

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	File No. EB-02-IH-0674
)	
)	Acct. No. 200332080012
)	
Qwest Communications)	
International Inc.)	FRN No. 0003605953
)	

ORDER

Adopted: May 5, 2003

Released: May 7, 2003

By the Commission:

1. The Commission has been conducting an investigation into possible violations by Qwest Communications International Inc. (“Qwest”) of sections 271(a) and 272(g)(2) of the Communications Act of 1934, as amended, and of the Merger Order issued by the Commission in Memorandum Opinion and Order, *Qwest Communications International Inc. And U S WEST, Inc.; Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, 15 FCC Red 11909 (2000) (“Merger Order”), by providing, marketing, or selling, in-region interLATA services prior to receiving authority pursuant to section 271.¹

2. The Commission and Qwest have negotiated the terms of a Consent Decree that would terminate the Commission’s investigation. A copy of the Consent Decree is attached hereto and is incorporated by reference.

3. We have reviewed the terms of the Consent Decree and evaluated the facts before us. We believe that the public interest would be served by approving the Consent Decree and terminating the investigation.

4. Based on the record before us, and in the absence of material new evidence relating to this matter, we conclude that there are no substantial and material questions of fact as to whether Qwest possesses the basic qualifications, including its character qualifications, to hold or obtain any FCC licenses or authorizations.

5. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 154(j) that the Consent

¹ See Letter from David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission, to Lauren Belvin, Qwest (May 24, 2001) (initial Letter of Inquiry).

Decree, incorporated by reference in and attached to this order, is hereby ADOPTED.

6. IT IS FURTHER ORDERED that the Secretary SHALL SIGN the Consent Decree on behalf of the Commission.

7. IT IS FURTHER ORDERED that the above captioned investigation IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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CONSENT DECREE

I. Introduction

1. The Federal Communications Commission (“Commission”) and Qwest Communications International Inc. (“Qwest”) enter into this consent decree (“Consent Decree”) for the purpose of terminating an informal investigation by the Commission’s Enforcement Bureau (“Bureau”) into whether Qwest provided, marketed, or sold in-region, interLATA services prior to receiving authority pursuant to section 271 of the Communications Act of 1934, as amended (“the Act”), and/or in violation of sections 271(a) and 272(g) of the Act, and in violation of the Merger Order issued by the Commission in Memorandum Opinion and Order, *Qwest Communications International Inc. And U S WEST, Inc.; Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, 15 FCC Red 11909 (2000) (“Merger Order”).²

2. For the purposes of this Consent Decree the following definitions shall apply:

- a. “Commission” or “FCC” means the Federal Communications Commission.
- b. “Bureau” means the Enforcement Bureau of the Federal Communications Commission.
- c. “Qwest” means Qwest Communications International Inc. and any subsidiaries.

² See Letter from David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission, to Lauren Belvin, Qwest (May 24, 2001) (“Solomon May 24, 2001 Letter of Inquiry”) (initial Letter of Inquiry).

- d. "Parties" means Qwest and the Commission.
- e. "Adopting Order" means an Order of the Commission adopting the terms and conditions of this Consent Decree.
- f. "Effective Date" means the date on which the Commission releases the Adopting Order.
- g. "Investigation" means the investigation initiated by the Commission regarding the matters discussed in paragraph 6 below, concerning Qwest's conduct during the period from June 30, 2000 to the Effective Date of this Consent Decree.

I. BACKGROUND

3. On June 26, 2000, the Commission approved the transfer of licenses and lines from U S WEST, Inc. ("U S WEST") to Qwest Communications International Inc. in connection with the merger of the two companies.³ Qwest agreed to discontinue or divest to an unaffiliated carrier ("acquiring carrier") certain in-region interLATA services provided in the former U S WEST region prior to the close of the merger to avoid violations of section 271 of the Act as a result of the merger.⁴ These services included all private lines with an end point in-region, 1+ switched interLATA service originating and 8XX interLATA service terminating in-region, and in-region interLATA operator and calling card services.⁵ Qwest's commitments were set forth in its Divestiture Plan, dated April 14, 2000, and filed with the Commission on that date in the Merger docket.⁶ The Commission approved the merger of U S WEST and Qwest in the Merger Order, based on the entire record before it.⁷

4. The Merger Order required Qwest to engage an independent auditor to examine Qwest's compliance with section 271 as set forth in its Divestiture Plan. Qwest has done so, and two such audits have been conducted under the supervision of the Commission.

³ *Merger Order* at 11932-3, ¶¶ 42-45.

⁴ Section 271 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 271, prohibits a Bell operating company ("BOC"), or its affiliate, from entering the in-region, interLATA market, unless the BOC demonstrates that its local market is open to competition in accordance with the requirements of section 271. *Merger Order* at 11911 ¶ 19. *See also* Memorandum Opinion and Order, *Qwest Communications International Inc. And U S WEST, Inc.; Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 5376, 5384, ¶ 14 (2000) ("March Merger Order").

⁵ Divestiture Compliance Report, Qwest Communications International Inc., *Qwest Communications International Inc. and U S WEST, Inc.; Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 99-272 (April 14, 2000) ("Divestiture Compliance Report"), at 14. *See also* *March Merger Order*, at 5384, ¶¶ 14-15.

⁶ *Divestiture Compliance Report* at 37-39.

⁷ *Merger Order* at 11932 ¶¶ 43-44.

5. On April 16, 2001 and September 7, 2001, Arthur Andersen (“AA”) filed audit reports addressing Qwest’s compliance with the Merger Order for the period June 30, 2000 through December 31, 2000, and on March 11, 2002 AA filed an audit report for the period January 1, 2001 through December 31, 2001. AA also filed letters with the Commission related to the audit reports on June 8, 2001 and June 3, 2002 (collectively, “the AA Audit Reports”). Although the independent auditor concluded that Qwest complied in all material respects with the Merger Orders, the independent auditor also identified certain instances of mis-branding and mis-billing of the acquiring carrier’s private lines services and Internet global service provider (“GSP”) services, and facts concerning Qwest’s retention of certain revenues received in the billing process for these services as set-off for amounts that Qwest asserted it was owed by the acquiring carrier. These instances are described in the AA Audit Reports. The AA Audit Reports also noted that Qwest had sold Indefeasible Rights-of-Use (“IRUs”). Qwest responded to these reports at the time, and also has responded to letters of inquiry or other questions from the staff of the Enforcement Bureau related to these matters in connection with EB-01-IH-376 and EB-02-IH-0674, as well as CC Docket No. 99-272 and the merger audit proceedings generally. Qwest has described corrective action that has been taken with respect to the matters identified in the AA Audit Reports. Qwest also has asserted that its IRU transactions identified by AA do not violate Section 271.

6. Following these audit reports, the Bureau began its Investigation of Qwest’s compliance with the Merger Order and Sections 271 and 272 of the Act (“the Investigation”) prior to receiving section 271 authority. In particular, the Bureau issued Letters of Inquiry (“LOIs”) on May 24, 2001, August 7, 2002, October 16, 2002, November 26, 2002, and December 23, 2003.⁸ Qwest responded to the Bureau’s LOIs on June 14, 2001, September 11, 2002, October 29, 2002, December 11, 2002, December 23, 2002, January 10, 2003, January 15, 2003, January 21, 2003, January 24 2003, January 31, 2003, February 3, 2003, and February 11, 2003.⁹ In addition, AT&T Corp. (“AT&T”), the Competitive Telecommunications Association (“CompTel”), and WorldCom, Inc. (“WorldCom”) submitted information to the Bureau in response to the AA Audit Reports.¹⁰ Touch America

⁸ See Solomon May 24, 2001 Letter of Inquiry; Letters from Maureen F. Del Duca, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Melissa Newman, Vice President – Federal Regulatory, Qwest, and Robert McKenna, Associate General Counsel, Qwest (Aug. 7, 2002, Oct. 16, 2002, Nov. 26, 2002, Dec. 23, 2003).

⁹ See Letter from Sharon J. Devine, Associate General Counsel, Qwest, to David H. Solomon, Chief, Enforcement Bureau, Federal Communications Commission (June 14, 2001); Letters from Sharon J. Devine, Associate General Counsel, Qwest, to Maureen F. Del Duca, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (Sept. 11, 2002, Oct. 29, 2002, Dec. 11, 2002, Dec. 23, 2002, Jan. 10, 2003, Jan. 15, 2003, Jan. 21, 2003, Jan. 24, 2003, Jan. 31, 2003, Feb. 3, 2003, and Feb. 11, 2003).

¹⁰ See Letter from Lisa B. Smith, Senior Policy Counsel, WorldCom, Inc., to David Solomon, Chief, Enforcement Bureau, FCC, CC Docket No. 99-272 (May 14, 2001); Letter from Jonathan D. Lee, Vice President, CompTel, to David Solomon, Chief, Enforcement Bureau, FCC, CC Docket No. 99-272 (May 16, 2001); Letter from Aryeh S. Friedman, Senior Attorney, AT&T Corp., to David Solomon, Chief, Enforcement Bureau, FCC, CC Docket No. 99-272 (Jul. 18, 2001); Letter from David Lawson, Outside Counsel for AT&T Corp., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 99-272 (May 2, 2002).

submitted related information to the Bureau.¹¹ Qwest voluntarily disclosed certain issues regarding provisioning of in-region interLATA services and related matters, including advertising of in-region interLATA services.¹² The Bureau's Investigation included, among other things, the following matters arising from its review of this collective record:

- a. *Private Line Provisioning*: On December 3, 2002, Qwest disclosed that earlier that year it had provisioned four in-region interLATA private line services to Cable and Wireless, USA, Inc.¹³ On March 7, 2003, Qwest identified additional in-region interLATA private line services that Qwest had found it had provided for some period after the Merger.¹⁴
- b. *Dark Fiber Leases*: On December 3, 2002, Qwest disclosed that it had failed to terminate two in-region interLATA dark fiber leases as of the Merger.
- c. *Private Line Billing and Branding*: The AA Audit Reports noted certain instances in which Qwest billed and branded non-metered services (e.g., private line services) provided by the acquiring carrier as Qwest services. Qwest asserted that it retained some of the associated revenues as set-off for other amounts due it from the acquiring carrier.

¹¹ See Letter from Charles H. Helein and Jonathan S. Marashlian, Counsel for Touch America, Inc., to Maureen F. Del Duca, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (Sept. 20, 2002); Application of Touch America, Inc. for Admission of Relevant Discovery Produced in Related Proceedings (Sept. 25, 2002); Letter from Charles H. Helein and Jonathan S. Marashlian, Counsel for Touch America, Inc., to Maureen F. Del Duca, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (Oct. 9, 2002); Letter from Charles H. Helein and Jonathan S. Marashlian, Counsel for Touch America, Inc., to Maureen F. Del Duca, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (Jan. 6, 2003); Application of Touch America, Inc. for Admission of Relevant Evidence Produced in Related Proceedings (Jan. 9, 2003); Letter from Charles H. Helein and Jonathan S. Marashlian, Counsel for Touch America, Inc., to Mark Stone, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (Jan. 17, 2003).

¹² See Letter from Sharon Devine, Associate General Counsel, Qwest, to Michelle Carey, Chief, Competition Policy Division, Wireline Competition Bureau, and Anthony Dale, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (Dec. 3, 2002); Letter from Sharon Devine, Associate General Counsel, Qwest, to Maureen F. Del Duca, Chief, and Anthony Dale, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (March 7, 2003); Letter from Melissa Newman, Vice President-Federal Regulatory, Qwest, to Maureen F. Del Duca, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission (April 10, 2003).

¹³ Qwest subsequently provided additional information regarding these matters at the request of the Bureau. Qwest's responses included correspondence dated January 10, 15, and 31, and February 3 and 11, 2003.

¹⁴ Qwest provided further information in correspondence dated March 11, 2003 and in response to questions from the staff.

- d. *GSP Billing and Branding*: The AA Audit Reports noted certain instances in which Qwest billed and branded GSP services provided by the acquiring carrier as Qwest services, and other instances where Qwest failed to include a charge for the GSP service provided by the acquiring carrier. Qwest asserted that it retained some of the associated revenues as set-off for other amounts due it from the acquiring carrier.
- e. *Indefeasible Rights-of-Use*: The AA Audit Reports noted that Qwest had sold Indefeasible Rights-of-Use (“IRUs”). These IRUs were either “lit,” for which Qwest supplied the electronics necessary for transmission, or “dark,” for which Qwest’s customer supplied such electronics. On December 3, 2002, Qwest submitted a letter to the Bureau disclosing certain record-keeping and administrative errors in its provision of lit IRU capacity and divestiture of services to the acquiring carrier. Moreover, Qwest states that these IRUs were sold by Qwest Communications Corporation, an affiliate that Qwest states is presently not qualified as a Section 272 affiliate pursuant to Section 272(b) of the Act and the Commission’s implementing rules and orders.
- f. *Calling Cards*: The AA Audit Reports noted certain instances in which Qwest misidentified revenues otherwise due the acquiring carrier in connection with the in-region use of prepaid calling cards sold in conjunction with the acquiring carrier, where the acquiring carrier provided the in-region interLATA service. Qwest asserted that it retained those revenues as set off for other amounts due it from the acquiring carrier. On March 7, 2003, Qwest identified certain networking matters, including 8XX transport, related to operator services provided by the acquiring carrier.
- g. *Advertising of interLATA Services*: On April 10, 2003, Qwest disclosed that on April 7-8, 2003, certain television advertisements for in-region, interLATA services had run in states for which Qwest had not yet had a section 271 application granted. Qwest asserted that the advertisements had been broadcast in those states through an error by its advertising agency, and contrary to Qwest’s instructions.

II. AGREEMENT

7. The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between Qwest and the Commission of the Investigation. In consideration for the termination of this Investigation in accordance with the terms of this Consent Decree, Qwest agrees to the terms, conditions, and procedures contained herein. Qwest agrees that the Commission has jurisdiction over the matters contained in this Consent Decree and the authority to enter into and adopt this Consent Decree.

8. Qwest admits that, with respect to the following matters, Qwest violated the *Qwest/U S WEST Merger Order* by not terminating, suitably modifying or divesting by the

close of the merger (June 30, 2000) the following services provided to the following customers:

- a. Two leases of dark fiber: one to Timing Solutions Corp. in Arizona and one to MEANS, Inc. in Minnesota.
- b. Six private line services: one DS3 to Electric Lightwave, Inc. between Medford, OR, and Portland, OR; four DS3s to Triumph Communications each of them having one end point in Denver, CO, with the other end points in Chicago, IL, Kansas City, MO, Los Angeles, CA, and Sacramento, CA; and one DS3 to Teleglobe USA Inc. between Seattle, WA, and Los Angeles, CA.

9. Qwest further admits that its provision of four optical level private line services to Cable & Wireless USA, Inc. in March 2002 constituted a violation of Section 271: three circuits between Englewood, CO and each of Colorado Springs, CO, Kansas City, MO, and Chicago, IL; and one circuit between Minneapolis, MN and Chicago, IL.

10. Qwest maintains that its failure to terminate, suitably modify or divest the dark fiber leases and private line services identified in paragraph 8(a) and (b) above by June 30, 2000 and its provision of private line services to Cable & Wireless USA, Inc. identified in paragraph 9 above were inadvertent and the result of record-keeping and administrative errors.

11. Qwest agrees that it shall make a voluntary contribution to the United States Treasury in the amount of \$6.5 million. This amount shall be paid within 10 calendar days after the Commission order adopting this Consent Decree becomes final. Qwest must make this payment by check, wire transfer or money order drawn to the order of the Federal Communications Commission, and the check, wire transfer or money order should refer to "Acct. No. 200332080012" and "FRN No. 0003605953." If Qwest makes this payment by check or money order, it must mail the check or money order to: Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois, 60673-7482. If Qwest makes this payment by wire transfer, it must wire such payment in accordance with Commission procedures for wire transfers.

12. The Commission agrees that, based on the facts developed in this Investigation and in the absence of material new evidence related to this matter, it will not use the facts developed in this Investigation through the Effective Date of the Consent Decree or the existence of this Consent Decree to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against Qwest concerning the matters discussed in paragraph 6(a) through 6(d) and 6(f) above. With respect to paragraph 6(e) above, the Commission agrees not to take any future actions on its own motion in the absence of material new evidence against Qwest for any violations of sections 271 or 272 of the Act, or the Merger Order, concerning lit IRUs, provided Qwest complies with paragraph (d) of the attached Compliance Plan. The Commission also agrees that, based on the facts developed in the Investigation, and in the absence of material new evidence related to this matter, it will not use the facts developed in this Investigation through the Effective Date of this Consent Decree

or the existence of this Consent Decree to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against Qwest with respect to Qwest's basic qualifications, including its character qualifications, to be a Commission licensee or with respect to compliance with the Commission's rules and policies.

13. Nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints filed pursuant to section 208 of the Communications Act, as amended, 47 U.S.C. § 208, against Qwest or its affiliates for alleged violations of the Merger Order, or for any other type of alleged misconduct, regardless of when such misconduct took place. This Consent Decree does not affect the rights of Qwest or Touch America in EB-02-MD-003 and EB-02-MD-004, or the ability of the Commission to resolve those complaint proceedings in the manner it deems appropriate.¹⁵ With respect to those proceedings or any other Section 208 complaints that may be filed against Qwest, the Commission's adjudication of each such complaint will be based solely on the record developed in that proceeding.

14. In express reliance on the covenants and representations contained herein, the Commission agrees to terminate the Investigation. Qwest agrees to take the actions described in the attached Compliance Plan.

15. In the event that Qwest is found by the Commission or its delegated authority to have engaged in a violation of the Act or the Merger Order subsequent to the release of the Adopting Order, the Commission or its delegated authority reserves the right to consider the conduct described in paragraph 6 above in determining an appropriate sanction. If such conduct is considered by the Commission or its delegated authority in determining an appropriate sanction, Qwest will not be estopped from litigating the issues of whether such conduct or the facts involved in such conduct actually violated the Act or the Commission's rules, the merits of Qwest's conduct, or the relevance or weight to be given such conduct under section 1.80 of the Commission's rules.

16. Qwest waives any rights it may have under any provision of the Equal Access to Justice Act, 5 U.S.C. § 504.

17. In the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, this Consent Decree shall become null and void and may not be used in any manner in any legal proceeding.

¹⁵ Because of the nexus between the formal complaints and the Investigation, the Bureau treated the Investigation as a restricted proceeding under section 1.1208 of the Commission's rules, 47 C.F.R. § 1.1208. As a result, the Bureau included Touch America in correspondence between Qwest and the Commission. Pursuant to section 1.1204(a)(10) of the Commission's rules, 47 C.F.R. § 1.1204(a)(10), the Commission and Qwest conducted bi-lateral settlement discussions. All of the information provided by Qwest during those settlement discussions "relat[ed] to how a proceeding should or could be settled, as opposed to new information regarding the merits." *See* 47 C.F.R. 1204(a)(10)(ii).

18. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither Qwest nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and Qwest and the Commission will waive any statutory right to a trial *de novo* with respect to any matter upon which the Adopting Order is based, and shall consent to a judgment incorporating the terms of this Consent Decree.

19. The Commission and Qwest agree that this Consent Decree is for settlement purposes only and that it does not constitute an admission, denial, adjudication on the merits, or factual or legal determination regarding any compliance or noncompliance with the law or requirements of the Merger Order other than as stated in paragraphs 8-9, above. Qwest does not admit any noncompliance, violation, or liability associated with or arising from any alleged actions or failures other than as stated in paragraphs 8-9, above. Nothing in this Consent Decree constitutes a waiver, suspension, or modification of the Act or the Commission's rules.

20. Qwest agrees that any violation of the Consent Decree (including the attached Compliance Plan) or the Adopting Order will constitute a separate violation of a Commission order, entitling the Commission to exercise any rights or remedies attendant to the enforcement of a Commission order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary
Federal Communications Commission

R STEVEN DAVIS
Senior Vice President
Qwest Communications International Inc.

Date

Date

ATTACHMENT**COMPLIANCE PLAN**

Qwest's Compliance Plan consists of the following six parts:

(a) Not later than 45 days after entry of the Adopting Order, Qwest will fully implement supplemental changes to its order entry process designed as further controls to prevent the completion of an order for the provision of in-region, interLATA private line services in either Arizona or Minnesota until such time as the Commission has granted a Qwest application for Section 271 authority in the respective state. Qwest will maintain these procedures until it receives section 271 authorization in all of its in-region states.

(b) Not later than 60 days after entry of the Adopting Order, Qwest will provide refresher training to Qwest Communications Corporation order entry personnel on proper guidelines for the provision of interLATA private line services.

(c) Qwest has performed an internal investigation into its potential provisioning of in-region interLATA services, the results of which are reflected in the disclosures recited in the Consent Decree. Qwest will submit the procedures and nonprivileged work papers from that investigation to the independent auditor for consideration in the auditor's report. Qwest will continue to provide to the independent auditor such further nonprivileged information as the independent auditor may request concerning Qwest's internal investigation and its results.

(d) Absent prior written action by the Commission after entry of the Adopting Order, Qwest will not sell any lit IRUs, whether by exchange transaction or otherwise, with an end point in either Arizona or Minnesota until such time as the Commission has granted a Qwest application for section 271 authority in the respective state. If Qwest sells any lit IRUs in states where it has received section 271 authorization, it will do so in compliance with section 272.

(e) Qwest will assign one or more Vice Presidents to oversee these measures and to ensure their effectiveness.

(f) Qwest's independent auditor for the Merger Order Audit will review Qwest's compliance with this Compliance Plan as a part of the Merger Order Audit.