OAH Docket No. 7-2500-14487-2
PUC Docket No. P-421/CI-01-1372

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of a Commission Investigation Into Qwest's Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272)

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDATIONS

The above-entitled matter came before Administrative Law Judge (ALJ) Richard C. Luis for evidentiary hearing on January 7, 2002 and January 8, 2002, in the Small Hearing Room of the Minnesota Public Utilities Commission (MPUC), Suite 350, Metro Square, 121 Seventh Place East, St. Paul, Minnesota.

John Munn, Attorney at Law, Qwest Corporation (QC or Qwest BOC), 1801 California Street, Suite 3800, Denver, Colorado, 80202; and Jason Topp, Attorney at Law, Qwest Corporation, 200 South Fifth Street, Room 395, Minneapolis, Minnesota, 55402, appeared on behalf of Qwest Corporation and Qwest Communications Corporation (QCC or the 272 Affiliate).

Priti R. Patel, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared on behalf of the Minnesota Department of Commerce.

Greg Kopta, Attorney at Law, Davis, Wright, Tremaine, L.L.P., 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington, 98101, appeared on behalf of ATT.

Mary Crowson, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Residential Utilities Division of the Office of Attorney General.

Karen Hammel, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, and John Lindell, Public Utilities Analyst, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, Minnesota 55101, appeared in a neutral capacity on behalf of the staff of the Minnesota Public Utilities Commission.

NOTICE

Notice is hereby given that pursuant to Minnesota Statute § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, exceptions to this report, if any, by any party adversely affected must be filed within twenty (20) days of the mailing date hereof or such other date as established by the Commission's Executive Secretary or as agreed to by the Parties with the Commission's Executive Secretary.

Questions regarding filing of exceptions or replies should be directed to Dr. Burl Haar, Executive Secretary, Minnesota Public Utilities Commission, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, Minnesota 55101. Exceptions must be specific and stated and numbered separately. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the ALJ's recommendation who request such argument. Such request must accompany the filed exceptions or replies, and an original and 14 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions or replies, as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Commission may, at its own discretion, accept, reject or modify the Administrative Law Judge's recommendations and that said recommendations have no legal effect unless expressly adopted by the Commission as a final order.

STATEMENT OF ISSUES

The issues in this matter concern whether Qwest has demonstrated by a preponderance of the evidence that QCC (the 272 Affiliate) meets the requirements of Section 272 to enable Qwest Corporation to meet the requirement of Section 271(d)(3)(B) as part of QC's 271 application. Specifically, the issues are whether QCC has shown that it will operate independently from the Qwest BOC, in accordance with Section 272(b)(1); whether it will maintain books, records, and accounts separate from those maintained by the Qwest BOC, in accordance with Section 272(b)(2); that it will have separate officers, directors, and employees from the Qwest BOC, in accordance with Section 272(b)(3); that it will not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Qwest BOC, in accordance with Section 272(b)(4); that it will conduct all transactions with the Qwest BOC of which it is an affiliate on an arm's length basis, with any such transactions reduced to writing and available for public inspection, in accordance with Section 272(b)(5); that it and the Qwest BOC will comply with the joint marketing requirements set forth in the FCC's 1996 *Non-Accounting Safeguards Order* and Section 272(g); and that the Qwest BOC will not discriminate between the 272 Affiliate and any other entity

in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards, in accordance with Section 272(c).

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. PROCEDURAL BACKGROUND

1. On September 11, 2001, the Minnesota Public Utilities Commission (Minnesota PUC) issued a Notice and Order for Hearing in In the Matter of an Investigation Regarding Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 with Respect to the Provision of InterLATA Services Originating in Minnesota, docket no. P-421/CI-96-1114.

2. In the Notice and Order for Hearing, the Minnesota PUC stated that a thorough and orderly development of certain factual matters will be required in the above-mentioned docket and therefore, referred the matter to the Office of Administrative Hearing (OAH) for contested case proceedings.

3. In the Notice and Order for Hearing, the Minnesota PUC indicated that it seeks a Report from the OAH making proposed findings and recommendations on issues relevant to Qwest's compliance with Section 271 of the Telecommunications Act of 1996 (Act), one of which is Qwest's compliance with Section 272 of the Act.[1]

4. This matter was divided into six individual dockets involving issues arising from different aspects of the Act's standards for 271 approval. This docket addresses compliance with Section 272.

II. STATUTORY FRAMEWORK -- JURISDICTION AND AUTHORITY

5. The Telecommunications Act of 1996 conditions entry by a Bell Operating Company (BOC) into the provision of in-region interLATA ("long distance") services on compliance with certain provisions of section 271.[2] BOCs must apply to the Federal Communications Commission (FCC) for authorization to provide interLATA services originating in any in-region state.[3] The FCC must issue a written determination on each application no later than 90 days after receiving such application.[4]

6. Section 271 requires the FCC to make various findings before approving BOC entry. In order for the FCC to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate, with respect to each state for which it seeks authorization, that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[5] In order to obtain authorization under section 271, the BOC must also show that: (1) it has "fully implemented the competitive checklist" contained in section 271(c)(2)(B);[6] (2) the requested authorization will be carried out in accordance with the requirements of section 272;[7] and (3) the BOC's entry into the in-

region interLATA market is "consistent with the public interest, convenience, and necessity."[8] The statute specifies that, unless the FCC finds that these criteria have been satisfied, the FCC "shall not approve" the requested authorization.[9]

7. The FCC set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.[10] Together, these safeguards discourage and facilitate the detection of improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.[11] In addition, the safeguards are designed to ensure that BOCs do not discriminate in favor of their section 272 affiliates.[12]

8. The FCC must consult with the MPUC to verify whether Qwest has opened its local markets in Minnesota to competition in compliance with the requirements of Section 271(c).[13]

9. The Minnesota PUC has responsibility under Section 271(d)(2)(B) of the Act to advise the FCC whether to grant or deny Qwest's request to provide interLATA service within Minnesota.[14]

10. The FCC has defined a state commission's primary goal as development of "a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition. . ."[15] In prior orders, the FCC has stated that it will "consider carefully state determinations of fact that are supported by a detailed and extensive record."[16]

III. BACKGROUND

11. In early October 2001, Qwest Corporation (the Qwest BOC) filed its petition with the Minnesota PUC seeking a finding of compliance with Section 272 of the Act. In its petition, the Qwest BOC identified Qwest Communications Corporation (QCC or the 272 Affiliate) as the Qwest entity that will provide in-region interLATA services if Qwest is given Section 271 authority by the FCC.

12. In support of its petition, Qwest filed the Affidavits of Judith Brunsting and Marie Schwartz.[17] Ms. Brunsting is the Senior Director of 272 Business Development in the 272 Affiliate.[18] The purpose of Ms. Brunsting's testimony is to provide the Minnesota PUC with information relating to the progress the 272 Affiliate has made with regard to Section 272 compliance and to demonstrate that upon Qwest's receipt of in-region, interLATA authority in Minnesota, the 272 Affiliate will comply with Section 272.[19]

13. Ms. Schwartz is a Director in FCC Regulatory Accounting at the Qwest BOC and is responsible for ensuring that the Qwest BOC's regulatory accounting practices comply with Section 272.[20] The purpose of her testimony is to demonstrate that the Qwest BOC is prepared to satisfy all of the relevant requirements of Section 272 of the Act, and related FCC rules, following the receipt of in-region interLATA authority in Minnesota by the BOC's 272 Affiliate.[21]

14. The Department of Commerce responded to Qwest's petition and other filings through the testimony of Dr. Lee L. Selwyn.[22] Dr. Selwyn is President of Economics and Technology, Inc. (ETI), a research and consulting firm specializing in telecommunications and public utility regulation and public policy, and Dr. Selwyn has presented testimony before the Minnesota PUC on a number of occasions dating back to the mid-1970s.[23]

15. ATT responded to Qwest's petition and other filings through the testimony of Cory Skluzak.[24] Mr. Skluzak is employed by ATT as a policy analyst in the Access Management Group.[25]

16. In response to the filings by the Department of Commerce and ATT, Qwest filed additional affidavits of Ms. Brunsting and Ms. Schwartz and introduced the testimony of Dr. William Taylor.[26] Dr. Taylor is the Senior Vice President of National Economics Research Associates, Inc. (NERA). Dr. Taylor's testimony disputed economic and policy issues raised by Dr. Selwyn.[27]

17. Qwest, the Department and ATT participated in the hearing. Witnesses for the various parties were allowed to present short summaries of their testimony. Counsel for parties were given opportunity to cross-examine the witnesses. Counsel for parties were given the opportunity to conduct redirect of their respective witnesses, if necessary.

18. During the hearing, Dr. Selwyn was given an opportunity to respond orally to the written testimony of Dr. Taylor.[28] Qwest was provided an opportunity to file surrebuttal reply testimony by Dr. Taylor after the hearing. That surrebuttal reply testimony of Dr. Taylor was submitted on January 16, 2002.[29] Dr. Taylor's surrebuttal reply testimony is admitted to the record as Exhibit 39.

IV. QWEST'S "FAMILY OF COMPANIES."

19. Qwest consists of parent and subsidiary corporations, dividing areas of business or corporate functions among them.[30] Qwest Communications International, Inc. (QCI), is the ultimate parent corporation. One of QCI's wholly-owned subsidiaries is the Qwest Services Corporation (QSC). Two of QSC's wholly-owned subsidiaries are the Qwest Corporation (QC or the Qwest BOC) and Qwest Communications Corporation (QCC or the 272 Affiliate). The Qwest BOC provides local telephone service across a 14-state region as a Regional Bell Operating Company (RBOC). QCC is a facilities-based provider of interLATA services (long distance). It currently provides long distance services outside the RBOC's 14-state region.

V. APPLICATION OF SECTION 272.

20. Since Qwest owns an RBOC, Qwest can only originate interLATA telecommunications services in the RBOC's region through a separate affiliate that meets the standards set out in Section 272.[31] The separate affiliate requirement is incorporated into the Section 271 application process.[32] The FCC states that "compliance with section 272 is 'of crucial importance' because the structural,

transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field."[33] Failure to comply with the Section 272 requirements is an independent ground for denial of a Section 271 application.[34] While the obligation to comply with Section 272 does not start before the FCC grants interLATA authority in the RBOC's region, Qwest asserts that its 272 Affiliate currently meets the applicable standards.

21. Circumstances under which a separate affiliate is required are set out in subdivision (a) of Section 272. The specific requirements that the affiliate must meet are set out in subdivisions (b) through (g). Broadly speaking, the requirements set out a framework for permissible contacts and conduct between the BOC and an affiliated company that will provide interLATA telecommunications services in the same region where the BOC is the incumbent local exchange carrier.

22. Structural and transactional requirements are set out in subdivision (b) of Section 272. Nondiscrimination safeguards are set out in subdivision (c). The standards to be met in a biennial audit are set out in subdivision (d). Prohibitions against discrimination in the fulfillment of certain requests made by unaffiliated providers are set out in subdivision (e). Subdivision (f) has a sunset provision that is inapplicable here. The standards to be met when joint marketing is conducted between the BOC and its 272 affiliate are set out in subdivision (g). Subdivision (h) provided a one-year transition period from February 8, 1996, for any BOC to cease offering existing services that had become prohibited by the Act. Each of the Section 272 standards at issue in this matter will be discussed individually.

VI. SECTION 272(B)(1) -- THE "OPERATE INDEPENDENTLY" REQUIREMENT.

23. Section 272(b)(1) requires that the separate affiliate "shall operate independently from the Bell operating company." In its *Non-Accounting Safeguards Order*, the FCC indicated that "operating independently" does not have a common sense meaning when used in this context.[35] The FCC indicated that the restriction meant that there could be:

> (1) no joint BOC-affiliate ownership of switching and transmission facilities;
>
> (2) no joint ownership of the land and buildings on which such facilities are located;
>
> (3) no provision by the BOC (or other non-section 272 affiliate) of operation, installation, or maintenance services with respect to the 272 affiliate's facilities; and
>
> (4) no provision by the section 272 affiliate of operation, installation or maintenance services with respect to the BOC's facilities.[36]

24. When rules implementing the statute were adopted, the FCC was urged to adopt a wider interpretation of the requirement for the BOC and 272 affiliate to operate independently. The FCC responded:

> We decline to read the "operate independently" requirement to impose a blanket prohibition on joint ownership of property by a BOC and a section 272 affiliate. Rather, we limit the restriction to joint ownership of transmission and switching facilities and the land and buildings where those facilities are located. We conclude that the prohibition we have adopted should ensure that the section 272 affiliate's competitors gain nondiscriminatory access to those transmission and switching facilities that both section 272 affiliates and their competitors may be unable to obtain from other sources.[37]

25. In addition to requiring that a BOC and its Section 272 affiliate do not share ownership of switching and transmission facilities, the BOC and 272 affiliate are also prohibited from contracting with each other for one entity to provide operating, installation, or maintenance services with respect to the other's facilities. The FCC has stated:

> As stated above, we believe that a prohibition on joint ownership of transmission and switching facilities is necessary to ensure that a BOC complies with the nondiscrimination requirements of section 272. Consistent with that approach, we further interpret the term "operate independently" to bar a BOC from contracting with a section 272 affiliate to obtain operating, installation, or maintenance functions associated with the BOC's facilities. Allowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors.[38]

26. Qwest represents that section 272(b) of the Act prohibits a 272 affiliate from jointly owning telecommunications, transmissions and switching facilities or the land or the building on which the facilities are located and states that the 272 Affiliate "will not jointly own any transmission and switching facilities in the future."[39]

27. Qwest had planned to propose Qwest Long Distance (QLD, formerly known as US West Long Distance) to be its 272 Affiliate.[40] QLD was a long distance reseller, not a facilities-based carrier.[41] In January 2001, Qwest decided that its existing, out-of-region interLATA carrier, QCC, would be its 272 Affiliate for in-region interLATA services.[42] QCC currently owns some network facilities and the Qwest BOC will be transferring other facilities to QCC. Such facilities transfers are being monitored on a quarterly basis.[43]

28. The Department of Commerce requested specific information as to what transmission and switching facilities will be used by QCC to provide interLATA long distance services and who owns those facilities. Information regarding the terms of use, routing of Minnesota interLATA calls, nature of the traffic routed by those facilities, and documentation of collocation for switching facilities was also requested.[44]

29. Qwest states that it is "still in the process of completing its network strategy."[45] Qwest has not provided documentary evidence that supports its assertion that the Qwest BOC and the 272 Affiliate will not jointly own transmission and switching facilities in the future. Qwest asserts that no such documentation exists.[46] There has been no description of Qwest's asset deployment plan within its network strategy.[47] Qwest has stated that the Qwest BOC and the 272 Affiliate "will not jointly own any network facilities or share OI&M functions."[48]

30. Qwest has not met its burden of proof that the Qwest BOC and 272 Affiliate will "operate independently" because Qwest has not demonstrated by a preponderance of the evidence that the entities will not jointly own any transmission and switching facilities or the land and buildings where those facilities are located if and when granted authority to re-enter the interLATA market.

31. Qwest can meet its burden of proof that its 272 Affiliate will "operate independently" by completing an asset deployment inventory that shows Qwest BOC and the 272 Affiliate do not jointly own any transmission and switching facilities and the land and buildings where those facilities are located at the time when QCC is authorized to enter the interLATA market in the Qwest BOC service region.

VII. SECTION 272(B)(2) -- THE SEPARATE "BOOKS, RECORDS, AND ACCOUNTS" REQUIREMENT.

32. Section 272(b)(2) sets out the requirement that a separate 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 ….

33. In the *Accounting Safeguards Order*, the FCC determined that Section 272 affiliates must maintain their books, records, and accounts in accordance with Generally Accepted Accounting Principles ("GAAP").[49]

34. Qwest has indicated that both the Qwest BOC and the 272 Affiliate follow GAAP, as adopted by the FCC in Docket 96-150; maintain separate charts of accounts; maintain separate sets of financial statements; maintain expenditure controls; maintain separate ledger systems; maintain separate software systems on hardware located at separate facilities; have separate federal tax identification numbers; pay taxes and fees to various taxing and regulatory agencies separate from one another; and separately report to state and federal regulatory agencies.[50]

35. QCC's general ledger software is the PeopleSoft FRED system and that software is operated on computers located in Arlington, Virginia.[51] The Qwest BOC's general ledger software is the PeopleSoft PROFIT system and that software is operated on computers located in Denver, Colorado.[52]

36. The Qwest BOC has commissioned a report by Arthur Andersen, L.L.P., that found "no material departures from GAAP."[53] The Qwest BOC files biennial

reports with the FCC using the Automated Reporting Management Information System (ARMIS).[54] Qwest failed to account properly for transactions occurring in 2000.[55] ATT maintains that this failure constitutes a basis for denying Qwest's application under Section 271. This failure was attributed to the merger transition between US West and Qwest.[56] Transactions from 2000 were identified between the Qwest BOC and QCC in a special accounting process conducted in 2001 and those transactions were billed with interest.[57]

37. The FCC requires providers to account for transactions using GAAP. In 271 applications, the past failure of a provider to comply with GAAP is not conclusive of future noncompliance.[58] Qwest is not obligated to meet the requirements of Section 272 before the grant of interLATA authority. Qwest must show that it will comply once that authority has been granted. Qwest has described controls to assure ongoing compliance with GAAP for future transactions. Qwest has demonstrated by a preponderance of the evidence that the Qwest BOC and the 272 Affiliate will comply with Section 272(b)(2).

VIII. SECTION 272(B)(3) -- THE "SEPARATE EMPLOYEES" REQUIREMENT.

38. Section 272(b)(3) sets forth the third structural and transactional requirement that :

> The separate affiliate required by this section--
>
> . . .
>
> (3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;[59]

39. Qwest indicated that the Qwest BOC and the 272 Affiliate each do not have any officers or directors who are officers, directors or employees of the other entity.[60] There are individuals who share officer and director functions between the 272 Affiliate and other non-Qwest BOC entities. For example, Joseph P. Nacchio is identified as the Chairman, Chief Executive Officer, and President of QCC.[61] Mr. Nacchio is CEO of Qwest Communications International (QCI), the parent company for the entire Qwest family of companies. The relationship between the officers, directors, and employees of the Qwest BOC and the 272 Affiliate includes:

(a) The Qwest BOC has employees, officers and directors on a payroll that is separate from the payroll for 272 Affiliate's employees, officers and directors.

(b) No director of the 272 Affiliate will also act as a director of the BOC as long as Section 272 remains in force.

(c) Employees for the Qwest BOC, the 272 Affiliate and the Qwest Services Corporation (QSC) will wear different colored dots on their badges to identify their payroll employer.[62] The Qwest BOC employees wear blue dots, QCC employees wear red dots, and QSC employees wear yellow dots.[63] QSC

provides legal services, public policy advice, and other services on a contract basis to both the Qwest BOC and the 272 Affiliate.

(d) The Qwest BOC and 272 Affiliate employees may occupy the same Qwest buildings and in some cases will be located on the same floors, but employees for the Qwest BOC, the 272 Affiliate and QSC will have nameplates with a color identifying their payroll employer.[64]

(e) While employees of the Qwest BOC and the 272 Affiliate will be on only one affiliate's payroll,[65] any employee of either of the two affiliates may be "loaned" to the other for up to four (4) months in a 12-month period.[66] Loaned employees would work full-time for the borrowing entity. Loaned employees will be under the supervision and authority of the borrowing entity, not the company issuing the employee's paycheck.[67] Loaned employees will continue to wear a badge with a color designating each employee's payroll employer.[68] While not currently occurring, such employee loans would be priced, identified, and made available to competing interexchange carriers (IXCs).[69]

(f) Employees of the Qwest BOC or the 272 Affilate may be assigned to perform "services" on behalf of the other entity under an affiliate agreement entered into between the two entities without those employees being considered to have been "loaned" to the other entity.

(g) Administrative services such as payroll,[70] human resources,[71] accounting and financial functions,[72] and computer systems[73] will be provided by the Qwest BOC or QSC to the 272 Affiliate. The Qwest BOC operates the internal computer system (Qwestnet) that provides access to shared corporate information and email.[74] The description of Qwestnet indicates that the 272 Affiliate's access to underlying data is restricted. There is no reciprocal statement indicating that employees from the Qwest BOC are restricted from accessing proprietary data of the 272 Affiliate.[75]

(h) Persons to be hired by Qwest are presented with an offer letter and attachment identifying terms of the employment relationship.[76] The offer letter contains a blank for filling in the particular entity to be the payroll employer.[77] The letter characterizes "Qwest" as the employer. The attachment describes the duties of the employee as running to "Qwest." Confidential information is described as information held by "Qwest" and not generally known to third parties.[78] There is no description of any obligation to maintain information confidential from any affiliate in the Qwest "family of companies."

(i) The Qwest BOC will provide billing and collection services on behalf of the 272 Affiliate,[79] and Qwest BOC customer service representatives will provide billing inquiry services for and on behalf of the 272 Affiliate.[80]

(k) Qwest has established policies for employees to follow when an employee terminates employment with one Qwest company and accepts employment with another Qwest company.[81]

(l) Employees of Qwest must review a Code of Conduct manual and sign a nondisclosure statement agreeing not to share nonpublic information with third parties.[82] The Code of Conduct manual states that confidential information can be used "for Qwest business only."[83] The Code of Conduct manual does not expressly state that information must be maintained as confidential between entities in the Qwest "family of companies." In its section entitled "Government Relations," the Code of Conduct states that:

> State and federal regulatory requirements govern the relationship and business transactions between the various affiliates of Qwest. These requirements cover:
>
> * * *
>
> Information flow between entities ….[84]

No other portion of the Code of Conduct describes this "information flow." Employees are directed to contact Legal Affairs or Regulatory Accounting for further information.[85] Legal Affairs, as Qwest is currently structured, is provided as a service to the Qwest BOC and QCC by QSC. Regulatory Accounting is part of the Qwest BOC.

40. Qwest's policy of contracting services between entities can result in a Qwest BOC employee working 50% of the day performing services for the Qwest BOC and the remaining 50% of the day performing services for the 272 Affiliate (QCC).[86] Similarly, a QCC employee could provide services to the Qwest BOC in the same manner. Contracting services does not change the formal employer of the employee and does not change the supervisory relationship governing the employee.

41. Qwest's contracting of services between the Qwest BOC and QCC is governed by Article 4 of the Master Services Agreement between these entities, which states:

> Qwest Corp [the BOC] hereby declares and agrees that it has engaged in an independent business and will perform its obligations under this Agreement as an independent contractor and not as the agent or employee of QCC [the 272 affiliate]; that Qwest Corp does not have the authority to act for QCC or to bind QCC in any respect whatsoever, or to incur any debts or liabilities in the name of or on behalf of QCC; that any persons provided by Qwest Corp shall solely be the employees or agents of Qwest Corp under its sole and exclusive direction and control. Qwest Corp and its employees or agents are not entitled to QCC's unemployment benefits as a result of performing under this Agreement . . . Qwest Corp shall indemnify and hold QCC harmless for

any causes of action arising out of Qwest Corp's liability to its employees or agents.[87]

42. Qwest asserts that its Code of Conduct governs "information flow between entities" and that this ensures that confidential information is not shared.[88] The portion of the Code of Conduct cited merely states that, "The rules are often complex and may create special requirements for record keeping, reporting and regulatory approvals."[89] Employees are directed to "[c]ontact Legal Affairs or Regulatory Accounting for questions regarding the relationships or business dealings between Qwest affiliates."[90] This language is inadequate to inform any employee of QC or QCC what information is confidential and that such confidential information must not be shared across the BOC/272 Affiliate boundary.

43. Qwest has no policy (beyond the vague statement in the Code of Conduct) to restrict the sharing of confidential information transmitted by e-mail. Qwest has not identified any process by which employees of Qwest can be accurately and immediately identified, including in the e-mail system, as to which employees work for which entity in the Qwest "family of companies."

44. Qwest has indicated that the sharing of confidential information between employees of the Qwest BOC and QCC would only be appropriate where that information was, "reduced to writing, priced according to the rules, the information was paid for, and it was provided to third parties."[91] Qwest intends to rely on the separation of employees to prevent sharing of confidential information rather than offer confidential information to third parties.

45. Qwest has proposed a color identifying system designed to indicate whether an employee is accessing information appropriately. But a "blue dot" employee (of the Qwest BOC) may be working in a "red" area (of QCC) by contract. That blue dot employee may be on loan to QCC. Or that blue dot employee may be in the red area improperly. Conversely, a "red dot" employee could be in the blue dot area under the same variety of circumstances. The colored dot on the employee's badge does nothing to clarify whether that employee's presence is appropriate since Qwest has proposed so many ways in which these employees will be working together. Similarly, Qwest has proposed situations where supervisory staff could be loaned or contracted for among the affiliates.

46. The mechanisms proposed by Qwest are inadequate to distinguish among employees of Qwest BOC, QCC, and QSC. The mechanisms go only so far as identify each individual employee as separate (based on payroll employer) from other employees. But the actual supervision of employees and handling of confidential information is proposed to be independent of the actual payroll employer of each employee. Qwest's proposal for handling confidential information held by employees who cross affiliate company boundaries is inadequate to meet the nondiscrimination standard. In addition, there is no description as to how information will be managed on the Qwestnet network. The payroll employer of email recipients is not readily identifiable. Qwest expects that employees moving from one affiliate to another in the

Qwest family of companies will retain the same email address. There is no ongoing assurance that the recipient of the information will recognize that the information is confidential and act appropriately.

47. The failure to identify adequately the employer of each employee within the shared information technology system (Qwestnet and e-mail) renders the improper sharing of confidential information (intentional or inadvertent) nearly certain. Since Qwest is relying on the separation of employees to meet the nondiscrimination provision, the proposed information technology system process must actually separate the employees from the information. Failure to do so under these circumstances violates the requirement of Section 272(b)(3) that the 272 Affiliate have separate employees from the BOC.

48. Qwest has not demonstrated by a preponderance of the evidence that it has sufficient safeguards in place to prevent the improper communication of confidential information between the Qwest BOC and the 272 Affiliate.

49. Qwest's policy of lending BOC employees to the 272 Affiliate violates the requirement of Section 272(b)(3) that the separate affiliate have separate employees. The policy of loaning employees contradicts the Master Services Agreement and constitutes a provision of services under terms and conditions not available to unaffiliated interLATA providers since the employees are under the supervision of the borrowing entity. Continued existence of this policy results in Qwest not meeting its burden of proof that the Qwest BOC and QCC will maintain separate employees if and when it obtains authority to enter the interLATA market.

50. The Department of Commerce asserted that the "sharing" of employees by the Qwest BOC and QCC under the terms of the Master Services Agreement constitutes a failure to maintain "separate employees" as required by Section 272(b)(3). The contracting for services between affiliates is expressly permitted by the FCC, so long as the other requirements, such as non-discrimination and retention of supervisory responsibility, are met.[92]

51. The Department of Commerce asserted that QCC should be required to compensate the Qwest BOC for intangible benefits received when experienced employees transfer from the BOC to the 272 Affiliate. The Department of Commerce recommended that a fee be imposed on transfers akin to that adopted by the California PUC.[93] The California PUC adopted a 25% "employee transfer fee" to be applied against the annual salary of any Pacific Bell employee that is transferred to an affiliate.[94]

52. The Department of Commerce maintains that imposing compensation for such employee transfers is important to prevent the cross-subsidization of the 272 affiliate from the BOC. The argument is that the 272 affiliate gains high level, experienced professionals from the BOC, while the BOC receives no comparably valuable employees or any compensation in return.[95] Qwest pointed out that no

interLATA exchange carrier (IXC) compensates any former employer for the training received or added value of that employee's experience.

53. The obligation to maintain separate employees does not prevent employees from changing employment between BOC-affiliated companies. There is nothing in the separate employee requirement that would require compensation for employees moving between affiliated companies. The California PUC decision appears to address concerns of appropriate pricing of tariffed services, not the requirements of Section 272. Requiring an employee transfer fee would impose a cost on the 272 Affiliate that is not required of competing IXCs.

54. There is legitimate concern over employee transfers as a means of evading the separate employee requirement. Requiring Qwest to maintain logs of employees hired between affiliates, with sufficient detail to determine the job titles of those employees and their length of service is a means of detecting such evasion. Such a listing is required to be developed during the biennial audit required by Section 272(d).[96] Maintaining that record on an ongoing basis can provide a means of self-policing by the Qwest BOC and the 272 Affiliate. As with the audit procedure, the transfers should be recorded between all Qwest affiliate companies. Similarly, requiring all such transfers to comply with all of the formalities of new hires is another means of ensuring that the transfers do not avoid other requirements of Section 272.[97]

55. The management structure of QCC (the 272 Affiliate) is divided between a Board of Directors and corporate officers. As of June 1, 2001, the QCC Board consisted of two individuals.[98] Both of these individuals were also officers of QCC. These same two individuals are also officers of Qwest Communications International, Inc. (QCI - the ultimate parent for the Qwest family of companies). In addition to these two officers, QCC has another eight officers. The titles of these individuals indicate that they also have officer functions in either QSC (the immediate parent of QCC) or QCI.[99] The QCC Director of Finance is a Qwest Services Corporation employee.[100] Ms. Brunsting is the only employee of the 272 Affiliate responsible for administration and public policy.[101] Ms. Brunsting reports directly to Carol Kline, who is an employee of Qwest Service Corporation.[102]

56. The Qwest BOC paid QCC for "management services" provided by Joseph P. Nacchio.[103] The Qwest BOC paid QCC for "management services" provided by a number of QCC supervisors, including Augustine M. Cruciotti.[104] Mr. Cruciotti is listed as a Director of the Qwest BOC.[105] Qwest explained that Mr. Cruciotti terminated his status as an employee of QCC on December 15, 2000.[106] He remains a Director for the Qwest BOC and an officer and employee of QSC (the parent company of both the Qwest BOC and the 272 Affiliate).[107]

57. Another Qwest executive, Robin Szeliga, is simultaneously Vice President and Chief Financial Officer of QCI, an officer of QCC, an officer of QLD, and an officer of QSC.[108] Ms. Szeliga signed a reporting statement on behalf of the Qwest BOC that was required to be signed by an officer of the BOC. Qwest described the action as an error,[109] and explained that her action resulted from Ms. Szeliga's position having

"expanded or changed several times in the past year due to reorganizations resulting from the merger and the decision to use QCC as the 272 Affiliate."[110]

58. The management structure of the Qwest BOC is divided between a Board of Directors and corporate officers. As of June 1, 2001, the Qwest BOC Board consisted of two individuals.[111] These same two individuals are officers of QCI. One of these two individuals is an officer of Qwest BOC.[112] QCC paid the Qwest BOC for a substantial number of employees providing supervision or management of QCC employees.[113]

59. ATT and the Department of Commerce asserted that the proper analytical framework for separate employees, officers, and directors was whether such persons performed separate functions. Qwest asserted that the obligation was met solely by identifying the payroll employer, regardless of what that person was doing. The FCC has addressed whether common corporate officers and directors between parent companies and affiliates meets the separate officers and directors requirement of Section 272(b)(3). In the Ameritech Michigan Order, the FCC stated:

> We do not find it necessary to examine in detail the various corporate reporting relationships that TCG and Ameritech debate in their pleadings to find that Ameritech does not comply with section 272(b)(3). The fact, however, that the Presidents of both Ameritech Michigan [the BOC] and ACI [the 272 affiliate] report to the same Ameritech Corporation Executive Vice President, as Ameritech [the common parent] acknowledges, underscores the importance of the separate directors requirement. Generally, corporate officers report to their board of directors, and, in the case of the BOC interLATA affiliate, that board is to be a separate body than the BOC's board. Given that the principal corporate officers of Ameritech Michigan and ACI report to the same Ameritech Corporation officer, it is clear that as a practical matter (as well as a matter of law), Ameritech Corporation is the corporate director for both Ameritech and ACI.[114]

60. The arrangement of officers and directors created by Qwest goes beyond the common reporting of officers to a single superior outside of the particular corporate entity. The directors and officers of both the Qwest BOC and QCC are integrated within each company and the officers and directors of each company are integrated into the corporate structure of the common parent. Some of these same individuals have provided management between the Qwest BOC and its 272 Affiliate by contract. This structure defeats the purpose of the separate officers and directors requirement, described by the FCC as follows:

> We recognize that corporations are ultimately responsible to their shareholders and that, in the context of any parent-subsidiary relationship, complete independence of management of the subsidiary will not always be possible. However, in enacting section 272(b)(3), Congress obviously required that the BOC and the interLATA affiliate be separately managed

> to at least some degree, and one of the affirmative requirements of that provision is the separate director requirement.[115]

61. Qwest has not attempted to show that independence of management is impossible here.[116] Qwest relies upon language in the *Non-Accounting Safeguards Order* to support its contention that it has met the requirements of Section 272(b)(3) regarding the officers and directors of the Qwest BOC and QCC. That language states:

> the section 272(b)(3) requirement that a BOC and a section 272 affiliate have separate officers, directors, and employees 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."[117]

62. The FCC explicitly mentioned that passage from the *Non-Accounting Safeguards Order* in the *Ameritech Michigan Order.*[118] The law governing the corporate relationships involved in that application resulted in the BOC and the 272 affiliate having, as a factual matter, different directors.[119] Despite this formal separation between the directors of the two companies, the FCC held that, "[the 272 affiliate] lacks the independent management that Congress clearly intended in enacting the separate director requirement." [120] That separation is not to be "easily nullified merely through a legal fiction."[121] The same absence of independent management results from the management structure Qwest created for the Qwest BOC and QCC.

63. The integration of management structure proposed by Qwest conflicts with the FCC's interpretation of what constitutes separate officers and directors. The statement in the *Non-Accounting Safeguards Order* (that "separate" just means not the same person in each position) was significantly qualified by the FCC in its *Ameritech Michigan Order*, where reporting relationships (similar to those in the Qwest family of companies) were not a concern, because of the existence of independent directors to oversee the conduct of the corporate officers. There are no such independent directors in the Qwest proposed structure. The FCC's statement that the congressional intent of the separate officers and directors requirement was "obviously" to require separate management compels a finding that the structure proposed by Qwest does not meet the statutory standard.

64. Qwest has frequently cited the Biennial Audit process as assurance that any noncompliance will be rectified in a variety of areas. The audit process directs auditors to examine the corporate management structure, including reporting "to determine the independence of the affiliate."[122] Similarly, the audit procedures require examination of all services rendered by all affiliates to the 272 affiliate.[123] The auditors are directed "to determine whether any departments [of the 272 affiliate] report either **functionally or administratively** (**directly or indirectly**) to an officer of the BOC."[124] As this language makes clear, the issue is not the organizational chart, but the underlying structure of relationships used to manage the organization. The practice of having the same persons who are QCC officers and directors occupying positions elsewhere in the Qwest corporate management structure is the sort of functional, indirect reporting that is identified as a concern in the audit process.

65. Qwest has not demonstrated by a preponderance of the evidence that it has separate officers and directors between the Qwest BOC and its 272 Affiliate as required by Section 272(b)(3).

IX. SECTION 272(B)(4) -- PROHIBITING ANY CREDIT ARRANGEMENT THAT WOULD PERMIT RECOURSE BY A 272 AFFILIATE CREDITOR TO THE ASSETS OF THE BOC.

66. Section 272(b)(4) sets forth the requirement that a 272 affiliate:

> may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company.[125]

67. In the *Non-Accounting Safeguards Order*, the FCC interpreted Section 272(b)(4) as prohibiting a BOC, the parent of a BOC, or a non-section 272 affiliate of a BOC from co-signing a contract or other instrument with a section 272 affiliate that would permit a credit or recourse to the BOC's assets in the event of default by the section 272 affiliate.[126]

68. Qwest maintains that creditors of the 272 Affiliate do not and will not have recourse to the assets of the Qwest BOC. Qwest asserts that the 272 affiliate does not and will not make available to any creditor recourse to the BOC's assets indirectly through a non-272 Qwest Affiliate.[127] The 272 Affiliate is capitalized separately from the Qwest BOC, through Qwest Capital Funding, Inc., another affiliate of QCI.[128]

69. The integration that Qwest contemplates between its Qwest BOC and the 272 Affiliate requires the former to provide an extensive array of services for and on behalf of the latter.[129] These services are governed by the Master Services Agreement. The Master Services Agreement provides for payment by the 272 Affiliate 30 days after receipt by the 272 Affiliate of the invoice from the Qwest BOC. [130] DOC asserts that this arrangement has the effect of creating effectively permanent financing of QCC's purchases of BOC services for a period in excess of 30 days.

70. DOC maintains that the accounts receivable approach described by Qwest would place the Qwest BOC in the position of an unsecured creditor in the event of a default on the part of the 272 Affiliate. The Qwest BOC would be in the same position as any other unsecured creditor insofar as its ability to "collect" the debt from the 272 Affiliate.[131]

71. There is no improper provision of operating capital to the 272 Affiliate by maintaining a net account receivable from the 272 Affiliate, so long as the Qwest BOC offers the same terms and conditions in its accounting for receivables from unaffiliated entities. There is no requirement under Section 272 for the Qwest BOC to treat its separate affiliate less advantageously than competitors.

72. Offering the same terms and conditions to all providers of intraLATA services is the standard for compliance with several Section 272 requirements,

including the issues raised regarding accounts receivable. The Master Services Agreement, Amendment No. 1, requires a late fee for unpaid balances in accounts receivable.[132] The record contains copies of bills showing exactly this type of unpaid balance.[133] However, these bills indicate that the Qwest BOC had not levied late fees on the balances carried over by the 272 Affiliate, despite the terms in the amended Master Services Agreement imposing such a late fee.[134] There is no evidence from Qwest that late fees are not imposed on competing interLATA providers with overdue balances.

73. Despite the failure to charge late payment fees to the 272 Affiliate in the same manner as late fees are charged to other IXCs, failing to properly manage accounts receivable for services provided by Qwest does not constitute recourse to the assets of the Qwest BOC. The no recourse standard being imposed by Section 272(b)(4) is directed at third party creditors, not the 272 Affiliate itself. Failure to manage the accounts receivable to ensure timely payment for services provided to the 272 Affiliate does not constitute recourse to the assets of the Qwest BOC. The record shows that Qwest has managed receivables from the 272 Affiliate under terms more advantageous than those imposed on unaffiliated interLATA providers. That situation existed as recently as October 2001.[135] While this practice is, in effect, the Qwest BOC affording the 272 Affiliate an interest-free line of credit, the improper conduct relates to the nondiscrimination requirements, not the nonrecourse provisions. Qwest has met its burden of proving that the Qwest BOC and 272 Affiliate will operate in compliance with Section 272(b)(4).

X. SECTION 272(B)(5) – CONDUCTING ALL TRANSACTIONS BY THE 272 AFFILIATE WITH THE BOC ON AN ARM'S LENGTH BASIS.

74. Section 272(b)(5) sets forth the requirement that a 272 affiliate:

> shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.[136]

75. The Qwest BOC and the Qwest 272 Affiliate are wholly owned subsidiaries of the Qwest Services Corporation.[137] The organizational chart of the Qwest corporate structure indicates that both the 272 Affiliate and the Qwest BOC report to the Qwest Services Corporation.[138] Qwest Services Corporation provides legal and policy support services for all Qwest affiliates, including the Qwest BOC and the 272 Affiliate.[139]

76. In answering interrogatories sent by the Department to Qwest regarding the extent to which the Qwest BOC and the 272 Affiliate were engaging in joint marketing, a policy support analyst with the Qwest Services Corporation answered the questions.[140]

77. Ms. Brunsting is the only employee of the 272 Affiliate responsible for administration and public policy.[141] Ms. Brunsting reports directly to Carol Kline, who is

an employee of Qwest Service Corporation.[142] The Director of Finance for the 272 Affiliate is an employee of the Qwest Services Company. Qwest Services Company provides a number of corporate accounting functions for the 272 Affiliate. The 272 Affiliate does not have its own Vice President or Director of Finance.[143] Persons holding officer, director, and supervisor positions within the Qwest family of companies also provide "management services" under contract to the Qwest BOC.

78. Qwest repeatedly stated that, for transactions between the BOC and the 272 Affiliate, it would "conduct all transactions on an arm's length basis, reduce them to writing, and make them available for public inspection."[144] DOC pointed out that QSC will be providing legal and policy planning services to each side of the Qwest BOC-QCC transaction. The separation between the Qwest BOC and QCC is bridged by the provision of services to both entities by the same employees who will be in possession of confidential information belonging to each entity not being offered to competitors on a nondiscriminatory basis. That separation is also bridged by the integrated management structure that places officers and directors in positions where they cannot exercise independent judgment regarding the interests of the 272 Affiliate.

79. Entities dealing with each other cannot depend upon the same source for legal services, public policy analysis, and financial consulting with respect to transactions occurring between the two entities and remain at "arm's length" in a transaction. The decision-maker at the separate affiliate cannot report to the same officer of the joint owner of the affiliate and the BOC and maintain "arm's length" in a transaction.[145] The practice of contracting for management and supervisors between the Qwest BOC and QCC also erodes the capacity of each entity to act at "arm's length" in transactions.

80. Qwest maintains that there are efficiencies arising from the use of services from a common source. These efficiencies, Qwest asserts, are legitimate practices that have been approved by the FCC. At no point has the FCC stated that a BOC can engage in practices that place a BOC-affiliated entity in a confidential relationship with both the BOC and its 272 affiliate when transactions between them are being conducted that must be at arm's length. Such an arrangement results in an evasion of the arm's length requirement.

81. Qwest witness Ms. Brunsting testified in her written affidavit that:

> As affiliates, the 272 affiliate and BOC have unique financial and business responsibilities and obligations to their boards of directors and ultimately to their shareholders, notwithstanding section 272 requirements.[146]

82. Ms. Brunstig states that one of those unique financial and business responsibilities is to ensure that the Qwest BOC's aggregate profits will be maximized, even if in order to accomplish those results, certain individual affiliates' profit levels would need to be sacrificed.[147]

83. The pricing of transactions is another critical component of the arm's length requirement. Where, as here, the 272 Affiliate is a wholly-owned subsidiary of Qwest Services Corporation, any profit or loss by QCC is ultimately experienced by the parent corporation. The same financial reality is true for the Qwest BOC, which is also a wholly-owned subsidiary of Qwest Services Corporation. Any financial transaction between the Qwest BOC and QCC results in a net difference of **zero** to Qwest Services Corporation when only the two subsidiaries are involved.[148] But Section 272(c) requires that any services offered by the BOC to its 272 affiliate be made available to competing interLATA providers on the same terms and conditions. A transaction with no net difference between entities with a common owner can have a dramatically different financial result when applied to competing carriers.

84. A single example is sufficient to demonstrate the potential for serious adverse impact on competition in the telecommunications market when pricing of services is manipulated. Combining local and long distance billing on a single monthly statement and paying both billings with a single payment is perceived by consumers as an attractive option. Qwest has already engaged in advertising suggesting that it will be able to offer that feature. QCC has already entered into an agreement with the Qwest BOC to pay at least $1.20 per bill (up to $1.50 per bill if volume discount totals are not met) for each monthly customer billing. Since most of QCC's billings will be made to customers of the Qwest BOC, relatively few of these bills will be generated independently of the existing bills that the Qwest BOC is already generating to its own customers. The actual costs incurred by the Qwest BOC in combining its billing with that of QCC may be lower than ten cents per bill page.[149] The payment between QCC and the Qwest BOC has no impact whatsoever on the revenues received by QSC (the common parent of QCC and the Qwest BOC) or QCI (the ultimate parent company). But the offering of the "negotiated price" to third parties can make participation in the service too expensive or impair the ability of those third parties to compete in the market.

85. The capacity for manipulating pricing between a BOC and its 272 affiliate has been recognized by the FCC.[150] Manipulation of pricing to the detriment of third parties is generically known as a "price squeeze." The FCC has been directed to consider the impact of any potential price squeeze in 271 applications.[151] Manipulation of Total Element Long Run Incremental Cost (TELRIC) pricing of network elements can impair the ability to compete of competing local exchange carriers (CLECs). Similarly, manipulation of pricing for services between the BOC and its 272 affiliate can impair competition in the interLATA services market.[152] Requiring that transactions be conducted at "arm's length" is a means of preventing such manipulation.

86. The arm's length requirement of Section 272(b)(5) means that transactions between the BOC and its 272 affiliate must reflect a bargained for price of the product or service. With interlocking management structures between the parent and affiliates, different means of pricing for different transactions, and the expressed intent that transactions be structured for the benefit of the Qwest BOC,[153] the arm's length requirement of Section 272(b)(5) is not met.

87. The current operations of the Qwest BOC and the 272 Affiliate do not meet the arms length transaction requirement of Section 272(b)(5). Qwest's intended manner of operation of the 272 Affiliate is akin to that of a closely-held subsidiary, not a separate affiliate as required by Section 272.

XI. SECTION 272(B)(5) – MAKING ALL TRANSACTIONS WITH THE 272 AFFILIATE AVAILABLE FOR PUBLIC INSPECTION.

88. Section 272(b)(5) requires that any transactions between the BOC and the 272 affiliate must be available for public inspection. The FCC has clarified that this requirement consists of three components:

> (1) the 272 affiliate must provide, at a minimum, a detailed written description of the asset transferred or the service provided in the transaction, and post terms and conditions of the transaction on the company's home page on the Internet within 10 days of the transaction;[154]
>
> (2) the description "should be sufficiently detailed to allow us to evaluate compliance with our accounting rules";[155] and
>
> (3) the descriptions must be made available for public inspection at the BOC's principal place of business, and must include a statement certifying the truth and accuracy of such disclosures.[156]

89. The FCC has stated that the 272 affiliate must "provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction" and, that such description "should be sufficiently detailed to allow us to evaluate compliance with our accounting rules."[157] As the FCC has stated:

> In the *Accounting Safeguards Order*, however, we expressly stated that the information contained in a BOC's CAM [Cost Allocation Manual] is not sufficiently detailed to satisfy section 272(b) because the BOC's CAM contains only a general description of the asset or service and does not describe the terms and conditions of each individual transaction. Therefore, a statement of the valuation method used, without the details of the actual rate, does not provide the specificity we required in the *Accounting Safeguards Order*. Because Ameritech has failed to provide a sufficiently detailed description of the transactions to allow us to evaluate compliance with our accounting rules, we are unable to find that Ameritech will carry out the requested authorization in accordance with section 272.[158]

90. ATT objected to the level of detail provided generally in the work orders posted to Qwest's website. Qwest responded that its work orders provide the same level of specificity found on those posted to the Southwestern Bell Corporation (an RBOC) website for its affiliate transactions.

91. When asked what specific details of an affiliate transaction must be posted on the Qwest web site, Ms. Schwartz responded:

> The details should be sufficient enough to allow a third party to determine whether or not they would be interested in providing that service and as you indicated, it would provide rates, terms, and conditions. . . . the FCC has further given guidance that that sufficiency should include the level and expertise of personnel, the frequency that the service is provided, any special equipment used, and so forth. So again, we do comply with the FCC sufficiency guidelines . . . .[159]

92. Ms. Schwartz testified that one of the purposes of posting work orders, such as the *Joint Marketing Work Order*, on the Internet is to ensure that the services that the Qwest BOC provides to its 272 affiliate are also available on the same terms and conditions to other competing IXCs.[160]

93. Each affiliate agreement includes a brief description of services to be provided, the employees providing the service, and the rate at which the service will be charged.[161] By FCC rule, a carrier must price a service at the greater of fair market value or fully distributed cost only after the total aggregate value of that service reaches or exceeds $500,000.[162] To assign a pricing method, Qwest provides a *Fair Market Value Questionnaire* to be filled out concurrently or prior to the execution of the contract. This Questionnaire asks the respondent to specify:

(1) if the estimated annual billing for this service is greater than $500,000;

(2) whether benchmarking studies have been performed (and if so, the studies must be attached to the worksheet); and

(3) whether an external market exists for the service, and any explanation/studies this would entail.[163]

94. For the provision of joint marketing services to the 272 Affiliate, the Qwest BOC did not perform a fair market value study or undertake a benchmarking report.[164] Actual billing data provided in response to Department Information Request No. 15031, shows a total billing for joint marketing services that exceeds $500,000, on which no payments were made and no late charges were assessed.[165]

95. Qwest failed to comply with the rules on affiliate transactions when it failed to justify its pricing methodology on joint marketing. While the affiliate rules are not part of Section 272, Qwest also failed to post the terms and conditions of the transaction as required by Section 272(b)(5) by not disclosing that no interest or late fees would be charged on overdue payments from its 272 Affiliate.[166] Qwest has not demonstrated that its 272 Affiliate currently meets the applicable standards for posting transactions.

96. The *Information Technologies Services Work Order, Amendment 1,* between the Qwest BOC and the 272 Affiliate contains a provision for “Facilities

Management" (floor space in the Qwest Corporation Zuni facility).[167] A portion of this Work Order entitled, "Facilities Management," appears to lease office space between the Qwest BOC and the 272 Affiliate in Denver, Colorado. There is no description of the *amount* of office space to be provided to the 272 Affiliate contained in the Work Order.[168]

97. Failure to reduce to writing the amount of office space provided by the Work Order does not comply with Section 272(b)(5) because it fails to include a critical term or condition of the transaction.[169] Failure to specify the amount of office space obtained does not describe with sufficient specificity the terms and conditions of the transaction reflected in the Work Order.

98. Qwest claims that the estimated annual billing for this "rental" of office space is below $500,000.[170] The Department of Commerce points out that this assertion cannot be tested because the amount of space for which the 272 Affiliate has contracted is unknown.[171] The $500,000 "trigger" requires application of particular methods of valuation to comply with FCC rules. There is no exemption from the posting requirement in Section 272(b)(5) for transactions falling below $500,000 in annual cost.

99. Qwest did not attempt to determine the fair market value of services for Accounts Payable services[172] and Human Resources services[173] by comparing costs from outside vendors. Qwest indicated that its services were customized to provide for specific Qwest BOC needs and, therefore, a fair market value study could not be undertaken. Qwest described these services as follows:

> The regulated employees who perform accounts payable functions provide for payment of vendor invoices, payment of employee expenses, image processing, corporate card, vendor base, reconciliation, system administration duties. These employees are specialists for Qwest in the knowledge of our accounts payable process. External vendors do not offer such a broad spectrum of support and services. Nor do they have the expertise specific to Qwest accounts payable process. Therefore, the services performed by these regulated employees are not available in the same degree in the market place.[174]

100. The fact that some "customization" of accounts payable, payroll, human resources or any other generic corporate operational function may be required does not render such functions incapable of being subject to a fair market value assessment.[175] The activities described by Qwest are generic and frequently "outsourced" (i.e., purchased from a third-party provider). Customization is part of the purchase price for that activity and does not impair Qwest's ability to obtain market valuation for these services.[176]

101. Qwest has no obligation to go beyond the level of specificity maintained by other RBOCs when posting affiliate transactions. But the FCC rules require fair market valuation for some transactions. Where certain transactions have triggered the fair market valuation provision, Qwest has failed to price appropriately and post the terms

and conditions of those transactions. Further, where a particular transaction is conducted (such as rental of office space) the posting must include relevant specific details, such as the actual space obtained, to contain the terms and conditions of the transaction. The current manner of reporting these transactions between the Qwest BOC and the 272 Affiliate falls short of the requirement that such transactions be "public" within the meaning of Section 272(b)(5). Qwest must ensure that future postings will comply with this requirement to meet the standards of Section 272.

XII. SECTION 272(C) -- THE "NONDISCRIMINATION" REQUIREMENT.

102. Section 272(c) requires that a BOC not discriminate in favor of its 272 affiliate and against competitors. That statutory provision states:

> (c) NONDISCRIMINATION SAFEGUARDS- In its dealings with its affiliate described in subsection (a), . . . a Bell operating company--
>
> (1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; and
>
> (2) shall account for all transactions with an affiliate described in subsection (a) . . . in accordance with accounting principles designated or approved by the Commission.[177]

103. In its *Non-Accounting Safeguards Order*, the FCC interpreted this section to require a BOC to "provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions."[178]

104. The FCC has also concluded that the non-discrimination requirement in section 272(c)(1) extends to any good, service, facility or information that a BOC provides to its section 272 affiliate, including those that are not telecommunications-related,[179] as well as administrative and support services.[180]

105. Qwest has acknowledged that it has the obligation for the Qwest BOC to not discriminate in favor of its 272 Affiliate. Qwest has noted that the non-discrimination requirement extends to the use of confidential information between the Qwest BOC and its 272 Affiliate. Qwest does not intend to identify, price, or offer that information to competing IXCs. Instead, Qwest intends to rely upon other means to meet the non-discrimination requirement.

106. Qwest will rely upon the separation required by Section 272(b)(3) to comply with the nondiscrimination standard of Section 272(c) regarding the use of confidential information. Qwest has not described how common officers and directors of the parent companies and QCC will avoid being privy to such information (or if they are privy to it, how Qwest will assure that such confidential information is not used in the 272 Affiliate's decision-making process). Qwest's reliance on separation to meet the nondiscrimination standard means that it must apply that separation to officers and

directors who will obtain confidential information indirectly through the parent, as well as directly from the BOC.[181]

107. ATT asserts that Qwest discriminates by performing an evaluation for any services requested from the Qwest BOC by the 272 Affiliate. The process set out by Qwest provides a single point of contact for such inquiries which is then analyzed as to type of product, service, or information, manner of accomplishing the request, and the potential for risk arising from meeting the request.[182] The flowchart describing the process indicates that the submission of the request to the single point of contact is the "[s]ame process used by 3rd party requests for Products/Services/Information."[183] The process, as described, does not discriminate against competing IXCs.

108. Compliance with the non-discrimination requirements regarding transactions are assessed in the context of specific transactions for goods and services. Determinations regarding such compliance are discussed in Findings concerning such transactions. Specific instances of noncompliance are noted at Findings 73 and 117. Qwest has not met its burden to show that the Qwest BOC will not discriminate in favor of its 272 Affiliate.

XIII. SECTION 272(G) -- JOINT MARKETING.

109. Section 272(g) sets forth a BOC's ability to engage in joint marketing of its own local services with its 272 Affiliate's long distance service. The statute states in pertinent part:

> (1) Affiliate sales of telephone exchange service.
>
> A Bell Operating company affiliate required by this section 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 market and sell its telephone exchange services.
>
> * * *
>
> (3) Rule of construction
>
> The joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c).[184]

110. In the *Non-Accounting Safeguards* proceeding, NYNEX (then an RBOC) asked the FCC to define "marketing activities" governed by Section 272(g)(3) to include "product development, product management, market management, channel management, market research, and product pricing."[185] The FCC declined to go so far in its Order, stating:

> In our view, such activities are not covered by the section 272(g) exception to the BOC's nondiscrimination obligations. We see no point to

> attempt at this time to compile an exhaustive list of the specific BOC activities that would be covered by section 272(g). We recognize that such determinations are fact specific and will need to be made on a case-by-case basis.[186]

111. The FCC reiterated this position in the *Third Order on Reconsideration*. In that order, the FCC stated:

> The broad interpretation of the "joint marketing and sale of services" exception BellSouth advocates would create a loophole that would allow potential BOC discrimination in countless activities. Section 272(c)(1) would provide little protection against BOC discrimination were we to construe section 272(g)(3) as *exempting all activities* that may impact on marketing and sales activities from the nondiscrimination requirements.[187]

112. The Qwest BOC intends to engage in "joint marketing" of local exchange services provided by the Qwest BOC and interLATA long distance services to be provided by its 272 Affiliate, once Qwest receives Section 271 authority.[188]

113. The *Joint Marketing Work Order* between the Qwest BOC and the 272 Affiliate defines the type of services the Qwest BOC agrees to provide the 272 Affiliate:

> *Planning for In-region InterLATA (Local Access and Transport Area) Services* — Includes planning functions required to be ready to sell interLATA services when 271 relief is granted. Also includes pre-implementation activities such as sales operations functions, budgets, establishing sales expectations, planning sales and promotion functions, developing marketing and customer segmentation plans such as provisioning billing, order entry and management, customer care, reporting, training, and compensation; and determining requirements for changes to systems and processes.
>
> *Qwest Communications Corporation (QCC) Sales* — Providing various aspects of selling QCC products and services inside and outside the 14 state region such as private line data and out of region long distance. Includes activities such as direct sales, supporting alternative sales channels, support for planning for out of region sales, managing marketing efforts for out of region services, and development of training for Section 272 products, services, policies and processes for sales and sales support personnel.[189]

114. Marie Schwartz (a Director in FCC Regulatory Accounting for the Qwest BOC) has approval authority over the *Joint Marketing Work Order*.[190] At the hearing, neither Ms. Schwartz nor Ms. Brunsting was able to provide specific details as to what type of services fall under "planning sales and promotion functions".[191]

115. When asked to describe what services were provided by the Qwest BOC to QCC under the *Joint Marketing Work Order* regarding the "planning function," Ms. Schwartz stated:

> I can't list the specific services listed under those functions, but in essence the work order in this section is basically designed to encompass those planning functions.[192]
>
> * * *
>
> I think planning means readying ourselves to joint market. I'm not familiar with the detailed plans associated, or that, you know, the details associated with the planning functions, however, you know to the extent that, for instance, it would include any marketing scripts, as we've discussed earlier, I'm not aware of any that have been drafted or prepared in final form.
>
> Q. Would you agree then that that phrase [planning, sales and promotion functions] is somewhat vague?
>
> A. Well, it does capture a number of activities that would be required to jointly market.
>
> Q. Like what?
>
> A. Well, for instance, as we just discussed, marketing scripts, making sure that we have the appropriate training available, as we talked about, to allow anyone in the customer ordering centers to be prepared to provide both in-region and -- excuse me, in-region local and interLATA service.[193]

116. When asked to identify exactly what the Qwest BOC is providing to its 272 Affiliate with regard to the phrase "planning, sales, and promotion functions," as set forth in *the Joint Marketing Work Order*, Ms. Schwartz was unable to provide an explanation, but identified other Qwest BOC officials who might know.[194] The Qwest BOC has billed QCC in excess of $500,000 for these undescribed services.[195]

117. The *Joint Marketing Work Order* violates the nondiscrimination requirements of Section 272(c)(2) because it does not sufficiently disclose the services, terms, and conditions provided by the Qwest BOC to the 272 Affiliate.

118. The absence of a sufficient description of the services provided under the *Joint Marketing Work Order* implies that the Qwest BOC and QCC are not engaging in transactions with each other at arm's length as required by Section 272(b)(5).

119. Qwest acknowledged that its right to jointly market services for both the Qwest BOC and its 272 Affiliate does not exempt Qwest from the nondiscrimination requirement for "product design, planning, or development."[196] As the FCC has stated:

> BellSouth states that, to the extent BST engages in product development with BSLD, it will do so on a nondiscriminatory basis with unaffiliated entities so long as it is required to do so under section 272. We note that AT&T is concerned that BellSouth's joint marketing plans involve the development and creation of packages of services offered on an integrated basis, and that BellSouth has not shown that it will make these services available on a nondiscriminatory basis. We expect, however, as BellSouth commits in good faith, that to the extent BST is involved with planning, design, and development activities for BSLD, BST will make these services available to other entities on a nondiscriminatory basis pursuant to section 272(c)(1).[197]

120. Qwest intends to permit other IXCs to engage in joint marketing for telephone exchange services, information services, and product design, planning or development on the same terms and conditions that the service is made available to QCC.[198] Qwest did attempt to distinguish between product development services provided by QSC and those provided by the Qwest BOC.[199] Qwest's description of services in the *Joint Marketing Work Order* is insufficient to permit a competing IXC to ascertain what specific services are being provided under that *Order*.[200] The *Joint Marketing Work Order* fails to describe the terms and conditions associated with the services provided in specific detail sufficient to allow a competing IXC to exercise its rights provided under section 272(g)(1). Qwest has not met its burden of proof that it will comply with Section 272(g)(1).

XIV. OTHER JOINT MARKETING ISSUES.

121. On July 24, 2001, Qwest ran advertisements in various Minnesota newspapers for the purpose of:

> informing the in-region population that J.D. Power and Associates has just ranked Qwest '#1 in Residential Long Distance Customer Satisfaction for High Volume Users.' Additionally, we [Qwest] will indicate that Qwest is working hard to be able to offer the same service in their area.[201]

122. The scripts used by the sales representatives for the Qwest BOC for answering responses to the advertisements directed the representative to inform the prospective customers to either call them at 1-866-LD-CHOICE, or go online to provide Qwest with contact information so that Qwest can contact them once the Qwest BOC offers long distance in the state.[202]

123. The advertisements and scripts used by Qwest demonstrate that Qwest has engaged in joint marketing activity for the products of the Qwest BOC and its 272 Affiliate prior to Qwest's entry into the interLATA market. This is joint marketing activity constituting a violation of section 272(g)(2).

124. Notwithstanding that the activity described in the preceding three Findings constitutes a violation, the particular activity the Qwest BOC engaged in was notice to

the public of future planned activity. No customer was offered interLATA telephone service, either in the advertisement or on the telephone. The violation constitutes a *de minimus* failure to comply with the prohibition against joint marketing activity imposed by Section 272(g)(2).

125. ATT argues that Qwest's predecessor 272 affiliate, QLD (formerly known as U.S. West Long Distance), violated the prohibition against joint marketing. Based on these violations, ATT maintains that Qwest has not demonstrated current compliance with Section 272. Qwest maintains that the QLD noncompliance was not severe and should not prevent approval of Qwest's application now. The sale of interLATA services by U.S. West Long Distance occurred under a mistaken interpretation of the application of the Act. That past noncompliance, by itself, is insufficient support for a conclusion that Qwest will be unable to comply with the joint marketing requirements in the future.

126. Testimony from Qwest witnesses suggests that a critical component of Qwest's joint marketing is to offer long distance services from QCC to "inbound" *local* service customers of the Qwest BOC.[203] Commerce cites figures indicating that Qwest can reach over 20,000 new customers per month with this marketing message.[204] Due to the market reach of this method of customer contact, Commerce asserts that additional requirements beyond the federal standards should be placed upon Qwest's ability to jointly market services.

127. Commerce has suggested that states, on their own authority, may place more stringent competitive requirements on a BOC than those of the federal statute or the FCC, and that the State has the authority to enforce those requirements.[205] The Department cites Section 253(b) as support for this position, which states:

> (b) STATE REGULATORY AUTHORITY—Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[206]

128. The FCC has found, in the *Non-Accounting Safeguards Order*, that in the event that the FCC determines that the BOC has complied with Section 271, a state Commission has the authority to impose any requirements it deems necessary short of delay or denial of entry into the intrastate interLATA market.[207] The FCC held that:

> For all of the reasons discussed above, we conclude that sections 271 and 272, and the Commission's authority thereunder, apply to intrastate and interstate interLATA services provided by the BOCs or their affiliates. We hold, therefore, that the rules we establish to implement section 272 are binding on the states, and the states may not impose, with respect to BOC provision of intrastate interLATA service, requirements inconsistent with sections 271 and 272 and the Commission's rules under those provisions. In this regard, based on what we find is clear congressional

> intent that the Commission is authorized to make determinations regarding BOC entry into interLATA services, we reject the suggestion by the Wisconsin Commission that, after the Commission has granted a BOC application for authority under section 271, a state nonetheless may condition or delay BOC entry into intrastate interLATA services.[208]

129. Qwest maintains that any action taken by the MPUC must be "competitively neutral" to comply with the *Non-Accounting Safeguards Order*. The action proposed by the Department of Commerce is to limit the information that the Qwest BOC may provide to callers when provisioning local telephone service. Such a limitation was entered in 1996 when the Bell System was broken up into seven RBOCs and ATT provided intraLATA telephone services in competition with other providers.[209]

130. The FCC has explicitly addressed what a BOC may state in jointly marketing interLATA telephone services. The FCC stated:

> We agree with BellSouth and Ameritech that a BOC, during an inbound telephone call, should be allowed to recommend its own long distance affiliate, as long as it contemporaneously states that other carriers also provide long distance service and offers to read a list of all available interexchange carriers in random order. In the Non-Accounting Safeguards Order, the Commission stated that the BOCs' existing obligation to provide any customer who orders new local exchange service with the names and, if requested, the telephone numbers of all of the carriers offering interexchange services in its service area in random order was not incompatible with the BOCs' right to joint market. The Commission concluded that a BOC could market its affiliate's long distance services to inbound callers as long as the BOC also informed those customers of their right to select the interexchange carrier of their choice and provided the names and numbers of all interexchange carriers in random order. Thus, the Non-Accounting Safeguards Order sought to balance a BOC's continuing equal access obligations pursuant to section 251(g) with the right of a BOC and its affiliate to market services jointly under section 272(g).[210]

131. The FCC identified the approach in the *BellSouth South Carolina Order* as a "safe harbor, so that the BOCs will have some guidance on what we view as consistent with sections 251(g) and 272."[211] The Department of Commerce has not identified how its proposed limitations on Qwest's marketing scripts can be applied in a competitively neutral fashion. The proposed limitation is beyond the authority of the MPUC in the context of this 271 application.[212]

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

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1. The Minnesota Public Utilities Commission and the Administrative Law Judge have jurisdiction over the subject matter of this hearing pursuant to Minn. Stat. §§14.57-.62 and 216A.05 and Minn. R. 1400.5100-.8300.

2. The Minnesota PUC gave proper notice of the hearing in this matter, has fulfilled all relevant substantive and procedural requirements of law or rule and has the authority to take the action proposed.

3. As the party proposing that certain action be taken, Qwest must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.[213] According to the FCC, the BOC at all times bears the burden of proof of compliance with section 271, even if no party challenges its compliance with a particular requirement.[214] As the Party proposing the action in this proceeding, Qwest has the burden of establishing facts supporting its proposals by a preponderance of the evidence. Similarly, any other Party advocating an affirmative proposal has the burden of proving that proposal by a preponderance of the evidence.[215] A party asserting an affirmative defense shall have the burden of proving that the defense by a preponderance of the evidence.[216]

4. Qwest has failed to demonstrate by a preponderance of the evidence that its 272 Affiliate (QCC) will operate independently from the Qwest BOC, in accordance with Section 272(b)(1).[217]

5. Qwest has failed to demonstrate by a preponderance of the evidence that the 272 Affiliate will have separate officers, directors, and employees from the Qwest BOC of which it is an affiliate, in accordance with Section 272(b)(3).

6. Qwest has demonstrated by a preponderance of the evidence that the 272 Affiliate will not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Qwest BOC, in accordance with Section 272(b)(4).

7. Qwest has failed to demonstrate by a preponderance of the evidence that the 272 Affiliate will conduct all transactions with the Qwest BOC on an arm's length basis with any such transactions reduced to writing and available for public inspection, in accordance with Section 272(b)(5).

8. Qwest has failed to demonstrate by a preponderance of the evidence that the Qwest will comply with the joint marketing requirements in Section 272(g), since the descriptions of work performed under the Joint Marketing Work Order are insufficient to notify competing IXCs of what joint marketing services are available.

9. Qwest has failed to demonstrate by a preponderance of the evidence that the Qwest BOC, in its dealings its 272 Affiliate, will not discriminate between the 272 Affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards, in accordance with

Section 272(c) in the areas of the handling of confidential information and the availability of services to competing IXCs on the same terms as the 272 Affiliate.

10. Any of the above Findings of Fact more properly considered Conclusions of Law are hereby adopted as such, and any Conclusions of Law more properly considered Findings of Fact are hereby adopted as such.

NOTICE

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE PUBLIC UTILITIES COMMISSION WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Minnesota Public Utilities Commission:

1. Include in its Order in this proceeding a determination that Qwest has failed to meet the requirements set forth in 47 U.S.C. § 272; and

2. Include in its Order a determination that Qwest could meet the requirements set forth in 47 U.S.C. § 272 by modifying the relationships among Qwest Communications International, Inc. (QCI), its wholly-owned subsidiary Qwest Services Corporation (QSC), and QSC's wholly-owned subsidiaries, Qwest Corporation (QC) and Qwest Communications Corporation (QCC) as follows:

a. QCC shall provide an inventory of the telecommunications switching and transmission facilities it owns, and identify the land and buildings in which such facilities are located, prior to receiving 271 authorization. QCC shall ensure that none of the facilities, land or buildings are jointly owned with QC.

b. QCC shall provide more complete postings of transactions that identify the services being provided. Inadequate postings such as the *Joint Marketing Work Order* will be reposted with the detail needed to describe adequately the services provided.

c. Transfers of employees between QC and QCC shall cease on the date that QCC receives 271 authorization. Any employee of one of these corporations that will be working for the other must formally terminate employment with the prior employer before formally entering employment with the subsequent employer.[218] At the time

of termination, the employee will execute a confidentiality agreement that expressly precludes the use of the former employer's confidential information with the subsequent Qwest-affiliated employer. Qwest shall modify its code of conduct to clarify that QCC is to be treated as a third party, not "Qwest" or "us."

d. Qwest shall maintain a log of employee movement between all of its affiliated entities. The log shall identity each employee's job title and length of service for each affiliated employer. The log shall be in the form of a database that can be searched by employee name, employer name, and length of service with employer.

e. Qwest shall modify its information systems to isolate all employees of both the Qwest BOC and QCC from confidential information that is not in the possession of those employees' payroll employer. Access to confidential information by any other Qwest entity shall be afforded on a limited basis to assure that access to such information is not provided on a discriminatory basis to the 272 Affililate. Identifiers, such as email addresses, shall readily identify the employer of the email addressee.

f. Qwest shall revoke its proposed employee loan policy and replace that policy with a statement that reaffirms that the employees of QC and QCC are separate and that supervision can only come from the actual employer of the employee. The statement shall also include a mechanism whereby violations of the policy can be reported anonymously. Qwest shall maintain a record of the complaints received, all pertinent information regarding each complaint, and the action taken in response to each complaint.

g. QSC shall institute a policy that any of its employees providing services that involve a confidential relationship shall provide services to either QC or QCC, but not both. QSC shall institute procedures to ensure that employees providing such services are identified by recipient of the service. QSC shall incorporate this provision into its service agreements with QC and QCC that expressly require QSC to treat the information of each affiliate as confidential from the other. Such treatment extends to employees of either affiliate who transfer to QSC and employees of QSC who transfer to either affiliate.

h. QC and QCC shall maintain timely entry of billing for services to each other and shall strictly enforce the penalty for late payments.

i. Qwest shall reorganize the management structure of QCC to eliminate commonality between officers and directors. No officer or director of QCC shall hold an employee, officer, or director position

with either QSC or QCI. Qwest shall not establish a management reporting structure that that permits the 272 Affiliate to obtain confidential information that is not made available to competing IXCs on a nondiscriminatory basis.

j. Qwest shall terminate any contract or work order that provides management or supervisory services from either QC or QCC to the other.

k. Qwest shall commit to business relationships between the 272 Affiliate (QCC) and the Qwest BOC (QC) to treat each entity as separate corporations acting at arm's length. Qwest shall not convey any expectation, express or implied, that the interests of the 272 Affiliate are not to be pursued using the best business judgment of the directors and officers of QCC.

Dated this _14th _ day of March, 2002.

__/s/ Richard C. Luis_____
RICHARD C. LUIS
Administrative Law Judge

Reported: Shaddix and Associates
Bloomington, Minnesota
Transcript prepared, Two Volumes

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Qwest has made significant efforts to transform its existing out-of-region, facilities-based interLATA carrier, QCC, into a 272-compliant affiliate to meet the needs of the Qwest BOC's 271 application. This transformation effectively began in January 2001 and is ongoing. But Qwest must demonstrate QCC's compliance with Section 272 in order to obtain approval for entry into the in-region interLATA market. Some modifications, such as the transformation of the accounting system to accomplish complete and timely posting of transactions, are necessarily going to take time to complete. Past noncompliance in such areas is not critical to the issues of future compliance. The ALJ has found that Qwest has met its burden there.

Other aspects of the QCC transformation are more problematic. Qwest has made certain choices with respect to confidential information that render nondiscrimination difficult absent stringent separation at the employee, officer, and director points of contact between QCC and the other members of Qwest's "family of companies." The corporate management structure proposed by Qwest does not allow for such separation. That corporate structure also makes arm's length transactions more an aspiration than an achievable goal. Qwest must show that its future operations will actually meet both these requirements before its 271 application should be granted.

Arm's length transactions are not accomplished merely by stating that each transaction is at arm's length. The testimony in this proceeding is unequivocal regarding how Qwest intends to treat transactions between QCC and the Qwest BOC:

> As affiliates, the 272 affiliate and BOC have unique financial and business responsibilities and obligations to their boards of directors and ultimately to their shareholders, notwithstanding section 272 requirements.[219]

In an arm's length transaction, there is no "unique relationship" that would require anything other than the normal exercise of business judgment. To comply with the arm's length requirement of Section 272(b)(5), QCC should anticipate dealing with the Qwest BOC on the same footing as ATT, WorldCom or any other IXC. Transforming the approach taken to arm's length transactions at each point of contact between the Qwest BOC and QCC will address most of the issues raised in this proceeding.

ATT asserted that instances of past noncompliance compel the conclusion that Qwest will not comply with Section 272 in the future. Qwest maintained that past noncompliance is not relevant to future compliance, because processes have been adopted to assure that the requirements of Section 272 will be met. The ALJ has not relied on past noncompliance in making these findings. Qwest's processes have been assessed to determine if they will result in future compliance using the standards set out by the FCC and in relevant caselaw. Where those processes are inadequate, changes have been suggested to address those shortcomings.

The need for independent management and operations between a BOC and its 272 affiliate has been clearly stated by the FCC. The record in this matter contains ample information regarding how Qwest's business operations can be structured to comply with Section 272. The suggestions made in the Recommendation are the ALJ's

assessment of what modifications can be made to Qwest's proposed structure of QCC to conform the operation of the affiliate to the structural separation requirements of Section 272. These suggestions are not the only means of addressing these issues. The ALJ expects that the parties will make their own suggestions to the MPUC as to what modifications are necessary and appropriate.

R.C.L.

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[1] As used in this Report, "Qwest" refers to the overall corporate enterprise of Qwest Communications International, Inc. Where affiliated companies are mentioned, each affiliate will be individually identified.
[2] 47 U.S.C. §271.
[3] *Id*. at § 271(d)(1).
[4] *Id*. at § 271(d)(3).
[5] *Id*. at § 271(d)(3)(A).
[6] *Id.* at §§ 271(c)(2)(B), 271(d)(3)(A)(i).
[7] 47 U.S.C. § 272. *See Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), petition for review pending sub nom. SBC Communications v. FCC, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*).
[8] 47 U.S.C. § 271(d)(3)(C).
[9] *Id*. § 271(d)(3); *see SBC Communications, Inc. v. FCC*, 138 F.3d 410, 413, 416 (D.C. Cir. 1998).
[10] *See Accounting Safeguards Order* and *Non-Accounting Safeguards Order, supra*.
[11] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914; *Accounting Safeguards Order*, 11 FCC Rcd at 17550; *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, 12 FCC Rcd 20543, 20725 (1997) (*Ameritech Michigan Order)*.
[12] *Non-Accounting Safeguards Order*, at paras. 15-16; *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346.
[13] 47 U.S.C. § 271(d)(2)(B).
[14] *Id.*
[15] *Ameritech Michigan Order*, at para. 30.
[16] *Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order*,* 13 FCC Rcd 20599, para. 18 (1998) (*BellSouth Louisiana II Order*).
[17] Exs. 1-4 (Public and non-public versions of Schwartz Affidavit; Schwartz Rebuttal Affidavit and Schwartz Errata); 12-16 (Public and non-public versions of Brunsting Affidavit; Brunsting Rebuttal; Brunsting Errata).
[18] Ex. 13, p. 1.
[19] *Id*.
[20] Ex. 2, p. 1
[21] *Id*.
[22] Exs. 35 and 36 (Public and non-public versions of Selwyn Affidavit).
[23] Ex. 35, Attachment 1

[24] Exs. 22 and 23 (Public and non-public versions of Skluzak Affidavit).
[25] Ex. 22, p. 1.
[26] Exs. 3, 14, 15 and 21.
[27] Ex. 21, p. 2 (Affidavit of Taylor).
[28] Hearing Transcript, Vol. 2, pp. 350-400.
[29] Ex. 39 (Reply Affidavit of Taylor).
[30] Where reference is made to the overall corporate organization of parents and subsidiaries in this Report, the expression "family of companies" or "Qwest" will be used.
[31] 47 U.S.C. §272(a)(2)(B).
[32] 47 U.S.C. §271(d)(3)(B).
[33] *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*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18374, para. 395 (2000) (*SWBT Texas Order)* (citing *Ameritech Michigan Order*, 12 FCC Rcd at 20725; *Bell Atlantic New York Order*, 15 FCC Rcd at 4153, para. 402).
[34] Id., citing *Ameritech Michigan Order*.
[35] *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *Third Order on Reconsideration*, released October 1, 1999, 14 FCC Rcd. 16299, 16305 ("*Third Order on Reconsideration"*).
[36] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21981-21982.
[37] *Id*. at 21983.
[38] *Non-Accounting Safeguards Order*, para. 163.
[39] Hearing Transcript Vol. 1, p. 204; Ex. 12, pp. 8-9.
[40] Ex. 1, p. 6; Hearing Transcript Vol. 1, p. 18.
[41] Ex. 1, p. 6.
[42] *Id*.
[43] Ex. 1, p. 12.
[44] Ex. 19 (Department IR No.15010 to Qwest).
[45] *Id*.
[46] Ex. 12, p. 207.
[47] *Id.*
[48] Ex. 12, pp. 8-9; Ex. 1, pp. 10-11, Ex. 3, pp. 6-7.
[49] *Accounting Safeguards Order*, 11 FCC Rcd. at 17617-17618.
[50] Ex. 12, pp. 10-13; Ex. 1, pp. 12-15.
[51] Ex. 12, p. 12.
[52] *Id*.
[53] Ex. 1, p. 14.
[54] *Id*.
[55] *Id*., p. 15.
[56] *Id*.
[57] *Id*.
[58] *SWBT Texas Order*, para. 401.
[59] 47 U.S.C. §272(b)(3).
[60] Ex. 1, p. 16; Ex. 12, pp. 13-14.
[61] Ex. 12, JLB 272.7.
[62] Ex. 12, p. 14; Ex. 1, p. 17.
[63] Transcript, Volume 1, p. 81.
[64] Ex. 35, Att. 2.3.
[65] Ex. 1, p. 16.
[66] Ex. 12, p.15.
[67] Ex. 35, Att. 2.14.
[68] Hearing Transcript Vol. 1, p. 95.
[69] Ex. 1, p. 82.
[70] Ex. 17 (Summary of Affiliate Transactions).
[71] Ex. 35, Att. 3.14.
[72] Ex. 12, p. 12.

[73] Ex. 35, Att. 3.15.
[74] *Id*.
[75] *Id*.
[76] Ex. 12, JLB 272.9.
[77] *Id*.
[78] Ex. 12, JLB 272.9, Attachment.
[79] Ex. 35, at Att. 2.2; see also *id*. at Att. 3.16.
[80] *Id*. at Att. 3.16.
[81] Ex. 12, p. 15.
[82] *Id*. JLB 272.9.
[83] Ex. 1, MES 272.14, p. 14.
[84] Ex. 1, MES 272.14, p. 21.
[85] *Id*.
[86] *Id*. at 89.
[87] Ex. 18, Article 4.
[88] Exhibit 2, MES 272.15, at 21.
[89] *Id*.
[90] *Id*.
[91] Hearing Transcript Vol.1, p. 80.
[92] *Third Order on Reconsideration*, para. 18.
[93] California Public Utilities Commission, D.87-12-067, 27 CPUC2d 1, 136.
[94] *Id.*
[95] *Id.*
[96] Ex. 22, p. 17.
[97] Requiring formalities provides an opportune time to sever an employee's electronic access to confidential information to avoid violations of the anti-discrimination provisions of Section 272.
[98] Exhibit 12, JLB 272.7.
[99] *Id*. The only exception to the common officers, judging by title, is the Treasurer.
[100] Hearing Transcript Vol.1, p. 210.
[101] Hearing Transcript, Vol. 1, p. 172.
[102] *Id*. at 173. Ms. Kline is also a member of the QCI Senior Management Team.
[103] Exhibit 22, p. 22. The terms of the contractual agreement are trade secret data, and therefore not included in this report.
[104] Exhibit 22, p. 23. The terms of the contractual agreement are trade secret data, and therefore not included in this report.
[105] Exhibit 12, JLB 272.8.
[106] Exhibit 14, p. 18.
[107] *Id*.
[108] Exhibit 12, p. 17.
[109] Exhibit 3, p. 14.
[110] Exhibit 14, pp. 17-18.
[111] Exhibit 12, JLB 272.8.
[112] *Id*.
[113] Exhibit 22, p. 21. The terms of the contractual agreement are trade secret data, and therefore not included in this report.
[114] *Ameritech Michigan*, at para. 362.
[115] *Id*., at para. 361.
[116] In the *Bell South Louisiana II Order*, the FCC found having a single independent director adequate to carry out the "collective oversight and consideration for the effective realization of the Board of Director's substantial responsibilities." *Bell South Louisiana II Order*, at para. 330. A board cannot carry out an oversight function of corporate officers when all or even most of the members of the board are themselves corporate officers. It bears noting that the *Bell South Louisiana II Order* was issued prior to recent events highlighting the importance of effective board oversight of corporate officers. The FCC may well reconsider its holding on the adequacy of a single independent director, should the issue arise again.
[117] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990.
[118] *Ameritech Michigan*, para. 355 at footnote 917.

[119] Under the applicable law, the shareholders of the parent company were "deemed" to be directors of the 272 affiliate. The BOC asserted that the parent was not "deemed" to be directors of the BOC. *Ameritech Michigan*, para. 360.
[120] *Ameritech Michigan*, para. 353.
[121] *Ameritech Michigan*, para. 361.
[122] Ex. 1, MES 272.14, p. 20.
[123] *Id*.
[124] *Id*. (emphasis added).
[125] 47 U.S.C. §272(b)(4).
[126] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21995.
[127] Ex. 12, p. 18.
[128] Hearing Transcript Vol. 1, p. 208; Ex. 12, p. 18.
[129] Ex. 35, p. 57.
[130] Ex. 18 (Master Services Agreement).
[131] Ex. 35, at 57-58.
[132] Ex. 1, Att. MES-272.7; Ex. 18, Amendment 1.
[133] Ex. 9.
[134] Ex. 1, Att. MES-272.7; Ex. 18, Amendment 1. Qwest's addition of a late fee to the amended Master Services Agreement supports the inference that Qwest usually charges a late fee on overdue billings.
[135] Ex. 9 (Response to DOC IR 15031); Ex. 35, Att. 3.1 (*Affiliate Billing Request Form*, BART BAN# BIQCC030, and Invoice NO: A681201).
[136] 47 U.S.C. § 272(b)(5).
[137] Ex. 12, pp.161-62.
[138] Ex. 12, Att. 272.3.
[139] Ex. 2, p. 31.
[140] Hearing Transcript, Vol. 1, p. 50; Ex. 6 (Qwest responses to DOC IRs 15036, 15038, 15049, and 15050).
[141] Hearing Transcript, Vol. 1, p. 172.
[142] *Id*. at 173.
[143] *Id*. at 210.
[144] Trancript Vol. 1, pp. 19-20.
[145] This is particularly true, where, as here, the Board of Directors is composed of other officers of the parent company who are also officers of the 272 Affiliate.
[146] Ex. 12, p. 17.
[147] Hearing Transcript Vol. 1, p. 193.
[148] Any service charge to QCC from the Qwest BOC is charged as an expense by QCC and income by the Qwest BOC in the same amount. Since both the Qwest BOC and QCC are wholly-owned subsidiaries of QSC, the profit and loss of each affiliate must be reported as QSC's own on its accounting statements. The same is true for QCI, with respect to QSC's profit or loss.
[149] Exhibit 22, p. 63.
[150] *In the Matter of BellSouth Telecommunications, Inc. Permanent Cost Allocation Manual Petition for Waiver of Section 32.27 of the Commission's Rules*, ASD File No. 01-46 (December 17, 2001). Paragraph 5 of the FCC's Order states:

> BellSouth explains that the affiliate BellSouth Long Distance, Inc. (BSLD), was created to provide interLATA services pursuant to section 272 of the Communications Act of 1934, as amended (Communications Act). All transactions between a Bell operating company and its section 272 affiliate must comply with the arm's length requirements of section 272(b)(5). BellSouth contends that it can comply with the arm's length requirements by recording the transaction at incremental cost for regulatory accounting purposes. We disagree. Our rules require such transactions with section 272 affiliates, where no tariff rate, prevailing price or publicly filed agreement exists, to be recorded for regulatory accounting purposes at the higher of cost or market when the carrier is the seller or transferor, and the lower of cost or market when the carrier is the buyer or transferee. BellSouth has not demonstrated how an incremental cost valuation would comply with the statutory requirement that transactions be at an arm's length basis. It is not sufficient to assert that the statutory requirement is met if the price for the transaction is recorded for financial

accounting purposes at fair market value. The Commission's revision of section 32.27(c) to allow the floor and ceiling discussed above does not apply to transactions with section 272 affiliates. For these reasons, we deny BellSouth's petition for waiver with respect to transactions with BSLD.

[151] *Sprint Communications Co. v FCC*, 274 F.3d 549, 553-56 (D.C.Cir. 2001).

[152] Qwest focuses its comments on the claimed desire of "entrenched" IXCs, such as ATT, to avoid competition with the 272 Affililate. But the current competitive market contains a wide variety of interLATA providers, many of which do not have the market share or financial resources of large IXCs, such as ATT. Qwest has used fully distributed cost pricing for features not likely to be obtained by competitors. Qwest has used pricing significantly over its own costs to put QCC customer billings for telephone services on the Qwest BOC customer bill. The impact of a "price squeeze" in a desirable feature such as the single customer bill has the potential for the greatest impact on the smaller IXCs.

[153] *See* Findings 81 and 82.

[154] *Accounting Safeguards Order*, 11 FCC Rcd. at 17593-94.

[155] *Id.*

[156] *Id.*

[157] *Id*.

[158] *Ameritech Michigan Order* at para. 369.

[159] Hearing Transcript, Vol. 1, pp. 66-67.

[160] *Id.* at 71.

[161] Ex. 35, Att. 2.2.

[162] 47 CFR 32.27.

[163] Ex. 35, Att. 3.1.

[164] *Id*.

[165] Ex. 9 (Response to DOC IR 15031); Ex. 35, Att. 3.1 (*Affiliate Billing Request Form*, BART BAN# BIQCC030, and Invoice No. A681201). The totals are trade secret data and therefore they are not provided in this Report.

[166] Qwest maintained that its Master Services Agreement had been amended in July 2001 to include the charging of interest and such interests has been billed retroactive to when the services were provided. Exhibit 3, at 18. The trade secret invoice is dated significantly later than July 2001 and contradicts Qwest's assertion that interest was being charged on overdue amounts payable after July 2001.

[167] Ex. 35, at Att. 3.15

[168] *Id*.

[169] Ex. 35, p. 44.

[170] Ex. 35, Att. 3.15.

[171] *Id*.

[172] Ex. 17 (Summary of Affiliate Transactions, *see* Finance Services Work Order).

[173] *Id.* (*see* Human Resources Work Order).

[174] Ex. 35, Att. 3.13.

[175] Ex. 35, p. 47.

[176] *Id*.

[177] 47 U.S.C. §272(c).

[178] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 22000-01.

[179] *Id.*

[180] *Id*. at 22007-08.

[181] The need for such separation is particularly critical where the information technology is only restricting access to the 272 affiliate. Any other user may be able to access information that cannot be provided directly to the 272 affiliate. Allowing information transfers through such other users indirectly to the 272 affiliate, without making the information available to competitors, discriminates in favor of the 272 affiliate in violation of Section 272(c).

[182] Exhibit 1, MES 272.12.

[183] *Id*.

[184] 47 U.S.C. § 272(g).

[185] *Non-Accounting Safeguards Order*, para. 295.

[186] *Non-Accounting Safeguards Order*, 11 FCC Rcd 22048.

[187] *Third Order on Reconsideration*, 14 FCC Rcd 16325 (emphasis added).

[188] Ex. 1, pp. 32-33.
[189] Ex. 35, Att. 3.1.
[190] Hearing Transcript, Vol. 1, p. 64.
[191] Hearing Transcript, Vol. 1, pp. 73-74, 189.
[192] *Id.* at 71-73; 75.
[193] *Id.* pp. 72-73.
[194] *Id*. pp. 73-75.
[195] Ex. 35, Att. 3.1. More examples of this arrangement between the Qwest BOC and QCC were identified by Mr. Skluzak. Ex. 22, p. 22. Since the amounts paid and personnel assigned in these transactions are trade secret data, those details are not included in this Report. A reasonable inference is that the transactions were not at arm's length, since details regarding the services provided are lacking and the amount paid for the services is substantial.
[196] Qwest Brief, p. 61.
[197] *BellSouth Louisiana II Order*, para. 360.
[198] Exhibit 3, p. 31; Exhibit 12, p. 24; Exhibit 14, p. 25.
[199] Exhibit 3, p. 31.
[200] Qwest maintains that no product development services have been provided to QCC after March 3, 2001. Qwest Brief, at 59. But Qwest has not identified what services have been provided to QCC that resulted in billings substantially in excess of $500,000 under the Joint Marketing Work Order. QCC is not currently eligible to market in-region interLATA services, therefore the Qwest BOC cannot jointly market those services either. The invoices on the billings described the subject of the transactions as "product development." Ex. 22, p. 22.
[201] Ex. 7, Att. A (Qwest response to Department of Commerce Motion).
[202] *Id*. at 1.
[203] Ex. 12, pp. 21-24; Ex. 1, pp. 31-33.
[204] "Qwest Quarterly Service Settlement Report," a monthly report regarding Minnesota customers, as required by the Commission's *Order* in *Qwest Corporation's Alternative Form of Regulation (AFOR) Service Quality Plan*, Docket No. P-421/AR-97-154, filed November 15, 2001. With billing and collection calls and service calls, the number of customer contacts rises to over 400,000 per month. But the larger number is not very useful for assessing marketing impact, since the circumstances of the contact may not be conducive to effectively selling long distance services.
[205] Exhibit 35, p. 13.
[206] 47 U.S.C. § 253(b).
[207] *Non-Accounting Safeguards Order,* 11 FCC Rcd 21905, 21929.
[208] *Non-Accounting Safeguards Order*, para. 47.
[209] *In the Matter of an Investigation into IntraLATA Equal Access and Presubscription*, Minnesota PUC Docket No. P-999/CI-87-697, *Order Denying Reconsideration and Clarifying Order*, April 2, 1996, at 6.
[210] *Application of BellSouth Corporation, et al. to Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, para. 237 (December 24, 1997)(*BellSouth South Carolina Order*).
[211] *Id*., para, 236.
[212] Should the MPUC conclude that joint marketing between all LECs and IXCs should be regulated, restrictions could be crafted on a competitively neutral basis. But a fuller record would need to be established to determine the proper extent of such regulation, beyond that developed in this proceeding.
[213] Minn. R. 1400.7300, subp. 5.
[214] *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*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18374, para. 46 (2000) (*SWBT Texas 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*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3972 para. 46 (1999) (*Bell Atlantic New York Order*), *aff'd*, *AT&T Corp. v. FCC,* 220 F.3d 607 (D.C. Cir. 2000).
[215] Minn. R. 1400.7300, subp. 5.
[216] Minn. R. 1400. 7300, subp. 5.
[217] To obtain Section 271 approval, the BOC must show that its 272 affiliate is "operating independently" from the BOC. The FCC has determined that operating independently is a term of art with a special

meaning for telecommunications companies. The term is construed to mean no joint ownership of telecommunications switching and transmission facilities and the land or buildings that hold those facilities. Qwest has the obligation to show that it will meet this requirement. But the record is lacking in an affirmative demonstration that no such joint ownership exists. The record does show that the allocation of facilities to QCC from QC is ongoing. Therefore it is impossible to conclude that the final allocation of assets actually demonstrates that QCC will operate independently from QC. The ALJ accepts that Qwest intends to comply with the "operating independently" requirement of Section 272(b)(1). But Qwest has the burden to show that it will comply. Lacking an inventory of facilities and land, Qwest cannot meet its burden.

[218] The formal termination of employment does not require any change in employee benefits or recalculation of seniority, if the benefit plans of QC and QCC are obtained from a single source and are otherwise transferable.

[219] Ex. 12, p. 17.