

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE ANALYSIS OF)	ORDER REGARDING
QWEST CORPORATION'S COMPLIANCE)	SECTION 272
WITH SECTION 271(c) OF THE)	
TELECOMMUNICATIONS ACT OF 1996)	TC01-165

SECTION 272

Qwest is required to show that, upon commencing in-region interLATA service, Qwest will provide such service in accordance with the requirements of section 272. 47 U.S.C. § 271(d)(3)(B). Section 272 sets forth the structure and business relationship that Qwest must establish with the affiliate that will be providing interLATA services.

The first requirement of section 272 relates to whether the affiliate is separate from Qwest. The section requires that a BOC may not provide interLATA long distance services unless it provides that service through one or more affiliates that are separate from the entity that is subject to section 251(c) requirements. 47 U.S.C. § 272(a)(1).

Qwest stated that it has created a separate affiliate as required by section 272. Qwest's 272 affiliate is Qwest Communications Corporation ("QCC" or "272 Affiliate"). Qwest Exhibit 61 at 1. QCC is an indirect, wholly owned subsidiary of Qwest Communications International Inc. *Id.* at 6. Qwest Corporation, the BOC, and QCC are both subsidiaries of Qwest Service Corporation which is a wholly owned subsidiary of Qwest Communications International Inc. ("QCI"). *Id.* Qwest asserted that the "272 Affiliate is one of the top five interLATA providers nationwide despite the fact that, because of the merger with U S WEST, Inc., Qwest Communications International Inc. and its subsidiaries were required to divest themselves of all in-region, interLATA business." Qwest Exhibit 59 at 10.

Qwest also maintained that it will comply with the structural separations requirements for the separate affiliate which are contained in section 272(b). They are as follows:

The separate affiliate required by this section -

- (1) shall operate independently from the Bell operating company;
- (2) 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;
- (3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;
- (4) 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; and
- (5) 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.

The FCC has interpreted the first requirement, that the 272 affiliate operate independently from the BOC, as imposing certain requirements beyond the structural separation requirements contained in section 272(b)(2)-(5). *In the Matter of Implementation of the Non-Accounting Safeguards of Section 272 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Third Order

on Reconsideration, at ¶ 9, (rel. October 1, 1999) ("*Third Order on Reconsideration*"). In that order, the FCC reaffirmed that "the 'operate independently' requirement precludes the joint ownership of transmission and switching facilities by a BOC and its section 272 affiliate, as well as the joint ownership of the land and buildings where those facilities are located." *Id.* The requirement also "precludes a section 272 affiliate from performing operating, installation, and maintenance functions associated with the BOC's facilities" and "it bars a BOC or any BOC affiliate, other than the section 272 affiliate itself, from performing operating, installation, or maintenance functions associated with the facilities that its section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated." *Id.*

Qwest stated that its 272 Affiliate satisfies the "operate independently" requirement. Qwest Exhibit 61 at 8. Qwest asserted that the 272 Affiliate does not and will not jointly own, with the BOC, telecommunications switching or transmission facilities, or the land or buildings where the facilities are located. Qwest Exhibit 59 at 11. Qwest further asserted that neither the BOC or any other Qwest affiliate performs operation, installation, and maintenance functions associated with the 272 Affiliate's switching and transmission facilities. *Id.* at 12. Conversely, Qwest stated that the 272 Affiliate does not perform such functions associated with the BOC facilities. *Id.*

Qwest further asserted that it complies with section 272(b)(2) and the 272 Affiliate maintains separate books, records, and accounts. Qwest Exhibit 61 at 9. Qwest further stated that the 272 Affiliate follows Generally Accepted Accounting Principles as mandated by the FCC. *Id.*

Qwest claimed that it meets section 272(b)(3) which requires the 272 Affiliate to have separate officers, directors, and employees from the BOC. *Id.* at 12. Qwest stated that the 272 Affiliate and the BOC maintain separate payrolls and staff. *Id.* at 14. Qwest further asserted that "[w]hen 272 Affiliate employees provide services to Qwest affiliates, including the BOC, the employees are required to time report and the BOC is charged for their time using rates set according to applicable FCC requirements." *Id.* Qwest stated that if an employee accepts employment with a different Qwest corporation, the new employee is required to sign a non-disclosure statement to prevent the sharing of non-public information between the companies. *Id.* at 15.

With respect to section 272(b)(4), Qwest maintained that its Section 272 Affiliate cannot obtain credit under any arrangement which would permit a creditor to have recourse to the assets of the BOC. *Id.* at 17. Qwest stated that the 272 Affiliate is capitalized separately from the BOC and funding is provided by financial obligations issued by Qwest Capital Funding, Inc. and which is guaranteed by Qwest Communications International Inc. *Id.* at 17. Qwest claimed that neither the debt obligations issued by Qwest Capital Funding, Inc. nor the guarantee by Qwest Communications International Inc. provide creditors recourse to the assets of the BOC. *Id.* at 18.

Qwest claimed that its 272 Affiliate satisfies section 272(b)(5) which requires all transactions between the BOC and the 272 Affiliate to be on an arm's length basis, with any such transactions reduced to writing and available for public inspection. *Id.* Qwest asserted that "[t]he 272 Affiliate has accounted for all transactions between itself and the BOC in accordance with the FCC's affiliate transaction rules back to the date of the Qwest - U S WEST merger, which closed on June 30, 2000." *Id.* Qwest stated that all of the transactions are posted on Qwest Communications International Inc.'s website. *Id.* at 19.

Section 272(c) sets forth nondiscrimination safeguards and provides as follows:

In its dealings with its affiliate described in subsection (a) of this section, 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) of this section in accordance with accounting principles designated or approved by the Commission.

Qwest stated that the 272 Affiliate is required to contact the BOC's IXC Sales Executive Team representative to obtain services in the same manner as other IXCs. Qwest Exhibit 59 at 26. Qwest claimed that the 272 Affiliate does not currently have access to the BOC's OSS and would obtain access only if the 272 Affiliate obtained CLEC status at some time in the future. *Id.* at 26-27. Non-tariffed services which are available to the 272 Affiliate are reduced to writing in a contract or a work order. *Id.* at 27. Qwest asserted that these services will be made available to other entities under the same terms, conditions, and rates except for joint-marketing related services which are not subject to the nondiscrimination requirement. *Id.*

Section 272(d) requires a BOC that has received section 271 authority to obtain and pay for a biennial audit. The section provides that:

(1) General Requirement. A company required to operate a separate affiliate under this section shall obtain and pay for a joint Federal/State audit every 2 years conducted by an independent auditor to determine whether such company has complied with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under subsection (b) of this section.

(2) Results submitted to Commission; State commissions. The auditor described in paragraph (1) shall submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection. Any party may submit comments on the final audit report.

(3) Access to documents. For purposes of conducting audits and reviews under this subsection - (A) the independent auditor, the Commission, and the State commission shall have access to the financial accounts and records of each company and of its affiliates necessary to verify transactions conducted with that company that are relevant to the specific activities permitted under this section and that are necessary for the regulation of rates; (B) the Commission and the State commission shall have access to the working papers and supporting materials of any auditor who performs an audit under this section; and (C) the State commission shall implement appropriate procedures to ensure the protection of any proprietary information submitted to it under this section.

Qwest stated that, in accordance with FCC directives, the first biennial audit will be conducted 23 months after the BOC receives its first section 271 approval. Qwest Exhibit 59 at 30. Qwest stated that it will cooperate to the fullest extent possible in providing data necessary to assist the auditor in accomplishing its objective and that the results of the audits will be provided to the FCC and state commissions as required. *Id.*

Section 272(e) outlines four other requirements for a BOC and its 272 affiliate. The section provides:

A Bell operating company and an affiliate that is subject to the requirements of section 251(c) of this title - (1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates; (2) shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) of this section unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions; (3) shall charge the affiliate described in subsection (a) of this section, or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service; and (4) may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.

Qwest stated that, upon obtaining section 271 approval, the 272 Affiliate will obtain telephone exchange service or exchange access under the same tariffed terms and conditions as are available to unaffiliated IXCs. Qwest Exhibit 59 at 31. Qwest further asserted the orders will be processed in a nondiscriminatory manner. *Id.*

Section 272(g) contains the requirements and restrictions regarding joint marketing efforts between the BOC and the 272 affiliate. Section 272(g)(1) provides that "[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." Qwest stated that it will comply with this section and "[t]he 272 Affiliate will not market or sell BOC services except through agreement on an arm's length basis, reduced to writing, and made publicly available as required by Section 272(b)(5)." *Id.* at 22.

Section 272(g)(2) states that "[a] Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d) of this title." Qwest asserted that "[t]he 272 Affiliate will not market or sell interLATA services with the BOC until the BOC is authorized by the FCC to provide interLATA service in South Dakota." *Id.* at 23.

MOTION TO REOPEN RECORD

On September 27, 2002, AT&T submitted a Motion to Reopen and Supplement the Record ("AT&T Motion"). AT&T requested that the Commission reopen the record and require Qwest "to supplement the record with sufficient evidence to demonstrate that Qwest and its new section 272 affiliate are in compliance with section 272. . . ." ¹ AT&T asserted that "Qwest has announced its

¹ AT&T Motion at 1. The Commission notes that although AT&T submitted unverified comments prior to the hearing concerning section 272, AT&T never offered the comments during the hearing and, therefore, they are not part of the record.

On October 10, 2002, Qwest submitted Opposition of Qwest Corporation to AT&T's Motion to Reopen and Supplement the Record ("Qwest Response"). Qwest maintained that "the prudent course of action would be for the Commission to issue no findings or recommendations at all on Qwest's section 272 compliance, and to simply leave that subject for the FCC's imminent decision. There is no reason to delay the Commission's work to otherwise complete this docket or waste its resources by opening a parallel investigation into the very same matters the FCC is actively considering, especially when nothing about those matters is specific to South Dakota." Qwest Response at 2. Qwest further contended that "the FCC staff specifically advised the state commissions at the September 23, 2002 Regional Oversight Committee open session that (1) the section 272 questions are interLATA issues that fall within the FCC's purview, (2) it was not necessary for the states to conduct an evaluation of section 272 or the new affiliate, and (3) the states could provide comments to the FCC on section 272 in their comments on Qwest's federal applications." Id. at 6-7.

At its October 17, 2002, meeting, the Commission listened to arguments from AT&T and Qwest concerning AT&T's motion. At its November 20, 2002, meeting, the Commission denied AT&T's motion. The Commission finds that reopening the record at this point would accomplish very little. Moreover, scheduling another hearing and briefing schedule would most likely significantly delay this proceeding. No one disputed Qwest's statement that FCC staff had stated in a public meeting that it was not necessary for the states to conduct an evaluation of section 272 or the new affiliate. The Commission agrees with Qwest that the Commission will have the opportunity to comment on the new section 272 affiliate in Qwest's filing before the FCC. Moreover, AT&T will have an opportunity to comment before the FCC also. The Commission further finds that since Qwest has just recently formed a new section 272 affiliate, the details of which are not in the record before the Commission, the Commission will make no recommendation to the FCC on this issue.

It is therefore

ORDERED, that the Commission makes no recommendation to the FCC regarding Qwest's compliance with section 272.

Dated at Pierre, South Dakota, this 22nd day of November, 2002.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>Melaine Kaebs</u>
Date:	<u>11/22/02</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Robert K. Sahr
ROBERT K. SAHR, Commissioner