BEFORE THE
WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE INVESTIGATION INTO U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271OF 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 TELECOMMUNICATIONS ACT OF 1996	)	DOCKET NO. UT-003040

TOUCH AMERICA'S PETITION TO INTERVENE AND MOTION TO REOPEN ISSUES

Touch America, Inc. ("Touch America") hereby submits this Petition to Intervene and Motion to Reopen Issues in the above-captioned dockets. By its Motion, Touch America seeks from the Washington State Utilities and Transportation Commission (the "Commission") an order reopening issues to receive evidence vital to finalizing the recommendation to the Federal Communications Commission (the "FCC") regarding Qwest Corporation's ("Qwest") compliance with Sections 271 and 272 of the Telecommunications Act of 1996 (the "Act"), the competitive checklist and the public interest. Further, Touch America seeks an order from the Commission staying these proceedings pending resolution of Touch America's complaints before the FCC that raise critical questions concerning Qwest's current and potential future compliance with these provisions. In the alternative,

Touch America requests that the Commission condition its recommendation regarding Qwest's 271 application on the FCC's determination regarding the Touch America complaints.

I. INTRODUCTION AND SUMMARY

This Commission is responsible for providing a recommendation to the FCC regarding the most important reward offered to Qwest under the Act: authority to provide in-region, interLATA service pursuant to Section 271 of the Act. In arriving at its recommendation, the Commission examines, among other items, Qwest's compliance with the competitive checklist under Section 271(c)(2)(B) and the public interest implication of granting to Qwest in-region, interLATA service authority. The Commission, prior to finalizing its recommendation concerning Qwest's 271 application, should examine certain Qwest activities recently brought to light. Those activities, which are highlighted below, demonstrate serious public interest concerns and a failure by Qwest to comply with the competitive checklist items under the Act.

Although the 271 proceedings are entering the final phase prior to Qwest's submitting its 271 applications to the FCC, the issues raised in this Motion have a tremendous impact on all competitors in the Qwest region. Touch America and Qwest are engaged in arbitration[1] and litigation, including complaint actions before the FCC[2] and in federal district court in Colorado,[3] over several disputes,

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[1] *Qwest Communications Corporation v. Touch America Services, Inc. and Touch America, Inc.*, AAA No. 74 Y 181 013 09 01 JEC (filed Aug. 7, 2001).

[2] Pursuant to Section 208 of the Act, Touch America brought complaint actions before the FCC regarding the lit fiber IRUs and the Qwest in-region, interLATA divestiture. The complaints are pending. *See In the Matter of Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-003 (filed Feb. 8, 2002) ("*IRU Complaint*"); *see also In the Matter of Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-004

some of the facts of which relate to the issues presented in this Motion. By the instant Motion, Touch America is not requesting an opportunity to litigate the various complaint issues before this Commission; rather, Touch America is introducing important factual information that should be considered when assessing Qwest's compliance with the competitive checklist requirements of Section 271. The facts noted and the issues raised in this Motion affect all Qwest competitors, not just Touch America; therefore, Touch America believes it is necessary to present this Commission with relevant information to ensure a complete record in these proceedings.

Because it did not want to be premature in interjecting these points in the 271 proceedings, Touch America has not previously raised these matters before this Commission. However, since the FCC has determined that it will decide the *IRU Complaint* on the merits, it is now appropriate to present issues related to the 271 proceedings.[4] Furthermore, Touch America realized the full panoply of 271 implications – as set forth in this Motion – only after Qwest filed answers to the FCC complaints and submitted additional information in response to related discovery. In any event, Touch America is not the first party to raise similar matters in the context of the 271 proceedings. For example, in the Washington 271 proceeding on April 19, 2002, Public Counsel submitted comments to the Commission addressing the Public Interest aspects of Qwest's activities and Qwest's responses to Public Counsel's data requests concerning the very facts at issue in this Motion.

It is imperative that Touch America raise these matters before this Commission prior to the

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("*Divestiture Complaint*") (filed Feb. 11, 2002).

[3] *Qwest Communications International, Inc. et al. v. Touch America, Inc. and Touch America Services, Inc.*, Case No. 01-B-1696 (D. Colo. filed Aug. 27, 2001).

[4] In addition, the FCC has ordered discovery and further briefing with regard to the *Divestiture Complaint*. Prior to the FCC's decision to move forward with the complaints, Qwest would have

submission of Qwest's 271 application to the FCC. The FCC has explained that checklist item concerns should not be raised for the first time during the FCC's review of a 271 application. As the FCC noted in the *Massachusetts 271 Order*, "[C]LECs should raise issues [concerning checklist items] in the relevant state proceedings where they can be properly addressed."[5] Thus, Touch America presents facts regarding three important issues to this Commission as the proper initial forum to address such concerns.

First, the Commission should not ignore the public interest consequences of Qwest's rich history of anti-competitive actions and unlawful behavior. Qwest's lit fiber IRU service offerings (as described in Touch America's complaints to the FCC) represent no less than the fourth Section 271 violation by Qwest or U S WEST Communications, Inc. ("U S WEST"). On three previous occasions the FCC found U S WEST in violation of Section 271 in its provision of certain in-region, interLATA services: (1) the provision of 1-800-4USWEST service; (2) the teaming arrangement between U S WEST and Qwest; and (3) U S WEST's offering of National Directory Assistance. Unlike the previous violations, which Qwest presumably no longer offers, the lit fiber IRUs represent an ongoing violation of the Act.

Second, Qwest's lit fiber IRUs violate the nondiscrimination safeguards of Section 272(c). In its provision of information regarding long distance services and customers, including access to databases containing customer information, billing data, and circuit and facilities identification information, Qwest provides Touch America with inadequate and discriminatory access to such

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attempted to present a colorable argument concerning the frivolity of the actions.

[5] *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, FCC 01-130, CC Docket No. 01-9, ¶

information. Further, the Qwest affiliate, Qwest Communications Corporation ("QCC"), that provides the lit fiber IRUs has not represented that the IRUs are available to other carriers at the same rates, terms and conditions. The arrangement demonstrates that Qwest and QCC have the ability to prevent competitors from purchasing facilities as UNEs by placing assets and facilities in the non-BOC affiliate.

Third, Touch America strongly believes and thus unequivocally contends that Qwest offers lit fiber IRUs as interLATA services in violation of Section 271. But Qwest's arguments regarding the classification of the IRUs as "facilities" raises serious questions whether the IRUs are subject to the competitive checklist under Section 271(c)(2)(B). In light of recent Qwest arguments that the IRUs are akin to unbundled network elements ("UNEs"); therefore, the time is right to examine the lit fiber IRUs for checklist compliance and nondiscriminatory access and pricing under Sections 251(c)(3) and 252(d)(1) of the Act.

II. QWEST'S HISTORY OF ANTI-COMPETITIVE ACTIONS AND SECTION 271 VIOLATIONS PRESENTS PUBLIC INTEREST CONSEQUENCES THAT SHOULD NOT BE IGNORED

Qwest's lit fiber IRUs violate Sections 251, 252 and 272 of the Act and further demonstrate Qwest's penchant for violating Section 271. With the lit fiber IRU offerings, Qwest (including the legacy U S WEST entity) has achieved an unprecedented fourth violation of Section 271. As highlighted in this Motion, Touch America's complaints before the FCC regarding Qwest's unlawful lit fiber IRU offerings go right to the heart of the matter regarding Qwest's intention and/or ability to comply with the promises it is currently making to the Commission in the 271 proceeding.

Without rehashing the specifics of each violation, it is important for Touch America to remind

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192 (rel. Apr. 16, 2001) ("*Massachusetts 271 Order*").

the Commission of Qwest's and U S WEST's previous violations of Section 271. For example, the FCC found that U S WEST violated Section 271 by offering in-region, interLATA services through the provision of 1-800-4USWEST service.[6] In addition, prior to their merger, Qwest and U S WEST teamed to offer in-region, interLATA services bundled with local exchange services, in violation of Section 271.[7] And in another example of unlawful conduct, the FCC found that U S WEST's National Directory Assistance service offering was a violation of Section 271 of the Act.[8]

While parties to the Qwest 271 proceedings have addressed the previous Section 271 violations in the provision of 1-800-4USWEST service, the Qwest-U S WEST teaming arrangement and National Directory Assistance, the lit fiber IRU presents a different set of circumstances. Most important, the lit fiber IRU is a current and ongoing violation of Section 271. While the Section 271 violations regarding 1-800-4USWEST, the teaming arrangement and National Directory Assistance are historic violations, the lit fiber IRUs exist at this very moment, demonstrating that Qwest is a continuing bad actor in the telecommunications marketplace.

Qwest's anti-competitive behavior is unlikely to improve once it obtains 271 authority. Because Qwest continues to violate Section 271 prior to receiving proper 271 authority from the FCC, Touch America believes that Qwest cannot be trusted to keep its promises made in the 271 proceeding. The

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6 *See In the Matter of AT&T Corp. v. U S WEST Communications, Inc., and MCI Telecommunications Corp. v. U S WEST Communications, Inc.*, File Nos. E-97-28 and E-97-40A, DA 01-418 (rel. Feb. 16, 2001).

7 *See In the Matter of AT&T Corp. v. Ameritech Corp. and Qwest Communications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 21438 (1998) ("*Teaming Order*"), *aff'd sub nom., U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999), *cert. denied* 120 S. Ct. 1240.

8 *See MCI Telecommunications Corp. v. U S WEST Communications, Inc., and MCI Telecommunications Corp. v. Illinois Bell et al.*, Memorandum Opinion and Order, DA 99-2479

Commission should not ignore Qwest's anti-competitive behavior and unlawful actions. When 271 authority is granted, Qwest will simply step up its anti-competitive efforts to the detriment of competition and consumers.

III. QWEST'S LIT FIBER IRUS, PROVIDED THROUGH A SEPARATE AFFILIATE, DISCRIMINATE AGAINST CARRIERS, IN VIOLATION OF SECTION 272(C) OF THE ACT

In its Answer to the IRU Complaint, Qwest explains that QCC, an affiliate separate from the local exchange carrier Qwest, provides the lit fiber IRUs.[9] Section 272 of the Act requires that in-region, interLATA services, when offered by an RBOC after receipt of 271 authority, must be offered through a separate affiliate; however, it is premature for Qwest to offer in-region, interLATA services without 271 authority, regardless of the entity used to offer such services.

In addition to offering in-region, interLATA services through a separate affiliate, the RBOC and affiliate must comply with the nondiscrimination safeguards of Section 272(c). Under Section 272(c)(1), an RBOC may not discriminate between itself or its Section 272 affiliate and any other entity "in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards."[10] The FCC has determined that "the protection of section 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate."[11] More specifically, the FCC "construe[s] the term 'services' to encompass any service the BOC provides to its section 272

(rel. Nov. 8, 1999).

9 *See Answer of Defendants Qwest Communications International Inc., Qwest Corporation, and Qwest Communications Corporation*, File No EB-02-MD-003, at 11 (filed March 4, 2002) ("*Qwest Answer*").

10 47 U.S.C. § 272(c)(1).

11 *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order, FCC

affiliate, including the development of new service offerings."[12]

In the proceedings before the FCC, Touch America has demonstrated that Qwest discriminates against Touch America vis-à-vis Qwest in its provision of information regarding long distance services and customers.[13] Qwest provides Touch America with inadequate and discriminatory access to various databases containing, among other things, customer information, billing data, and circuit and facilities identification information. Touch America has made a significant showing that Qwest has access to Touch America customer information, software systems and other databases that Qwest or an affiliate can access or manipulate without Touch America's authorization, consent or knowledge.

With respect to the lit fiber IRUs offered by QCC, the Qwest local exchange carrier leases dark fiber and transport from QCC while other carriers are unable to obtain the same services at the same rates, terms and conditions. In addition, Qwest and QCC have not represented that other carriers will be able to obtain those services on nondiscriminatory terms. Qwest and QCC are able to engage in a shell game by placing assets and facilities in the non-BOC affiliate and claiming that the BOC has no facilities available for purchase as UNEs. Thus, the BOC and the 272 affiliate can avoid complying with the nondiscrimination safeguards of Section 251 and 272.

It would be illogical for the FCC to approve a Qwest 271 application at this time. Touch America urges the Commission and the FCC not to turn a blind eye to the unlawful lit fiber IRU offerings of Qwest. If Qwest were granted in-region, interLATA authority today, Touch America would immediately move for a "stand-still" order based on violations of the nondiscrimination provisions

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96-489 ¶ 218 (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*").

12 *Id.* ¶ 217.

13 *See supra* n.2.

of Section 272(c) of the Act. As the FCC has explained in its orders granting Section 271 approval, such authority is subject to review and potential suspension of revocation.[14]

Touch America is not presenting an argument based on hypothetical or potential discrimination. Rather, Touch America has shown actual discrimination by Qwest in favor of itself and its affiliates over other carriers like Touch America. That discrimination will not simply disappear with the grant of Section 271 authority, and the FCC has explained that it will not hesitate to remedy such discrimination in violation of Section 272 by issuing "stand-still" orders and freezing a carriers subscribership as of the date of such order.[15] Moreover, as the FCC explained in its Verizon New York 271 Order, Section 271(d)(6)(A) of the Act permits the FCC to issue such "stand-still" orders and freeze subscribership without conducting a full-blown trial type hearing beforehand.

Qwest's outrageous actions in violation of Section 271 are bad enough without considering the fact that it is also prematurely acting in violation of Section 272. This Commission should not ignore such information as it evaluates the Qwest 271 checklist, particularly as it considers the public interest aspect of recommending approval of Qwest's Section 271 application.

IV. BASED ON QWEST'S POSITION THAT ITS LIT FIBER IRUS ARE AKIN TO

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[14] *See, e.g., In the Matter of Application of Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, FCC 99-404, CC Docket No. 99-295, ¶¶ 446-453 (rel. Dec. 22, 1999) (noting that Section 271(d)(6)(A)(iii) of the Act permits the FCC to suspend or revoke 271 approval if the BOC has ceased to meet any of the conditions required for such approval) ("*New York 271 Order*").

[15] *Id*.

UNES, THE IRUS SHOULD BE EXAMINED FOR COMPLIANCE WITH THE NONDISCRIMINATION REQUIREMENTS OF SECTIONS 251 AND 252

On June 30, 2000, Qwest and U S WEST merged to form a single entity, which remained subject to the regional RBOC restrictions and incumbent local exchange carrier ("ILEC") obligations under the Act. Pursuant to the FCC's *Merger Order*, Qwest and U S WEST where ordered to comply with Section 271 of the Act by divesting Qwest's interLATA business in the U S WEST region.[16] Despite divestiture requirements under the *Merger Order*, Qwest continued – and, to this day, continues – to provide indefeasible rights of use (IRUs) in lit fiber in the Qwest region. The lit fiber IRUs provided by Qwest are in-region, interLATA services in violation of section 271 of the Act.[17]

In a complaint action filed before the FCC, Touch America has detailed the many reasons why the lit fiber IRUs violate Section 271.[18] In its answer to the *IRU Complaint*, Qwest denies that the lit fiber IRU arrangements constitute in-region, interLATA services and claims that the IRUs do not violate Section 271.[19] As one element of its defense, Qwest argues that the dark fiber and lit fiber IRUs are facilities rather than services.[20] Furthermore, Qwest states that Qwest Communications Corporation, a separate affiliate of the Qwest local exchange carrier, sells the IRUs.[21]

In drawing analogies to support its position that IRUs are interests in facilities and not

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16 *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 Application o Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 11909 (2000) ("*Merger Order*").

17 *See IRU Complaint*.

18 *Id*.

19 *See generally Qwest Answer*.

20 *See, e.g., Qwest Answer* at 5-12 and ¶¶ 8, 81-85.

21 *Id.* at 11 ("The IRUs here are sold by Qwest Communications Corporation, a separate affiliate of the local exchange carrier….").

telecommunications services, Qwest likens the IRUs to the permissible transfer of facilities, including such transfers as international undersea cables and bare satellite transponder capacity.[22] In addition, Qwest asserts that its lit fiber IRUs are facilities with competitive importance "as a potential alternative to constructing one's own facilities."[23] Further, Qwest admits that some of the lit fiber IRUs are in-region and that the lit fiber IRUs in question "only can be of use to an extremely small number of sophisticated parties (typically, but not necessarily always, carriers or ISPs) as part of their own network systems."[24] Qwest argues further that its lit fiber IRUs are facilities akin to lit fiber transport capacity required to be offered as unbundled network elements ("UNEs").[25]

Touch America has no doubts concerning the correctness of its position that Qwest's lit fiber IRUs are prohibited in-region, interLATA service offerings. To the extent such IRUs are found by the FCC to be in-region, interLATA service offerings, Qwest is in clear violation of Section 271. However, Qwest's argument that the lit fiber IRUs are comparable to UNEs raises important issues. If the FCC determines that Qwest is correct in its position that the lit fiber IRUs are akin to UNEs, then this Commission should determine that it has a duty under Section 271(c)(2)(B)(ii) of the Act to ensure that Qwest offers nondiscriminatory access to and pricing for the lit fiber IRUs in accordance with Sections 251(c)(3) and 252(d)(1) of the Act.[26] The Commission has been reviewing Qwest's checklist compliance but has not investigated this issue at all to date.

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22 *Qwest Answer* at 7-8 and ¶¶ 95, 110, 112.

23 *Qwest Answer*, ¶ 112 (citing an FCC decision addressing lit and unlit fiber IRUs).

24 *Qwest Answer*, ¶¶ 83, 169.

25 *Qwest Answer*, ¶ 112 ("The Commission has also held that incumbent local exchange carriers are required to offer both lit fiber transport capacity and dark fiber as unbundled network elements.").

26 47 U.S.C. § 271(c)(2)(B)(ii).

CONCLUSION

For the foregoing reasons, Touch America seeks an order from this Commission staying these proceedings pending resolution of Touch America's complaint at the FCC. In the alternative, Touch America requests that the Commission condition its recommendation regarding Qwest's compliance with Sections 271 and 272 on the FCC's determination regarding the Section 271 and 272 issues.

Respectfully submitted this ___ day of June, 2002.

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