A, thereto, ("Qwest Point-by-Point Response to AT&T") at 3.

280. Qwest represented to the Commission that by changing from a "lease" to a "grant of exclusive access to 100% of the functionality" of the switches, it was not changing the substance of the transaction or the nature of Touch America's use and management of the switches. *See* Exhibit 14, Qwest Point-by-Point Response to AT&T at 3, 11.

281. Contrary to its representations to the Commission and to Touch America, Qwest has never provided Touch America with exclusive access to 100% of the functionality of these switches. *See* Spear Affidavit, Exhibit 16 at ¶¶ 4-13.

282. And, as demonstrated by this Complaint, Qwest has never provided Touch America with the kind of operational control over the switches that would allow Touch America to perform the "core functions" associated with the operational management of a switch.

283. To exercise the degree of operational management control over the switches that it thought it purchased, Touch America needed to have full "read and write" access to the switches. *Id*. at ¶ 4.

284. In late March 2001, Qwest provided Touch America with "read" access only to three of the switches (all but the Seattle switch). *Id* at ¶ 6.

285. At the same time, Qwest revealed to Touch America that Qwest itself had been running traffic through these switches.

286. Had Touch America been given the appropriate control over or access to the switches, it would have known on July 1, 2000, that Qwest was continuing to run its traffic through the switches. *Id*. at ¶ 6.

287. In early July 2001, Qwest finally provided Touch America with "write" access. *Id*. at 10.

288. However, Qwest abruptly terminated this "write" access on or about August 8, 2001. *Id*. at 11.[16]

[16] On or about January 31, 2002, Qwest granted "read" and "write" access to coincide with, and for the limited purpose of, facilitating certain data migration. Exhibit 2 at ¶ 9.

289. Denial of full access (both "read" and "write") to the 4 voice switches severely inhibits Touch America's ability to address customer issues and to manage its traffic that flows through the switches. *Id.* at ¶¶ 11-12.

290. Touch America's customers have suffered greatly because of Qwest's refusal to provide the necessary access. *Id.* at ¶¶ 11-12.

291. Touch America has been harmed economically and competitively because it has been denied the ability to manage the operations of these switches (for example, implementing least-cost routing decisions) and it has been denied access to switch records that would allow it to verify costs and revenues associated with the traffic routed through the switches. *Id.*

292. Moreover, by refusing full access, Qwest has been able to shield Touch America from learning about the traffic that Qwest, itself, has and is routing through the switches, in contravention of Touch America's having been granted exclusive use of the switches and without payment to Touch America for such use.

D. Failure to Designate Touch America as the Customer of Record for Transferred Circuits

293. To provide the necessary services to the Transferred Customers, Touch America assumed Qwest's rights and obligations for certain circuits owned by third parties ("Transferred Circuits"). *See* Divestiture Agreements, Vol. I at Exhibit II-F ("Local Access and Assignment Agreement").

294. To enable these third parties to recognize Touch America as the successor to Qwest, and thereby allow Touch America to exercise control over these Transferred Circuits, Qwest must notify the third parties that Touch America should replace Qwest as the Customer of Record. Exhibit 11 at ¶ 43.

295. Only Qwest can assure that this step is taken and completed. *Id.*

296. For many Transferred Circuits, Qwest either never notified the third party that Touch America was the proper Customer of Record, or did not follow through to assure that the third party made the changes in its record appropriate to this resignation. *Id.* at ¶ 44.

297. As a result, Touch America cannot: (i) provision these circuits; (ii) disconnect circuits it may not need; or (iii) obtain information about the circuits from the third party. *Id.* at ¶ 42.

298. Yet Touch America still received charges from Qwest for these Transferred Circuits. *Id.* at ¶ 44.

299. Qwest has refused to assist Touch America in resolving these issues. *Id.* at 45.

300. Faced with Qwest's refusals, Touch America has been left with no choice than to attempt to address circuit issues directly with all of the third party vendors. *Id.* at ¶ 46.

301. Qwest's failure to assure that Touch America is designated the Customer of Record for Transferred Circuits owned by third parties allows Qwest to continue to control those circuits. *Id.* at ¶ 47.

E. Continued Receipt of Material Economic Benefits From Transferred Customers

302. Pursuant to the TSA approved by the Commission, Qwest provides Touch America with billing and collection services for Transferred Customers. *See* Exhibit 1, Divestiture Report at 37-39; *see also* Exhibit 9.

303. As a result, Touch America utilizes and is reliant upon Qwest's billing system (a.k.a., billing platform).

304. Pursuant to the Bilateral Wholesale Agreement ("BWA") approved by the Commission, Touch America agreed to utilize Qwest as its non-exclusive provider of out-of-region transport and termination services. *See* Exhibit 17.

305. Qwest represented to the Commission and to Touch America that pursuant to the BWA, Touch America is free to use competitive providers of transport services ("off-net providers") to supplement or to replace the services provided by Qwest. *See* Exhibit 14, Qwest Reply Comments at Attachment A, Qwest's Point-by-Point Response to AT&T at 21.

306. While Touch America was using Qwest to bill and collect Transferred Customers, Touch America approached Qwest about changing out-of-region providers. Qwest informed Touch America that it would be unable to bill Transferred Customers if Touch America actually purchased services from another off-net provider(s). Exhibit 2 at ¶ 10.

307. Qwest not only did not inform the Commission or Touch America at any time that it configured its billing system in such a fashion, Qwest made the opposite representation and it informed the Commission that Touch America was not required to purchase out-of-region capacity from Qwest. *See* Exhibit 1, Divestiture Report at 22. By refusing to separate customer billing from the use of Qwest capacity out-of-region, Qwest has required Touch America to use Qwest out-of-region capacity, thereby assuring itself of obtaining ongoing revenues associated with the Transferred Customers, and thus maintaining a material economic benefit from the Divestiture transaction. Exhibit 2 at ¶ 13; *see also* AT&T Comments at 17, n. 52.

F. <u>Billing Practices</u>

308. Touch America has disputed Qwest's invoices for Qwest's charges under the BWA and under Qwest's Facilities Charges Invoices. *See* Exhibit 11.

309. Qwest has issued to Touch America grossly inaccurate bills that have overstated costs by a significant amount. Exhibit 11 at ¶ 49.

310. Qwest has also refused to supply Touch America with reasonably adequate and industry-standard billing detail (the kind of detail Touch America, and its carrier peers, need to verify the completeness, accuracy and responsibility for charges rendered). *Id.* at ¶ 50.

311. Validating costs and revenues constitute core business functions and are performed by every interexchange carrier ("IXC"), including Qwest. *Id.* at ¶ 48.

312. Qwest's botched invoices and insufficient call detail, when combined with the lack of access and incomplete information in the databases Qwest created and "licensed" to Touch America, has prevented Touch America from performing the core business functions of validating costs and revenues related to Transferred Customers and Transferred Services. *Id.* at ¶ 51.

313. Because Qwest refused to assist Touch America in any reasonable way to determine the proper amounts Qwest should be invoicing Touch America, Touch America was forced to hire an independent consulting firm, PricewaterhouseCoopers LLC ("PwC"), to assist it with the Qwest billing dispute. *Id.* at ¶ 52.

314. This effort was time-consuming for Touch America personnel, expensive, and ultimately unsuccessful because of Qwest's continued refusal to provide reasonably adequate information even to Touch America's consulting firm. *Id.*

315. Attached as Exhibit 18 is the Affidavit of Joni Logan, PwC Manager, filed by Touch America in connection with litigation between the Qwest and Touch America in the Federal District Court in Montana. *Id.* at ¶ 53.

316. The report attached to Ms. Logan's Affidavit summarizes the problems that Touch America and the PwC consulting team encountered in their efforts to decipher Qwest invoices. *See* Exhibit 18; Exhibit 11 at ¶ 54.

317. Ms. Logan concluded that "Touch America had a reasonable basis for its billing disputes, that Qwest had not provided adequate documentation or responses to our information requests concerning the data underlying those disputes, and that Qwest failed to provide industry standard records and documentation to support its bills to Touch America." Exhibit 18; Exhibit 11 at ¶ 55.

318. Touch America has continued the time-consuming and costly work of trying to decipher and understand what the revenues and costs should be for the Transferred Customers and Transferred Services. Exhibit 11 at ¶ 56.

319. Although Touch America's investigation is not complete, nothing learned to date alters the conclusion stated in Ms. Logan's affidavit. *Id.* at ¶ 57.

320. Several specific examples set forth in Exhibit 11 at ¶¶ 59-65 help illustrate the untenable position in which Qwest has placed Touch America through the exercise of its control over the licensed data bases, its billing systems, and the grossly inadequate information it has chosen to provide Touch America as back up for its invoices. *Id.* at ¶ 58.

321. Another example of how Qwest has abused its control over the systems purportedly assigned to Touch America to its financial benefit, ultimately effected through its control over the billing processes, as well, pertains to the manipulation of and billing for the Capacity IRU.

322. Qwest has essentially "renamed" certain circuits that were conveyed to Touch America under the June 30, 2000 Capacity IRU Agreement while at the same time it continues to charge Touch America for the same circuits under the BWA. Exhibit 4 at ¶¶ 26-28.

G. Unauthorized Access to TA Licensed Data Systems and Self-Provisioning

323. Pursuant to the TSA, Qwest provides a limited number of Touch America employees with the right to use and access several of its data systems to provision services to Touch America's customers. *See* Exhibit 9 (Article 3 of TSA); *see also* Exhibit 10 (Attachment SO).

324. Qwest's data systems were "partitioned" at the time of divestiture to facilitate this use and access by Touch America employees. *See* Exhibit 1, Divestiture Report at 40, 41.

325. Qwest employees have "super user access" that enables them to access Touch America's accounts and to view Touch America customer information on these data systems. Exhibit 2 at ¶ 16.

326. Qwest, at one time, informed Touch America that there were 1,490 Qwest employees with "super user access." *Id.*

327. Qwest also has access to the databases partitioned to Touch America and, without Touch America's authorization or knowledge, has abused that access to: (i) self-provision its circuits; (ii) change rates to be paid by Qwest to Touch America; (iii) transfer third-party circuits to Touch America; and (iv) access information about Touch America's customers. *Id.* at ¶ 17.

328. Qwest then exploited its abusive access to these databases by issuing approximately $10 million in credits to itself and its affiliates. *Id.* at ¶ 18.

329. Specifically, Qwest issued to Qwest affiliates credits in excess of $400,000 on at least 15 different occasions. *Id.* at ¶ 19.

330. Qwest made these credit entries through the BAM system. *Id.* at 20.

331. These credit entries were made without supporting documentation setting forth their basis or how they were calculated. *Id.* at ¶ 21.

332. All were made by Qwest employees without first obtaining the necessary Touch America authorizations. *Id.*

H. Providing In-Region Telecommunications Services

333. Touch America has information, ranging from end user bills to direct marketing solicitations, supporting the fact that Qwest has continued to provide 271-prohibited in-region, interLATA telecommunications services following its merger with U S WEST. Exhibit 11 at ¶ 72.

1. Documented Evidence

334. End user customer bills demonstrate that Qwest is billing and receiving revenues for in-region services. *Id.* at ¶ 73.

335. Touch America has correspondence it received directing it to PIC the customers to 432, a Qwest CIC Code, for in-region services. *Id.* at ¶ 74.

336. Qwest's own billing records, which generally have been found to be incomplete, inaccurate and even, at times, incomprehensible, demonstrate that Qwest is either not billing all circuits related to the Transferred Customers or is itself billing the Transferred Customers and keeping the revenues. *Id.* at ¶ 75

337. Additionally, Qwest has routed and continues to route in-region traffic over Touch America's network. *Id.* at ¶ 76.

338. Qwest also transports non-affiliate (i.e., third party) traffic in-region Qwest has designated as "corporate communications" traffic. *Id.*

339. Although Touch America has unearthed evidence of this, the actual nature of the traffic involved is not determinable.

340. The fact that some of the traffic is "third party" traffic contradicts its being described as "corporate communications."

341. Even for traffic that might constitute legitimate "corporate communications," Qwest is not paying Touch America when it routes such traffic over Touch America's network. *Id.* at ¶ 77.

342. Convinced that it has not found all of the instances of Qwest's erratic and erroneous billings, Touch America continues its investigation. *Id.* at 78.

2. Evidence of Marketing

343. Correspondence from a Qwest salesperson to Touch America, dated January 22, 2002, demonstrates that Qwest is holding itself out as a full-service, nationwide long distance service provider to in-region customers. *See* Exhibit 12 at ¶ 18.

344. In the correspondence, it is made clear that the Qwest salesperson intends to address Touch America as a potential in-region customer, by asking if Touch America is "in the market for any additional bandwidth," such as "dedicated connectivity or wholesale dial-ups." *Id.* at ¶¶ 18-19.

345. Qwest's salesperson also indicates the types of telecommunications services Qwest has available to offer Touch America, saying, "We have some excellent pricing on the following: Internet T1s, DS3, OC3s, private lines, and wholesale dial-up. We also have extremely aggressive pricing on our long-distance rates (as low as 1 cent/minute)." *Id.* at ¶ 19.

346. By marketing such "plain vanilla" telecommunications services to Touch America, as a prospective customer, Qwest is "holding itself out" as a full-service, nationwide telecommunications provider, including in-region territory.

347. Moreover, Qwest has engaged in classic "bait-and-switch" marketing tactics, in-region. *Id.* at ¶ 24.

348. Qwest lures potential in-region customers (that should be off-limits to it) into its proverbial "showroom" by imparting the impression that it can provide a full suite of long distance services. Once the potential in-region customer is hooked, however, Qwest fesses up about being prohibited by federal law from providing such services but, while the potential customer is still hooked on the line, Qwest offers other services. *Id.* at ¶¶ 21-24.

349. And, in a development that has come to light most recently, though which Touch America suspects has been going on for some time, it appears that Qwest is marketing and providing in-region, interLATA voice services to end user customers using Voice Over Internet Protocol, or so-called VoIP. *See* E-mail Regarding In-Region Sales of Qwest's Voice Over Internet Protocol Solution, Exhibit 19.

I. Corporate Communications

350. As referenced in paragraphs 339 through 342, supra, since June 30, 2000, under the guise of "corporate communications" Qwest has transported and continues to transport non-permissible interLATA traffic.

351. Qwest may transmit in-region telecommunications that are either its "Official Services" communications [17] or services that qualify as incidental interLATA services. [18]

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[17] As defined by the Consent Decree court, Official Services "represent communications between personnel or equipment of an Operating Company located in various areas and communications between Operating Companies and their customers." *U.S. v. Western Elec. Co.*, 569 F. Supp. at 1097.

[18] The term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate. . . (5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or (6) of network control signaling information to and from common carriers offering interLATA

352. Representations in the first annual 271-compliance audit indicate that Qwest has designated its "Official Service" and some of its incidental traffic as "corporate communications." *See*, Letter from Arthur Andersen to Dorothy Attwood, Chief Common Carrier Bureau, FCC (June 6, 2001) ("Andersen Letter"), Exhibit 14, Attachment C at Finding 2.

353. Touch America has found that Qwest uses its "corporate communications" designation for in-region, interLATA traffic that does not qualify as Official Services communications or incidental traffic.

354. In fact, Touch America has learned that Qwest designates the traffic of such end user, non-affiliated customers as: ANR Pipeline, Qwest Government Systems (a non-272 affiliate), Star Telecom, Touch America, ICG Communications, Primus Telecommunications, Cais Internet, and Electric Lightwave. Exhibit 11 at ¶ 76.

J. Capacity IRU Agreement

355. On the eve of the divestiture and closing of Qwest's merger with U S WEST, and for the reasons discussed in paragraphs 160 through 172, supra, Touch America reluctantly agreed to enter into a lit Capacity IRU Agreement with Qwest. Exhibit 4 at ¶¶ 8-11.

356. The following day, June 30, 2000, Touch America and Qwest executed that Capacity IRU Agreement. *Id.* at ¶ 12.

357. At that time, Touch America remained unaware that Qwest had never submitted the capacity IRU agreement to the FCC as part of its divestiture filings. *See* Exhibit 5 at ¶ 11.

358. At no time prior to June 30, 2000, nor at any time thereafter until it was discovered in the marketplace by Touch America representatives several months later, had

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services at any location within the area in which such BOC provides service. *See* 47 U.S.C. § 271(g).

Qwest disclosed to Touch America its intention to market, provision and operate lit Capacity IRUs in-region, after merging with U S WEST. *See* Exhibit 4.

359. As shown by Touch America's Formal Complaint filed with the Commission on February 4, 2002, Qwest has indeed continued to market and provide lit Capacity IRUs within its 14-state local exchange service territory since merging.

360. To the best of Touch America's knowledge, Qwest still has not supplemented the proceedings on merger and divestiture with a copy of the Qwest/Touch America Capacity IRU Agreement, nor has it informed the Commission of the existence or nature of such agreement.

IX. NEGOTIATION AND QWEST RETALIATION

361. Touch America first raised its concerns about Qwest's then-existing post-Merger actions and activities as early into the divestiture as late August, early September of 2000. Exhibit 2 at ¶ 22.

362. In November 2000, Touch America and Qwest began formal quarterly meetings, with the president of each company in attendance, to try to resolve the disputes between the parties. *Id.* at ¶ 23.

363. In February 2001, Touch America and Qwest commenced a series of additional meetings and engaged in other efforts in an attempt to resolve disputes. *Id.* at 24.

364. In its attempts to resolve its disputes with Qwest, Touch America participated in the meetings described above, provided information and data to Qwest, and negotiated in good faith with Qwest. *Id.* at 25.

365. Touch America provides telecommunications services to Qwest. *See e.g.*, BWA at Exhibit 17.

366. As part of the transitional billing services provided to Touch America, Qwest, itself, prepares the information that determines what it should be billed for the telecommunications services provided to Qwest by Touch America, sends that information to Touch America, and then Touch America sends an invoice to Qwest reflecting that information. *See* TSA at Exhibit 9.

367. Qwest stopped paying Touch America for the undisputed portions of Touch America invoices beginning in March 2001. *Id.* at ¶ 80

368. Around the same time, Qwest and Touch America began discussing, in earnest, the resolution of Touch America's disputes with Qwest's invoices to Touch America. *Id.*

369. For months, Qwest simply did not pay Touch America. *Id.*

370. Then, in November 2001, Qwest began formally offsetting the amounts due to Touch America against the amounts Touch America disputed on Qwest's invoices. *Id.*

371. In accordance with the dispute resolution provisions in the TSA, Qwest and Touch America first attempted to resolve their billing disputes between themselves before proceeding to arbitration. Exhibit 2 at ¶ 24.

372. To this end, Touch America and Qwest agreed in April of 2000, to engage their independent auditors, PwC, for Touch America and KPMG for Qwest, to assist the parties in reviewing the invoices and verifying charges. Exhibit 11 at ¶ 52.

373. When resolution was not obtained, on August 7, 2001, Qwest unilaterally and unexpectedly terminated informal dispute resolution negotiations with Touch America.

374. Also, by letters faxed to Touch America on August 7, 2001, Qwest notified Touch America that (i) it had suspended filling orders for new or additional services for access accounts for the following Access Customer Name Abbreviations ("ACNAs"): MMI, THA, and AUD; (ii)

planned to suspend providing various interconnection services under the BWA; (iii) planned to increase the rates Qwest charges Touch America for terminating international calls; (iv) planned to disconnect services provided under its Interconnection Agreement with Touch America; (v) had placed Touch America on "Credit Hold" and had stopped processing pending and new orders, with some exceptions, until Touch America paid certain deposits and what Qwest calls "expedite fees"; (vi) intended to re-route in-region terminating switched traffic to other carriers and (vii) to stop purchasing wholesale services from Touch America. *See* Termination Notices, Exhibit 20 at Attachments A-F.

375. By faxed letter, dated August 8, 2001, Qwest next notified Touch America that it had stopped allowing Touch America technicians from exercising "write" privileges on Touch America's 4 leased switches and would stop billing and collecting for Touch America. *Id.* at Attachment G.

376. On or about August 7 or 8, Qwest stopped providing technician escort services into its facilities where Touch America's equipment is collocated. *Id.*

377. Qwest included in its August 7th termination notice for New Services a notice of conditions for new services. *Id.* at Attachment E.

378. Pursuant thereto, Qwest placed Touch America on credit hold so that any pending or new orders for installation of new services were suspended and/or not accepted, except for: "(x) Private Line Services to the extent consisting of cross-connects; and (y) Qwest Frame Relay Services to the extent consisting of the PVC component of NNIs [Network Node Interfaces] between Qwest's and Touch America's networks." Together, the so-called "New Services." *Id.*

379. Although Qwest did not terminate its provision of New Services, its August 7th letter informed Touch America that it planned to do so in 180 days. *Id.*

380. In the interim period, citing its FCC Access Tariff No. 1 as authority, Qwest conditioned its provision of the aforementioned services on the following: (i) Touch America's payment, in full, of non-recurring charges, including local loop, before performing the installation work; (ii) Touch America's payment of a deposit of 80% of the aggregate amount due for the service order over the term thereof; and (iii) Touch America's payment in full of any applicable expedite fees before such expedite activities are performed. *Id.*

381. Touch America's ability to serve its customers is inextricably linked to its contracts with Qwest and its interconnection of its in-region local and long distance networks with Qwest (as more fully explained below and as detailed in the Divestiture Agreements).

382. Because of this dependency, Touch America was forced to acquiesce to the conditions set forth above.

383. Then, on November 8, 2001, Qwest sent Touch America another Notice of Termination of Service Offerings ("Notice of Termination"). *Id.* at Attachment G.

384. In this notice, Qwest reaffirmed its intention to refuse acceptance of Touch America's service orders for New Services. *Id.*

385. Touch America responded to Qwest's Notice of Termination on November 20, 2001. *Id.* at Attachment H.

386. Touch America informed Qwest that its pending termination of New Services would result in customer-affecting consequences that Qwest could not possibly intend. *Id.*

387. Touch America put Qwest on notice that, if it followed through with its threatened conduct, the company would be in violation of its duties imposed by Sections 251 and 201 of the Communications Act. *Id.*

388. On January 3, 2002, Touch America's President, Michael J. Meldahl, sent a letter to Qwest's President, Afshin Mohebbi, in which Mr. Meldahl expressed grave concerns over Qwest's impending February 8, 2002 termination date and the impact such termination would have on shared customers. *Id.* at Attachment I.

389. Mr. Meldahl pointed to one letter, in particular, that was received the same day from a shared customer. *Id.*

390. The customer expressed concerns that, if Qwest followed through with its threatened disconnection and termination of services, it would seriously impact its relationship with and ability to serve its customers. *Id.*

391. Officials from both companies thereafter verbally discussed the possibility of maintaining the *status quo*, i.e., Qwest's continued provision of services in exchange for Touch America's continued payment of excessive and non-tariffed deposits (Qwest's deposits were set at amounts that were either not tariffed or which greatly exceeded the standard deposit requirements customary in the industry).[19]

392. On January 9, 2002, Mr. Meldahl spoke with Qwest's, Liza Burns, Vice President of Strategic Alliances, about the shared customer and Touch America's concerns.

393. Ms. Burns committed to responding to Touch America the next day.

394. On January 15, 2002, not having heard back from Ms. Burns, Touch America's Vice President of Venture Integration, Kevin Dennehy, sent a letter to Ms. Burns seeking

[19] Touch America raised Communications Act claims under Sections 201, 202 203 and 415 in the Colorado proceedings in relation to Qwest's actions regarding its federal communications tariff. Certain facts related to those claims are set forth herein, however, no claims are made based on those facts, nor does Touch America seek relief from the Commission in relation thereto.

assurances that Qwest would maintain the *status quo* as described in paragraph 392, above. *Id.* at Attachment J.

395. Despite Touch America's difficult concessions, Qwest refused to relent.

396. On January 16, 2002, in response to Mr. Dennehy's letter, Qwest's Liza Burns rejected Touch America's needs for refusal to provide interconnection to and with Touch America, stating, "At this time, Qwest is unwilling and is not contractually obligated to change its position." *Id.* at Attachment K.

397. In response, on January 21, 2002, Touch America asked the Commission's Enforcement Bureau to informally mediate a resolution of the specific issues related to Qwest's threatened termination of New Services. *Id.* at Attachment L.

398. Qwest declined the Commission's invitation, resolving instead to modify the terms and conditions under which Touch America could obtain New Services in exchange for Touch America's accepting an offer to mediate all commercial issues between the companies through "private" mediation.

X. THE LITIGATION

399. On August 8, 2001 Qwest filed a complaint in the District Court, City and County of Denver, Colorado.

400. Qwest did not serve that Complaint.

401. Instead, Qwest filed a First Amended Complaint and served Touch America on August 10, 2001. Exhibit 21 at Attachment A.

402. Two days earlier, on August 8, 2001, Qwest filed its Demand for Arbitration alleging that Touch America breached its obligations under the Bilateral Wholesale Agreement and the Transition Services Agreement. *Id.* at Attachment B.

403. Qwest also alleged that Touch America accessed Qwest's internal network and viewed Qwest's proprietary and trade-secret information without authorization. *Id*.

404. On August 22, 2001, Touch America filed an action arising out of the same transactions in the District of Montana.

405. On August 28, 2001, Touch America filed an Answering Statement in the Arbitration action, denying Qwest's allegations.

406. In the Answering Statement, Touch America asserted counterclaims against Qwest, asserting that Qwest breached its obligations under the TSA and BWA.

407. On August 27, 2001, Touch America removed the Colorado state court action to the United States District Court District of Colorado and later moved to have the case transferred to the District of Montana.

408. On September 7, 2001, Touch America filed its Answer and Counterclaims in the Colorado State action.

409. In that Answer, Touch America asserted counterclaims for breach of contract and alleged that Qwest's overcharges under the agreements violated its federal tariff and, as such, Sections 201, 202, 203 and 415 of the Act.

410. On November 5, 2001, the Montana District Court dismissed Touch America's Montana action, finding that the case should proceed in the District of Colorado.

411. On November 13, 2001, Touch America filed a motion for reconsideration of that order.

412. The Colorado Court deferred ruling on Touch America's motion to transfer the case to Montana pending the Montana Court's resolution of the reconsideration motion.

413. On December 19, 2001, the Montana Court denied that motion.

414. On January 7, 2002, Touch America filed its First Amended Answering Statement in the arbitration proceeding. *Id*. at Attachment C.

415. On January 31, 2002, Touch America filed an Amended Answer in the Colorado State action, adding counterclaims similar to those filed in the Montana action. *Id*. at Attachment D.

416. In addition to its previous counterclaims, Touch America, in its Amended Answer, asserted additional counterclaims for Breach of Duty of Good Faith and Fair Dealing; Tortious Interference with Business Relationships; Violation of the Sherman Act, Section 1 and C.R.S. § 6-4-104; and Violation of the Sherman Act, Section 2, and C.R.S. § 6-4-105. *Id.*

ARGUMENT

Introduction

417. Although Touch America purchased and, therefore, "owns" Qwest's divested in-region assets and customers, Touch America's ownership has been and is circumscribed by Qwest's failure to relinquish actual "control" over them.

418. Touch America's inability to capitalize on its ownership of the divested in-region assets has been used by Qwest to negate many of the consequences that would result from its having effectively divested its in-region assets.

419. Having thus avoided making an effective divestiture, Qwest continues to have direct involvement in the sale, marketing and provisioning of in-region interLATA services.

420. Having avoided effective divestiture, Qwest has positioned itself in the public's perception as being able to provide in-region interLATA services and to preserve in-region customers for such services until it can obtain 271 authorization and serve them outright.

421. Qwest has thus been able to reap substantial financial benefits from its continued involvement in in-region interLATA services.

422. Qwest has been able to protect its dominant position in-region as a monopoly provider of local exchange services, thereby nullifying any incentive it otherwise might have to take meaningful strides to open its local monopoly exchange services to competition. As such, Qwest has been able to frustrate competition in providing in-region telecommunications services.

423. Insofar as Touch America has thus far been able to discover, the devices, schemes and artifices by which Qwest has avoided the consequences and is avoiding the consequences of a total and complete divestiture are contained in this Complaint.

I. QWEST HAS NOT CEASED PROVIDING PROHIBITED IN-REGION INTERLATA SERVICES

424. Touch America restates the facts as set forth in paragraphs 255 through 271 and 333 through 360, of the Statement of Facts, supra.

425. The Merger Order mandated that Qwest completely divest its interLATA business and cease providing interLATA services originating in the U S WEST region prior to closing the merger. *See* Merger Order at ¶ 3. Black's Law Dictionary defines a divestiture as "the loss or surrender of an asset or interest." BLACK'S LAW DICTIONARY 491 (Seventh Edition 1999).

426. This mandate was repeated in the Commission's order approving the divestiture proposed by Qwest. *See* Divestiture Order at ¶ 44. In its Divestiture Order, the Commission emphasized the importance of on-going compliance with the strictures of Section 271 by the merged company, stating that such on-going compliance was "critically important." *See* Divestiture Order at ¶ 42. Because the merged entity's compliance with Section 271 was of such critical importance, the Commission expressly reserved the right to "revisit" its review of the merger. *See* Merger Order at ¶ 24. Because the merged entity's compliance with 271 was totally

dependent on proper divestiture, the Commission also specified that its review of the merger would be a top-to-bottom review to determine if the divestiture resulted in a merger that failed to comply with Section 271.

427. Qwest has continued providing in-region interexchange services through its marketing and sale of lit fiber facilities under the guise of "lit Capacity IRUs,"[20] under the pretext of carrying "corporation communications," (*see* paragraphs 350 to 354, supra), its manipulation of the customers of and its handling of the 244 carrier identification code ("the 244 CIC") (*see* paragraphs 255 to 271, supra), and, most recently, through its manipulation of advanced technologies, such as to provide in-region, interLATA voice communications over the Internet (*see* paragraph 349, supra).

428. Qwest's failure to relinquish and its efforts to retain control over the customers and assets it was required to divest demonstrate that Qwest has continued to "provide," as that term is defined in the *Qwest Teaming Order*, prohibited in-region, interLATA services.

429. In addition, Qwest sales employees continue to directly market to and solicit the interLATA telecommunications business of in-region end users.

430. Qwest's decisions to engage in these activities were conscious and deliberate choices and did not arise out of inadvertence, mistake or other error. Indeed, knowing that the Commission would require it to divest its 271-prohibited in-region businesses and cease all 271-prohibited activities before consummating the merger, Qwest undertook to at first minimize, and later simply avoid by any means or device available or contrived, the restrictions imposed by Section 271, the Merger and Divestiture Orders, and the *Qwest Teaming Order*.

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[20] The lawfulness of Qwest's in-region lit Capacity IRUs under Section 271 and the *Qwest Teaming Order* is challenged in a separate formal Section 208 complaint filed with the Commission by Touch America on February 4, 2002 (hereafter referred to as "Capacity IRU Complaint").

A. Qwest's Transmission of In-Region InterLATA Telecommunications Under the Guise of 'Corporate Communications' Violates Section 271

431. Touch America restates the facts set forth in paragraphs 350 through 354, of the Statement of Facts, supra.

432. In the first annual audit of Qwest's compliance with the Merger and Divestiture Orders,[21] Arthur Andersen identified traffic records that contained in-region interLATA component codes. These codes identify in-region traffic and, hence, their presence in these records indicated Qwest was carrying interLATA in-region traffic.

433. When asked about this, Qwest admitted that they represented in-region interLATA traffic, but explained that this traffic was exempt from the prohibitions because the codes identified Qwest's "corporate communications." Arthur Andersen's auditors did not ask Touch America about these codes or Qwest's explanation of them.

434. Instead, Andersen informed the Commission's staff that it had found out that Qwest "had in-region interLATA codes that were assigned to Qwest because the components represented corporate communications for Qwest (which Qwest believes it is permitted to provide for itself) or indefeasible rights of use transactions." *See* Letter from Arthur Andersen to Dorothy Attwood, Chief, Common Carrier Bureau, June 6, 2001.

435. Other than parroting what it was told by Qwest, the auditors made no effort to verify the nature of the traffic Qwest had called its "corporate communications." Nor was any effort made to confirm whether some of these codes actually related to indefeasible rights of use

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[21] *See Report of Independent Public Accountants,* Arthur Andersen ("*Report of Independent Public Accountants*") (April 16, 2001); *see also* Qwest Communications International Inc., *Statement of Management Assertions,* Augustine M. Cruciotti, Executive Vice President of Qwest Communications International Inc. (April 16, 2001).

traffic.[20] The quality of Arthur Andersen's audit here (though questionable) is not the issue, but it is relevant that by not actually auditing the presence of these codes in Qwest's records, Qwest was able to avoid having its compliance, or more correctly, its apparent non-compliance, with the Merger and Divestiture Orders disclosed to the Commission.

436. The exemption to the prohibitions of Section 271 pertaining to interLATA traffic are very narrow, [22] well-defined and are to be construed very narrowly.[23] The exemptions include only "Official Services" [24] and "incidental interLATA services."[25] Nowhere are the terms "corporate communications" to be found in either of these exemptions and it must be accepted that Qwest chose them with care in order to obtain the necessary level of definitional precision.

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[20] *See* Complaint filed by Touch America against Qwest regarding capacity IRUs - Capacity IRU Complaint.

[22] According to the Consent Decree court, the four basic categories of Official Service systems are: (1) the Operational Support System Network which permits the monitoring and controlling of trunks and switches and the routing of traffic from a centralized location; (2) the Informational Processing Network which is used to transmit data relating to customers' trouble reports, service orders, trunk orders from interexchange carriers, and other information necessary for carrying out the Operating Companies' business; (3) the Service Circuits which are used to receive repair calls and directory assistance calls from Operating Company customers; and (4) Voice Communications which are used by the Operating Companies for calls relating to their internal business. *U.S. v. Western Elec. Co.*, 578 F. Supp. 658, 661 (D.D.C. 1983).

[23] The provisions of subsection (g) are intended to be narrowly construed. *See* 47 U.S.C. § 271(h).

[24] As defined by the Consent Decree court, Official Services "represent communications between personnel or equipment of an Operating Company located in various areas and communications between Operating Companies and their customers." *U.S. v. Western Elec. Co.*, 569 F. Supp. at 1097.

[25] The term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate. . . (5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or (6) of network control signaling information to and from common carriers offering interLATA services at any location within the area in which such BOC provides service. *See* 47 U.S.C. § 271(g).

437. In other circumstances, the use of the phrase "corporate communications" might be accepted as mere colloquialism, a convenient reference. But what was going on here was not a chat over lunch, but an officially mandated audit to determine Qwest's compliance or non-compliance with the law and with official orders of this Commission issued to enforce that law. A competent audit would have focused on the description provided, and investigated its relevancy and true meaning in relationship to the facts that had been found suggesting a violation of Section 271's prohibition on carrying interLATA traffic in-region.

438. What could and should have been investigated were the points of communication for these "corporate communications," the volume of traffic involved, and the nature of the traffic. Did these "corporate communications" fit the definition of Qwest's Official Services? It seems clear the traffic represented by these codes did not involve any incidental, interLATA traffic, for Qwest did not mention this type.

439. It is significant, however, that Qwest did mention another type of traffic, that created by Qwest's "indefeasible rights of use transactions." Here another bell should have gone off because if Capacity IRUs truly are "sales" of facilities, as Qwest purports, then the interLATA component codes logically would no longer have been in Qwest's traffic records because the IRU purchaser would have taken over maintaining such codes.

440. Touch America does not have access to the full record of what the true nature of all of the interLATA traffic carried by Qwest in connection with these codes was. But it is certain that among that traffic was prohibited interLATA traffic, i.e., traffic that was not Official Services or incidental interLATA traffic.

441. Touch America knows this to be true because Qwest is transporting in-region, interLATA traffic of non-affiliated end users, such as ANR Pipeline, Star Telecom, Touch

America, ICG Communications, Primus Telecommunications, Cais Internet, Electric Lightwave and Qwest Government Systems (a non-272 affiliate) and has designated such traffic as "corporate communications." The logical conclusion to be drawn from these facts is that Qwest has cleverly disguised its provision of 271-prohibited services under the guise of "corporate communications."

442. As such, Qwest has engaged in prima facie violations of Section 271's prohibition.

443. Moreover, by using this ploy Qwest enables itself to engage in in-region marketing of its interLATA services and cover up any sales resulting from those efforts by designating the traffic in its records as "corporate communications."

444. The subterfuge effected by Qwest's "corporate communications" cover-up enables the company to engage in in-region activities that are clearly prohibited by the *Qwest Teaming Order*. Qwest not only affords itself the ability to "hold itself out" as a provider of long distance service to in-region customers, it also obtains material benefits that are uniquely associated with its ability to include a long distance component in a combined service offering. *See Qwest Teaming Order* at 27.

445. As is evidenced by Andersen's blind and unchallenged acceptance of Qwest's designation of this end user in-region, interLATA traffic as such, Qwest has thus far successfully hidden its 271-violative activities from the Commission.

446. Once Qwest's activities are revealed for what they are, however, the Commission can reach no other conclusion than that Qwest has violated Section 271 and the *Qwest Teaming Order*. As such it must also be found in violation of the Merger and Divestiture Orders.

B. Qwest's Activities in Regard to the "244 CIC" Prove that Qwest is Providing 271-Prohibited Services

447. Touch America restates the facts as set forth in paragraphs 255 through 271, of the Statement of Facts, supra.

448. Qwest represented to the Commission that "all in-region Qwest switched services will have been switched over to 244 [CIC] prior to sale of TeleDistance to Touch America." *See* Divestiture Report at 27.

449. Qwest has not, however, transferred all metered customers and services that should have been transferred under the SPA to the Carrier Identification Code 244 (the "244 CIC") - the CIC used for the Transferred Customers.

450. The actual billing statements containing the call detail records associated with the 244 CIC document conclusive evidence that Qwest did provision 271-prohibited services through its use of the 244 CIC. *See* Exhibit 11 at ¶¶ 30-33.

451. Simply put, two non-affiliated carriers cannot use the same CIC Code,[26] and Touch America is the only carrier that owns the right to use the 244 CIC Code.

452. Qwest nevertheless used the 244 CIC to originate Qwest customer traffic from Qwest switches out-of-region to terminate in-region and to originate traffic in-region and terminate that traffic out-of-region.

453. Because Qwest is carrying interLATA in-region traffic as is demonstrated by the bills received by Touch America for non-244 CIC traffic that belongs to customers associated only with Qwest, Qwest is carrying in-region traffic that is prohibited by Section 271.

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[26] *See* CIC Guidelines at Section 3.1.

C. Qwest's Marketing of InterLATA Services to In-Region Customers Amounts to the Provision of 271-Prohibited Services in Violation of the *Qwest Teaming Order* and is Therefore Unlawful

454. Touch America repeats the facts as set forth in paragraphs 333 through 349, of the Statement of Facts, supra.

455. The January 22, 2002, correspondence from a Qwest salesperson to Touch America demonstrates that Qwest is holding itself out as a full service, nationwide long distance service provider to in-region customers. *See* Exhibit 12 at Attachment B.

456. By engaging in such activities, Qwest directly contravenes the Commission's *Qwest Teaming* and *1-800-AMERITECH* Orders, the Merger and Divestiture Orders, and Section 271.

457. In other contexts Qwest has claimed that the mere marketing of interLATA services to in-region customers does not constitute the provision of 271-prohibited service. *See* Divestiture Report at Page 46, n. 69 (In attempting to defend its past coordinated marketing activities that the Commission found unlawful, Qwest claimed that "marketing of in-region interLATA services by a BOC prior to obtaining interLATA authority is not *per se* prohibited by Section 271").

458. Indeed, the coordinated marketing activities found unlawful in the *1-800-AMERITECH Order* are less egregious than those practiced here by Qwest. There, it was clear that Ameritech would not provide the transmission component of the marketed telecommunications service. Here, Qwest's marketing is to the opposite effect.

459. In fact, Qwest's e-mail solicitation is quite blatant. Qwest's sales force is soliciting and communicating to potential in-region customers that Qwest stands ready, willing

and able to provide a full array of interLATA transmission services, including "Internet, T1s, DS-3s, OC-3s, private lines, and wholesale dial-up." *See* Exhibit 12 at Attachment B.

460. It is also clear that Qwest's marketing efforts are not limited to intraLATA or other exempt services. This is evident from Qwest's unqualified promotion about its "aggressive pricing on long-distance rates." *Id.* Qwest goes even further with an invitation to prospective customers to "start building a relationship" with prospective customers "for future services." *Id.* (emphasis added).

461. Under the balancing test used to determine whether a particular BOC activity violates Section 271, a key assessment by the Commission is "whether a BOC's involvement in the long distance market enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition." *Qwest Teaming Order* at 27.

462. The Commission balances "several factors, including, but not limited to, [1] whether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long distance component in a combined service offering, [2] whether the BOC is effectively holding itself out as a provider of long distance service, and [3] whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public." *Id.*

463. Applying these factors to the example of Qwest's in-region marketing just described makes clear that it contradicts the principles of the *Qwest Teaming Order*. By ignoring Section 271 restrictions, Qwest nullifies any incentive for it to open its local markets to competition.

464. Further, by marketing and "holding itself out" as a full-service telecommunications provider willing and capable of serving any customer's needs for in-region

services, Qwest deliberately establishes itself in the public's perception as a one-stop shop for long distance and local exchange services.

465. By communicating with in-region customers in such a manner, Qwest is able to "strengthen its relationships" with in-region local customers and gain "a significant 'jumpstart' when [it does] obtain 271 authorization." This the Commission cannot tolerate. *See Qwest Teaming Order* at 28-30.

466. In this one instance, Qwest is shown to have breached its promise to the FCC that it would never "represent itself to former in-region customers such that those customers perceive Qwest as [their] continuing long distance provider." *See* Divestiture Report at 4. That one of Qwest's sales employees has directly marketed prohibited in-region services to Touch America is strongly suggestive that such marketing practices are widespread and a matter of course.

467. This being the situation, even if Qwest ultimately does not provision the prohibited services marketed by its sales force, Qwest has still engaged in an unlawful practice -- a practice that lessens Qwest's incentives to open its local markets to competition because of the inherent ability to build and maintain relationships with prospective in-region customers.

468. The Commission cannot tolerate such practices or the obvious violations of law upon which they are based.

II. QWEST DID NOT PROVIDE A DIVESTITURE REPORT THAT MET THE CONDITIONS OF THE MERGER ORDER

Background and Introduction

469. Touch America restates the facts as set forth in paragraphs 183 through 360, of the Statement of Facts, supra.

470. The Commission's approval of the merger application of Qwest and U S WEST rested squarely on the complete divestiture of Qwest's in-region, interLATA businesses and

cessation of 271-prohibited activities, in-region, until such time as Qwest obtained 271 approval. *See* Merger Order at ¶ 2.

471. To comply with section 271, the Commission ruled that, "the Applicants must completely divest Qwest's interLATA business originating in the U S WEST region prior to closing the merger." *See* Merger Order at ¶ 3.

472. To verify the divestiture would be complete, the Commission required that, "prior to closing the merger, the Applicants must submit a *full* report identifying the buyer of the divested businesses; details on any and all activities provided by the merged entity on behalf of the buyer; the term sheets; and the contract of sale, including any agreements related to the support services." *See* Merger Order at ¶ 3.

473. Additionally, the "Applicants must also provide information about *any relationship* between the Applicants and the buyer of the divested assets that do not involve the provision of support services, including but not limited to any joint or cooperative marketing or sourcing arrangements." *See* Merger Order at ¶ 3.

474. Once submitted, Qwest's Divestiture Report had to be placed on public notice so that the public and interested parties could comment or oppose. *See* Merger Order at ¶ 3.

475. To ensure meaningful participation by the public and interested parties, the Commission required that the "divestiture report must be complete and all relevant information we request herein regarding the divestiture must be submitted before the notice and comment period may begin." *See* Merger Order at ¶ 3.

476. Several commenters correctly identified the need for Qwest to provide a "complete" divestiture report. *See* Reply Comments of Nextlink Communications, Inc., Advanced Telcom Group, Inc., GST Telecom, Inc., and Firstworld Communications, Inc. at 5

("Because the Applicants have a poor record of compliance with Section 271, it is critical that the Commission require Qwest and USWC to provide substantial detail concerning exactly how they will come into compliance with Section 271 to ensure that there is no room for later misinterpretation of the requirements by the Applicants").

477. As demonstrated throughout the instant Complaint, the concerns expressed by the commenters were more than warranted. At every turn Qwest took the opportunity to provide incomplete or ambiguous disclosures to the Commission.

478. The record before the Commission shows that Qwest failed to "provide substantial [divestiture] details" in its Divestiture Report, omitted a significant amount of information and did not, therefore, intend to submit a "complete" divestiture report and did not do so as required by the Commission's Merger Order.

479. Qwest then uses its intentionally ambiguous and incomplete report to apply its "interpretations" of the Divestiture Report requirements. Not surprisingly, these post-merger interpretations contradict Qwest's express pre-merger representations to Touch America, the Commission and the public.

480. On April 14, 2000, Qwest submitted its Divestiture Report.

481. Qwest represented to the Commission that this report provided all information required in the Merger Order and demonstrated that Qwest's divestiture would fully satisfy Section 271. *See* Divestiture Report at ¶ 2.

482. On June 26, 2000, the Commission approved Qwest's proposed divestiture based in large part on the "details" in the Divestiture Report.

483. Given the mandate that Qwest had to submit a "complete" divestiture report containing "all relevant information," a divestiture report knowingly submitted without all known details about the divestiture would not have been acceptable to the Commission.

484. More importantly, in the absence of Qwest's full disclosure to the Commission of all known facts, including circumstances influencing the divestiture, business relationships and/or side agreements between itself and the buyer of divested assets, compliance with either the Merger or Divestiture Orders could not be achieved and closing the merger would not be permissible.

485. A divestiture report that, when submitted, was offered as being complete in all details, but whose substance actually changed after submission and being made available for comment due to subsequent events, whether intended or not, would not have provided the Commission with the report it ordered be submitted and on which closing of the merger was predicated.

486. In addition to its obligation to file a complete divestiture report, as made explicit in the Merger Order, Qwest was under a separate duty to ensure the continuing accuracy and completeness of the Divestiture Report. *See* 47 C.F.R. § 1.65(a) ("Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application").

487. This duty is "at the heart of the Commission's processes." *See In the Matter of SBC Communications, Inc.; Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, File No. EB-01-IH-0339, 2001 FCC LEXIS 5581 (October 12, 2001) ("SBC Forfeiture Order").

488. An application is "pending" before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court. *See* 47 C.F.R. § 1.65(a).

489. Qwest's legal duty to "update the record," therefore, remained until the Divestiture Order was no longer subject to reconsideration by the Commission or to review by any court.

490. Thus, Qwest's duty remained until at least the end of July 2000. *See* 47 C.F.R. § 1.106(f) (Petition for reconsideration of a final Commission action must be filed within 30 days from the date of public notice of the final Commission action).

491. As this Complaint documents, many post-submission events occurred that directly affected matters that Qwest was either expressly required to include and address in the Divestiture Report or was required by Section 1.65 of the FCC's rules to inform the Commission about after the report's submission.

492. Qwest failed to satisfy these obligations.

Information Withheld by Qwest

493. Qwest withheld information from the Commission concerning the execution of a post-submission "Capacity IRU" Agreement between itself and Touch America. *See* Paragraphs 355 through 360 in the Statement of Facts, supra; *see also* Exhibit 3.

494. The Capacity IRU Agreement is precisely the type of documentation that Qwest was obligated to submit to the Commission during the divestiture proceedings or afterwards while the Commission's decision thereto was still "pending."

495. This Capacity IRU Agreement is a vehicle by which Qwest provides in-region, interLATA telecommunications services using its own lit fiber facilities.[27]

496. Other relevant matters that Qwest failed to properly address in its Divestiture Report and failed to supplement later on, include: (i) attaching use of billing support services to Qwest's out-of-region facilities/services (as described in paragraphs 302 through 307, supra); (ii) limitations on Touch America's access to leased switches (as described in paragraphs 272 through 292, supra); (iii) limitations on Touch America's access to CPNI of Transferred Customers (as described in paragraphs 193 through 202, supra); and (iv) limitations on Touch America's access to Qwest databases and systems (as described in paragraphs 203 through 248, supra).

497. Qwest further failed to submit sufficiently detailed information regarding its post-merger planned uses of the in-region, interLATA facilities retained by the company under the guise of "Capacity IRUs," its self-serving and just plain misuse of "corporate communications" as a means to provide interLATA services, and its improper provisioning of dark fiber facilities.[28]

498. Qwest's failures also exhibit a lack of candor and disregard for the Commission's rules requiring the company to provide truthful statements in relation to official FCC proceedings. *See* 47 U.S.C. § 1.17 ("No applicant... shall... in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission").

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[27] Touch America has filed a formal complaint with the Commission under separate cover on the ground that Qwest's marketing and provisioning of lit fiber facilities under the guise of Capacity IRUs violates Section 271.

[28] *See* Complaint filed by Touch America against Qwest regarding capacity IRUs - Capacity IRU Complaint –for details regarding Qwest's provisioning of Capacity IRUs and dark fiber facilities.

499. Qwest's lack of candor and failure to provide information, as described above and elsewhere in the instant complaint, rendered the Commission, Touch America and the public incapable of adequately analyzing, interpreting, and exploring the legalities involved under Section 271.

Qwest's Duty to Disclose

500. It is reasonable to conclude that, in each case, Qwest either knew or should have known of these matters prior to filing the Divestiture Report.

501. The record makes it abundantly clear that, at a minimum, Qwest was aware of these issues either immediately before or shortly after the Merger.

502. Moreover, it is indisputable that Qwest knew of these matters well within the period in which its merger and divestiture approvals remained "pending" before the Commission.

503. What little information Qwest may have "provided" regarding these matters was, at best, ambiguous and duplicitous.

504. In the case of the Capacity IRU Agreement, it is not credible that Qwest was unaware until immediately prior to the scheduled closing of the Merger that transferring customers off of Qwest's network was not possible other than by Touch America's purchasing Capacity IRUs on Qwest's in-region network.

505. Equally incredible would be any claim that Qwest was unaware of: (i) its "built-in" billing limitations that require Touch America's use of Qwest for out-of-region traffic services; (ii) its willingness or unwillingness to provide "read" and "write" access to the 4 leased switches and intentions to continue to use the leased switches itself; (iii) its limitations on Touch

America's access to databases and systems; or (iv) its own position in regard to how much CPNI it would be willing to supply on customers that had to be transferred to effect divestiture.

506. Moreover, Qwest's post-merger uses of its retained in-region network facilities to transmit interLATA telecommunications for Touch America, enterprise customers, and other end users via Capacity IRUs and to transmit other non-affiliate, or otherwise non-permissible, traffic under the guise of "corporate communications" evidence Qwest's knowledge of these merger/divestiture-affecting matters when and after it filed its Divestiture Report.[29]

507. Possessing such prior knowledge, or rightfully being charged with such knowledge, renders inexcusable Qwest's failure to disclose these matters in its Divestiture Report or in a supplement thereto.

508. The lack of any credible explanation as to why such information was not provided makes its absence from the Divestiture Report culpable and unjustifiable.

509. The only inference to be drawn is that Qwest knowingly and intentionally failed to comply with the Merger Order's directives in preparing and submitting a report that met the Commission's pronounced requirements.

510. And moreover, Qwest's failure to supplement the record appropriately and in a timely fashion means Qwest violated the Commission's "rules that lie at the heart of the Commission's processes." *SBC Forfeiture Order* at ¶ 1.

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[29] A review of the Merger and Divestiture record suggests that Qwest was not completely forthright in its explanation to the Commission, Touch America and the public of the 271-permissible services it intended to provide post-Merger and post-Divestiture. Qwest suggested in its Divestiture Report that these "permissible" services would cover "switched long distance services that originate out-of-region and terminate in-region, and dedicated services that transit the region but neither originate nor terminate in-region." Divestiture Report at 30. Qwest's post-Divestiture actions, however, suggest that it is treading in a gray area of "permissible" services, namely the transmission of its BOC affiliate "Official Services" communications and its CMRS affiliate communications.

511. Moreover, by completing the divestiture of in-region, interLATA businesses in a manner that is inconsistent with the Divestiture Report approved by the Commission and thereafter closing the merger without ever supplementing the record or notifying the Commission of new developments, the Commission must find that Qwest violated and continues to violate the Merger and Divestiture Orders. *See* Divestiture Order at ¶ 44.

512. Further, by failing to submit a proper Divestiture Report or supplement thereto, Qwest deprived the public and Touch America of the ability to comment on these matters and their affect on merger, divestiture and Section 271 compliance.

513. Qwest's shirking of its duty to disclose also denied Touch America the opportunity to inform the FCC on how these matters would affect its ability to operate and serve its customers or to consider their economic impact on its operations.

514. Finally, the failure to satisfy this condition precedent to the approval of the Merger and Divestiture deprived the FCC of a complete record on which to determine whether it was in possession of the facts needed to perform its duties and/or whether Qwest's merger truly would serve the public interest.

515. By withholding this information, Qwest made a sham out of the merger and divestiture processes and undercut the validity of the FCC's approval process on the Merger and the Divestiture.

A. The Sham IRU Transaction

516. Touch America restates the facts as set forth in paragraphs 355 through 360, of the Statement of Facts, supra.

517. At the eleventh hour before divestiture, Qwest prevailed on Touch America to purchase a Capacity IRU, which, at the time, was claimed to be needed to move some

unidentified, but large, volume of in-region, interLATA traffic off of Qwest's network and ostensibly onto Touch America's.

518. But this transaction has proven to be a total sham. Qwest did not fully disclose, nor did Touch America have the time to learn, that Touch America needed high volume local access facilities to handle traffic whose transport required OC-3 and OC-12 capacity over numerous in-region routes. *See* Exhibit 3; *see also* Exhibit 4 at ¶ 15;

519. Because Touch America lacked these access facilities and was unaware of the need to obtain them, the Capacity IRUs purchased via the Capacity IRU Agreement were useless to Touch America.[30]

520. Further, it appears that Qwest never intended to provide and has never provided any information about the traffic purportedly carried by the Capacity IRUs purchased by Touch America. *See* Exhibit 4 at ¶¶ 15-24.

521. Despite the fact that Touch America could not identify the traffic for billing, collection and service maintenance purposes, Touch America was nevertheless charged full access rates to terminate traffic that, insofar as it knew, did not even exist.

B. Obtaining In-Region Revenues and Benefits by the Backdoor

522. Touch America restates the facts as set forth in paragraphs 302 through 307, in the Statement of Facts, supra.

523. In its Comments on the Divestiture Report, AT&T expressed concerns that under the divestiture's BWA, Touch America agreed to use Qwest as its "off-net" provider. This means that Qwest would receive revenues related to the in-region interLATA transport provided

[30] The facts surrounding the Capacity IRUs purchased by Touch America, specifically the fact that Touch America required access facilities for them to be put to use to serve the customer traffic purportedly carried on the IRUs, raise questions about Qwest's motivations in selling Touch America Capacity IRUs after the Divestiture Order issued.

by Touch America to divested customers. *See* AT&T Comments at 17, n. 52 ("Qwest also directly obtains a portion of [in-region] revenue under the BWA because calls originating in-region are to be switched to Qwest's (and not Touch America's or if Touch America does not have a presence there another IXC with a more competitive rate) network for out-of-region transport").

524. Qwest responded by advising the Commission that AT&T mischaracterized the BWA and assured the Commission that Touch America "has no commitment to purchase service from Qwest" and that it is "free to build its own network or buy service from 'another IXC with a more competitive rate.'" *See* Qwest Point-by-Point Response to AT&T's Comments at 21. Qwest even took an additional step and assured the Commission, through an *ex parte* submission, that Touch America was not locked into using Qwest as its off-net provider. *See* Divestiture Order at ¶ 17, n. 51 (*citing* May 22, 2000, Letter from Peter A. Rohrbach, Counsel for Qwest, to Magalie Roman Salas, Secretary, FCC). It was further confirmed that, "Touch America may supplement its own facilities and lease off-network capacity on other carriers with out-of-region Qwest wholesale services. However, Touch America is not required to use Qwest." *Id.*

525. Qwest was at all times aware, of course, that the platform it established before divestiture for providing transitional billing services to Touch America was linked into Qwest's out-of-region network.

526. Qwest thereby violates Section 271 by obtaining a portion of its revenues from Touch America's in-region customers.

C. The Leased Switches

527. Touch America restates the facts as set forth in paragraphs 272 through 292, of the Statement of Facts, supra.

528. First, although Touch America leased these switches from Qwest as part of the divestiture requirements, Qwest limits Touch America's access to and use of these switches.

529. In addition, Qwest has appropriated the use of these switches for its own purposes by reserving port capacity for itself and its affiliates.

530. Qwest also continues to run its traffic and that of its affiliates, despite divestiture, and, insofar as known, for completing in-region calling.

531. In negotiations, it was agreed that Touch America would "lease a number of circuit switches" and that it obtained an "option to purchase these circuit switches at a specified price at the end of the lease period." Divestiture Report at ¶ 11. Touch America understood from Qwest's representations and filings that Touch America's "lease" encompassed both "read" and "write" access, and that Qwest would not be using these switches for its own purposes.

532. But Qwest has both conditioned and limited Touch America's use of the switches and uses those switches for its own purposes, after-divestiture. Qwest's conduct cannot be squared with its duty to divest these in-region facilities and cease provisioning 271-prohibited switched services. Qwest's conduct also cannot be reconciled with its duty to disclose such information to the Commission and renders the Divestiture Report incomplete.

D. In-Region InterLATA Facilities

533. Qwest is using the in-region network facilities it retained to transmit interLATA telecommunications for enterprise customers, and other end users via Capacity IRUs and to

transmit other non-affiliate, non-permissible traffic under the guise of "corporate communications." (*See* paragraphs 350 through 360, supra).

534. Both of these uses raise issues under Section 271. However, neither was sufficiently disclosed to the Commission or Touch America while the Commission was considering the divestiture and merger.

535. Qwest claims that it disclosed its intention to market and provision in-region lit Capacity IRUs and interLATA capable dark fiber post-merger and that the Commission put a tacit stamp of approval on such activities. An extensive search of the record relating to the acquisition, merger and divestiture proceedings fails to support Qwest's claims.

536. In comments of AT&T on the Qwest/U S WEST Application for Transfer of Control, AT&T noted that:

> "the Application and Public Interest Statement contain virtually no information about how the Applicants will resolve the serious Section 271 issues raised by their proposed transaction. Applicants offer only their assurances that they will take unspecified steps to comply with unspecified 'standard processes' and likewise unspecified 'applicable requirements' that will, in their opinion, remove any possibility that their merger will result in Section 271 violations."
>
> *See* October 1, 1999 Comments of AT&T Corp. filed in CC Docket No. 99-272, at 2.

537. Allegiance Telecom, Inc. pointed out that Qwest "fails to describe in any meaningful detail what actions Qwest will take to divest or otherwise reconfigure its services within the U S WEST territory to comply with section 271 of the Act." *See* October 1, 1999 Comments of Allegiance Telecom, Inc., filed in CC Docket No. 99-272, at 2.

538. McLeodUSA Telecommunications Services, Inc. raised the same issue, specifically referencing the provisioning of dark-fiber in-region, stating:

> "the Applicants have inadequately addressed the issues related to Section 271 of the Act, stating only that Qwest will discontinue or reconfigure services to ensure

> compliance with Section 271. . . . For example, the Applicants have not provided information regarding Qwest's in-region facilities, such as whether the Applicants will continue to hold the facilities or whether such facilities will be sold to an independent third-party. If Qwest were to continue to hold its in-region facilities and continue its provision of dark fiber in-region, the proposed merger raises substantial questions regarding compliance with Section 271, and provides the merged entity with a means to circumvent the requirements of Section 271 altogether."
>
> *See* October 1, 1999 Petition to Deny of McLeod Telecommunications Services, Inc., filed in CC Docket No. 99-272, at 8.

539. Even the Commission described Qwest's divesture plan as "extremely vague and excessively broad." Merger Order at ¶ 18.

540. Based on the above, it is evident that from the beginning, Qwest had submitted divestiture plans that were less than clear.

541. The comments show that the provisioning of dark fibers in-region raised a red flag. Provisioning of lit fiber facilities in-region would have called out the dogs.

542. Qwest realized this so it did not disclose its plans to sell lit fiber facilities as "Capacity IRUs."

543. It carefully limited its presentations and representations to its previously existing dark fiber arrangements.

544. For example, in its August 19, 1999 Application for Transfer of Control, Qwest represented to the Commission that "as of closing, Qwest will not be providing any RBOC-prohibited in-region interLATA services." Qwest further pledged to transfer all presubscribed retail customers in the U S WEST region to another carrier or carriers stating that it "will discontinue providing other in-region interLATA services, including in-region calling card services and prohibited 800 and private line services. Qwest also will reconfigure other services, such as Internet access, web hosting and similar activities, to comply with the interLATA

restrictions of Section 271." *See* Qwest/U S WEST August 19, 1999 Application for Transfer of Control at 13-14.

545. In its October 18, 1999 Response to Comments, Qwest again stated its intent not to sell its existing fiber optic transmission plant but that it would "continue to use that plant to provide out-of-region and other telecommunications services permitted by Sections 271(b)(2) and (3) of the Act." *See* Qwest/U S WEST Response to Comments on Application for Transfer of Control, filed in CC Docket No. 99-272, at Attachment C, Qwest Plan for Divestiture of InterLATA Business in the U S WEST Region ("Divestiture Plan") (October 18, 1999) at 4.

546. In its October 1999 Divestiture Plan, Qwest addressed the matter of the sale of fibers by noting that it:

> "provides dark fiber under **term leases** in a few instances where the fiber path crosses U S WEST LATA boundaries. Qwest will discontinue or divest these arrangements. By contract, Qwest also has **sold** IRUs in its network outright. These sales conveyed ownership rights in specific dark fibers for the economically useful life of the fiber. The purchaser obtained control over the fiber, and is treated as the owner for tax and accounting purposes. Qwest has no legal ability to unwind these completed sales. . . . Qwest will continue to provide these functions."

Id. at 5 (emphasis added).

547. Indeed while candidly expressing its disagreement with the Commission dictum that lease of dark fiber violates 271, to facilitate the Merger, Qwest nonetheless "agreed" to divest its dark fiber leases affected by 271.

548. Qwest's representations were carefully structured to focus only on sales and leases previously completed before the merger. After the Merger Order was issued, Qwest did mention its provision of lit fibers but, again, its references were only to past transactions.

549. In its March 30, 2000 Letter to the FCC describing an *ex parte* meeting, Qwest stated that:

> "Qwest representatives also described certain **past** Qwest sales of Indefeasible Rights of Use ("IRUs") in **lit fiber** capacity to third parties, including some fiber with one or both ends in the U S WEST region. These IRU agreements conveyed permanent property ownership rights in such network facilities for the economic life of the facilities, and Qwest cannot unwind these final asset sales. Qwest's only continuing role is the provision of certain maintenance and repair services. It was also discussed that there is ample FCC precedent for treating such Capacity IRUs as sales of network facilities, rather than telecommunications services." (emphasis added).
>
> *See* Letter of David Sieradzki to Magalie R. Salas, Secretary, filed in CC Docket No. 99-272 (March 30, 2000).

550. Reviewing the progression of Qwest's presentations, it is evident that, prior to the Merger Order, Qwest discussed these types of sales only in the context of "dark" fiber, omitting any discussion of existing lit fiber facilities or "Capacity IRUs." But then, after the Merger Order issued, suddenly the past sales of lit fiber is raised by a newly-coined term, "Capacity IRUs." This term that came out of nowhere and was presented only in the form of an *ex parte* filing – a filing conveniently not subject to general public notice and whose content would not be readily available except by personal inspection of the Commission's on site files.

551. Qwest did eventually refer to its intended future sales of lit fiber in its April 14, 2000 Divestiture Report. By this time, Qwest had shaded the nature of these sales and what they involved in a way that is quite different from what they have become, stating:

> "Qwest has already sold a portion of the capacity that it originally constructed on these routes to third parties in the form of IRU contracts, both for the conveyance of dark fiber and lit fiber capacity. Qwest is not legally able, and is not required, to unwind the sale of such IRUs, which constitute telecommunications facilities and not telecommunications services subject to Section 271. As the Commission has stated, 'the one-time transfer of ownership and control of an interLATA network is not an interLATA service, which means it falls entirely outside the section 271/272 framework that governs interLATA services.' Qwest also intends to continue selling similar telecommunications facilities in the future."
>
> *See* Divestiture Report at 29.

552. The artifice here is clear -- Qwest inserts mention of lit fiber facilities in the guise of "Capacity IRUs" into its pre-merger discussions of dark fiber.

553. Resort to such artifice, as shown in the record, demonstrates that Qwest was deliberate in its strategy of referencing only existing sales of dark fiber prior to the Merger Order. Once it obtained approval of the Merger, however, Qwest slips a passing reference to lit fiber into the last formal document it submitted to the Commission.

554. Clearly, Qwest was not forthcoming with details regarding its intentions to market, sell or provision lit "Capacity IRUs" in-region, post-merger. To be more clear, the intentions were and are to market, sell and provision lit fiber facilities in-region in the guise of "Capacity IRUs." Qwest's artful manipulation of its presentations to build a thin record upon which to attempt to justify that which is plainly unjustifiable cannot succeed.

E. So-Called "Corporate Communications"

555. Touch America restates the facts set forth in paragraphs 350 through 354 of the Statement of Facts, supra.

556. There are narrow exceptions to Section 271's prohibitions and, in its Divestiture Report, Qwest seemingly disclosed its intention to use its in-region facilities post-merger, but only for "271-permissible telecommunications services." Divestiture Report at 30.

557. Qwest provided examples of such "permissible" services as "switched long distance services that originate out-of-region and terminate in-region, and dedicated services that transit the region but neither originate nor terminate in-region." *Id*.

558. Qwest, however, did not provide a full disclosure of what services it intended would fall under the scope of 271-permissible telecommunications services.

559. No mention is made here or elsewhere, however, about Qwest's in-region "corporate communications." However, Qwest does carry "corporate communications" on its in-region network.

560. This failure to disclose this information prevented the FCC, Touch America and the public from adequately analyzing and understanding the potential 271 ramifications of Qwest's retention of its in-region network facilities.

III. QWEST IS ENGAGING IN PRACTICES THAT VIOLATE SECTIONS 201(a) AND 201(b) OF THE ACT

561. Touch America restates the facts as set forth in paragraphs 361 through 398, in the Statement of Facts, supra.

562. To generally serve the Transferred Customers it purchased from Qwest, Touch America sought information from Qwest to: (i) verify charges imposed by Qwest; (ii) verify the authenticity of bills and invoices rendered; and (iii) identify customer traffic carried on Touch America's network. When disputes arose over the information requested, Touch America instituted the dispute resolution procedures provided for in the parties' divestiture agreements.

563. In response, Qwest deepened its stonewalling, expounded its delaying tactics and broke off all discussions and launched a campaign of retaliation against Touch America.

564. As of the filing of this Complaint, Qwest continues these tactics.

565. Qwest's threatened actions against Touch America violate Sections 201(a) and 201(b) of the Communications Act.

566. The most basic duty imposed upon Qwest under the Communications Act is set forth in Section 201(a), which provides that:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request . . .

47 U.S.C. § 201(a) (emphasis added). *See Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486, 490 (2d Cir. 1968); *Ward v. Northern Ohio Tel. Co.*, 300 F.2d 816 (6th Cir), *cert. denied*, 371 U.S. 820 (1962); *American Satellite Corp. v. MCI Telecommunications Corp.*, 57 FCC 2d 1165 (1976); *Chastain v. AT&T*, 43 FCC 2d 1079 (1973).

567. The duty imposed by Section 201 to furnish service upon reasonable request is clear and unconditional, that is, it exists notwithstanding the existence of a dispute over service terms. To that end, the Commission has stated:

> [W]e expect that carriers who are requested to provide service should make all efforts to do so, such as providing them under protest pending the resolution of complaints, petitions, or litigation, rather than refusing to meet a questionable obligation until after the complaint or litigation is resolved. Those who choose the course of non-compliance are on notice that they will be acting at their own peril, should the question of the legitimacy of their refusal to meet the common carrier obligations be decided against them.

In re AT&T Communications, Inc., 10 FCC Rcd 1664 (1995) at ¶ 11, n.16 (quoting *In re Hawaiian Tel. Co.*, 78 FCC 2d 1062, 1065 (1980)).

568. Touch America has, of course, made only reasonable requests for service from Qwest. Because of its critical need for these services, Touch America agreed to pay for those services at rates above and beyond those Qwest is required to charge under its tariff. Qwest's response has been to issue a Notice of Termination announcing its intent to deny Touch America's request for new and additional service arrangements.

569. Qwest has a duty under Section 201(b). "All charges, practices, classifications, and regulations for and in connection with [] communication service, shall be just and reasonable…" 47 U.S.C. § 201(b) (emphasis added).

570. Qwest's actions toward Touch America are not just and reasonable.[31] Qwest is attempting to "strong arm" Touch America into settling separate and unrelated disputes in order to obtain services. Qwest has threatened to use its exclusive control over its facilities (Qwest telecommunications network centers), cross-connects and PVC connections to prevent Touch America from interconnecting to Qwest's network.

571. Equally unreasonable and unlawful are Qwest's attempts to force Touch America to use "third parties" to replace the services Qwest proposes to terminate. Touch America cannot help itself by using other parties because Qwest will not allow non-Qwest personnel to work on Qwest-owned equipment and the equipment and facilities to which Touch America requires access are owned by Qwest.

IV. QWEST'S BILLING PRACTICES ARE UNREASONABLE, UNDULY DISCRIMINATORY, AND CONTRARY TO THE DUTIES IMPOSED BY THE DIVESTITURE ORDER, THEREBY RENDERING QWEST IN VIOLATION OF SECTION 271

572. Touch America restates the facts set forth in paragraphs 308 through 322, of the Statement of Facts, supra.

573. Qwest's execution and performance of its transitional billing services obligations under the TSA have proven deficient and have adversely impacted both Touch America and its customers.

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[31] Allegations of unjust and unreasonable practices under Section 201(b) by one carrier against another other common place and the Commission has addressed they types of allegations on numerous occasions. *See, e.g., In the Matter of Graphnet, Inc. v. AT&T Corp.*, 2002 WL 15531 (Jan. 8, 2002); *In the Matter of Total Telecommunications Services, Inc. v. AT&T Corp.*, 16 F.C.C.R. 5726 (2001); *In the Matter of TSR Wireless, LLC v. U.S. West Comm., Inc.*, 15 F.C.C.R. 11,166 (2000); *MGC Communications, Inc. v. AT&T Corp.*, 14 F.C.C.R. 11,647 (1999); and *In the Matter of ACC Long Distance Corp. v. New York Telephone Co.*, 9 F.C.C.R. 1659 (1994).

574. The Commission's Divestiture Order approved all of the transaction agreements that were entered into between Qwest and Touch America in order to facilitate the divestiture, including the TSA.

575. The Commission, therefore, has the authority to act to correct and remedy any billing actions and practices of Qwest rendered on behalf of Touch America and its customers that conflict with the Divestiture Order and Qwest's representations made in its Divestiture Report. *See* Divestiture Order at ¶32 (If the divestiture and on-going relationships [between Qwest and Touch America] do not comport, in practice, with the representations in the divestiture report, Qwest runs the risk of violating section 271).

576. The exercise of jurisdiction by the Commission rests on the Merger and Divestiture Orders and the duties imposed by the Act. What is presented here is whether the Act and the Commission's Merger and Divestiture Orders are being violated by Qwest's non-performance of these Divestiture implementing agreements. *See In the Matter of Citicasters Co., Notice of Apparent Liability and Forfeiture*, 16 FCC Rcd 3415 at 3419 (February 12, 2001)

577. Given the imperatives of the transitional billing arrangements, Touch America stands in representative capacity for each transferred customer subject to Qwest's billing services. Because Touch America cannot control the origination of the billing detail required to provide the ultimate billing to the transferred customers for their services, when Touch America is denied accurate billings for the transferred customers, the transferred customers are denied their derivative rights to accurate billing. As the final link between the transferred customers and their billing, Touch America is entitled to and is required to receive clear, unambiguous, and accurate telecommunications bills from Qwest. *See In the Matter of Truth-in-Billing and Billing*

Format, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-170 (May 11, 1999) ("*Truth-in-Billing Order*").

578. The Commission has long recognized that it is critical to the effective operation of a competitive telecommunications marketplace that telephone bills provide consumers with the information they need to make informed telecommunications choices and protect themselves against overcharges or fraudulent charges. *See Truth-In-Billing Order* at ¶20.

579. In its representational capacity, and in its own right as the service provider to the divested customers, Touch America has a right to receive clear and accurate telecommunications bills from Qwest. *See Truth-in-Billing Order* at ¶20 ("The manner in which charges and providers are identified on the telephone bill is essential to consumers' understanding of the services that have been rendered, the charges imposed for those services, and the entities that have provided such services"). Without clear and accurate bills, Touch America is unable to determine whether or not it is being accurately billed, and therefore cannot determine whether the Transferred Customers are being accurately billed.

580. This dilemma exists both for services rendered by Touch America to its customers and for services Touch America renders to Qwest and vice versa.

581. The inability, even with the assistance of independent consultants, to match the various Qwest bills to Touch America's customers, costs, and services, is clear evidence that Qwest's billing practices are unreasonable, discriminatory and contrary to the duties imposed by the Divestiture Order. *See e.g., Truth-In-Billing Order*; s*ee also Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards,* Report and Order and Request for Supplemental Comment, CC Docket No. 91-115, 7 FCC Rcd 3528, 3530-3533 (1992), *clarified on reconsideration*, 12 FCC Rcd 1632, 1643-1645 (1997); *Public Service Commission*

of Maryland, Memorandum Opinion and Order, 4 FCC Rcd 4000, 4004-4006 (1989), *aff'd Public Service Commission of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990) (The Commission has jurisdiction under Title II to regulate the manner in which a carrier bills and collects for its own interstate offerings, because such billing is an integral part of that carrier's communications service).

582. It is axiomatic that the fundamental principles of fairness to consumers and the requirement for just and reasonable billing practices by carriers that the Commission embodied in the *Truth-in-Billing Order* should apply to Qwest's billing practices under the TSA and Divestiture. *See Truth-in-Billing Order* at ¶5. Additionally, under the Commission's *Detariffing Order*, a carrier's billing and collection as a joint offering with other carriers is subject to the Commission's Title II jurisdiction. *See Truth-in-Billing Order* at ¶25 (emphasis added) (*citing Detariffing of Billing and Collection Services*, Report and Order, CC Docket No. 85-88, 102 F.C.C. 2d 1150, 1169-71 (1986) ("*Detariffing Order*").

583. Since, technically, the billing services provided by Qwest for Touch America are, a "joint offering," Title II requirements are directly applicable. This means Qwest's billing practices must be measured against the requirements of Sections 201(b) and 202(a) of the Act. *See* 47 U.S.C. §§ 201(b), 202(a).

584. Because Qwest's practice is to issue bills that are unclear, ambiguous and inaccurate, Qwest violates Section 201(b).

585. Because Qwest's practice is to issue to other customers bills that are not unclear, ambiguous and inaccurate, Qwest's billing Touch America is unduly discriminatory in violation of Section 202(a).[32]

V. QWEST HAS FRUSTRATED AND/OR DENIED TOUCH AMERICA ACCESS TO LICENSED DATABASES AND SYSTEMS

586. Touch America restates the facts set forth in paragraphs 183 through 254 of the Statement of Facts, supra.

587. By retaining control over the databases and systems it licensed to Touch America and refusing to provide Touch America access to the information it needs to service its customers Qwest has prevented Touch America from operating and servicing Transferred Customers independently of Qwest. Touch America has been held captive by Qwest's control over Touch America's information and access to it. These results are contrary to the Divestiture Order.

588. Qwest's denial and/or refusal to grant Touch America the requisite access to customer and network information is patently unreasonable in violation of 201(b) of the Act. *See* 47 U.S.C. § 201(b).

589. Further, because Qwest provides itself with: (i) unimpeded access to databases, customer and circuit information; (ii) advanced database system features and functionalities; and (iii) higher-quality customer and circuit information than it provides to Touch America, Qwest's treatment of Touch America is inferior to that which Qwest provides to itself and others. Such disparate treatment constitutes unfair discrimination against Touch America in violation of Section 202(a) of the Act. *See* 47 U.S.C. § 202(a).

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[32] Section 202(a) encompasses allegations of discriminatory actions in carrier-to-carrier relationships. *See, e.g., Metrocall, Inc. v. WorldCom, Inc.*, 15 F.C.C.R. 10,826 (2000) and *In the Matter of IT&E Overseas, Inc. and PCI Communications, Inc.*, 7 F.C.C.R. 4023 (1992).

VI. QWEST'S CONTINUING CONTROL OVER TOUCH AMERICA, ITS NETWORK, AND CUSTOMERS VIOLATES SECTION 271, THE Q*WEST TEAMING ORDER*, AND THE DIVESTITURE ORDER

590. Touch America restates the facts as set forth in paragraphs 183 through 292, in the Statement of Facts, supra.

591. To win approval of its Divestiture and Merger, Qwest represented that Touch America would obtain control over the divested businesses it purchased from Qwest, despite the transitional support services Touch America required. "The Divestiture Compliance Report and the agreements between Qwest and Touch America make it clear that Touch America will assume the independent responsibility for every aspect of the in-region interLATA business currently operated by Qwest." *See* Qwest's Reply to AT&T's Comments on Divestiture Plan at 4.

592. Thus did Qwest paint a picture of a complete and utter divestiture, one in which Touch America would be in complete control over all aspects of running the businesses it was acquiring.

593. The Commission's enforcement of Section 271 includes the balancing test it set forth in the *Qwest Teaming Order* and applied in the *1-800-AMERITECH*[33] and *1-800-4USWEST*[34] decisions. The Commission has determined that for purposes of 271, the provision of interLATA services "must encompass activities that, if otherwise permitted, would undermine Congress's method of promoting both local and long distance competition." *Qwest Teaming Order* at 23. As such, and noting that "history suggests that the restriction in section 271 should not be limited to prohibit only the transmission or resale of interLATA service," *id.* at 26, the

[33] *In the Matter of MCI Telecomms. Corp. v. Illinois Bell Telephone, et. al.,* Memorandum Opinion and Order, 15 FCC Rcd. 23184 (2000).

[34] *In the Matter of MCI Telecomms. Corp. v. U S WEST Comms., Inc.,* Memorandum Opinion and Order, E-97-28 and E-97-40A (Feb. 16, 2001).

Commission established a balancing test to determine whether a BOC's "provision" of interLATA service runs afoul of Section 271.

594. Under the balancing test, the Commission assesses "whether a BOC's involvement in the long distance market enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition. In making this determination, [the Commission] balance[s] several factors, including, but not limited to, [1] whether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long distance component in a combined service offering, [2] whether the BOC is effectively holding itself out as a provider of long distance service, and [3] whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public." *Qwest Teaming Order* at 27.

595. Qwest's post-divestiture, post-merger exercise and abuse of control over Touch America, the divested businesses, assets and customers, violates the principles of the *Qwest Teaming Order* and defeat the purpose of Section 271 to incent Qwest to open its local market to competition.

596. The limitations imposed by Qwest on Touch America's access to, use of, and control over the 4 leased switches (*see* paragraphs 272 to 292, supra) and Qwest's use of those switches for its own purposes; the post-divestiture limitations imposed by Qwest on Touch America's access to Transferred Customer CPNI (*see* paragraphs 183 to 202, 253-254, supra); and the post-divestiture limitations imposed by Qwest on Touch America's access to, use of, and control over the database and software systems that it licensed from Qwest to function as an independent and self-sufficient carrier on behalf of Transferred Customers (*see* paragraphs 203

to 254, supra) each show that Qwest is "performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public," and fail to meet any aspect of the balancing test set out in the *Qwest Teaming Order*.

CONCLUSION

597. Based on the record, it is clear that Qwest's pre-divestiture representations to the Commission stand in stark contrast to its actual implementation of the divestiture. Qwest's post-divestiture actions, conducted in blatant disregard of the Commission's Merger and Divestiture Orders and the governing statutory provisions, should be a warning that any future representations by Qwest should be approached with strict scrutiny. Moreover, Qwest's actions against Touch America, technically not yet a competitor to Qwest, offer valuable insight to what the Commission can expect when Qwest obtains Section 271 approval.

COUNT I – VIOLATION OF SECTION 271

598. Touch America repeats and re-alleges the allegations set forth in the foregoing paragraphs 1 through 597 as if each such allegation had been separately alleged herein.

599. Under Section 271 of the Act, BOCs are strictly prohibited from providing in-region interLATA services, including marketing of such services, unless and until the Commission grants an application that satisfies all of the requirements of Section 271 of the Act. 47 U.S.C. § 271(a).

600. The Commission has not approved any Qwest or U S WEST application for authority to provide in-region, interLATA services pursuant to Section 271.

601. Qwest is engaging in post-merger and post-divestiture provisioning of interLATA transmission services, in violation of Section 271 of the Act, by:

- failing to transfer all in-region, interLATA customers to Touch America under the appropriate 244 CIC code and continuing thereby to manage and control the in-region communications traffic and services of the non-transferred customers;

- limiting Touch America's control over in-region voice switches leased to Touch America as part of the divestiture, using these switches to process Qwest provisioned or controlled in-region traffic;

- continuing to use the 244 CIC code assigned to Touch America post-merger and divestiture to run Qwest in-region traffic over the 244 CIC Code;

- controlling the routing and pricing of in-region services by use of its billing platform to require Touch America's use of Qwest's out-of-region transport to terminate in-region traffic and services;

- accessing Touch America customer data systems to obtain in-region customer data and records and to self-provision Qwest's own in-region traffic without authorization, consent or knowledge of Touch America;

- transporting in-region interLATA traffic under the pretext of "corporate communications";

- provisioning in-region lit fiber facilities under the guise of "Capacity IRUs"; and

- holding itself out as a full-service in-region telecommunications provider.

602. Each of these activities violates Section 271's prohibition against the provision of in-region, interLATA services by a BOC prior to obtaining Section 271 authority.

COUNT II – VIOLATION OF THE *QWEST TEAMING ORDER*

603. Touch America repeats and re-alleges the allegations set forth in the foregoing paragraphs 1 through 602 as if each such allegation had been separately alleged herein.

604. Pursuant to the *Qwest Teaming Order,* whether a BOC is providing interLATA service within the meaning of and in violation of Section 271 of the Act involves the balancing of several factors to determine whether the "BOC's involvement in the long distance market enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition." *Qwest Teaming Order* at 27.

605. Qwest is engaging in post-merger and post-divestiture activities that involve it in the long distance market in ways that permit it to obtain competitive advantages that undermine the purposes of Section 271 by reducing Qwest's incentives to open its local markets to competition by:

- denying and/or providing insufficient access to relevant databases, facilities and information affecting in-region operations and customers thereby injuring Touch America's customer service efforts, its reputation and denying it the ability to properly and accurately manage its revenues and costs;

- failing to transfer all in-region, interLATA customers to Touch America under the appropriate 244 CIC code thereby diluting the value of Touch America's divestiture investment, depriving it of its rightful revenues and increasing its costs of operations thereby weakening Touch America as a competitor;

- denying Touch America control over in-region voice switches leased to Touch America as part of the divestiture thereby diluting the value of Touch America's divestiture investment, depriving it of its rightful revenues, and interfering with the management and control of its network operations, all of which increase its costs of operations and adversely affect its reputation as a competent carrier thereby weakening Touch America as a competitor;

- continuing to use the 244 CIC code assigned to Touch America post-merger and divestiture to continue to derive revenues it should not be receiving, pass on some of its costs to Touch America, and deprive Touch America of revenues it should be receiving thereby weakening Touch America as a competitor;

- combining Touch America's use of Qwest's billing platform with Qwest's out-of-region transport allowing Qwest to thereby control the routing and pricing of in-region traffic and services and to maintain Qwest's knowledge of Touch America's customers and their service profiles for later exploitation;

- transporting non-permissible interLATA traffic under the pretext of "corporate communications";

- provisioning in-region lit fiber facilities under the guise of "Capacity IRUs"; and

- holding itself out as a full-service in-region telecommunications provider.

606. Through each of these activities, Qwest obtains and intends to obtain "material benefits uniquely associated with the ability to include a long distance component in a combined

service offering . . . holding itself out as a provider of long distance service, and . . . performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public." *Qwest Teaming Order* at 27, in direct contravention of the spirit of the *Qwest Teaming Order*.

COUNT III - VIOLATION OF SECTION 201(a)

607. Touch America repeats and re-alleges the allegations set forth in the foregoing paragraphs 1 through 606 as if each such allegation had been separately alleged herein.

608. Pursuant to Section 201(a) of the Communications Act of 1934, Qwest has a duty to provide service on reasonable request therefore. 47 U.S.C. § 201.

609. By its actions and/or inactions, as incorporated herein, Qwest has willfully, intentionally and without just cause refused to provide Touch America service in violation of Section 201(a) of the Act.

COUNT IV - VIOLATION OF SECTION 201(b)

610. Touch America repeats and re-alleges the allegations set forth in the foregoing paragraphs 1 through 609 as if each such allegation had been separately alleged herein.

611. Pursuant to Section 201(b) of the Act, Qwest, as a common carrier, may not engage in unreasonable acts and practices in the provisioning of telecommunications services. 47 U.S.C. § 201.

612. By its actions and/or inactions, as incorporated herein, Qwest is engaging in unreasonable acts and practices in violation of Section 201(b) of the Act.

COUNT V - VIOLATION OF SECTION 202(a)

613. Touch America repeats and re-alleges the allegations set forth in the foregoing paragraphs 1 through 612 as if each such allegation had been separately alleged herein.

614. Pursuant to Section 202(a) of the Act, Qwest, as a regulated common carrier, may not engage in any acts and practices that result in any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or service for or in connection with the provision of interstate telecommunications services. 47 U.S.C. § 202.

615. By its actions and/or inactions, as incorporated herein, Qwest is engaging in unjust and discriminatory practices against Touch America in violation of 202(a) of the Act.

COUNT VI – VIOLATION OF COMMISSION RULE 1.65(a)

616. Touch America repeats and re-alleges the allegations set forth in the foregoing paragraphs 1 through 615 as if each such allegation had been separately alleged herein.

617. Pursuant to Section 1.65(a) of the Commissions Rules, Qwest had a duty to ensure the continuing accuracy and completeness of its Divestiture Report. 47 C.F.R. § 1.65(a).

618. By its actions and/or inactions, as incorporated herein, Qwest has willfully, intentionally and without just cause failed to ensure the continuing accuracy and completeness of its Divestiture Report in violation of Section 1.65(a) of the Commission's Rules.

COUNT VII – VIOLATION OF COMMISSION RULE 1.17

619. Touch America repeats and re-alleges the allegations set forth in the foregoing paragraphs 1 through 618 as if each such allegation had been separately alleged herein.

620. Pursuant to Section 1.17 of the Commissions Rules, Qwest had a duty of candor with regard to its submissions bearing on the Merger and Divestiture proceedings. 47 C.F.R. § 1.17.

621. By its statements and omissions, as demonstrated herein, Qwest has violated the duty of candor imposed by Section 1.17 of the Commission's Rules.

COUNT VIII – VIOLATION OF THE MERGER ORDER

622. Touch America repeats and re-alleges the allegations set forth in the foregoing paragraphs 1 through 621 as if each such allegation had been separately alleged herein.

623. By its actions and/or inactions, as incorporated herein, Qwest has and continues to engage in practices in direct violation of the Commission's Merger Order.

624. As a result, the Commission's approval of the merger, and the Merger Order, are null and void.

COUNT IX –VIOLATION OF THE DIVESTITURE ORDER

625. Touch America repeats and re-alleges the allegations set forth in the foregoing paragraphs 1 through 624 as if each such allegation had been separately alleged herein.

626. By its actions and/or inactions, as incorporated herein, Qwest has and continues to engage in practices in direct violation of the Commission's Divestiture Order.

627. As a result, the Commission's approval of the divestiture, and the Divestiture Order, are null and void.

PRAYER FOR RELIEF

628. Wherefore, for the above reasons, Touch America respectfully requests the Commission to issue an Order:

1) Finding that Qwest has engaged in the provision of in-region interLATA telecommunications services in violation of Section 271 of the Act;

2) Finding that Qwest has engaged in activities in the in-region long distance market to gain completive advantages that undermine its incentive to open its local market to competition and thereby stands in violation of the *Qwest Teaming Order*;

3) Finding that Qwest's intention to refuse to provide telecommunications services to Touch America is violative of Section 201(a) of the Act;

4) Finding that Qwest's billing and collections practices, its refusal and intention to refuse to provide service to Touch America, its refusal to interconnect and its denial and/or refusal to grant Touch America access to customer and network information and in-region switches constitute unreasonable acts and practices in violation of Section 201(b) of the Act;

5) Finding that Qwest's billing and collections practices, its refusal and intention to refuse to provide service to Touch America, its refusal to interconnect and its denial and/or refusal to grant Touch America access to customer and network information and in-region switches constitute prohibited and unlawful discrimination in violation of Section 202(a) of the Act;

6) Finding that Qwest's threatened refusal to allow access to switching essential facilities and records, its refusal to provide other facilities such as cross-connects and PVC connections and its refusal to allow any third party to access any Qwest facility on behalf of Touch America violates Section 201(b) of the Act;

7) Finding that Qwest has violated the conditions of the Commission's Merger Order;

8) Finding that Qwest has violated the terms and conditions of the Commission's Divestiture Order;

9) Finding that Qwest engaged in repeated and continuous violations of Commission Rule 1.65(a);

10) Finding that Qwest engaged in repeated and continuous violations of Commission Rule 1.17;

11) Finding that these violations of the Merger and Divestiture Orders and Commission Rules warrant the institution of proceedings to revoke the Commission's approval of the Merger and impose other administrative sanctions;

12) Directing Qwest to cease and desist from engaging in the above-stated unlawful activities;

13) Directing Qwest to file all Capacity IRU contracts and other contracts it has entered into since June 30, 2000 with customers having in-region service requirements;

14) Directing Qwest to provide an accounting of all revenues derived since June 30, 2000 from customers having in-region service requirements, including an audit, at Qwest's expense, identifying transferred customers, mapping those customers to respective circuits, tracking and tracing those customers' revenues and expenses, and all other information necessary for Touch America to reconcile Qwest-issued invoices;

15) Directing Qwest to provide all records pertaining to its handling, management and operations of the 244 CIC customers, Touch America's GSP customers, each Capacity IRU and all dark fiber sales for customers having in-region service requirements since June 30, 2000;

16) Directing Qwest to complete all actions necessary to effect the complete and irrevocable divestiture of its in-region, interLATA (and intraLATA) customers and assets to Touch America as required by the Divestiture Order and agreements approved by the Commission; and

17) Granting such other and further relief as the Commission deems just and proper.

PRAYER FOR ATTORNEY'S FEES

629. Pursuant to Section 206 of the Act, Touch America seeks recovery as part of its damages, all costs associated with having to bring and bringing and prosecuting this Complaint.

As such action is ongoing, these costs are subject to increase and cannot now be fully determined.

CERTIFICATIONS AND REQUIRED SUBMISSIONS

630. Touch America certifies, pursuant to § 1.721(a)(8) of the Commission's rules, that it has, in good faith, attempted to resolve its dispute with Qwest prior to filing this Formal Complaint.

631. Touch America previously raised the concerns set forth in the instant complaint in meetings with Qwest representatives in November and December 2000, and Touch America made known at all times its intention to raise the issues with the FCC if a mutually-agreeable resolution could not be reached.

632. Touch America and Qwest have engaged in months of private negotiations on the matters and concerns set forth in the instant complaint. Qwest unilaterally terminated those negotiations on August 7, 2001.

633. On December 17, 2001, Touch America sent a certified letter to Qwest's General Counsel and outside regulatory counsel setting out its concerns. Specifically notifying Qwest of Touch America's intent to file a formal complaint for the following behavior: (i) failure to submit all relevant information pertaining to the divestiture, including a complete divestiture report, to the Commission; (ii) transmission of 271-prohibited traffic under the guise of "Capacity IRUs"; (iii) transmission of 271-prohibited traffic under the guise of "Corporate Communications"; (iv) provision of 271-prohibited Internet backbone services; (v) failure to transfer all in-region, interLATA customers to Touch America prior to divestiture; (vi) continued provisioning of 271-prohibited telecommunications services to in-region customers; (vii) unreasonable refusal to provide information or to permit Touch America to access information,

facilities, and services necessary to serve Transferred Customers and operate independently; (viii) refusal to interconnect in violation of Section 251; (ix) unauthorized access into Touch America's portion of the databases licensed to Touch America pursuant to the divestiture for the purpose, among others, of issuing billing credits to itself and obtaining proprietary information about Touch America customers; (x) suspension or termination of telecommunications services in violation of Section 214; (xi) unreasonable billing practices; and (xii) other uses of its in-region network for purposes prohibited by law and Commission Orders. *See* Exhibit 22.

634. On December 18, 2001, Touch America's counsel received notice from Qwest's counsel requesting a meeting to discuss the allegations raised by Touch America's December 17 notice letter, but noting that, "Qwest is not aware of facts that would support any of these claims." Qwest counsel's purported ignorance of facts, some known to be in existence for over 18 months at the time, made it apparent to Touch America that any further meetings or discussions with Qwest would be frustrating and ultimately fruitless.

635. Therefore, on December 20, 2001, Touch America's counsel responded to Qwest's counsel rejecting any further discussions, noting that the "major disconnect" in Qwest's understanding and knowledge of the facts and issues in dispute and that of Touch America left little to discuss.

636. Given Qwest's refusal to even acknowledge Touch America allegations, Touch America and Qwest have been unable to reach an agreement that would resolve the dispute.

637. Touch America certifies that no separate actions regarding the matters raised in the instant Complaint have been filed with the Commission, any court, or any other government agency based on the same claims or set of facts and that Touch America does not seek

prospective relief identical to the relief herein proposed or at issue in a notice-and-comment proceeding that is currently before the Commission.[35]

638. Pursuant to § 1.721(a)(10)(i) of the Commission's rules, Touch America attaches hereto as Attachment 1 a list of names and addresses of persons with firsthand knowledge of facts alleged in this Complaint and a description of the facts known to such persons.

639. Pursuant to § 1.721(a)(10)(ii) of the Commission's rules, Touch America also includes as part of Attachment 1 a description of all documents that are relevant to the facts alleged in this Complaint, including the date, author, recipient, physical location and relevancy of each document.

640. Pursuant to § 1.721(a)(10)(iii) of the Commission's rules, Touch America also includes as part of Attachment 1 a description of the manner in which it identified all persons with information and designated all documents.

641. Pursuant to § 1.721(a)(6) of the Commission's rules, Touch America attaches hereto as Attachment 2 Proposed Findings of Fact and Conclusions of Law.

642. Pursuant to § 1.721(a)(13) of the Commission's rules, Touch America hereby certifies under penalty of perjury that the filing payment required under § 1.1105(1) has been submitted herewith.

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[35] The circumstances giving rise to the instant Complaint and the facts pertaining thereto, and as set forth herein, relate to Touch America's claims that Qwest has breached its obligations under the Commission's Merger and Divestiture Orders, failed to comply with Section 271 of the Communications Act and Commission orders interpreting Section 271, and, in specified circumstances, acted unreasonably and discriminatorily towards Touch America, in violation of the Act, in doing so. As set forth in the Statement of Facts, supra, Touch America is involved in litigation and arbitration regarding certain contract disputes not implicating the Communications Act, Commission orders or rules. In the Colorado proceedings, Touch America has raised claims against Qwest under Sections 201, 202 and 203 in relation to Qwest's actions regarding its federal communications tariff. However, as set forth in Footnote 19, supra, although certain facts related to those claims are set forth herein, no claims are made based on those facts, nor does Touch America seek relief from the Commission in relation thereto.

643. Pursuant to § 1.729(a) of the Commission's rules, Touch America hereby submits concurrently with this Formal Complaint its request to serve interrogatories on Qwest, attached hereto as Attachment 3.

Respectfully submitted,

_____

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Counsel for TOUCH AMERICA, INC.

Certificate of Service

I, _____, do hereby certify that on this ____ day of February 2002, I caused the noted copies of the foregoing Complaint of Touch America to be served on the following:

VIA OVERNIGHT MAIL

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau
P.O. Box 358120
Pittsburgh, PA 15251-5120
(originals)

VIA HAND DELIVERY
OFFICE OF THE COMMISSION SECRETARY
MAGALIE R. SALAS
Federal Communications Commission
236 Massachusetts Avenue, N.E., Suite 110
Washington, D.C. 20002
(9 copies)

ENFORCEMENT BUREAU
Market Disputes Resolution Division
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
(2 copies)

Hans Haney
Designated Agent for Qwest
1020 19th Street, NW
Suite 700
Washington, DC 20036
(3 copies)

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