BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022
In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	Docket No. UT-003040

SUPPLEMENTAL AFFIDAVIT OF DIANE F. ROTH

ON BEHALF OF AT&T

REGARDING PUBLIC INTEREST

April 19, 2002

I. INTRODUCTION AND QUALIFICATIONS

My name is Diane F. Roth. I am employed by AT&T as Assistant Vice President in the Law and Government Affairs Department. My business address is 1875 Lawrence Street Denver, Colorado 80202. I am a regulatory and legislative advocate for AT&T in Colorado. I have previously filed an affidavit in these proceedings, which further details my background and experience.

II. PURPOSE OF AFFIDAVIT

As noted in my previous affidavit, I adopted the prefiled affidavit of Mary Jane Rasher of AT&T and testified at the initial public interest hearings on July 17, 2001.

This proceeding concerning Section 271 is not about determining whether some local competition can develop *despite* Qwest; rather, the objective is to make sure that Qwest has completely implemented critical steps (*i.e.*, the Competitive Checklist) that are intended to foster local competition and that it would be in the public interest for this Commission to recommend approval of Qwest's 271 application to the FCC. While Qwest would like to focus this case on long distance competition, this proceeding is not about enabling customers to have one more competitor to choose from for interLATA long distance service. Rather, it is about ensuring that customers may have a choice of providers for their local service, now and in the future.

My supplemental affidavit contains new information not available at the hearings last summer. Consistent with the original affidavit, this supplement demonstrates that Qwest *continues* to exhibit both anti-competitive behavior and attitude. These latest incidents have all occurred after the previous hearing last summer.

My supplemental affidavit also offers the Commission an analysis prepared by Dr. Lee Selwyn, which shows that a Qwest commissioned study, the Hausman study, is flawed.

III. QWEST'S ANTI-COMPETITIVE BEHAVIOR WILL FRUSTRATE AND PREVENT TRUE COMPETITION IN THE LOCAL MARKET

My initial affidavit showed a pattern of Qwest's anti-competitive behavior. That pattern continues and shows no sign of changing, despite recent adverse state rulings, regulatory investigations and complaints either concluded or in progress in other states, this state, and at the FCC.

Secret Interconnection Agreements

Following a six month investigation, the Minnesota Department of Commerce on February 14, 2002, filed a complaint against Qwest alleging it has entered into a series of secret agreements with various CLECs to provide preferential treatment for those CLECs with respect to interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of way, reciprocal compensation, and collocation.[1] These agreements have been characterized as being amendments to existing interconnection agreements. As this Commission is well aware, Qwest is under a legal obligation to submit agreements of this nature to the state commission for approval, to make all such agreements public, and to provide the same services to other CLECs on a non-discriminatory basis.[2] The Minnesota Department of Commerce asserts in its complaint that Qwest did not obtain the required commission approval for these agreements, that

[1] *In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation*, before the Minnesota Public Utilities Commission, Docket No. P-421/DI-01-814, filed February 14, 2002. See Complaint, at paras. 17-25.

[2] See 47 U.S.C. §252(a)-(i). See also 47 U.S.C. §251(c).

Qwest has not made the agreements public as required, and that Qwest is not providing the same terms and conditions to other CLECs on a non-discriminatory basis. The Minnesota Department of Commerce is seeking civil penalties of between $50 million and $200 million.

Qwest has acknowledged the existence of these secret Minnesota agreements but has several different explanations for their existence ranging from "these are not interconnection agreements" to "these are merely implementation terms of existing interconnection agreements." I believe these agreements show a continued pattern of anti-competitive and unlawful behavior on Qwest's part. When all is said and done, the acknowledged existence of these agreements demonstrates that Qwest is engaged in a continuing effort to manipulate local competition by discriminating among competitors and essentially picking those competitors it wished to see succeed and those that it wished to see fail.

I urge this Commission to conduct an investigation, similar to that being done in Minnesota, New Mexico, Oregon, and Utah, into the possible existence of such secret agreements here, and to hold off from making any public interest finding in this case until after that investigation is complete.

UNE-P testing refused

On March 21, 2001, AT&T filed a complaint against Qwest with the Minnesota Public Utilities Commission ("MPUC"). The subject of the complaint is Qwest's violation of its interconnection agreement with AT&T as well as violations of state and federal law. In mid-September 2000, AT&T informed Qwest that it intended to test unbundled network element platform ("UNE-P") ordering and provisioning in

Minneapolis ("Test Trial"). Despite months of meetings between the parties, frustrated and prolonged by Qwest's ever-changing requirements of AT&T, Qwest at the eleventh hour flatly refused to conduct the test trial. Consequently, AT&T had no option but to file a complaint with the MPUC. As a result, on April 30, 2001, the MPUC issued an Order[3] granting AT&T temporary relief requiring Qwest to complete certification and bill-conductivity testing. It is unfortunate that the Commission and AT&T had to use valuable resources and engage in a hearing just so the Test Trial could be conducted.

Attached hereto as **Exhibit B** is the recommended decision of Administrative Law Judge Mihalchick, for the Minnesota Public Utilities Commission, handed down into this matter February 22, 2002. The recommended decision contains a detailed discussion of the facts of the case, and concludes that:

> Qwest committed a knowing, intentional, and material violation of its obligation to engage in cooperative testing under §14.1 of the Interconnection Agreement by its refusal to conduct AT&T's UNE-P test from September 14, 2000, to May 11, 2001. Such action also constitutes a knowing and intentional refusal to provide a service, product, or facility to a telecommunications carrier in accordance with a contract under Minn. Stat. §237.121(a)(4). Qwest is therefore subject to penalties under Minn. State. §237.462, subd. 1, (1) and (3).
>
> Qwest failed to act in good faith and committed knowing, intentional, and material violations of its obligations to act in good faith under the Interconnection Agreement and under Section 251(c)(1) of the Act by the following conduct:
>
> a) Creating a specious position to support its refusal to conduct AT&T's UNE-P test, when that refusal was actually based upon what Qwest saw as an assault against its 271 initiative and by its desire to prevent or delay AT&T from conducting a true market entry test—both pure retail business interests of Qwest.

[3] Before the Minnesota Public Utilities Commission, *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. against Qwest Corporation*, Docket No. P-421/C-01-391, Order Granting Temporary Relief and Notice and Order for Hearing, issued April 30, 2001. Attached as **Exhibit A.**

> b) Imposing its position regarding its testing obligations upon AT&T, whether specious or correct, without informing AT&T, by delaying AT&T's opportunity to challenge that position, by concealing its true intent to allow only certification testing, and by attempting to avoid and by delaying the UNE-P test by engaging AT&T in long and unnecessarily difficult negotiations over UNE-P testing that Qwest never intended to allow. These deceptions continued from September 14, 2000, until April 6, 2001, when Qwest filed its Answer and counterclaim declaring openly for the first time that it would not do the UNE-P test unless AT&T demonstrated to its satisfaction that it had legitimate business plans to enter the market.
>
> c) Sending the letter of August 29, 2001, to AT&T making false and misleading statements.
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> Such actions also constitute knowing and intentional failure to disclose necessary information under Minn. Stat. §237.121(a)(1). Qwest is therefore subject to penalties under Minn. Stat. §237.462, subd. 1, (1), (3) and (4). See **Exhibit B** at page 33.

The recommended decision goes on to emphasize that Qwest's violations were continuous and on-going. The ALJ also found that the violations were knowing and intentional, and are characterized as "a continuing pattern of conduct." See **Exhibit B** at page 34.

Beyond this, however, the ALJ also found that, during the course of the proceedings on the complaint, Qwest deliberately fabricated evidence in an attempt to assert that AT&T did not intend to enter the local exchange market in Minnesota. See **Exhibit B** at page 30.

On April 9, 2002, the full Commission concurred with the ALJ's findings that Qwest engaged in anti-competitive behavior.

These findings not only demonstrate an on-going pattern of anticompetitive behavior on the part of Qwest, they also show a willingness and ability on Qwest's part to prevaricate at the highest levels of the company, and thereby to subvert the ability of a

regulatory body to determine the true facts at hand. Qwest's behavior here has been shown to be deceitful, and it demonstrates a complete lack of respect for regulatory authority.

Touch America

Qwest was required to divest its in-region long distance business in order to merge with U S WEST. Touch America is the company that purchased Qwest's in-region long distance business.

Touch America has been forced to file two FCC complaints against Qwest as well as a federal lawsuit. One of the FCC complaints asserts that Qwest has in effect reneged on many aspects of the in-region long distance divestiture. (See **Exhibit C** for the press release announcing the complaint.) Directly relevant to this 271 proceeding are the complaints filed in federal court and at the FCC against Qwest asserting *inter alia* that, contrary to its obligations under both Section 271 and the U S WEST merger agreement, Qwest continues to market and provide in-region interLATA services through its "Q-Wave" service, which provides inter-LATA capable dark fiber facilities. See *Touch America, Inc. v. Qwest Communications International, Inc.*, Cause No. CV 01 148 M-DWM, U.S. District Court, District of Montana, Missoula Division (J. Molloy), filed August 22, 2001. A copy of Touch America's FCC complaint can be found at the following website: http://filings.tamerica.com/qwest/documents/TA-FCC%20Complaint01.pdf. See **Exhibit D** for the press release concerning the FCC complaint about the 271 violation.

AT&T Complaint on Qwest's Implementation of Local Service Freezes

On March 29, 2002, AT&T filed a complaint with this Commission about Qwest's practice of adding local freezes to Qwest local service accounts. (WUTC Docket UT-020388) This problem came to AT&T's attention when customers were unable to switch to AT&T Broadband local service due to freezes on their accounts--freezes which the majority of customers assert they never authorized. When AT&T tried to place orders in the system to have customers' numbers posted, the system rejected them. AT&T was then informed that freezes were in place on the customer's accounts. When customers tried to lift freezes, confusion and delay ensued. Again, Qwest has been successful in undermining local competition and causing a competitor and this Commission to spend resources in a complaint proceeding. This Commission will ultimately make a ruling in this complaint proceeding; however, I recommend that no finding on public interest be made until after that complaint proceeding is concluded.

Covad – Internal Qwest Employee Message

In addition to anti-competitive behavior, an anti-competitive attitude pervades the ranks, from top to bottom at Qwest. In an e-mail distributed to approximately 190 Qwest employees following the bankruptcy of Covad, Qwest characterized the situation as "Third batter down. End of the national DLEC game." Covad's management, according to Qwest's e-mail is "delusional," as the result of "too much Kool-Aid." See **Exhibit E**, attached hereto.[4] Such exuberance reflects more than just glee at the failure of Qwest's former rival; it also reveals the existence—indeed the success—of a deliberate strategy,

[4] This same e-mail was included in Covad's closing brief of August 22, 2001, in Colorado Docket No. 98I-178T. It was also discussed by representatives of Covad and Qwest before the Arizona Corporation Commission in a Special Open Meeting on August 23, 2001. A transcript of the pertinent portions of that Special Open Meeting has been provided here as **Exhibit F**, attached to this brief.

implemented by a large number of employees. The length of the distribution list here alone demonstrates a pervasive, thorough participation in that strategy within Qwest's organization.[5]

After failing and refusing to deplay DSL technology for a number of years, and upon facing nascent competition from broadband cable companies and smaller competitors, Qwest eventually moved aggressively to extend its dominance in the local voice market to the local data market via the DSL product. Qwest has led the market in DSL penetration and plans to double its DSL customer base in 2001.[6] While Qwest has plans to bolster its retail DSL penetration, it also has shown its plan to strike out its DSL competitors.

For purposes of this public interest analysis, the critical element is that Qwest does not provide the same level of service to its wholesale customers that it provides to its retail customers. The net effect of that anti-competitive and discriminatory behavior is that customers are unable to reap the competitive benefits envisioned by Congress and this Commission.

IV. THE HAUSMAN STUDY IS FLAWED AND IGNORES THE PLAIN AND SIMPLE TRUTH THAT COMPETITION HAS ALREADY PROVIDED CLEAR AND SUBSTANTIAL BENEFITS TO CUSTOMERS.

In arguing in favor of its 271 application in other states, Qwest also places great reliance in a study by Dr. Jerry Hausman of MIT. AT&T requested this study in this case in discovery. See **Exhibit G**. However, an examination of the Hausman study by

[5] Mr. Steven Davis has apologized on behalf of Qwest, and has indicated that the author of this e-mail has been disciplined. See **Exhibit F**, *supra*, attached hereto, Transcript, Special Open Meeting, Arizona Corporation Commission, August 23, 2001, pp. 248-249. Nevertheless, the fact remains that, when this e-mail is viewed in the context of Qwest's other, more public statements, the company's goal—elimination of new entrants—becomes clear.

[6] Qwest 2000 Annual Report, p. 22.

Lee L. Selwyn of Economics and Technology, Inc. reveals that "the various research methods and analysis techniques that were utilized by Hausman *et al*. are fatally deficient, in that they rely upon undocumented and nonreproducible econometric models that exclude highly relevant explanatory variables, make highly selective and obviously results-driven 'comparisons' with non-entry states, select an unrepresentative time period in which to perform their 'comparisons,' and inexplicably exclude certain source data without any justification or basis." See Lee L. Selwyn, PhD., BOC Long Distance Entry Does Not Benefit Consumers, March, 2002, attached here as **Exhibit H**.

Dr. Selwyn concludes, *inter alia*, that "the single most important source of the enormous drop in long distance prices is the succession of FCC-required decreases in 'access charges.'" While those access charge reductions have led to a real, inflation-adjusted price decrease of nearly 80 percent for competitive long distance rates, the inflation-adjusted prices of monopoly local phone service have "remained largely unchanged over that same period." **Exhibit H** at page 3. Emphasis in original.

In other words, the Hausman study is not only flawed in its methodology, but it ignores the plain and simple truth that competition has already provided clear and substantial benefits to long distance users. And, as Dr. Selwyn puts it:

> These enormous consumer benefits have been achieved not only without BOC entry into the long distance market, but because the BOCs were placed in the position where they had no incentive to discriminate in favor of or against any long distance carrier. BOC long distance entry reinstates those incentives [to discriminate], and portends a diminution of competition and a potentially serious loss-certainly not a gain—in consumer welfare.
> **Exhibit H** at page 2. Emphasis in original.

In short, the notion that Qwest's entry into the long distance market would benefit consumers has been easily and thoroughly discredited. Instead, it is far more likely that

Qwest's entry into the long distance market, under current prevailing conditions, will serve to benefit Qwest's shareholders, and not consumers, through the remonopolization of both the local and long distance markets.

V. CONCLUSION

Qwest continues to get it backwards – "271" isn't about another long distance competitor, it's about ensuring that local competition can take hold and thrive. Competition is alive and well in the long distance market. Qwest's Hausman study is flawed and should be ignored. Qwest's pattern of anti-competitive behavior on the other hand remains constant and requires closer scrutiny. This Commission should have serious doubts that it would be in the public interest for it to recommend approval of Qwest's application to enter the long distance business.