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 BRIEF OF AT&T REGARDING PUBLIC INTEREST

A. Introduction.

In the nine months which have now passed since AT&T filed its initial brief, very few things have changed, relevant to the issues in this public interest portion of Qwest's section 271 application. Qwest continues to wield considerable market power in the local exchange markets in Washington, and Qwest's presentation of its case in the public interest arena still improperly ignores the existence and extent of that market power. Qwest's monopoly over the residential market in Washington remains unabated. The insufficient wholesale margins that AT&T noted in its initial brief—and which are an important cause for the failure of effective competition to develop here—remain intact. The prospects for the development of UNE-based and facilities-based competition in Washington remain poor. Qwest has still failed to provide adequate assurances that the local market, once open, will remain so in the event Qwest's application for section 271 authority is granted.

Importantly, however, those few things that have changed do not support Qwest's application, but instead show that that application should be set aside pending further investigation. For example, the list of anticompetitive acts by Qwest continues to grow, and now includes specific findings by the Iowa Utilities Board that Qwest has engaged in anticompetitive conduct with respect to its negotiation of secret agreements. In addition, the Minnesota Public Utilities Commission has held that Qwest engaged in bad faith, and a pattern of anticompetitive conduct, in connection with UNE-P testing requested by AT&T.

The Minnesota decision is particularly germane because at least one of the secret agreements at issue involved "consulting services" which Qwest claims to have received from Eschelon. In other words, while Qwest was resisting AT&T's attempts to obtain UNE-P testing, Qwest was also engaging in secret collaboration, outside the section 271 workshop process, with Eschelon. The resulting discriminatory treatment is a clear violation of Qwest's obligations under section 271, and undermines the supposedly open collaborative process which Qwest itself sought and received as part of its efforts to obtain section 271 approval.

Qwest's anticompetitive conduct is also evident in its efforts to impose a local carrier freeze on customers in Washington and other states. Even before there is an indication that effective competition can develop in the state, Qwest has already taken dramatic and oppressive steps to hinder or halt that development.

Touch America has filed a motion to re-open proceedings here in Washington, to allow the Commission to take additional evidence relating to TouchAmerica's allegations

that Qwest has continually violated section 271 since the time the U S WEST/Qwest merger was approved.

In addition, Qwest is the subject of a well-publicized investigation by the Securities and Exchange Commission, seeking information on Qwest's accounting practices in connection with a variety of different transactions, including the negotiation of contracts for indefeasible rights of use (IRUs) for fiber optic facilities.

In short, regulators at both the state and federal levels are finally beginning to notice irregularities in the way which Qwest conducts its business. More importantly, where those regulators have taken the time to examine and investigate these irregularities—*viz*., Minnesota and Iowa—they have issued findings of fact that Qwest has engaged in a *pattern* of anticompetitive conduct, bad faith, and willful violation of state and federal law.

For the Washington Commission, at this time, to turn a blind eye and reward such conduct with approval of Qwest's 271 application would clearly be contrary to the public interest.

B. Secret Agreements.

1. The agreements at issue here directly reflect upon Qwest's unwillingness and inability to provide interconnection on a nondiscriminatory basis.

AT&T's review of the agreements at issue here reveals that each of them directly reflects upon Qwest's unwillingness and inability to provide interconnection to CLECs on a nondiscriminatory basis.[1] More specifically, AT&T finds the following terms and conditions, while not by any means an exhaustive list, to be among the best examples of

[1] See generally Exhibit 1635-C, containing the available, previously unfiled agreements that are most pertinent here.

preferential treatment of some CLECs by Qwest:

a) Qwest offered Eschelon a dedicated on-site provisioning team, while offering AT&T only a single individual representative, with off-site presence, multiple additional responsibilities, and limited availability.

b) Qwest also offered Eschelon the opportunity to "consult" with Qwest in exchange for a ten percent reduction in "aggregate billed charges for all purchases made by Eschelon from Qwest," while at the same time denying AT&T's request for UNE-P testing accommodation in Minnesota.

c) Qwest provided Eschelon a $13.00 per-line per-month credit (which it later increased to $16.00) ostensibly as compensation for Qwest's failure to provide accurate recording of access minutes through its daily usage files ("DUF"), while AT&T and other carriers struggled in vain to obtain accurate recording in order to properly bill access usage.[2]

d) Qwest provided a similar $2.00 per-line per-month credit to Eschelon for intraLATA toll traffic terminating to Eschelon's switch, where Qwest knowingly provided inaccurate access records to Eschelon for this type of traffic, while forcing other carriers to negotiate each such instance from the ground up.

e) Qwest agreed to provide Covad with more favorable service interval terms than any other carrier, including AT&T.

In each of these instances, Qwest provided important and useful interconnection services to one CLEC without making the same services available to others. Thus it is clear that Qwest has engaged in discrimination and preferential treatment of one group of CLECs over another. What remains unclear is the extent to which other acts of discrimination have also occurred. Without a thorough investigation into the agreements at issue here, any Commission decision on Qwest's application for 271 authority will be based on an incomplete record. AT&T therefore believes, as does the Public Counsel, that the Commission should exercise its independent authority to investigate these

[2] AT&T is informed, and believes, that Eschelon disputes Qwest's characterization of this payment, and maintains instead that the additional $3.00 payment per line is compensation for poor service quality.

allegations and reach its own determination on them prior to arriving at any conclusion on Qwest's application for 271 authority.[3]

2. These agreements show Qwest's willingness to violate federal law, and that in turn carries public interest implications.

Aside from the discrimination inherent in these agreements, there is also the matter of Qwest's failure and refusal to file and seek Commission approval of the agreements, in violation of 47 U.S.C. 252(e). This in turn carries important implications for the public interest analysis of Qwest's 271 application. To quote the FCC directly in this regard:

> Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anti-competitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.[4]

As the FCC has noted, the very success of the federal Act depends on BOC compliance; however, that compliance is absent here. The negotiation and implementation of these special agreements, in secret and away from the prying eyes of competitors and regulators alike, not only undermines the potential for the Act to be successful, but also undermines the authority of this Commission, and the integrity of the record in this case.

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[3] May 13 Transcript at p. 7598.

[4] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997), at para. 397.

Qwest has repeatedly asserted on the record that it is providing nondiscriminatory interconnection throughout the state. Indeed, that is one of the fundamental elements of its 271 application.[5] Yet, the evidence here is suddenly to the contrary. Interconnection is in fact not being provided in a nondiscriminatory manner. Moreover, other carriers—unaware of the existence of these special agreements—were unable to contradict the assertions of Qwest in this regard. As a result, the record here misrepresents the true state of competition. Furthermore Qwest is responsible for that misrepresentation, because Qwest has the burden, under the Act, to file these agreements and seek Commission approval for them. By failing to do so, and then representing itself as being in compliance with the federal Act, Qwest is attempting to deceive not only this Commission, but its competitors and the public at large as well.

In addition, the simple fact is that by failing and refusing to file these agreements and seek approval for them, Qwest has also flaunted the authority of the Commission, and undermined the Commission's ability to properly regulate a monopoly carrier, in accordance with the public interest.

At the very least, the discovery of these special agreements warrants further investigation. The question of whether these proceedings have been tainted by misrepresentations by the applicant Qwest is of vital importance to maintaining the Commission's integrity, and a proper respect for the truth.

[5] For example, the testimony of David L. Teitzel purports to provide totals of the various interconnection agreements entered into between Qwest and new entrants. Then, relying upon these totals, Qwest claims to have fulfilled the public interest and track A requirements of the Act.

3. The attempt by Qwest to silence its opponents in these and other proceedings impugns the integrity and completeness of the record in this case.

In at least one instance, Qwest bargained for and received a promise from one of its competitors—Eschelon—to be silent and refrain from opposing Qwest's 271 application in all fourteen states. Thus, by giving preferential treatment to one of its competitors, Qwest not only discriminated against its other competitors, but silenced an important critic in the very proceedings intended to open the local market to all competitors.

This is yet another reason for concern over the integrity and completeness of the record in this case. Qwest's actions here have actively precluded the Commission from hearing evidence from a potential witness or group of witnesses.

In this context, it is important—and rather easy—to distinguish between agreements which are subject to the filing requirements of sections 251 and 252, and those that are not. For example, the agreement between AT&T and U S WEST has absolutely nothing to do with interconnection. Quite simply, AT&T agreed not to oppose the merger of U S WEST and Qwest, and U S WEST/Qwest agreed not to advocate the imposition of forced access upon AT&T's cable properties. There is nothing in that agreement which remotely concerns interconnection, or which would at all invoke the filing and approval requirements of sections 251 and 252.

In addition, the agreement between AT&T and U S WEST took place in proceedings which were clearly adversarial in nature, settling a controversy between two opponents, whereas the agreements at issue here took place in circumvention of what had been intended to be an open, collaborative process; indeed a collaborative process which Qwest itself asked for, received, and then undermined.

The whole purpose of the collaborative process advocated by Qwest from the very inception of its 271 application was to ensure that all parties could benefit from the dialogue that was to occur. The intention—and Qwest's major selling point—of the so-called collaborative approach was to engage in an open dialogue, work out interconnection issues publicly, and provide equal treatment to all CLECs. However, with respect to the Eschelon agreement of November 15, we have a situation in which Qwest, in the midst of this purportedly collaborative process, has engineered a separate, private deal for one CLEC. Qwest promises to focus on the needs of this one CLEC, privately and apart from the public "collaboration," and in exchange the CLEC promises to remain silent during the "collaborative" process.

In other words, while Qwest was collaborating with some CLECs publicly, it was also being *more* collaborative with others privately. Other CLECs did not benefit from whatever dialogue might have occurred between Eschelon and Qwest with respect to Eschelon's interconnection needs. They were shut out of that dialogue. Clearly the creation of private, side-agreements, as here, does not promote the overall collaboration which was supposed to occur, but instead undermines it.

So on the one hand, the agreement between AT&T and Qwest/U S WEST had nothing to do with interconnection or the 271 process, but settled two disputed issues between the parties, namely forced access and the Qwest/U S WEST merger. On the other hand, the Eschelon agreement had everything to do with interconnection and the 271 process, and *also silenced opposition to Qwest's 271 application*. It is this

"intertwining" to which Ms. Roth objects, and which is clearly present in the Eschelon agreement.[6]

Under these circumstances, the entire 271 process has been compromised in two distinct ways: first, at least one of Qwest's critics was artificially kept out of those proceedings, detracting from the quality of the public dialogue, and secondly, the group that did participate in the collaborative process did not receive the benefit of the dialogue which evidently took place between Qwest and Eschelon. Participants have therefore been short-changed by Qwest, and should at a minimum be allowed to re-examine the issues discussed between Qwest and Eschelon prior to any grant of 271 approval by this Commission.

4. The standard for filing agreements under 47 U.S.C. 252 is clear.

Qwest argues, alternatively, that the standard for filing agreements under section 252 of the federal Act is unclear, that Qwest has filed a petition for declaratory ruling at the FCC to determine that standard, that these secret agreements are not a proper subject for examination in these section 271 proceedings, and that for a variety of reasons Qwest was never obligated to file these agreements.[7] AT&T will address each of these separately.

First of all, AT&T believes that the standard for filing, approval, and "pick and choose" of interconnection agreements under section 252 is quite clear. The Iowa Utilities Board, for example, had no difficulty establishing and applying a simple, complete, and practical standard for filing such agreements:

> For purposes of this proceeding, the phrase "interconnection agreement" as used in 47 U.S.C. §§251(c) and 252(a) through (i) and 199 IAC 38.7(4)

[6] May 13 Transcript, p. 7664.
[7] *Id*., pp. 7602-5, and 7608.

> should be defined to include, at a minimum, a negotiated or arbitrated contractual arrangement between an ILEC and a CLEC that is binding; relates to interconnection, services, or network elements, pursuant to §251, or defines or affects the prospective interconnection relationship between two LECs. This definition includes any agreement modifying or amending any part of an existing interconnection agreement.[8]

Thus, at this stage it is clear that Qwest has an obligation to file certain agreements, there is evidence that it has failed and refused to do so, and competitors have been harmed by that failure and refusal.

Even assuming *arguendo* that Qwest is correct and the standard is unclear, any asserted lack of clarity should not preclude this Commission from investigating whether and to what extent these secret agreements exist, and whether and to what extent these secret agreements may have harmed the development of competition in this state. In fact, this Commission has an obligation under state law to pursue this matter. State law prohibits discrimination with respect to the prices, terms, and conditions of interconnection, and gives the Commission primary jurisdiction with respect to violations of that prohibition:

> Notwithstanding any other provision of this chapter, no telecommunications company providing noncompetitive services shall, as to the pricing of or access to noncompetitive services, make or grant any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service, nor subject any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage. The commission shall have primary jurisdiction to determine whether any rate, regulation, or practice of a telecommunications company violates this section.[9]

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[8] Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing, *In Re: AT&T Corp. v. Qwest Corporation*, Iowa Utilities Board Docket No. FCU-02-2, issued May 29, 2002, attached here as Exhibit A.

[9] RCWA, section 80.36.186.

> Ultimately, the question presented here is whether or not Qwest has unlawfully discriminated against some CLECs and in favor of others. In other words, in the face of these secret agreements, has Qwest given the same terms and conditions to all CLECs on a nondiscriminatory basis? Under these circumstances, while the standard for filing these agreements is certainly important, it is secondary to the question of whether discrimination has occurred in violation of federal and state law.

Likewise, the existence of Qwest's petition to the FCC for declaratory ruling on the standard for filing documents should not deter this Commission from proceeding with its own investigation. It has not deterred the Minnesota or New Mexico Commissions. In fact, the New Mexico Public Regulation Commission's Hearing Examiner on May 23, 2002, flatly rejected Qwest's motion to stay its proceedings. Qwest's New Mexico motion was based on the same grounds presented here.[10]

Qwest begins its argument by asserting that the governing standard for filing agreements under section 252 has never been defined in the federal Act or by the FCC.[11] Qwest then asserts that there is no consensus on what specific agreements the Act requires to be filed.

Qwest's fretfulness over the definition of a governing standard for filing agreements is entirely unnecessary. Over the six or more years in which the Act has been in effect, there have been innumerable agreements negotiated between carriers, and approved by various state commissions including the Washington UTC. Most of these agreements were thoroughly and painstakingly negotiated, and in many cases arbitration was necessary in order for them to be concluded and implemented. One result of this process is that the subject matter of interconnection agreements is at the same time fairly

[10] Order from the bench, May 23, 2002, *In the Matter of an Investigation into Unfiled Agreements Between Qwest Corporation and Competitive Local Exchange Carriers*, Utility Case No. 3750.
[11] May 13 Transcript, at pp. 7602-3 and 7607-8.

broad yet well defined. A brief glance at the table of contents for the AT&T/Qwest agreement reveals that the subject matter of an interconnection agreement can range from the obvious topics of payment, pricing, branding, resale, and the definition of unbundled network elements, to the more indirect (but no less important) subjects of dispute resolution, maintenance, and network security.[12]

From AT&T's perspective, it appears reasonable to insist that any agreement between carriers that addresses the same issues, or deals with the same subject matter as an interconnection agreement should be approved, filed, and made available in the same manner as any other interconnection agreement. This follows directly from the express requirements of sections 252(e), 252(h), and 252(i). Guidance with respect to what subject matter constitutes "interconnection" can be derived from industry practice over the past six years, by examining the contents of previous interconnection agreements approved and filed by this Commission.

In addition, AT&T believes that any agreement which would give one carrier an advantage over another in the area of interconnection must be approved, filed, and made available pursuant to sections 252(e), (h), and (i). This follows directly from the nondiscrimination provisions of the Act, *viz*., sections 251(c)(2)(C) and (D). So, for example, an agreement giving a carrier special privileges or processes for escalating a problem or a trouble ticket should be approved and filed.

Furthermore, Qwest's assertion that a national standard is necessary for determining which agreements should be filed and which need not, is contrary to the

[12] *See* Table of Contents to the *Agreement for Local Wireline Network Interconnection and Service Resale*, between AT&T and Qwest, attached here as Exhibit B.

letter and spirit of the federal Act. Under 47 U.S.C. §252(e)(3), "[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement…." In other words, the federal Act not only establishes that individual states have the right to review and approve interconnection agreements, but they also have the right to impose and enforce other requirements, consistent with state law, in the review of an agreement. Thus, the plain language of the Act is expansive when it refers to state jurisdiction over interconnection agreements. The federal Act does not anticipate establishing a national standard here, and in fact expressly rejects the need for such a standard.

In short, this Commission has full statutory authority to establish a state-specific standard for filing interconnection agreements. The fact that the Commission has not yet done so should not deter the Commission from proceeding with an investigation and determination on this issue. Furthermore, as noted above, the Commission has a statutory obligation under state law to address and eliminate discriminatory practices by the incumbent monopoly carrier.

5. Qwest's strained interpretation of section 252(a)(1) should be summarily rejected.

Qwest further attempts to argue that section 252(a)(1) limits the applicability of the filing and approval requirements of section 252. Qwest asserts that the fact that section 252(a)(1) requires inclusion of a detailed schedule of charges for interconnection and each service or network element means that any agreement which does not contain such a detailed schedule is not subject to the filing and approval requirements.[13] Such a strained interpretation would eviscerate the nondiscrimination requirements of the

[13] May 13 Transcript, p. 7606.

remainder of section 252, and lead to a situation in which an ILEC could discriminate against individual CLECs with impunity, on the terms and conditions of interconnection. Such a result would be clearly contrary to the letter and spirit of the Act.

Interconnection agreements contain much more than prices. Indeed these agreements typically go on for hundreds of pages, and the bulk of these agreements relates not to pricing but to terms and conditions, each of which have been the subject of painstakingly negotiations, review, and argument. Allowing only a narrow reading of section 252 will result in a myriad of discriminatory amendments to these agreements, and will license preferential treatment of some CLECs by Qwest, with respect to the terms and conditions of interconnection.

The language of section 252(a)(1) must be read in context, and not in a vacuum, as Qwest would prefer. Where interconnection agreements can be arrived at through voluntary negotiations, then certainly the Act prefers that approach. But the Act still imposes the filing and approval requirements on voluntary agreements, just as it does arbitrated agreements.[14] Section 252(e) requires that "any" interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the state commission. Furthermore, the grounds for rejection of an interconnection agreement are clear: such an agreement must be rejected, *inter alia*, if the agreement *or any portion thereof* discriminates against a telecommunications carrier not a party to the agreement.

[14] It should be noted that Qwest has forced AT&T to arbitrate each and every one of the interconnection agreements it has with AT&T. In this context, any expectations that Qwest will be cooperative or "customer focused" with respect to its wholesale, CLEC customers, are misplaced. Indeed, Qwest's track record demonstrates a determination on the part of the company to resist new entrants at every turn, and in every imaginable manner. The Texas Commission was aware that this same corporate attitude was present in SBC, and demanded that SBC take specific actions to eradicate that corporate attitude in advance of any grant of 271 authority. See Texas Commission Order No. 25 in Project No. 16251, dated June 1, 1998, attached here as Exhibit C. This Commission should do likewise.

The nondiscrimination requirements of section 252(e) are an integral part of the approval requirements of that same section, as well as the filing requirement of section 252(h). In turn, these nondiscrimination requirements are implemented and enforced by way of the "pick and choose" requirement found in section 252(i) of the Act.

Each of these nondiscrimination protections is as applicable to terms and conditions as it is to price.

The language of the Act, when read in its entirety and unencumbered by Qwest's selective myopia, calls for a broad interpretation of what agreements are subject to state commission approval, filing, and "pick and choose." Not only should "any" interconnection agreement be filed with the state commission, but the commission may reject it if even a *portion* of the agreement is found to be discriminatory. Additionally, when asked about the applicability of the filing, approval, and nondiscrimination requirements of section 252, the FCC clearly chose to use an expansive interpretation of which agreements should be subject to those requirements.[15]

Qwest's strained interpretation of section 252(a)(1) should be summarily rejected.

6. Qwest's promises to address and resolve these problems are empty and do not adequately address the public interest concerns inherent in the secret agreements issue.

Qwest represents to this Commission that it has committed voluntarily to "file all contracts, agreements, or letters of understanding between Qwest Corporation and CLECs that create obligations to meet the requirements of sections 251(b) or (c) on a going forward basis."[16]

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[15] See for example *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, paras. 165-7 (1996) ("Local Competition Order").

[16] May 13 Transcript, p. 7610.

From the outset, AT&T would note that this is merely a commitment to do what is required under the Act—something Qwest should have been doing all along. But in addition, the safeguards proposed by Qwest here are illusory. The creation of an internal committee, irrespective of the seniority or depth of experience of its members, does not provide the kind of oversight that this Commission should condone. Instead, the Commission should pursue an investigation into this matter in order to arrive at its own methods and procedures for preventing discrimination by Qwest against the CLECs.

In short, the creation of this internal committee does not obviate the need for further investigation into the discriminatory business practices of Qwest. Nor does it cure the underlying violations of federal law, the discriminatory conduct, and anticompetitive behavior by Qwest which renders Qwest's 271 application contrary to the public interest. The promises by Qwest to alter and improve its internal structure do not change the underlying need for oversight by this Commission.

7. These secret agreements render Qwest's 271 application contrary to the public interest.

The existence of these secret agreements renders Qwest's 271 application contrary to the public interest for several reasons. First, these agreements are discriminatory and therefore demonstrate that Qwest's local markets are not opened. Instead, Qwest is acting as a gatekeeper for its local markets, giving preferences to whom it will, and withholding important information and benefits from others. Second, these agreements are evidence that Qwest has violated state and federal law. As noted previously, the FCC has specifically stated that violations of state and federal law by an applicant are relevant to whether a grant of 271 authority is in the public interest. Clearly in this case, approval of Qwest's 271 application is not in the public interest. And third,

the negotiation of at least one of these agreements was contrary to, and undermined, the collaborative process which Qwest itself sought for the examination of its 271 application. Qwest has failed and refused to play by its own rules, and should not be rewarded for that anticompetitive behavior.

C. UNE-P testing.

As this Commission is already aware, on March 21, 2001, AT&T filed a complaint against Qwest with the Minnesota Public Utilities Commission ("MPUC") regarding Qwest's violation of its interconnection agreement with AT&T as well as violations of state and federal law. Previously, in mid-September 2000, AT&T had informed Qwest of AT&T's desire and intention to test unbundled network element platform ("UNE-P") ordering and provisioning in Minneapolis. 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. On April 30, 2001, the MPUC issued an Order granting AT&T temporary relief requiring Qwest to complete certification and bill-conductivity testing.[17]

Subsequently, on February 22, 2002, the administrative law judge in the case handed down a recommended decision containing a detailed discussion of the facts of the case, and concluding 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

[17] 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.

> 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.
>
> 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).[18]

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."

[18] See Roth Supplemental Affidavit, Exhibit B, at p. 33.

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.[19]

On April 9, 2002, the full Commission concurred with the ALJ's findings that Qwest engaged in anti-competitive behavior. While Qwest may assert that "reasonable minds can differ on the conclusion to be drawn from that record,"[20] the fact is that the Commission concurred with the ALJ's recommended decision, and that decision is therefore binding, the opinion of the MPUC Staff or other "reasonable minds" notwithstanding.

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.

This behavior goes directly to the credibility, or lack of credibility, attributable to Qwest in its dealings with competitors and regulators generally. It also demonstrates a lack of willingness on Qwest's part to cooperate in the opening of its markets throughout its 14 state service territory. Moreover, as previously mentioned, Qwest's behavior demonstrates once again the discriminatory treatment by Qwest of CLECs attempting to enter the local market. While Qwest was cooperating privately with some CLECs, and negotiating secret, preferential agreements with them, Qwest was simultaneously

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[19] *Id*., at p. 30.
[20] May 13 Transcript, p. 7633.

blocking others from obtaining the necessary information to proceed with market entry. Once again, this renders Qwest's 271 application contrary to the public interest and should cause this Commission to be very cautious with regard to the nature and number of promises which it has heard from Qwest during the course of these 271 proceedings.

D. The SGAT language.

Qwest asserts that the solution to this UNE-P testing controversy is the implementation of certain SGAT language, as follows:

> 12.2.9.8 In addition to the testing set forth in other sections of Section 12.2.9, upon request by CLEC, Qwest shall enter into negotiations for comprehensive production test procedures. In the event that agreement is not reached, CLEC shall be entitled to employ, at its choice, the dispute resolution procedures of this agreement or expedited resolution through request to the state Commission to resolve any differences. In such cases, CLEC shall be entitled to testing that is *reasonably necessary to accommodate identified business plans or operations needs* counting for any other testing relevant to those plans or needs. As part of the resolution of such dispute, there shall be considered the issue of assigning responsibility for *the costs of such testing*. Absent a finding that the test scope and activities address issues of *common interest to the CLEC community*, the cost shall be assigned to the CLEC requesting the test procedures.[21]

However, this language, offered in these proceedings by Qwest as a solution to the UNE-P testing difficulty experienced by AT&T in Minnesota, would clearly require AT&T and other CLECs to share their business plans with their most powerful, ubiquitous competitor. The very idea that Qwest would require a new entrant to share its business plan with Qwest in order to obtain requisite testing of facilities is on its face unfair, and frankly reflects the anticompetitive corporate attitude which permeates Qwest's ranks.

[21] Language taken from Qwest's 4/5/02 Washington SGAT. In the Washington SGAT the language is stricken through with a footnote notation stating "This change reflects post-workshop consensus language agreed upon by Qwest, WorldCom and AT&T." See Roth Surrebuttal Affidavit, Exhibit A.

In addition, as the SGAT language proffered by Qwest makes clear, the CLEC is responsible for the costs associated with the tests—a condition to which AT&T has never objected. However, when coupled with the notion that the CLEC must also share its business plan, Qwest's SGAT language is clearly not a genuine solution to the problem at hand.

Furthermore, when cross-examined on this issue, Mr. Teitzel deferred questions to a witness who never appeared in these proceedings. In other words, Qwest offered this SGAT language as a solution to a public interest issue, but was unable to answer any questions on that solution.[22]

Qwest should not be allowed to act as the gatekeeper determining who may compete in the local market and who may not. However, the SGAT language offered by Qwest in this regard firmly establishes Qwest in that role. To grant Qwest's section 271 application without first addressing and eliminating this difficulty is not in the public interest.

E. 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. The complaints filed in federal court and at the FCC against Qwest are directly relevant to these 271 proceedings,

[22] May 13 Transcript, pp. 7745-7.

because they assert *inter alia* violations of section 271. According to those complaints, 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.

In addition, however, the TouchAmerica complaints are highly unusual, because they relate to allegations of a violation of section 271 by a company seeking 271 authority. Even the Qwest witness admitted that he was unaware of any similar action pending against another RBOC.[23]

In fact, although Mr. Teitzel, testifying on behalf of Qwest, attempted to provide additional facts relating to the TouchAmerica complaint, on cross-examination he was woefully unable to discuss many important details of the TouchAmerica proceedings. At one point in his supplemental direct affidavit, he asserted that the FCC had actually approved Qwest's conduct, and yet his citation was to Qwest's answer in the complaint, and he was unable to provide any language from the FCC actually addressing the IRUs at issue in TouchAmerica's complaint.[24]

Now, Touch America has filed a motion to re-open proceedings here in Washington, to allow the Commission to take additional evidence relating to Touch America's allegations that Qwest has continually violated section 271 since the time the U S WEST/Qwest merger was approved. AT&T believes the Commission should hear that evidence before making any decision relative to Qwest's section 271 application. In

[23] *Id*., p. 7720.
[24] *Id*., p. 7737.

view of the collaborative nature of the 271 process, it is difficult to see how the inclusion of such evidence would prejudice any party. In fact, in the interests of developing a full and complete record here, it would appear imperative to allow for the presentation of this evidence. As previously noted, the FCC has specifically held that:

> [E]vidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.[25]

AT&T would urge this commission to allow for the inclusion of such evidence by TouchAmerica, as part of these section 271 proceedings.

F. 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

[25] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997), at para. 397.

ultimately make a ruling in this complaint proceeding; however, no finding on public interest should be made until after that complaint proceeding is concluded.

G. Qwest's Anticompetitive Corporate Attitude.

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."[26]

Aside from its language and content, the most striking thing about this e-mail is the sheer number of addressees. Having been addressed to nearly two hundred individuals, it cannot be seen as an independent item sent without the sanction and approval of management. One must conclude, on the contrary, that it was a common practice for this individual to send out this specific type of e-mail in a broadcast, and that the editorial comments were part of an accepted, if not encouraged, pattern of behavior.

Furthermore, the exuberance contained in this e-mail 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, 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.

For purposes of this public interest analysis, the critical element demonstrated here is that Qwest does not really consider its CLEC-customer business to be at all important. As a result, Qwest does not provide the same level of service to its wholesale

[26] See Roth Supplemental Affidavit, Exhibit E.

customers that it provides to its retail customers. The net effect of that anti-competitive and discriminatory behavior is that retail customers are unable to reap the competitive benefits envisioned by Congress and this Commission.

As previously indicated, the Texas Commission saw this same anticompetitive corporate attitude present in SBC, and took specific steps to eliminate it.[27] AT&T recommends that the Washington Commission take similar steps, in advance of any grant of 271 authority to Qwest.

H. Conclusion.

The evidence produced in these proceedings demonstrates a clear and unabated pattern of anticompetitive behavior on Qwest's part: from Qwest's refusal of a CLEC's request for testing, to its secret agreement with another CLEC to provide discounts; from the improper provisioning of interLATA service by Qwest—in violation of section 271 itself—to an e-mail addressed to 190 employees celebrating the demise of one of its rivals. All of these several incidents add up to a pattern of anticompetitive behavior; a pattern explicitly found in the Minnesota ALJ's decision relating to UNE-P testing.[28]

Other states have encountered this kind of attitude in an RBOC seeking 271 authority, and have taken specific steps to address and eliminate it. AT&T urges this Commission to refrain from any grant of approval to Qwest's section 271 application until Qwest's anticompetitive attitude has been corrected, and there is solid evidence of that correction.

At the present time, Qwest's 271 application is not in the public interest and it should be denied.

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[27] See footnote 14, supra.
[28] See footnote 17, supra.

Respectfully submitted this 7th day of June, 2002.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

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