

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
AT&T CORP.,)	
)	
Complainant,)	
)	File No. E-97-28
v.)	
)	
U S WEST COMMUNICATIONS, INC.,)	
)	
Defendant.)	

In the Matter of)	
)	
MCI TELECOMMUNICATIONS CORPORATION,)	
)	File No. E-97-40A
Complainant,)	
)	
v.)	
)	
U S WEST COMMUNICATIONS, INC.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2001

Released: February 16, 2001

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we grant in part two formal complaints, one filed by MCI Telecommunications Corporation (“MCI”)¹ and one by AT&T Corp.

¹ Effective September 14, 1998, MCI Telecommunications Corp. merged with WorldCom, Inc. to form MCI WorldCom, Inc. This Order uses “MCI” to refer to the complainant in File No. E-97-40A.

(“AT&T”), against U S WEST Communications, Inc. (“U S WEST”)² concerning U S WEST’s 1-800-4USWEST service (the “Service”).³ The Service provides a calling platform that permits U S WEST’s local subscribers to place local and long distance calls originating inside and outside the U S WEST service area. Section 271 of the Communications Act of 1934, as amended (“Act”), prohibits any Bell Operating Company (“BOC”) -- including U S WEST -- from providing long distance (“interLATA”) service originating in the region where it provides local service, unless and until the Commission determines that various conditions relating to competition in local telephone service are satisfied.⁴ U S WEST has not received Commission approval to provide long distance service in any state in its service region, and therefore is subject to the general section 271 prohibition.

2. The Commission recently addressed the legality of a similar calling platform service offered by another BOC, the Ameritech Operating Companies (“Ameritech”). In the *1-800-AMERITECH Order*, the Commission determined that Ameritech’s service violated section 271 of the Act.⁵ The Commission relied upon its earlier *Qwest Teaming Order* to reach this conclusion.⁶

3. The evidence in this case demonstrates that U S WEST’s Service is, in all material respects, the same as Ameritech’s unlawful service. Specifically, like Ameritech, U S WEST: (1) designed and developed a combined service offering for its local service customers that includes a long distance component; (2) relied on its brand name in marketing the combined offering; (3) used bill inserts and other mailings to promote the combined offering to its local calling subscriber base; (4) maintained control and ownership of the customer relationship in connection with the combined service offering; (5) exercised exclusive control over the marketing of the Service; (6)

² On June 30, 2000, U S WEST merged with Qwest Corporation (“Qwest”), and Qwest is now the legal successor to U S WEST. This Order refers to the defendant company in the two proceedings as “U S WEST.”

³ Pursuant to section 1.735(a) of the Commission’s formal complaint rules (47 C.F.R. § 1.735(a)), we have consolidated AT&T’s and MCI’s actions against U S WEST, because the U S WEST Service challenged in both actions is identical.

⁴ 47 U.S.C. § 271(a) (“Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.”). InterLATA service “means telecommunications between a point located in a local access transport area [LATA] and a point located outside such area.” 47 U.S.C. § 153(21). LATAs are contiguous geographic areas established by a BOC such that no exchange area includes points within more than one metropolitan statistical area or state. 47 U.S.C. § 153(25).

⁵ See *MCI Telecommunications Corp. v. Illinois Bell Tel. Co., et al.*, Memorandum Opinion and Order, 15 FCC Rcd 23184 (2000) (“*1-800-AMERITECH Order*”).

⁶ See *AT&T Corp. v. U S WEST Corp.*, 13 FCC Rcd 21438 (1998) (“*Qwest Teaming Order*”), *aff’d sub nom.*, *U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999), *cert. denied*, 120 S. Ct. 1240 (2000). In the *Qwest Teaming Order*, the Commission found that a self-described “teaming” arrangement between U S WEST and Qwest (and a similar arrangement between Ameritech and Qwest) violated section 271. U S WEST combined Qwest’s long distance service with its own local services and offered the resulting package to U S WEST customers under a U S WEST brand, with U S WEST customer support. As noted above, U S WEST subsequently merged into Qwest.

selected the long distance provider that would carry in-region, interLATA calls and dictated certain of the terms and conditions of the Service; and (7) reserved the right to substitute its own services in place of the long distance provider's service as U S WEST obtained authority under section 271 to provide long distance service in various states. Accordingly, we conclude, based on the totality of circumstances, that U S WEST's 1-800-4USWEST Service violates section 271. Because we find that U S WEST's Service violates section 271, we do not reach the remaining claims raised by AT&T and MCI regarding other alleged violations of the Act.⁷

II. BACKGROUND

4. In April 1997, U S WEST began offering its 1-800-4USWEST Service, which permits its subscribers to place local, long distance, and international calls from anywhere in the country by accessing a dialing platform through the Service's toll-free number.⁸ U S WEST promoted the Service as a way for its customers to make calling card calls from payphones without paying excessive fees.⁹ Thus, the promotional materials mailed to U S WEST's local-service customers asserted that, by dialing 1-800-4USWEST, customers could "bypass unknown pay phone companies that can charge . . . exorbitant rates" and instead obtain a single "great low rate" for calling card calls, including domestic long distance calls.¹⁰ Similarly, U S WEST's advertisements for the Service stated that, by using the Service, callers could ensure that they would avoid having their calls blocked from completion.¹¹

5. A year earlier, U S WEST sent a Request for Proposal ("RFP") to long distance carriers, seeking in-region, interLATA transport to support its new 1-800-4USWEST Service.¹² Among other things, the RFP required the long distance carrier to allow its calls to be listed on the bill that U S WEST sent to its customers for U S WEST-provided services, and provided that portions of the long distance provider's contract with U S WEST would be terminable on a state-by-state basis on 60 days' notice, as U S WEST became eligible in each state to offer in-region interLATA service under section 271.¹³ From the responses that U S WEST received, it chose

⁷ In addition to section 271, AT&T contends that U S WEST's Service violates sections 202, 251(g), and 272 of the Act. Complaint of AT&T Corp., File No. E-97-28 (May 22, 1997) ("AT&T Complaint") at 9-10 (citing 47 U.S.C. §§ 202, 251(g), and 272). MCI argues that U S WEST's Service violates section 201(b), as well as section 271. Complaint of MCI Telecommunications, Inc., File No. E-97-40 (July 21, 1997) ("MCI Complaint") at 7-10 (citing 47 U.S.C. § 201(b)).

⁸ See Answer of U S WEST Communications, Inc., File No. E-97-28 (June 23, 1997) ("U S WEST Answer in AT&T Case") at 12-13, ¶¶ 49-50, and Attachment 9.

⁹ MCI Complaint, Exhibit B.

¹⁰ *Id.*

¹¹ *Id.*; see Letter dated Jan. 25, 1999 from Robert B. McKenna (counsel for U S WEST) to Tonya Rutherford (Attorney-Advisor, FCC), File Nos. E 97-28 and E-97-40 ("U S WEST January 25, 1999 Letter"), Attachments.

¹² U S WEST Answer in AT&T Case, Attachment 11.

¹³ *Id.* (RFP at 9).

Frontier Communications Services, Inc. (“Frontier”)¹⁴ to carry the in-region, interLATA calls.¹⁵ The RFP specifically contemplated that U S WEST could contract with other long distance providers, and could utilize its own or its affiliate’s resources to provide similar services.¹⁶

6. U S WEST’s name and trademark have been far more prominently featured in advertisements promoting the Service than Frontier’s. The toll-free number for the Service conspicuously links U S WEST’s name to the Service. Similarly, the promotional materials that U S WEST mailed to its local-service subscribers highlight U S WEST’s name and logo.¹⁷ Only in smaller type do the materials identify the carriers that actually transmit the calls, and, in many cases, the materials are not specific as to which carrier handles which calls.¹⁸ Subsequently, U S WEST changed the promotional materials to state, usually in small print, that Frontier provides in-region, long distance services.¹⁹

7. When a customer accesses the platform by dialing 1-800-4USWEST, he or she hears a greeting referencing the U S WEST name, and then receives a prompt to enter the called number, the calling card number, and a personal identification number. Once the calling card number is verified, a customer placing a local, intraLATA toll, or out-of-region interLATA call

¹⁴ Frontier has since merged with Global Crossing Ltd. This Order refers to the company as “Frontier.”

¹⁵ U S WEST Answer in AT&T Case at 19, ¶ 69. U S WEST itself is the carrier for both local and intraLATA calls for its 1-800-4USWEST Service. *Id.* at 13-15, ¶ 51. U S WEST’s interLATA affiliate, U S WEST Long Distance, Inc., carries the interLATA calls originating outside U S WEST’s region (out-of-region interLATA traffic). *Id.* Section 271(b) permits a BOC, upon passage of the Telecommunications Act of 1996, to provide interLATA calls originating outside of its local service territory through a structurally separate affiliate. 47 U.S.C. §§ 271(b), 272.

¹⁶ U S WEST Answer in AT&T Case, Attachment 11 (RFP at 9).

¹⁷ MCI Complaint, Exhibit B. Thus, the materials emphasize the U S WEST brand as the source for the services provided with the calling card: “use the 1-800-4USWEST Calling Card to make local calls, long distance calls, international calls. . . .” MCI Complaint at Exhibit B; “Introducing 1-800-4USWEST. All your calls with just one card.” U S WEST Answer in AT&T Case, Attachment 9; “U S WEST has introduced the U S WEST Express Calling Card, which allows users to place domestic long distance calls anytime from anywhere in the United States for just 20 cents a minute.” AT&T Complaint, Exhibit K; “Because 1-800-4USWEST gives you a low 20-cents-per-minute rate on every call you make when you’re away from home. It’s a better rate than those charged by *our* long distance competitors.” U S WEST Answer in AT&T Case, Attachment 8 (emphasis added).

¹⁸ *See, e.g.*, MCI Complaint, Exhibit B (“[C]alls made via 1-800-4USWEST will be handled by U S WEST Communications, U S WEST Long Distance or Frontier. Call Customer Service for more details.”). Moreover, in some instances, no mention is made of Frontier at all. *See, e.g.*, Letter dated Sept. 30, 1997 from Peter H. Jacoby (counsel for AT&T) to Deena M. Shetler (Attorney-Advisor, FCC), File No. E-97-28, attaching U S WEST brochure entitled “Small Business Guide to Communications Services.” On a page entitled “U S WEST Complementary Long Distance Services,” the 1-800-4USWEST card is described as “the simple way to make long distance calls when you’re away from the office.” *Id.* at 23. The brochure fails to mention Frontier or its role in providing long distance service.

¹⁹ U S WEST January 25, 1999 Letter, Attachments.

hears “[t]hank you for using U S WEST.”²⁰ A customer placing an in-region, interLATA call hears a thank-you message that mentions Frontier by name.²¹

8. The Service is promoted through, among other means, bill inserts and other mailings sent to U S WEST’s local customer base.²² U S WEST serves as the initial sales and customer care contact for the 1-800-4USWEST Service, and exercises exclusive control over the marketing and promotion of the Service.²³ U S WEST’s agreement with Frontier provides that U S WEST “owns and creates all marketing communications (card creation, creation design, collateral, fulfillment, messages, etc.) *as well as the caller relationship.*”²⁴ The Service is billed through the customer’s U S WEST monthly service bill.²⁵

III. DISCUSSION

A. U S WEST’s Service Violates Section 271.

9. Complainants’ primary contention is that the 1-800-4USWEST Service violates section 271 of the Act, because it amounts to the provision of in-region, interLATA service before U S WEST has received approval from the Commission to offer such service. Section 271(a) states that “[n]either a Bell operating company nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.”²⁶ The statute permits a BOC to provide interLATA service originating within its local service area on a state-by-state basis only upon application to and approval from the Commission pursuant to section 271(d).²⁷ Section 271 thus “both gives the BOCs an opportunity to enter the long distance market and conditions that opportunity on the BOCs’ own actions in opening up their local markets.”²⁸ Congress intended section 271 to create a strong incentive for the BOCs to comply

²⁰ U S WEST Responses to MCI’s First and Further Set of Interrogatories, File No. E-97-40 (Oct. 3, 1997) (“U S WEST October 3, 1997 Interrogatory Responses”) at 20-21.

²¹ *Id.*

²² *Id.* at 3-6.

²³ *See* Supplemental Responses of U S WEST to AT&T’s First Set of Interrogatories, File No. E-97-28 (Aug. 22, 1997) (“U S WEST August 22, 1997 Supplemental Interrogatory Responses”) at 22, 28.

²⁴ U S WEST August 22, 1997 Supplemental Interrogatory Responses at 28. U S WEST identified several related agreements involving its Service that U S WEST, U S WEST’s affiliate (U S WEST Long Distance), Frontier, and Frontier’s affiliate (LinkUSA Corporation (“LinkUSA”)) executed. *Id.* at 3-28. This Order refers to these agreements collectively as one agreement between U S WEST and Frontier.

²⁵ Stipulation of Undisputed Facts, File No. E-97-28 (Sept. 9, 1997) (“Stipulation of Undisputed Facts”) at 1, ¶ 1.

²⁶ 47 U.S.C. § 271(a).

²⁷ 47 U.S.C. § 271(d).

²⁸ *U S WEST Communications*, 177 F.3d at 1060.

with new obligations in sections 251 and 252 of the Telecommunications Act of 1996,²⁹ which, in turn, were designed to facilitate competition in local markets (including interconnection, unbundling, and resale). The statute creates this “powerful incentive” by conditioning BOC entry into the in-region, long-distance market on compliance with a checklist of local market-opening criteria and other requirements.³⁰

10. U S WEST has not received approval from the Commission to provide long distance service in any state in its region.³¹ It is therefore subject to section 271(a)’s general prohibition against offering such services. Complainants’ section 271 claim presents the generic issue, previously addressed by the Commission in the *Qwest Teaming Order* (affirmed by the Court of Appeals) and the *1-800-AMERITECH Order*, of whether a challenged offering for which a BOC does not actually transmit in-region, interLATA traffic may nevertheless amount to the “provision” of interLATA service. In the *Qwest Teaming Order* and the *1-800-AMERITECH Order* – as in this case – the relevant BOCs were offering a combined service that included their own local and intraLATA toll service bundled with in-region, interLATA transport provided by an unaffiliated long distance carrier.

11. The *Qwest Teaming Order* sets forth the issue that the Commission considers in deciding whether an offering violates section 271: “whether a BOC’s involvement in the long distance market enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition.”³² Thus, the “provision” of interLATA services, within the meaning of section 271(a), “must encompass activities that, if otherwise permitted, would undermine Congress’s method of promoting both local and long distance competition by prohibiting BOCs from full participation pursuant to section 271’s competitive checklist.”³³ In order to determine whether a BOC’s long distance-related activities run afoul of this standard, the Commission balances the following non-exclusive factors: “whether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long-distance component in [the challenged offering], whether the BOC is effectively holding itself out as a provider of long distance service, and whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for

²⁹ See 47 U.S.C. §§ 251, 252. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.*, amended the Communications Act of 1934.

³⁰ *U S WEST Communications*, 177 F.3d at 1060; 47 U.S.C. § 271(c). See also *AT&T Corp. v. FCC*, 220 F.3d 607, 612 (D.C. Cir. 2000) (conditional long distance entry pursuant to section 271 is designed “[t]o encourage BOCs to open their markets to competition as quickly as possible”). The Commission’s decision in the *Qwest Teaming Order* contains a more extensive explanation of the market-opening incentives behind section 271. 13 FCC Rcd at 21441-47, ¶¶ 3-7.

³¹ Supplemental Brief of WorldCom, Inc., File No. E-97-40A (Dec. 8, 2000) at 5; Stipulation of Undisputed Facts at 2, ¶ 4. U S WEST has not requested authorization from the Commission to provide long distance service in any state in its region.

³² *Qwest Teaming Order*, 13 FCC Rcd at 21465, ¶ 37.

³³ *Id.* at 21462, ¶ 30.

providing interLATA service to the public.”³⁴ In evaluating the challenged BOC actions, the Commission considers “the totality of [the BOC’s] involvement, rather than focus[ing] on any one particular activity.”³⁵

12. The Commission applied this fact-based test in the *1-800-AMERITECH Order* and concluded that Ameritech’s service violated section 271. The U S WEST Service at issue in this case is substantially the same as Ameritech’s unlawful service. Accordingly, as described below, application of the *Qwest Teaming Order*’s fact-based test and the Commission’s *1-800-AMERITECH Order* similarly leads us to conclude that the U S WEST Service violates section 271.³⁶

1. U S WEST Obtains Material Benefits Uniquely Associated With Its Ability to Include a Long-Distance Component in the Service.

13. One of the principal factors that led the Commission to find section 271 violations in the *Qwest Teaming Order* and the *1-800-AMERITECH Order* was that the challenged offerings would have afforded the defendants a “significant jumpstart when they do obtain 271 authorization.”³⁷ Thus, by developing an extensive customer base for the challenged services, the defendant carriers could “pre-position” those customers for a seamless transition to the long distance services of the carriers’ section 272 affiliates, once the carriers received section 271 authority to begin providing in-region, interLATA service.

³⁴ *Id.* at 21465-66, ¶ 37.

³⁵ *Id.*

³⁶ U S WEST argues that the *1-800-AMERITECH Order* is not relevant precedent, and encourages the Commission to rely instead upon the Common Carrier Bureau’s decision involving BellSouth’s pre-paid calling card. *See AT&T Corp. v. BellSouth Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 8515 (Com. Car. Bur. Mar. 30, 1999). We decline to do so; reliance on the staff-level pre-paid calling card decision would be misplaced in these circumstances. The BellSouth pre-paid calling card is meaningfully different than the offerings at issue in the *1-800-AMERITECH Order* and in this case. As the Commission pointed out in the *1-800-AMERITECH Order*, the Common Carrier Bureau determined that BellSouth’s pre-paid card offering did not violate section 271 because, *inter alia*, (1) the card did not involve a continuing, presubscribed relationship that would allow BellSouth to gain meaningful information about card purchasers and to exploit that relationship in customer retention or win-back efforts; and (2) the card served a segment of the telecommunications market that is replete with similar prepaid offerings sponsored by non-carriers, thereby reducing the risk that consumers would perceive BellSouth as offering in-region, interLATA services. *Id.* at 8525-28, ¶¶ 19-27. In light of these differences, the BellSouth pre-paid card case does not support a conclusion in this case that U S WEST’s Service passes muster under section 271. Rather, as explained below, this case is controlled by the Commission’s *1-800-AMERITECH Order*. Similarly, we reject U S WEST’s contention that its Service is not meaningfully different than calling card offerings that were lawful under the Modified Final Judgment. QWEST Corporation Supplemental Opening Brief on the Relevance of the AMERITECH Calling Card Order, File No. E-97-28 (Dec. 8, 2000) (“U S WEST Brief re Applicability of Ameritech in AT&T Case”) at 2-4, 12-14. The Commission addressed and rejected this same contention in the *1-800-AMERITECH Order*. *1-800-AMERITECH Order*, 15 FCC Rcd at ___, ¶ 22.

³⁷ *Qwest Teaming Order*, 13 FCC Rcd. at 21467, ¶ 41 (internal quotation omitted).

14. As with the arrangements in the *Qwest Teaming Order* and the *1-800-AMERITECH Order*, we find that the 1-800-4USWEST Service permits U S WEST to obtain material benefits uniquely associated with the ability to include a long distance component in the Service. Specifically, the Service allows U S WEST, prior to gaining section 271 approval, to build up goodwill as a full service provider with its local-service customers, who can place their long distance calling-card calls through the Service.³⁸ Upon receiving section 271 authority, U S WEST would be well positioned to substitute the interLATA service of its section 272 affiliate for that of Frontier, thereby capturing a ready base of customers.

15. The opportunity to amass goodwill as a full service provider appears to be a significant reason why U S WEST developed the Service in the first place. In announcing the launch of the Service, U S WEST's Chief Executive Officer stated that "[i]ntroduction of this card represents another step toward offering our customers *one-stop shopping* with complete, integrated solutions to meet all their communications needs."³⁹ U S WEST explained that its new calling card responded to customers' requests that U S WEST give them a way to make long distance calls while away from the home or office. The "one-stop shopping" advantage touted by U S WEST was repeated and emphasized in several reports describing the new offering.⁴⁰

16. Our concern in this regard is heightened by the structure of U S WEST's agreement with Frontier to provide in-region, interLATA transmission for the Service. The Frontier agreement, much like the agreement in the *1-800-AMERITECH Order*, provides that U S WEST may terminate the contract or any orders for service made pursuant to the contract "for its convenience" at any time after the contract has been in effect by giving Frontier 30 days' notice.⁴¹ This affords U S WEST the right not only to contract with other long distance providers, but to utilize its affiliates' resources to provide similar services.⁴² Thus, U S WEST

³⁸ See *U S WEST Communications*, 177 F.3d at 1060 ("By offering one-stop shopping for local and long distance under their own brand name and with their own customer care . . . [the BOCs] could build up goodwill as full service providers, positioning themselves in these markets before section 271 allows them actually to enter.").

³⁹ AT&T Complaint, Exhibit K (emphasis added).

⁴⁰ AT&T Complaint, Exhibits G, I, and J. Further, U S WEST emphasized in a late 1996 filing to the Iowa Utilities Board that its calling card Service was "essential for U S WEST's effective participation in the long distance market." *Id.*, Exhibit H. These contemporaneous representations concerning the one-stop shopping advantage U S WEST sought to gain with its Service severely undercut U S WEST's current contention that it was not seeking a "jumpstart." See U S WEST Brief re Applicability of Ameritech in AT&T Case at 9, 11-14. U S WEST's argument is also belied by an independent industry analysis which concludes that BOC calling card services, like U S WEST's, are targeted to "jumpstarting" the BOC's entry into the long-distance market. See Yankee Group Report, Exhibit 1 to AT&T's Reply Brief Concerning Effect of *QWEST* Order, File No. E-97-28 (Feb. 12, 1999), at 21 (BOCs are "using calling card platforms in preparation for authorization for in-region long-distance entry," and the cards are designed, in part, to "accustom [the BOC's] local customer base to perceiving the [BOC] as an all-distance, multiple service provider").

⁴¹ U S WEST August 22, 1997 Supplemental Interrogatory Responses at 15.

⁴² See U S WEST Answer in AT&T Case, Attachment 11 (RFP at 9); U S WEST August 22, 1997 Supplemental Interrogatory Responses at 15, 18.

preserved the right to replace Frontier's services with the services of U S WEST's section 272 affiliate once the Commission grants U S WEST section 271 authorization.⁴³ In doing so, U S WEST positioned itself well "to substitute the long distance service offered by [its] section 272 affiliate, when [it] obtain[s] section 271 approval, into the [1-800-4USWEST] package in the future."⁴⁴

17. In the *Qwest Teaming Order* and the *1-800-AMERITECH Order*, we found that the challenged offerings allowed the defendant carriers to "enhance [their] goodwill in the marketplace" and to "add value" when dealing with their customers in a way that further cemented their relationships with their end users before their markets were open to meaningful competition.⁴⁵ Here, it is apparent that U S WEST sought to enhance its goodwill by controlling the customer relationship. Specifically, the RFP provided that U S WEST "owns and creates all marketing communications (card creation, creation design, collateral, fulfillment, messages, etc.) as well as the customer relationship."⁴⁶ This requirement was ultimately incorporated into U S WEST's contract with Frontier.⁴⁷ Thus, U S WEST controls the information sent to its customers concerning its Service, as well as all other aspects of the relationship with its customers.⁴⁸ This provides U S WEST with a significant competitive advantage in building goodwill with the 1-800-4USWEST customers. We believe that once U S WEST receives Commission authorization to offer in-region, long distance service, the 1-800-4USWEST customers who receive local service from U S WEST will be more inclined to select U S WEST as their presubscribed long distance carrier as well.

18. Another troubling factor is the manner in which U S WEST promotes the Service to its local subscriber base. In addition to advertising through various media, U S WEST avails itself of a communication channel that is uniquely available to it as the monopoly provider of local

⁴³ The RFP provides additional evidence that U S WEST intended the Service to afford a considerable jumpstart for its in-region, long distance operations as it received section 271 authority in each state. For example, pursuant to the RFP, U S WEST could cancel the portion of the contract concerning Frontier's provision of in-region interLATA service on 60 days' notice, and could effect such a cancellation on a state-by-state basis. U S WEST Answer in AT&T Case, Attachment 11 (RFP at 9). Thus, the RFP expressly contemplated that U S WEST quickly would move, on a state-by-state basis, to substitute its section 272 long-distance affiliate as the provider of record for in-region, interLATA traffic generated by 1-800-4USWEST customers.

⁴⁴ *Qwest Teaming Order*, 13 FCC Rcd at 21467, ¶ 41. See also *U S WEST Communications*, 177 F.3d at 1060.

⁴⁵ *Qwest Teaming Order*, 13 FCC Rcd at 21468, ¶ 42; *1-800-AMERITECH Order*, 15 FCC Rcd at ____, ¶ 14.

⁴⁶ U S WEST Answer in AT&T Case, Attachment 11 (RFP at 10) (emphasis added).

⁴⁷ U S WEST August 22, 1997 Supplemental Interrogatory Responses at 28.

⁴⁸ While Frontier, through its affiliate LinkUSA, apparently provides some customer service to U S WEST customers in connection with their use of the 1-800-4USWEST Service, it is of little significance given U S WEST's contractual control over messages provided to customers and over the customer relationship in general.

service within its region – bill inserts and other mailings that draw on its subscriber list.⁴⁹ Thus, U S WEST can advertise the Service to virtually every subscriber on its network, and it can do so using a customer database that is either unavailable, or available only at a significant additional charge, to its competitors in the local service market. Moreover, by using bill inserts, U S WEST can effectively promote the Service at a fraction of what a stand-alone mailing would cost one of its competitors, even assuming the competitor had access to U S WEST’s subscriber mailing list. Use of a subscriber list, and the unique benefits it provides, is one of the factors the Commission found problematic in the *1-800-AMERITECH Order*.⁵⁰

19. In sum, U S WEST’s participation in the long distance market through its 1-800-4USWEST Service enables it to obtain significant competitive advantages that are similar to what the *Qwest Teaming Order* found to be objectionable and almost identical to what the *1-800-AMERITECH Order* found to be objectionable. The Service allows U S WEST to build goodwill with its local-service customers, depicting itself as a full-service provider prior to receiving section 271 approval. Indeed, the full-service, or one-stop shopping, advantages provided by the Service appear to have been U S WEST’s primary objective in implementing the Service in the first place.⁵¹ As the Commission held in the *1-800-AMERITECH Order*, these competitive advantages could reduce U S WEST’s incentive to open its local market to competition and, thus, run counter to Congress’s intent in enacting section 271.⁵²

2. U S WEST Is Effectively Holding Itself Out As a Provider of Long-Distance Service.

20. We also must inquire whether U S WEST is effectively holding itself out to customers as a provider of long distance services. In the *Qwest Teaming Order*, the Commission found that, through the challenged services, the defendant carriers were holding themselves out in such a manner, because they had “taken several specific steps to brand [the challenged offerings] as their exclusive combined service offerings.”⁵³ In affirming the Commission, the Court of Appeals agreed that, viewed as a whole, the challenged promotional materials could lead consumers to believe that the BOCs were providing in-region long distance service.⁵⁴

21. Similarly, in the *1-800-AMERITECH Order*, we noted that the use of the vanity 800 number⁵⁵ was plainly calculated to cause customers to associate Ameritech with the services

⁴⁹ U S WEST October 3, 1997 Interrogatory Responses at 3-6.

⁵⁰ *1-800-AMERITECH Order*, 15 FCC Rcd at ___, ¶ 15.

⁵¹ *See, supra*, at ¶ 15.

⁵² *See 1-800-AMERITECH Order*, 15 FCC Rcd at ___, ¶ 16; *U S WEST Communications*, 177 F.3d at 1060.

⁵³ *Qwest Teaming Order*, 13 FCC Rcd at 21471, ¶ 45.

⁵⁴ *U S WEST Communications*, 177 F.3d at 1061.

⁵⁵ A vanity number is a telephone number for which the letters associated with the number’s digits on a telephone handset spell a name or word of value to the number holder. *In re Toll Free Service Access Codes*, (continued....)

offered through the 1-800-AMERITECH platform.⁵⁶ Thus, the 800 number allowed Ameritech to link the service's long distance offering (as well as its other offerings) with the carrier's accumulated customer good will and its established reputation as a local service provider.⁵⁷

22. In this case, U S WEST virtually concedes that its promotional and marketing materials may have caused in the minds of its customers the type of confusion that the Commission and Court of Appeals have found to be problematic.⁵⁸ Specifically, U S WEST acknowledges that some of its promotional materials "might have created some confusion in some customers," and that "from a regulatory perspective, some of the materials might be deemed to have 'gone over the line.'"⁵⁹

23. Indeed, an examination of U S WEST's promotional materials confirms that U S WEST is holding itself out as a provider of long distance service. The materials prominently display the U S WEST brand, creating the impression that U S WEST provides all components of the Service, including long distance.⁶⁰ Other statements in the materials similarly foster this impression. For example, one advertisement features the U S WEST logo in large type and, in describing the Service, strongly suggests that U S WEST is the long distance service provider.⁶¹ Several other promotional materials attest to the card's ability to make all types of calls, including long distance.⁶² The promotional materials U S WEST used to introduce and market its Service are strikingly similar to those found to be troublesome and misleading in the *1-800-AMERITECH Order*.⁶³

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Fourth Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 9058, 9058, ¶ 1 (1998) ("*Toll Free Service Access Codes Order*").

⁵⁶ *1-800-AMERITECH Order*, 15 FCC Rcd at __, ¶ 18.

⁵⁷ As the Commission stated in the *Toll Free Service Access Codes Order*, vanity numbers "are of value to their subscribers because they can generate high visibility and consumer recognition when used in advertising." *Id.* at 9064, ¶ 11.

⁵⁸ *QWEST Teaming Order*, 13 FCC Rcd at 21471, ¶ 45; *U S WEST Communications*, 177 F.3d at 1061.

⁵⁹ U S WEST Brief re Applicability of Ameritech in AT&T Case at 18.

⁶⁰ *See generally* MCI Complaint, Exhibit B; U S WEST Answer in AT&T Case, Attachments 6-9.

⁶¹ U S WEST Answer in AT&T Case, Attachment 8 ("Because 1-800-4USWEST gives you a low 20-cents-per-minute rate on every call you make when you're away from home. It's a better rate than those charged by *our* long distance competitors.") (emphasis added).

⁶² MCI Complaint, Exhibit B ("use the 1-800-4USWEST Calling Card to make local calls, long distance calls, international calls. . ."); U S WEST Answer in AT&T Case, Attachment 9 ("Introducing 1-800-4USWEST. All your calls with just one card"); AT&T Complaint, Exhibit K ("U S WEST has introduced the U S WEST Express Calling Card, which allows users to place domestic long distance calls anytime from anywhere in the United States for just 20 cents a minute.").

⁶³ *1-800-AMERITECH Order*, 15 FCC Rcd at __, ¶¶ 3, 19.

24. U S WEST argues that its 1-800-4USWEST customers always have a choice in selecting their long distance service provider, because they can dial 0+ to access another service provider.⁶⁴ Because this 0+ capability is disclosed on the back of its calling card and on certain promotional materials, U S WEST contends that it cannot obtain any benefit from holding itself out as the provider of long distance services.⁶⁵ However, even while disclosing in certain materials the availability of the 0+ option, U S WEST actively discourages its customers from using that option. Almost uniformly, U S WEST describes the 0+ option as one that customers should never consider using in comparison to dialing 1-800-4USWEST.⁶⁶ U S WEST's repeated warnings that dialing 0+ "doesn't work" and that U S WEST cannot "protect" customers if they dial 0+ severely undercut U S WEST's reliance on its advertisements' references to 0+ capability. Moreover, the references to 0+ capability actually support our conclusion that U S WEST is unlawfully holding itself out as a long distance service provider. By comparing the long distance services provided by its 1-800-4USWEST Service to those furnished by other long distance carriers through the 0+ option, U S WEST implicitly suggests to its customers that it is a less expensive provider of long distance services.⁶⁷

25. U S WEST also contends that the shortcomings in its initial promotional materials for the Service were remedied by the promotional materials it has used since November 1997, which specify that Frontier handles in-region, interLATA calls.⁶⁸ However, this is no different from the situation the Commission confronted in the *1-800-AMERITECH Order*. Although later promotional materials in that case identified the supporting long distance provider who handled in-region, interLATA calls, they usually did so in small type.⁶⁹ In this case, there also is a proportional dissimilarity in type size between the U S WEST brand name and the Frontier brand name.⁷⁰ Moreover, the disclosures are generally relegated to an obscure portion of the promotional materials.

⁶⁴ U S WEST Brief re Applicability of Ameritech in AT&T Case at 2-4, 16-17.

⁶⁵ *Id.*

⁶⁶ See U S WEST January 25, 1999 Letter at 1 ("Dial 1-800-4USWEST" and "You Will Save . . . It Works . . . [and] It's Complete;" "Dial 0" and "We Can't Guarantee You'll Save . . . It Doesn't Work . . . [and] It's Incomplete."). Other advertisements warned customers that, although they could still dial "0" when using the Service, U S WEST could not "protect" them if they did. See AT&T Complaint, Exhibit B.

⁶⁷ Similarly, U S WEST's promotional materials expressly compare U S WEST's calling card services for long distance calls with the long distance services provided by MCI, Sprint, and AT&T. U S WEST January 25, 1999 Letter at 14. This further bolsters our conclusion that U S WEST is holding itself out as a provider of long distance services. *1-800-AMERITECH Order*, 15 FCC Rcd at ___, ¶ 20.

⁶⁸ U S WEST Brief re Applicability of Ameritech in AT&T Case at 15-16; U S WEST January 25, 1999 Letter, Attachments.

⁶⁹ *1-800-AMERITECH Order*, 15 FCC Rcd at ___, ¶ 21.

⁷⁰ U S WEST January 25, 1999 Letter, Attachments. In addition, not all of the later disclaimers state that Frontier handles the in-region, interLATA calls. At least one of the disclaimers continues to use the original (continued....)

26. U S WEST further asserts that in-region interLATA calls are branded and billed as Frontier calls, which purportedly confirms the distinction between U S WEST and Frontier and eliminates any possible customer confusion.⁷¹ We disagree. Viewing the Service as a whole and the manner in which U S WEST promotes it, we conclude that U S WEST holds itself out as a long distance provider.⁷² The vanity access number all but ensures that the offering, and all of its components, generally will be perceived as a U S WEST-provided service. Furthermore, given the prominence of U S WEST's brand name on the promotional materials, the fact that U S WEST does not furnish the in-region, interLATA transmission for the Service likely will be lost on all but a few sophisticated consumers.⁷³ This is the case regardless of whether a customer's monthly U S WEST statement identifies long distance calls as being carried by Frontier.⁷⁴

3. U S WEST Performs Activities Typically Undertaken by Resellers.

27. In determining whether U S WEST performs activities in connection with its Service that are typically performed by those who resell interLATA service, we look to the degree of control U S WEST exercises over marketing and the customer relationship.⁷⁵ Although the facts of this case are slightly different than in the *1-800-AMERITECH Order*, the degree of
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language that "calls made via 1-800-4USWEST will be handled by U S WEST Communications, U S WEST Long Distance or Frontier. Call Customer Service for more details." *Id.* at 6.

⁷¹ U S WEST Brief re Applicability of Ameritech in AT&T Case at 15.

⁷² See *U S WEST Communications*, 177 F.3d at 1061 (considered in their entirety, the U S WEST and Ameritech promotional materials could "lead consumers to link long-distance service to the BOCs, particularly as long-distance was offered only as part of a full-service package within a BOC brand name.").

⁷³ Cf. *United States v. Western Elec. Co.*, 698 F. Supp. 348, 356 nn.38, 42 (D.D.C. 1988) (advertisements for long distance service in connection with BOC-provided calling cards that failed to indicate that the BOCs were not providing the long distance service were misleading and inconsistent with the Modified Final Judgment's prohibitions, because customers would be misled into believing the BOCs were carrying the long distance calls).

⁷⁴ The fact that the long distance provider's name was listed on Ameritech's customer bills in the *1-800-AMERITECH Order* also did not save the Ameritech service from a section 271 violation. *1-800-AMERITECH Order*, 15 FCC Rcd at ___, ¶¶ 7, 22.

⁷⁵ *Qwest Teaming Order*, 13 FCC Rcd at 21473, ¶ 48; *1-800-AMERITECH Order*, 15 FCC Rcd at ___, ¶¶ 23-25.

control U S WEST exercises over the customer relationship appears to be just as significant.⁷⁶ U S WEST made it clear in the RFP and the resulting agreement with Frontier that U S WEST would exercise exclusive control over messages provided to customers and the overall customer relationship.⁷⁷ While Frontier apparently is not prohibited from responding to certain customer service inquiries, it does so subject to U S WEST's direction, as U S WEST is contractually authorized to dictate how Frontier responds to customer inquiries and what messages Frontier provides to customers.

28. Similarly, U S WEST exercises exclusive control over the marketing of the 1-800-4USWEST Service. As described above, the agreement between U S WEST and Frontier provides that U S WEST "owns and creates all marketing communications."⁷⁸ Further, the agreement states that "Frontier does not have any approval rights about any of the promotional, advertising or fulfillment packages," and that U S WEST, "as a courtesy, supplies Frontier with a copy of such materials."⁷⁹ Thus, U S WEST controls the right to market and sell, under the 1-800-4USWEST name, not only its own local and intraLATA toll services, but Frontier's long distance services as well.⁸⁰

29. U S WEST's exercise of exclusive control over customer relations and marketing demonstrates that U S WEST was significantly involved in the design and development of the long distance component of its 1-800-4USWEST Service. The fact that U S WEST could insist on such requirements, select a long distance provider who would accept the requirements without modification, and reject those who would not, is a testament to U S WEST's control over the design of the Service.⁸¹ For these reasons, we conclude that U S WEST is engaged in activities typically performed by resellers.⁸²

⁷⁶ Indeed, U S WEST makes almost no attempt to distinguish between the customer control restrictions imposed in its agreement with Frontier and those described in the *1-800-AMERITECH Order*. U S WEST simply states that "[t]he business relationship between Frontier and U S WEST as reflected in the record demonstrates some similarities and some material differences as between that relationship and the one outlined in the *AMERITECH Calling Card Order*." U S WEST Brief re Applicability of Ameritech in AT&T Case at 10, n. 22. Yet U S WEST fails to support this assertion with any cites to the record or discussion of differing contract terms. U S WEST merely suggests that Frontier's carrying, branding, and rating of the calls is inconsistent with the conclusion that U S WEST acts as a reseller. *Id.* As discussed *infra* at n.74, however, it is clear that the long distance company in the *1-800-AMERITECH Order* also branded and carried the calls in question. *1-800-AMERITECH Order*, 15 FCC Rcd at ___, ¶¶ 7, 22.

⁷⁷ U S WEST Answer in AT&T Case, Attachment 11 (RFP at 10); U S WEST August 22, 1997 Supplemental Interrogatory Responses at 28.

⁷⁸ U S WEST August 22, 1997 Supplemental Interrogatory Responses at 28.

⁷⁹ *Id.* at 22.

⁸⁰ The parties have not identified any instances in which Frontier engaged in independent marketing, sales, or promotional activities in connection with the 1-800-4USWEST Service.

⁸¹ U S WEST declared, in its RFP, that it would own the customer relationship and would exercise exclusive control over the marketing of the 1-800-4USWEST Service. These requirements were apparently (continued....)

4. Conclusion

30. Based on the totality of the circumstances, we conclude that, through the 1-800-4USWEST service, U S WEST is "providing" in-region, interLATA service in violation of section 271. First, the Service affords U S WEST material benefits uniquely associated with the inclusion of long distance service in the offering. Specifically, it permits U S WEST to accumulate a significant base of customers who rely on the Service, and it enables U S WEST to amass goodwill as a full-service provider with its local service customers. Second, through the Service and the many associated promotional materials that prominently bear U S WEST's brand, the carrier essentially holds itself out as providing long distance service. Finally, in connection with the Service, U S WEST controls numerous functions, including marketing and customer care, that are typically performed by a reseller of long distance service. All of these factors lead us to conclude that U S WEST is "providing" in-region, interLATA service in violation of section 271.

B. We Reject U S WEST's Arguments Regarding Remedies.

31. U S WEST devotes much of its supplemental briefing to remedy-related arguments, contending, first, that the Commission's alleged delay in ruling on liability renders any damages award inappropriate. According to U S WEST, until a ruling in this case, the state of the law regarding the legality of its Service was unclear.⁸³ We disagree, but note that we need not decide damages at this time. We will address damages when, and if, complainants file supplemental complaints for damages.

32. Second, U S WEST attempts to expand the scope of this proceeding by arguing that proposed marketing and promotional changes to its Service convert the Service into a lawful offering.⁸⁴ We decline U S WEST's invitation to issue a declaratory ruling regarding its prospective conduct. Our task in this section 208 complaint proceeding is to adjudicate the lawfulness of prior or current conduct and not to opine on the lawfulness of hypothetical or future conduct. However, U S WEST is free to file a Petition for Declaratory Ruling requesting an opinion as to the lawfulness of proposed changes to its Service.

C. We Need Not and Do Not Reach Complainants' Other Claims.

33. In addition to their section 271 claims, complainants argue that: (1) the 1-800-4USWEST service amounts to an unreasonable practice, in violation of section 201(b); (2) U S WEST excluded complainants in a discriminatory manner from providing transport services to support the Service, in violation of section 202(a); (3) the structure of the Service contravenes

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adopted wholesale in U S WEST's agreement with Frontier. U S WEST August 22, 1997 Supplemental Interrogatory Responses at 22, 28.

⁸² *1-800-AMERITECH Order*, 15 FCC Rcd at __, ¶¶ 25-26.

⁸³ U S WEST Brief re Applicability of Ameritech in AT&T Case at 4-6.

⁸⁴ *Id.* at 20-22.

U S WEST's equal access obligations, in violation of section 251(g); and (4) by holding out itself as a provider of in-region, interLATA services prior to receiving authorization under section 271, U S WEST has circumvented separate affiliate safeguards, in violation of section 272. Because we find that U S WEST violated section 271, we need not and do not reach complainants' claims alleging other violations of the Communications Act.⁸⁵

IV. CONCLUSION

34. We find that U S WEST, through its 1-800-4USWEST Service, is providing in-region, interLATA services without authorization, in violation of section 271 of the Act. We do not reach other statutory claims raised by complainants.

V. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 208, and 271 of Act, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and 271, that the Formal Complaints filed by MCI Telecommunications Corporation and AT&T Corporation ARE GRANTED to the extent that they allege that the 1-800-4USWEST Service violates section 271 of the Act.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

⁸⁵ *1-800-AMERITECH Order*, 15 FCC Rcd at ___, ¶ 28; *Qwest Teaming Order*, 13 FCC Rcd at 21476, ¶ 53.