

**BEFORE THE WASHINGTON UTILITIES  
AND TRANSPORTATION COMMISSION**

In the Matter of the Investigation into  
U S WEST Communications, Inc.'s  
Compliance with § 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

**AT&T'S MOTION TO REOPEN AND SUPPLEMENT THE RECORD**

AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle and TCG Oregon, (collectively "AT&T") hereby move for the Commission to reopen the record in this proceeding and require Qwest Corporation ("Qwest") to supplement the record with sufficient evidence to demonstrate that Qwest and its new section 272 affiliate are in compliance with section 272 of the Telecommunications Act of 1996 ("Act")<sup>1</sup>.

**I. INTRODUCTION**

Sections 271 and 272 of the Act describe the requirements a Bell operating company ("BOC") must meet to obtain authority to provide in-region, interLATA long distance authority. Although the competitive checklist contained in section 271(c)(2)(B) of the Act often receives the most attention during the review of a BOC's application for in-region, interLATA long distance authority, there is no question that compliance with the safeguards contained in section 272 is mandatory. Section 271(3)(B) states that the

---

<sup>1</sup> Qwest has announced its intention to create a completely new, separate subsidiary to establish compliance with section 272 of the Telecommunications Act. *See infra* at 4.

Federal Communications Commission (“FCC”) shall not approve an application unless it finds that “the requested authorization will be carried out in accordance with the requirements of section 272.” The FCC has held that non-compliance with section 272 constitutes an independent ground for denying a BOC’s application.<sup>2</sup> Section 272, therefore, is a critical part of any evaluation into whether a BOC’s application is adequate to obtain in-region, interLATA authority.

Recent events have confirmed the continuing importance of a BOC’s compliance with section 272. Qwest recently withdrew its section 271 application at the FCC that would have, if granted by the FCC, permitted it to provide in-region, interLATA authority in this State. Qwest withdrew its application one day before the statutory deadline for the FCC to either accept or deny Qwest’s application because, as explained by Qwest, “there have been questions raised regarding our plans to restate our financial statements for prior periods.”<sup>3</sup> FCC Chairman Powell stated that “questions remain regarding whether Qwest has complied with the safeguards set forth by Congress in section 272 of the Act.”<sup>4</sup> In a letter to the FCC withdrawing its application, Qwest’s attorney states that, although Qwest believed its application fully satisfied the requirements of section 271, “in recent days the Commission staff has raised questions regarding the issue of whether Qwest Communications Corporation (“QCC”), the designated Section 272 affiliate, can be said to meet the requirements of Section 272 given pending restatement of its financial statements for past periods.”<sup>5</sup>

---

<sup>2</sup> *Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (rel. Oct. 13, 1998), ¶ 322 (“*BellSouth Louisiana II Order*”).

<sup>3</sup> [http://www.qwest.com/about/media/pressroom/1,1720,1107\\_current,00.html](http://www.qwest.com/about/media/pressroom/1,1720,1107_current,00.html)

<sup>4</sup> Statement of FCC Chairman Michael Powell, dated September 10, 2002. <http://www.fcc.gov/>

<sup>5</sup> Letter dated September 10, 2002, from Peter A. Rohrbach, Hogan & Hartson, L.L.P., to Ms. Marlene Dortch, Secretary, FCC, WC Docket Nos. 02-148 and 02-189.

And there certainly have been significant developments since the Commission last examined the issue. On July 28, 2002, Qwest issued a press release acknowledging that it was analyzing its accounting practices.<sup>6</sup> “Based on analysis to date, the Company has determined that it has in some cases applied its accounting policies incorrectly with respect to certain optical capacity asset sale transactions in 1999, 2000, and 2001.”<sup>7</sup> Misapplied accounting policies resulted in a \$1.6 billion error.<sup>8</sup> As a result of ongoing review, Qwest still cannot certify the Company’s financial statements.<sup>9</sup>

On August 20, 2002, Oren G. Shaffer, Qwest’s Chief Financial Officer, sent a letter to Ms. Marlene Dortch, Secretary, FCC. In that *ex parte* submission Mr. Shaffer stated:

QCII’s internal investigations have now identified, with respect to the QC and QCC financial statements, (1) accounting transactions for QCC that did not comply with the requirements of GAAP, and (2) certain potential adjustments to the financial statements of QC that may be necessary to comply with GAAP. Additional analysis is in progress regarding these matters. The paragraphs in the Declarations of Judith L. Brunsting and Marie E. Schwartz that addressed GAAP compliance for QCC and QC were believed to be true when submitted. ...In light of the developments in the ongoing internal investigation, QCII is currently unable to certify that QCC’s or QC’s financial statements are accounted for consistently with GAAP, and the paragraphs of the Declarations are impacted accordingly.<sup>10</sup>

Though Qwest attempted to argue that these matters did not effect its showing that it was in compliance with section 272, the FCC obviously disagreed; and, three weeks after making these admissions, Qwest pulled its applications.

---

<sup>6</sup> [http://www.qwest.com/sbout/media/pressroom/1,1720,1070\\_archive.00.html](http://www.qwest.com/sbout/media/pressroom/1,1720,1070_archive.00.html)

<sup>7</sup> *Id.*

<sup>8</sup> Rocky Mountain News, Denver, CO (July 29, 2002), at 1B.

<sup>9</sup> Qwest filed its current 8-K Report with the Securities and Exchange Commission on August 19, 2002. [http://www.qwest.com/about/media/pressroom/1,1720,1091\\_archive.00.html](http://www.qwest.com/about/media/pressroom/1,1720,1091_archive.00.html)

<sup>10</sup> Ms. Brunsting and Ms. Schwartz were the Qwest witnesses on section 272 in the state proceeding, and the information filed in the states was obviously also impacted. A copy of Mr. Shaffer’s letter is attached to AT&T’s Motion.

The facts are clear and are not in dispute – Qwest and its section 272 affiliate are *not* in compliance with section 272. Qwest has announced its intent to create a wholly-new separate subsidiary, explicitly acknowledging the apparently irremediable shortcomings of its present section 272 affiliate. In light of these developments, the information which has recently been revealed, the new facts which will be presented by Qwest’s creation of a new affiliate and Qwest’s previous misrepresentations regarding its 272 compliance, the Commission should establish a process for the filing and evaluation of Qwest’s new separate subsidiary.

## **II. ARGUMENTS**

### A. The State’s Role in Review of a BOC’s Application

The FCC has stated in the past that it relies on the states to develop a comprehensive record for any BOC application brought before it for review under sections 271 and 272:

In requiring the Commission to consult with the states, Congress afforded the states an opportunity to present their views regarding the opening of the BOC’s local networks to competition. In order to fulfill this role as effectively as possible, state commissions must conduct proceedings to develop a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition in advance of the filing of section 271 applications.<sup>11</sup>

This Commission’s recommendation is based on an outdated record that has been shown to be inadequate for Qwest to obtain in-region, interLATA authority. With respect to this Commission’s section 272 determination, the FCC no longer must give this Commission’s past decision any weight in any future application filed by Qwest.

---

<sup>11</sup> *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997), ¶ 30 (“*Ameritech Michigan Order*”).

In the *Ameritech Michigan Order*, the Commission determined that, because the Act does not prescribe any standard for Commission consideration of a state commission's verification under section 271(d)(2)(B), it has discretion in each section 271 proceeding to determine that amount of weight to accord to the state commission's verification. The Commission has held that, although it will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the Commission's role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.<sup>12</sup>

In light of the new facts, new information and new issues that such a filing will contain, this Commission should reopen the record, take additional evidence and compile a new record that would support a finding that Qwest is in compliance with section 272 *before* Qwest submits a new application to the FCC. Otherwise, the FCC will be required to make a decision without a fully-developed state record and without a state commission recommendation.

B. It is Appropriate For This Commission to Determine Whether Qwest has Corrected the Problems

AT&T has clearly demonstrated the need for the Commission to reopen the record to take new evidence and develop a new record. The FCC agrees as well.

We fully acknowledge and are sensitive to limitations on state commissions' resources for purposes of developing their recommendation on a BOC's 271 application. We believe, however, that in making its recommendation on a BOC's section 271 application, a state commission may assist us greatly by providing factual information. When a BOC files a subsequent application in a state, it is important for the state commission to provide the factual information gathered and relied upon by the state commission concerning changes that have occurred since the previous application was filed. *Thus, for subsequent applications, we encourage state commissions to submit factual records, in addition to their comments, demonstrating that: (1) the BOC has corrected the problems identified in previous applications; and (2) there are no new facts that*

---

<sup>12</sup> *Application by 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*, CC Docket No.99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999), ¶ 20 (footnotes omitted).

suggest the BOC's actions and performance are no longer consistent with the showing upon which this Commission based any determination that the statutory requirements for certain checklist items have been met.<sup>13</sup>

The Commission should reopen the record and advise Qwest that it must file testimony and supporting documentation with this Commission for the Commission's review before it can confirm its prior recommendation.

C. Scope of Commission Review

The only remaining issue is to establish an acceptable and adequate procedure for reviewing Qwest's filing with this Commission. AT&T recommends that any procedure contain five essential components: 1) Qwest should file testimony and exhibits demonstrating that Qwest and its section 272 affiliate are in compliance with section 272; 2) discovery must be permitted of Qwest's filing; 3) competitive local exchange carriers ("CLECs") and other interested parties must be given an opportunity to file comments; 4) Qwest should have an opportunity to reply; and 5) the Commission should make a new recommendation that Qwest is in compliance with sections 271 and 272.

AT&T believes that a reasonably expeditious schedule can be agreed to for conducting this review, assuming that Qwest's initial filing is not incomplete and it responds timely to discovery.

1. Qwest Must File Additional Testimony To Support Compliance with Section 272.

Qwest has failed to demonstrate compliance with section 272. Indeed, it has acknowledged that, contrary to its previous representations to this Commission, it is not

---

<sup>13</sup> *BellSouth Louisiana II Order*, ¶ 21 (emphasis added).

in compliance with legal requirements. It must file a new case that documents the corrective measures it has taken to bring it into compliance with section 272.

Qwest has publicly admitted that questions have been raised regarding Qwest's plans to restate its financial statements. Recent newspaper articles discuss a proposed solution.

Steve Davis, Qwest's senior vice president of policy and law, said Tuesday that Qwest's financial uncertainties made it impossible for the company to show that its applications complied with generally accepted accounting principles (GAAP).

\* \* \*

He said Qwest has a plan that will allow it to refile the applications by the end of September. The company, which already is in the long-distance business outside its 14-state local-service territory, will create a new long-distance subsidiary only for the 14-state region, which includes Minnesota. That subsidiary will comply with GAAP because it will not be affected by any Qwest financial statement, he said.<sup>14</sup>

In short, Qwest is proposing to create a new section 272 affiliate. Creating a new affiliate will not, by itself, demonstrate compliance. Qwest must demonstrate, for example, that adequate controls are in place, the BOC and section 272 affiliate operate independently, intercompany service contracts have been posted to the Company's web site, and new intercompany agreements are reduced to writing and were entered into at arm's length. These are just a few of the compliance issues. Section 272 identifies a list of structural, transactional and discrimination safeguards that must be met.

47 U.S.C. § 272(b) and (c). The FCC has implemented regulations that impose additional safeguards.

---

<sup>14</sup> Star Tribune, Minneapolis, MN (Sept. 11, 2002), at D1.

Qwest is ignoring the fact that the BOC also must be in compliance with Generally Accepted Accounting Principles (“GAAP”). Creating a new subsidiary may resolve the section 272 affiliate’s GAAP problems but it will not resolve Qwest’s problems complying with GAAP. In any event, there are a multitude of factual issues that must be resolved before compliance with section 272 can be demonstrated.

Qwest should be required to file testimony that demonstrates compliance with section 272. The testimony should address each of the structural, transactional and discrimination safeguards of section 272 contained in the Act and FCC regulations.

2. Discovery

Parties must be provided an opportunity to conduct discovery. Results of discovery in earlier proceedings raised a host of issues. In fact, as a result of discovery, many shortcomings in Qwest’s case were discovered, necessitating corrective measures and the instituting of internal controls by Qwest. A rush to create a new subsidiary creates the possibility for shortcomings, deficiencies and noncompliance issues.

Discovery will help to verify Qwest has properly done its job.<sup>15</sup>

3. CLEC and Intervenor Testimony

The opportunity for CLEC and intervenor testimony is critical. This was demonstrated by the initial review of Qwest’s compliance with section 272. The Commission is required to develop an adequate record. Uncontested and untested assertions by Qwest do not result in an adequate record.

---

<sup>15</sup> Qwest created a new section 272 affiliate as a result of the merger. AT&T must point out that it was the creation of the present section 272 affiliate, QCC, and the transition to it that caused many of the problems for Qwest. In a rush to create the new section 272 affiliate and conduct business with it, transactions were not recorded and some transactions were not posted to the web for over six months, far longer than the ten days required by the FCC.



4. Qwest Reply Testimony

Qwest is the applicant. Qwest has the burden of proof at all times.<sup>16</sup> It is entitled to reply to the CLECs and intervenors.

5. Commission Recommendation

A fresh Commission evaluation and recommendation on Qwest's new separate subsidiary is imperative. It is appropriate for the Commission to review corrective measures and make a decision based on a new record that Qwest is now in compliance with section 272. The FCC is required by law to consult with the state commission on any application. 47 U.S.C. § 271(d)(B). The Commission should not forego the opportunity by failing to vote on a formal recommendation. It also provides the Commission an opportunity to explain the review the Commission conducted and the facts it relied on in rendering its decision.

### **III. CONCLUSION**

Qwest has withdrawn its application at the FCC because it could not demonstrate compliance with section 272. Qwest's own public statements indicate that it needs to take positive steps to rectify the problems. Qwest has publicly discussed ways to resolve its deficiencies; however, Qwest has stated that it does not intend to go back to the states for state review of the proposed solutions.<sup>17</sup> That is not for Qwest to decide, and its statements confirm only that the Company's arrogance is undiminished. The FCC has stated that states should review whether the BOC has corrected deficiencies found in prior applications and should submit a factual record to document the corrections. That process was followed previously; no reason has been presented why that process should

---

<sup>16</sup> *Ameritech Michigan Order*, ¶ 43.

<sup>17</sup> "Davis said Qwest will not have to go through more hearings at the state level in order to refile its applications with the FCC." *Star Tribune*, Minneapolis, MN (Sept. 22, 2002), at D1.

be changed. If anything, Qwest's previous misrepresentations underscore the importance of following that process again.

AT&T's motion is supported by and is consistent with prior FCC orders. The procedures AT&T proposes also are reasonable.

AT&T respectfully requests that the Commission reopen the record on Qwest's compliance with section 272, order Qwest to file testimony that reflects the corrective measure taken and documents its compliance, adopt the procedures set forth in AT&T's Motion, and adopt other reasonable procedures for conducting its review.

Dated this 18<sup>th</sup> day of September, 2002.

**AT&T COMMUNICATIONS OF THE  
PACIFIC NORTHWEST, INC.,  
TCG SEATTLE AND TCG OREGON**

---

Mary B. Tribby  
Letty S.D. Friesen  
Richard S. Wolters  
1875 Lawrence Street, Suite 1575  
Denver, Colorado 80202  
Telephone: (303) 298-6475