Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.,	)	
Consolidated Application for Authority to	)	
Provide In-Region, InterLATA Services in	)	WC Docket No. 02-148
Colorado, Idaho, Iowa, Nebraska and North	)	
Dakota	)	
	)	

COMMENTS OF AT&T CORP.

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark C. Rosenblum
Lawrence J. Lafaro
Richard A. Rocchini
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4263

Mark E. Haddad
Ronald L. Steiner
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
555 West Fifth Street
Los Angeles, California 90013
(213) 896-6000

Mary B. Tribby
AT&T Communications of the Mountain States, Inc.
1875 Lawrence Street, Room 1575
Denver, Colorado 80202
(303) 298-6163

David L. Lawson
Mark Schneider
R. Merinda Wilson
James P. Young
Richard E. Young
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Corp.

July 3, 2002

A. The Secret Deals Discrimination Is Undisputed.

It is now beyond dispute that Qwest has entered into blatantly discriminatory agreements with favored CLECs and has kept those agreements secret from state regulators and competitors by failing to file them with state commissions, as required by law. Further, it is beyond dispute that in some cases, the favored CLECs agreed in return to acquiesce in major Qwest regulatory initiatives, including Qwest's instant section 271 application.

As a result of a six-month investigation into potential anticompetitive conduct, the State of Minnesota Department of Commerce filed a complaint against Qwest with the Minnesota Public Utilities Commission on February 14, 2002.[15] That complaint alleges that Qwest entered into a series of secret, discriminatory agreements with various competitive LECs to provide preferential treatment for those competitive LECs with respect to access to rights of way, reciprocal compensation, and collocation.[16] The Department of Commerce Complaint included as exhibit 11 written agreements between Qwest and various CLECs that Qwest had never filed with the Minnesota Public Utilities Commission pursuant to Section 252(a)(1). The Minnesota Department of Commerce is seeking civil penalties in excess of $50 million against Qwest.[17] The Minnesota PUC has already held one hearing before an ALJ and will conduct further proceedings, scheduled for August 6-8, on additional, newly discovered agreements between Qwest and McLeod before issuing a decision.[18]

---

[15] *See, e.g., Second Amended Verified Complaint, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Minnesota Public Utilities Commission*, Docket No. P-421/C-02-197 (Attachment 2 hereto).

[16] *See* Second Amended Verified Complaint ¶ 24 ("By entering into the Secret Agreements, Qwest is providing discriminatory treatment in favor of the CLECs that are party to these agreements and to the detriment of CLECs that are not"); *id.* at ¶ 26 ("[T]he ongoing and repeated behavior of Qwest in entering into these secret agreements was, and is, anticompetitive and in violation of federal and state law").

[17] *See* Second Amended Verified Complaint ¶¶ 275-77, 282.

[18] Favoring selected CLECs held little risk for Qwest, because if any carrier began to grow beyond "acceptable" boundaries, Qwest could neutralize that carrier's opposition by a pretense of cooperation, holding the carrier to its

Significantly, the Minnesota Department of Commerce has uncovered evidence demonstrating that five of the agreements identified in its Complaint "were the direct result of efforts by Qwest to prevent Eschelon and McLeodUSA – two of Qwest's largest wholesale customers – from participating in consideration of Qwest's application to provide in-region, interLATA long-distance services by the state commissions and the FCC."[19] As a result of these secret agreements to silence Eschelon and McLeodUSA, the Minnesota Department of Commerce noted that "14 states, including Minnesota, have been reviewing Qwest's Section 271 application without the participation of two of Qwest's largest wholesale customers in most of their workshops or adjudicative proceedings."[20] While "[t]he extent of the damage that these agreements have caused with respect to 271 proceedings across Qwest's territory is still unknown," the Minnesota Department of Commerce recently "uncovered information that Qwest has not provided accurate billing or access information for the UNE platform products ordered by Eschelon from Qwest at any time from 2000 through the present."[21] The Department's investigation is continuing.[22]

Upon learning of the Minnesota complaint, several other state commissions in the Qwest region commenced similar investigations of their own. The New Mexico Public Regulatory Commission, for example, has issued over 80 subpoenas to competitive LECs

---

promise not to oppose Qwest's section 271 proceedings, but paying only lip service to its own promises of "favorable" treatment.

[19] *See* Comments Of The Minnesota Department of Commerce In Opposition To Qwest's Petition For Declaratory Ruling, WC Docket No. 02-89, at p. 18 (filed May 29, 2002). *See also id.* ("Qwest granted Eschelon various preferences "in exchange for Eschelon agreeing not to participate in consideration of Qwest's Section 271 application before any state commission or the FCC"); *id.* at 20 ("Qwest entered into a similar arrangement with McLeodUSA in exchange for an oral agreement to stay out of the Section 271 proceedings"; noting that McLeodUSA confirmed this in response to a discovery request).

[20] *Id.* at 22.

[21] *Id.* at 22-23.

[22] AT&T is aware, for example, that – prior to their defections from the workshops – Eschelon raised serious problems with Qwest's UNE-P offering and McLeod raised issues with respect to access to poles/duct/conduits and rights of way.

operating in the state, requiring them to produce any and all agreements relating to interconnection that were not previously filed with that commission. Several additional secret agreements were recently produced in response to the subpoenas. The State of Washington has also begun an investigation.[23]

Two states have now issued decisions concluding that Qwest entered into interconnection agreements with individual CLECs that granted them preferential rates, terms and conditions (thereby discriminating against other CLECs) and also violated section 252(a)(1) and applicable state rules by failing to file these agreements with the state commissions. On May 29, 2002, the Iowa Utilities Board (the "IUB") issued a decision concluding that Qwest violated section 252(a)(1) and Section 38.7(4) of the Iowa Code by failing to file three agreements with the Board.[24] The three agreements that the Board examined had been identified by the Minnesota Department of Commerce as involving CLEC operations in Iowa.[25] The Iowa Board concluded that the secret deals presented to it "include interconnection agreement provisions that should have been filed with the Board pursuant to § 252."[26]

The Board further concluded that each of the agreements was discriminatory because it granted preferential rates, terms or conditions to the CLEC. The first agreement was between Qwest and Covad and provided that U S West would commit to meeting several specific interconnection performance standards (including timing, service and quality standards

---

[23] *See, e.g.*, Deborah Solomon, *States Probe Qwest's Secret Deals to Expand Long-Distance Service*, Wall Street Journal, Apr. 29, 2002, Section A:1 (col. 5) (2002 WL-WSJ 3393212) (noting investigations in Colorado, Arizona, Oregon, New Mexico, and Utah).

[24] *See AT&T Corp. v. Qwest Corporation, Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing*, Docket No. FCU-02-2 (May 29, 2002) ("Iowa Order") (Attachment 3 hereto).

[25] Iowa Order at 2.

[26] *Id.* at 9. The Board made clear that this was not a close question with respect to any of the three agreements. *See id.* at 11 ("there can be no serious argument" that the terms of the first agreement "are not properly considered a part of an interconnection agreement"); *id.* at 12 ("there can be no real argument" that the terms of the second agreement

for its firm order commitment ("FOC") process, service intervals, new service failure rate, and facilities problems) not applicable to other carriers, in return for Covad committing to withdraw its opposition to the U S West/Qwest merger.[27] The Board found that "[e]ach of these service quality standards relates to interconnection, would have been of interest to other CLECs negotiating with U S WEST in the relevant time frame, and may still be of interest to other CLECs negotiating with Qwest today."[28]

The second agreement was between Qwest and McLeod and set going-forward rates that McLeod would pay for subscriber list information, amended the existing interconnection agreement to incorporate bill-and-keep in place of reciprocal compensation, and provided that certain interim rates would be treated as final.[29] The Board concluded that this nominal "settlement agreement" plainly "discriminated against other CLECs in favor of McLeod, at least in Minnesota."[30] The Board explained:

> Other CLECs that purchased services for resale apparently began paying higher rates on February 8, 2000, but McLeod was permitted to continue to purchase those same services at the lower interim rates for several more weeks. *It was a form of discrimination to extend this favored treatment to McLeod and not to other CLECs. This discrimination would not have been possible if the agreement had been filed with the various state commissions where it was intended to have effect (all 14 Qwest states).* Because the agreement was not filed in any state, Qwest was able to extend uniquely favorable treatment to McLeod, in return for which McLeod dropped its opposition to the Qwest-U S West merger. Thus, Qwest's failure to file McLeod Agreement No. 1 violated both the letter and the purpose of the statute and the Board's rule.

Id. at 13 (emphasis added).

---

are "anything other than an interconnection agreement"); *id.* at 15 ("Qwest's own arguments establish" that the third agreement "is an interconnection agreement that must be filed with the Board").

[27] *Id.* at 9-10. For example, "U S West (and, as a result of the subsequent merger, Qwest) agree[d] to provide 90 percent of Covad's FOC dates within 48 hours of receipt of a service request for regular unbundled loop services and within 72 hours of a service request for DSL-capable, ISDN-capable, and DS-1-capable unbundled loop services." *Id.* at 10.

[28] *Id.* at 10.

[29] *Id.* at 11-12.

[30] *Id.* at 13.

The third agreement – also between Qwest and McLeod – established escalation procedures to facilitate dispute resolution and quarterly executive meetings to resolve issues relating to implementation of the interconnection agreements.[31] The Board concluded that these provisions "are logical and necessary parts of a comprehensive interconnection agreement" and that exempting these "important" provisions from the filing requirement "would undermine the pick-and-choose and nondiscrimination features of the Act."[32]

The Iowa Board further recognized that the three unfiled agreements it examined may be just the tip of the iceberg. It therefore ordered Qwest to "file any other non-filed interconnection agreements with the Board" within 60 days.[33] Last week, Qwest declined its opportunity to request a hearing with respect to the Iowa Board's conclusions. As a result, the tentative decision is now final.

The staff of the Arizona Corporation Commission ("ACC") recently confirmed the obviousness and seriousness of Qwest's unlawful and anticompetitive conduct, concluding that Qwest violated its filing obligations under section 252 by failing to file at least *25* agreements with the ACC.[34] The ACC staff made specific findings that the unfiled agreements are discriminatory:

> It is clear, for instance, through Qwest's own description of what it includes within the terms and conditions of business-to-business arrangements, *i.e.*, dispute resolution, escalation procedures, account team support, and the mechanics of provisioning and billing for ordered interconnection services, that giving favored treatment to one carrier while denying it to another, is the very type of discrimination that the Act attempts to prevent. Without the level of transparency achieved through public filing of these agreements, it would be impossible to ensure that the provisions of the Act were being carried out in a

[31] *Id.* at 14-15.

[32] *Id.* at 15.

[33] *Id.* at 21.

[34] *See Staff Report And Recommendation In The Matter Of Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 1 (June 7, 2002) ("Arizona Report") (Attachment 4 hereto).

> nondiscriminatory manner, an important prerequisite to the development of competition in Arizona . . . The Commission cannot determine the nature of, and CLECs cannot pick and choose terms, that are kept secret . . . . Staff believes that this is exactly the type of discrimination that the Act seeks to prevent.

Id. at 15-16.

The Arizona Staff particularly noted the "egregious nature of [Qwest's] infraction" with respect to seven agreements which had provisions "in which CLECs agreed that they would not participate in regulatory proceedings before the FCC," including Section 271 proceedings.[35] The Staff recognized that these agreements attempt to suppress participation by all parties for full development of the record in regulatory proceedings before the Commission are not in the public interest."[36] Arizona "Commission Chairman William Mundell said he was 'shocked and disgusted' when he read the clauses in question. 'It's very troubling that Qwest would have competitors sign interconnection agreements to not participate in the 271 process,' he said. 'Whether it's one (competitor) or 50, the fact that a competitor has to sign an agreement not to participate goes to the heart of the process,' Mundell said."[37]

ACC Staff also recognized that it may not have identified all of Qwest's secret agreements.[38] An ALJ recently heard arguments on whether the ACC should proceed to a full hearing on this matter. And two of the three Arizona commissioners have now properly recognized that the only possible course in light of Qwest's secret deals misconduct is to suspend further consideration of Qwest's section 271 proceeding, pending further investigation: "It is clear to me that continuing with our Section 271 review must be suspended until the Commission

---

[35] *Id.* at 1-2, 19.

[36] *Id.* at 1; *see also id.* at 16 ("[P]rovisions in agreements which gave favored treatment in exchange for a party's agreement not to participate in proceedings before this Commission . . . are of extreme concern to the Commission and detrimental to the public interest").

[37] Oscar Abeyta, *Probe Will Slow Qwest's Arizona Call Application*, Tucson Citizen, June 20, 2002, at 1B.

can determine to what extent the agreements in question may have compromised the entire Section 271 review."[39]

In a blatant effort to preempt these ongoing state investigations, and to dodge the Section 271 implications of its pervasive discrimination, Qwest filed a request for a declaratory ruling with the Commission with respect to the scope of its filing obligations under section 252(a)(1).[40] Specifically, Qwest requested "guidance" as to "which types of negotiated contractual arrangements between ILECs and CLECs are subject to the mandatory filing and 90-day state commission pre-approval requirements of Section 252(a)(1) – and which are not." *Id.* at 3. This petition is a frivolous attempt by Qwest to seek cover for its unlawful failure to file secret, discriminatory agreements and to avoid the fatal section 271 consequences of that misconduct. All commenters uniformly opposed Qwest's Petition, and AT&T and other commenters demonstrated that Qwest's proposed narrow construction of section 252(a)(1) flies in the face of the statute's plain language.[41] In addition, several commenters provided additional evidence of Qwest's discriminatory and anticompetitive practices.[42] In short Qwest's Petition for Declaratory Ruling is nothing more than a transparent attempt to derail or distract the enforcement efforts that its own misconduct has spawned.

---

[38] *See id.* at 20 n.4 ("These recommendations should also apply to agreements subsequently submitted by CLECs (in response to Staff data requests) which Qwest may not have filed and which Staff determines should have been filed by Qwest under Section 252(e).")

[39] *See* Letter of Commissioner Jim Irvin to All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 27, 2002) (Attachment 1 hereto); *see also* Letter of Commissioner Marc Spitzer to All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 26, 2002) ("[T]he question I posed in my initial letter must first be answered before the Commission moves forward on the remaining issues regarding Qwest's entry into the long distance market.") (Attachment 5 hereto).

[40] *See Petition For Declaratory Ruling Of Qwest Communications International, Inc.,* WC Docket No. 02-89 (filed Apr. 23, 2002).

[41] *See Opposition of AT&T Corp. To Petition For Declaratory Ruling Of Qwest Communications International Inc., WC Docket No. 02-89*, at 6-10 (filed May 29, 2002).

[42] *See* Comments of Touch America, Inc. at 2 n.2, 4-6 & n.4, 9; Comments of PageData.

Regardless of the Commission's ruling on the Section 252 filing requirement issues raised in the declaratory ruling proceeding, Qwest has engaged in blatant discrimination against CLECs, in direct violation of its nondiscrimination obligations under the Act. The Commission cannot lawfully disregard that discrimination in this proceeding.

B. The Secret Deals Foreclose Any Finding That Qwest Has Met Its Checklist Or Public Interest Burdens.

The mounting evidence of Qwest's secret, discriminatory agreements with selected CLECs precludes any finding that Qwest has satisfied its obligation to provide nondiscriminatory access to UNEs as required by Checklist Item 2. Indeed, it is hard to imagine a more blatant example of providing discriminatory access to UNEs. As the Iowa Utilities Board and Arizona Commission Staff concluded, Qwest has given a few CLECs preferential UNE rates and superior access to UNEs to the competitive detriment of all others. Qwest further engaged in a deliberate campaign to keep these deals secret from regulators by requiring the favored CLECs to promise not only to hide this discrimination from regulators and other carriers, but also to keep silent about their own problems with Qwest.

This discrimination impedes competitive entry by the disfavored CLECs. Not only do they face an entrenched monopolist that is unwilling to provide them with commercially reasonable access to its bottleneck facilities, but the favored secret deal competitors do not face these overwhelming disadvantages. Whereas the favored CLECs have a Qwest representative to assist them in navigating Qwest's inadequate OSS, other competitive carriers do not. Even where the disfavored competitive carriers can succeed in placing orders, they must pay excessive rates for UNEs and interconnection. This not only puts them at an enormous competitive disadvantage against Qwest, but also against other CLECs that are able to purchase access to

Qwest's network at lower rates.[43] And when the inevitable problems arise in dealing with a supplier that has no interest in the emergence of local competition, most CLECs must resort to costly and time consuming litigation to vindicate their rights under the Act. Those CLECs that are parties to the secret deals, in contrast, were entitled to expedited dispute resolution with Qwest.[44]

The magnitude of this discrimination precludes any finding that Qwest's applications satisfy the public interest. By favoring a few at the expense of the many, Qwest has assured that it will not face ubiquitous, effective competition in any of the applicant states. Granting the applications under these conditions would, by definition, eliminate Qwest's incentives fully to open its local markets and free Qwest to leverage its monopolies to impede long distance competition on the merits.

Even without the direct evidence of Qwest's discriminatory conduct uncovered so far, the Commission could not make a reasoned determination that Qwest has satisfied its nondiscrimination obligations, for two independent reasons. First, the state investigations are ongoing and the full scope and extent of Qwest's discriminatory conduct are not yet known. Indeed, the state commissions are still trying to identify and obtain copies of interconnection agreements that Qwest improperly failed to file (and has not been forthcoming in producing voluntarily, necessitating the use of subpoenas and data requests, as in Iowa, New Mexico, and Arizona). Without the benefit of complete investigative findings from the state commissions, and without any independent analysis of the unfiled agreements (which Qwest has not submitted for Commission review), there can be no finding that Qwest has met any of the eight checklist items that expressly forbid discrimination.

---

[43] *See Fassett/Mercer Decl.* (discussing Qwest's inflated UNE loop rates); *Chandler/Mercer Decl.* (discussing Qwest's inflated non-loop UNE rates); *Weiss Decl.* (discussing Qwest's inflated non-recurring rates).

Second, wholly apart from the issue of the scope and extent of Qwest's discriminatory conduct and violation of filing requirements, Qwest's secret agreements taint its ability to demonstrate compliance with the other checklist requirements. This is because the evidence demonstrates that Qwest bought the silence of CLECs that may be aware of additional discriminatory conduct by Qwest and have additional information bearing on Qwest's checklist compliance. Indeed, Eschelon has now stated on the record that it was prevented by its secret agreement with Qwest from providing critical evidence regarding Qwest's failure to comply with the Act in state section 271 proceedings.[45] As a consequence, the Commission cannot rely on the *absence* of evidence of discrimination or other checklist violations in the state commission proceedings to conclude that the checklist requirements are satisfied because the record in those proceedings is suspect and incomplete. Nor, because of Qwest's anticompetitive actions, can the Commission rely on the *absence* of evidence of discrimination or other checklist violations in *this* proceeding. Accordingly, unless the Commission conducts an independent investigation of Qwest's compliance with all checklist items, the Commission cannot make a reasoned determination that Qwest has satisfied its nondiscrimination and other checklist obligations. Absent such an independent investigation, any finding by the Commission that Qwest has satisfied the competitive checklist would be reversible error.[46]

The terms of the secret deals uncovered to date also provide conclusive evidence that Qwest has not provided just, reasonable and cost-based UNEs and interconnection to CLECs. In each of the applicant states, Qwest has offered under the table UNE rates well below the rates it

---

[44] *See Iowa Order* at 14-15.

[45] Letter from J. Jeffrey Oxley, Eschelon, to Bruce Smith, Colorado PUC, Docket No. 02M-260T (filed May 16, 2002) (Attachment 6 hereto).

[46] *See Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency decision is arbitrary and capricious if agency "entirely failed to consider an important aspect of the problem"); *Sprint*

relies upon to support its applications. For example, in a secret agreement with Eschelon, Qwest provided a flat 10 percent discount on all purchases made by Eschelon from Qwest.[47] Eschelon also received a significant per line per month rebate based on Qwest's inability to provide accurate daily usage information.[48] It, of course, would defy common sense to believe that Qwest has voluntarily agreed to UNE rates that are below Qwest's own forward-looking, economic costs of providing the UNEs.[49] Thus, by charging favored CLECs much less for UNEs and interconnection than the rates set by the state regulatory commissions, Qwest has through its own actions demonstrated that those rates are well in excess of TELRIC.

II. QWEST DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

Because "access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements (UNEs) under terms and conditions that are nondiscriminatory and just and reasonable, and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable," a BOC seeking Section 271 authority must demonstrate that it provides nondiscriminatory access to its OSS.[50] The Commission has repeatedly found that "nondiscriminatory access to OSS is a prerequisite to the development of meaningful local

---

Communications Co. v. *FCC*, 274 F.3d 549, 553-56 (D.C. Cir. 2001) (remanding 271 order to Commission for failure to consider clearly relevant factor in granting application).

[47] *See* Second Amended Verified Complaint ¶ 99 (quoting paragraph 3 of *Confidential Amendment to Confidential/Trade Secret Stipulation*, Nov. 15, 2000).

[48] *Id.* at ¶ 110.

[49] *Local Competition Order* ¶ 679 (TELRIC seeks to "replicate[], to the extent possible" the "costs . . . incurred by the incumbents" in providing "interconnection and unbundled elements.") If Qwest were to price UNEs below TELRIC, it would place itself at a significant competitive disadvantage vis-a-vie the competitive carriers obtaining below-cost access to its network.

[50] *New Jersey 271 Order*, App.C ¶ 26.