BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of US West Communications, Inc., Denver, Colorado, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify US West compliance with Section 271(c).	) Application No. C-1830))) SECTION 272 SATISFIED)))) Entered: September 19, 2001

BY THE COMMISSION:

1. Under the Telecommunications Act of 1996 (the Act), a Bell Operating Company (BOC) may not generally provide in-region interLATA service until it has received approval to do so from the Federal Communications Commission (FCC). 47 U.S.C. § 271. To receive Section 271 interLATA relief, a BOC must demonstrate that "the requested authorization will be carried out in accordance with the requirements of section 272."[1] Section 272 defines the separate structure and business relationship that the BOC must establish with its affiliate in order to provide interLATA services following such FCC approval.[2] On April 9, 1999, this Commission concluded that US West Communications, Inc. (US West) had established a separate affiliate, US West Long Distance, Inc., that fully complied with the requirements of Section 272.[3]

2. However, on June 30, 2000, the parent of US West merged with Qwest Communications International Inc. (QCI). Following that merger, US West was renamed Qwest Corporation (QC), and US

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[1] 47 U.S.C. § 271(d)(3)(B).

[2] *Id*. § 272.

[3] *See* US West Communications, Inc., Application No. C-1830, Nebraska Public Service Commission, April 9, 1999 at ¶¶ 161-163.

West Long Distance, Inc. was renamed Qwest Long Distance, Inc. (Qwest LD). The FCC order approving the merger required the merged entity to divest all of QCI's in-region interLATA operations prior to that date, in order to comply with Section 271.[4] Thus, after the closing, neither QCI nor its subsidiaries were permitted to provide the kinds of interLATA services in Nebraska that, following the merger, would have been required by Section 272 to be provided by a separate affiliate.

3. QC advised the Commission that following the merger, it had determined to revise its plans for providing interLATA services through Qwest LD. QC ultimately determined to rely instead on Qwest Communications Corporation (QCC), which had been a substantial long distance subsidiary of QCI prior to the merger, as QC's Section 272 affiliate. In light of this change, the Commission determined to supplement the record on its previous findings with respect to Section 272.

4. The Commission held a hearing for this purpose on July 9,2001, at which it heard testimony from Judith L. Brunsting of QCC and Marie E. Schwartz of QC. Cory W. Skluzak also presented testimony on behalf of AT&T Communications of the Midwest (AT&T). The witnesses submitted written testimony prepared in advance of the hearing, and the 272 transcripts and exhibits from the Seven State Collaborative Workshops were also incorporated into the record.

F I N D I N G S OF F A C T

5. The US West/Qwest merger involved a substantial transformation of US West into a new company with substantial additional telecommunications and other offerings. Following the merger, in the fall of 2000, the merged entity began to revisit its proposed use of Qwest LD as its designated Section 272 affiliate. In January 2001, Qwest decided to begin replacing

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[4] Memorandum Opinion and Order, *Qwest Communications International, Inc. and US West, Inc.*, 15 FCC Rcd 5376 ¶ 3 (2000).

Qwest LD as its designated Section 272 affiliate, in favor of integrating such future in-region interLATA service into the extensive facilities-based long distance network that QCC had established long before the merger.[5]

6. Following this decision, QC took steps to overlay on QCC the extensive Section 272 requirements to which Qwest LD had already been subject. This process took from approximately January 15 to March 26, 2001, and included a review of QCC's asset records to ensure against prohibited joint ownership, implementation of the special billing controls required for a Section 272 affiliate, realignment of employees, examination of contract provisions to ensure against recourse to QC, and a review of every transaction between QC and QCC following the merger.[6]

7. Since designation of QCC as QC's Section 272 affiliate, QC has adopted a wide range of internal training programs and accounting and other controls designed to prevent, as well as detect and correct, any noncompliance with Section 272 once QCC is permitted by the FCC to provide in-region interLATA service.[7]

Section 272(a)

[5] In the Matter of Qwest Corporation Filing Its Notice of Intention to File Section 271(c) Application with the FCC and Request for Commission to Verify Qwest's Compliance with Section 271(c) Application No. C-1830, Supplemental Direct Testimony of Marie E. Schwartz (filed May 29, 2001) (Schwartz Neb. Supp. Direct) at 8-9.

[6] In the Matter of Investigation into US West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996, Seven State Collaborative Section 271 Workshop, 6/7/01 Transcript, Public Version, June 7, 2001 (6/7/01 MS Tr.) at 143-145; In the Matter of Qwest Communications' Compliance with § 272 of the Telecommunications Act of 1996, Seven State 271 Collaborative Process, Rebuttal Testimony of Marie E. Schwartz (May 23, 2001) (Schwartz MS Rebuttal) at 7.

[7] 7/9/01 Neb. Tr. at 168-69.

8. QCC is a separate subsidiary.[8] Both QCC and QC are wholly-owned indirect subsidiaries of QCI. Neither QCC nor QC owns any stock in the other.[9]

Section 272(b)(1)

9. QCC does not, and QC has provided adequate assurances that QCC will not, jointly own with QC any telecommunications switching and transmission facilities, or the land and buildings on which such facilities are located.[10] QCC is not providing, and QC has provided adequate assurances that QCC will not provide, operations, installation or maintenance (OI&M) services in connection with QC's switching and transmission facilities. Nor does QCC accept, and QC has provided adequate assurances that QCC will not accept, such services from QC or any of its affiliates.[11]

Section 272(b)(2)

10. QCC maintains a chart of accounts separate from that of QC, has a separate ledger system and maintains separate accounting software which is kept at a separate geographic location.[12] The books, records and accounts of both QC and QCC are maintained in accordance with generally accepted accounting principles (GAAP).[13]

11. AT&T has made various claims that QC or QCC failed to timely bill or accrue for certain transactions occurring between the date of the Qwest/US West merger and the designation of QCC

[8] In the Matter of Qwest Corporation Filing its Notice of Intention to File Section 271(c) Application with the FCC and Request for Commission To Verify Qwest's Compliance with Section 271(c), Application No. C-1830, Supplemental Direct Testimony of Judith L. Brunsting (filed May 29, 2001) (Brunsting Neb. Supp. Direct) at 4-5.

[9] *Id.*

[10] *Id.* at 7-8.

[11] *Id.*

[12] *Id.* at 10-11.

[13] Brunsting Neb. Supp. Direct at 9-10; 7/9/01 Neb. Tr. at 173.

as Qwest's Section 272 affiliate. However, none of these claims involve any transactions that occurred after the overlay of Section 272 controls on QCC, which was completed on March 26, 2001.[14] Moreover, the record reveals no material instances of any such untimely billing or accrual with respect to Qwest LD transactions during the extensive period in which Qwest LD has served as the designated Section 272 affiliate.

12. The process of overlaying Section 272 controls on QCC took less time than the one-year period contemplated in the analogous subsection of Section 272(h) of the Act, 47 U.S.C. § 272(h). As noted above, that process involved a comprehensive review of all such transactions, with the assistance of numerous interviews conducted by Arthur Andersen, that included review of accrual and billing for these transactions.[15]

Section 272(b)(3)

13. QCC and QC do not have, and QC has adopted controls sufficient to ensure that they will not have, overlapping officers, directors or employees.[16] QC and QCC have provided lists of their respective officers and directors, which contain no overlap. QC also has conducted an analysis of the payroll registers of both entities, demonstrating no such overlap with respect to their respective employees.[17] QC also has implemented a variety of policies designed to physically distinguish and segregate QC employees from QCC employees, including the use of separate offices and distinguishing employee badges.[18] QC and QCC also have implemented policies designed to ensure that their respective employees do not share confidential information.[19]

[14] 7/9/01 Neb. Tr. at 253.
[15] 7/9/01 Neb. Tr. at 185.
[16] Schwartz Neb. Supp. Direct at 19-21.
[17] In the Matter of Qwest Corporation's Compliance with § 272 of the Telecommunications Act of 1996, Seven State 271 Collaborative Process, Testimony of Marie E. Schwartz (March 30, 2001) (Schwartz MS Direct) at 18 and Exh. MES-3.
[18] Schwartz MS Rebuttal at 18-19.
[19] Brunsting Neb. Supp. Direct at 14-15.

Section 272(b)(4)

14. QCC is separately capitalized by a non-BOC financial subsidiary of QCI. It has not requested, and has represented that it will not request, any co-signature that would allow a creditor to obtain recourse to QC's assets.[20] QC's intra-corporate debt is non-recourse to QC, and QCC's Master Services Agreement with QC provides that QCC's contracts are non-recourse to QC.[21]

Section 272(b)(5)

15. QCC has instituted procedures to ensure that all services performed by QC for QCC, and vice versa, are conducted on an arm's length basis, and that all such transactions are reduced to writing and posted on the Internet within ten days of their execution.[22]

16. QCC is currently posting these transactions on a timely basis.[23] QCC's predecessor (Qwest LD) posted transactions on average in less than six days.[24] Since the date it was designated as the Section 272 affiliate, on March 26, 2001, QCC's postings have been completed on average in less than five days.[25] These postings include information concerning rates, terms, conditions, frequency, number and type of personnel and level of

[20] Schwartz Neb. Supp. Direct at 21-22.

[21] Brunsting Neb. Supp. Direct at 16-17.

[22] Schwartz Neb. Supp. Direct at 23-30; Brunsting Neb. Supp. Direct at 18-19.

[23] 7/9/01 Neb. Tr. at 181-82.

[24] In the Matter of Investigation into US West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996, Seven State Collaborative Section 271 Workshop Exhibit (Multistate Exh.) S7-QWE-MES-13.

[25] Schwartz MS Direct at 24; Schwartz MS Rebuttal at 7-8; In the Matter of Investigation into US West Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996, Seven State Collaborative Section 271 Workshop, 6/7/01 Transcript, Public Version, June 8, 2001 (6/8/01 MS Tr.) at 37; Multistate Exh. S7-QWE-MES-9.

expertise.[26] To ensure compliance with the posting requirements, QC has implemented a process of monthly reconciliations of QCC's Internet postings,[27] which demonstrate that QCC had reduced any discrepancies between its postings and its billing detail to 0% for postings in April 2001.[28] Information provided by QC following the hearing demonstrates that this 0% discrepancy rate continued after monthly reconciliations for postings in both May and June 2001 as well.[29] QCC has also posted all of its affiliate transactions with QC back to the date of the merger.[30]

Section 272(c)

17. QC charges QCC the same rates, terms and conditions for goods, services, facilities and information, that QC would charge any other carrier.[31] The pricing used by QC for services provided to QCC follows the pricing hierarchy contained in Part 32.27 of the FCC's rules, 47 C.F.R. § 32.27, and the FCC's *Accounting Safeguards Order*.[32]

18. QC has also established training and other programs to ensure that QCC complies with the requirements of Section 272 on a going-forward basis.[33] QC has established a "Compliance Oversight Team," which is comprised of regulatory accounting,

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[26] See http://www.qwest.com/about/policy/docs/qcc/overview.html; Brunsting Neb. Supp. Direct at 18-19.
[27] 6/7/01 MS Tr. at 207-08; 6/8/01 MS Tr. at 141.
[28] 7/9/01 Neb. Tr. at 182.
[29] *See* E-mails from Joanne Ragge to Multistate distribution list (271superlist@psclist.state.mt.us) (July 30 and Aug. 8, 2001) (QCC Reconciliation of Billing Summaries).
[30] 7/9/01 Neb. Tr. at 219-20; Schwartz MS Rebuttal at 7.
[31] Schwartz MS Rebuttal at 23.
[32] *Id.* at 25. *See* Report and Order, *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd 17,539 (1996) *(Accounting Safeguards Order*).
[33] Brunsting Neb. Supp. Direct at 24-25; Schwartz Neb. Supp. Direct at 44-46.

legal and public policy experts, in order to assess and ensure compliance with the nondiscrimination obligations of Section 272(c) and other Section 272 requirements.[34] In addition, QC and QCC have established employee training programs to inform employees about the guidelines to restrict the sharing of nonpublic information between Qwest entities.[35]

Section 272(d)

19. QC and QCC have committed to pay for and undergo a biennial audit as required by Section 272(d).[36]

Section 272(e)

20. QC has committed not to discriminate in favor of QCC in the provision of telephone exchange service or exchange access service.[37]

Section 272(g)

21. Both QC and QCC have demonstrated their commitment to compliance with the limitations on joint marketing between the BOC and its Section 272 affiliate contained in Section 272(g).[38]

A N A L Y S I S A N D C O N C L U S I O N S

22. While the Section 272 structural and transactional separation requirements are extensive, they do not mandate that a BOC and its 272 affiliate be wholly unrelated. The 272

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[34] *Id.* at 25-33.
[35] In the Matter of Investigation into Qwest Corporation's Compliance with § 271 of the Telecommunications Act of 1996, Seven State Collaborative Process, Rebuttal Testimony of Judith L. Brunsting (May 23, 2001) (Brunsting MS Rebuttal) at 10.
[36] 7/9/01 Neb. Tr. at 189, 191-92; Schwartz Neb. Supp. Direct at 37-39.
[37] Schwartz Neb. Supp. Direct at 40.
[38] Brunsting Neb. Supp. Direct at 20-23; Schwartz Neb. Supp. Direct at 42.

affiliate is, of course, an "affiliate," defined in the Communications Act of 1934 (the Act of 1934) to include an entity "under common ownership or control with" another entity. 47 U.S.C. § 153(1). Accordingly, the FCC has rejected the argument that Section 272 requires "fully separate operations."[39]

23. The FCC has observed that a Section 272 finding will be informed by a review of the applicant's "past and present behavior."[40] Based on the record in this case of past compliance by Qwest LD, the comprehensive overlay of Section 272 controls on QCC as its successor, and the subsequent record of present compliance by QCC, the Commission concludes that QC has demonstrated that it complies, and has implemented controls sufficient to ensure that it will continue to comply, with each of the requirements of Section 272.

24. Section 272(a) provides that a BOC may not provide in-region interLATA services except through an affiliate that is both "separate" from the BOC and meets the requirements of Section 272(b). 47 U.S.C. § 272(a)(1)(A) and(B). QC has demonstrated that QCC meets the separation requirements of 272(a). Both are wholly-owned by the same parent rather than investors in each other. (Findings ¶ 8.) As discussed below, QC has also demonstrated that it satisfies the more specific structural and transactional separation requirements of Section 272(b).

25. Section 272(b)(1) requires that QCC "shall operate independently" from QC. QC has demonstrated that it complies with this requirement by showing that QC and QCC do not jointly own transmission and switching facilities or land and buildings on which such facilities are located or provide each other with

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[39] Third Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 14 FCC Rcd 16,299 ¶ 18 (1999) (*Third Order on Reconsideration*).

[40] Memorandum Opinion and Order, *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 20,543 ¶ 55 n.111 (1997) (*Ameritech Michigan Order*).

OI&M services in connection therewith (Findings ¶ 9), and by complying with the remaining provisions of Section 272(b).

26. Section 272(b)(2) provides that the 272 affiliate "shall maintain books, records and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate." 47 U.S.C. § 272(b)(2). The FCC further requires a Section 272 affiliate to maintain its books, records and accounts pursuant to GAAP, and separate from the BOC.[41] QCC has provided adequate assurances that it will follow GAAP in its operations as a Section 272 affiliate, that its books, records and accounts are separate from those of QC, and thus that QC will comply with Section 272(b)(2). (Findings ¶ 10.) The only evidence provided by AT&T that arguably suggests that QCC has not complied with this requirement of Section 272 relates to the timeliness of its accruals and billings. The most probative evidence on this issue is not how such transactions were recorded or billed before QCC was the Section 272 affiliate, but how they are currently recorded or billed, and how Qwest LD recorded and billed them when Qwest LD was the Section 272 affiliate. Both Qwest LD and QCC have accrued and billed (or been billed by QC) on a timely basis during their respective tenures as Section 272 affiliates in all material respects, and there has been no showing of any "systemic flaws" in this regard.[42] (Findings ¶ 11.) Our "predictive judgment regarding the future behavior of the BOC"[43] is, therefore, that QC will comply with Section 272(b)(2).

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[41] Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20,599 ¶ 328 (1998) (*BellSouth Louisiana II Order*); *Accounting Safeguards Order* ¶ 170.

[42] *See* Memorandum Opinion and Order, *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,* 15 FCC Rcd 3953 ¶ 412 (1999)(*BANY Order*), *aff'd sub nom. AT&T Corp. v. FCC,* 220 F.3d 607 (D.C. Cir. 2000).

[43] *Ameritech Michigan Order* ¶ 347.

27. Section 272(b)(3) provides that the 272 affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate." 47 U.S.C. § 272(b)(3). This requirement "simply dictates that the same person may not ***simultaneously*** serve as an officer, director or employee of both a BOC and its Section 272 affiliate."[44] QC has demonstrated through the record, its commitments, and its internal controls and safeguards, that it complies with this requirement. (Findings ¶ 13.) Section 272(b)(3) does not prohibit transfers by employees from employment by QC to QCC, or vice versa. Nor does it prevent reporting to a common parent, or overlaps of officers and directors between QCC (or QC) and its direct or indirect parent.[45] The FCC has expressly rejected the contention that permitting sharing of services between a BOC and its 272 affiliate would undermine the "separate employee" requirement.[46] Instead, the FCC has repeatedly reaffirmed the benefits "inherent in the integration of some services."[47]

28. Section 272(b)(4) prohibits the 272 affiliate from obtaining "credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]." QC has demonstrated, and there is no dispute, that QCC complies with this requirement. (Findings ¶ 14.)

29. Section 272(b)(5) requires QCC to "conduct all transactions with [QC] . . . on an arm's length basis with any such transactions reduced to writing and available for public inspection." QC has demonstrated that QCC complies with this requirement, and that such transactions are timely posted on QCC's website in accordance with the FCC's rules. (Findings ¶ 15.) The detail provided in these postings is equivalent to

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[44] Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* 11 FCC Rcd 21,905 ¶ 178 (1996) (*Non-Accounting Safeguards Order*) (emphasis added).

[45] *Non-Accounting Safeguards Order* ¶ 182; *Ameritech Michigan Order* ¶ 362.

[46] *Third Order on Reconsideration* ¶ 10.

[47] *Id*. at 18.

that found acceptable by the FCC in other Section 271 orders and need not be supplemented with further information concerning the volume of particular transactions.[48]

30. Section 272(c) requires the BOC to account for transactions with its 272 affiliate in accordance with FCC-approved accounting principles and prohibits the BOC from discriminating in favor of its Section 272 affiliate in the provision of goods and services. 47 U.S.C. § 272(c). QC has demonstrated that it complies with these principles, that it acknowledges this non-discrimination requirement, and that it has established a training program and system of controls designed to ensure its future commitment thereto. (Findings ¶¶ 17-18.)

31. Section 272(d) requires a biennial audit of the BOC's compliance with Section 272 by an independent auditor following receipt of interLATA authorization. QC and QCC have committed to comply with this requirement. (Findings ¶ 19.)

32. Section 272(e) imposes certain non-discrimination and accounting requirements on the BOC concerning telephone exchange and exchange access. QC has provided assurances that it will comply with this provision (Findings ¶ 20), which are consistent with those accepted by the FCC in prior cases.[49]

33. Section 272(g)(1) requires that a 272 affiliate "may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service" to do so as well. *Id.* § 272(g). Both QC and QCC have demonstrated their commitment to

[48] *BANY Order* ¶ 413; Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas,* 15 FCC Rcd 18,354 ¶¶ 405, 407 (2000).

[49] *See BellSouth Louisiana II Order* ¶ 354; *Non-Accounting Safeguards Order* ¶ 258.

compliance with Section 272(g). (Findings ¶ 21.) This is sufficient to comply with Section 272(g).[50]

34. In light of the foregoing findings and conclusions, QC has demonstrated that the provision of interLATA service by QCC following FCC approval will be carried out in accordance with the requirements of Section 272. QC has satisfied the requirements of Section 272.

O R D E R

35. IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Qwest Corporation has satisfied the requirements of 47 U.S.C. Section 272 of the Telecommunications Act of 1996 as set forth above.

36. MADE AND ENTERED at Lincoln, Nebraska, this 19th day of September, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

[50] *BANY Order* ¶ 419.