5/9/02

Additional Statement

Thru

5/22/02

~~Hearing~~ Opening Requests Post Hearing

Reported under the ROC Created Performance Metrics;
05/03/02 - Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan;
05/07/02 - Transcripts of Hearing held on April 22, 23, 24, 25, 29 and 30, 2002;
05/09/02 - Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan;
05/09/02 - Staff's Late-Filed Exhibit 5;
05/13/02 - Notice of Appearance of Additional Counsel on behalf of Intervenor Black Hills FiberCom;
05/13/02 - Qwest's Exhibit 80;
05/14/02 - AT&T's Motion to Reopen Proceedings;
05/17/02 - Staff's Exhibit 6;
05/17/02 - Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan;
05/22/02 - Qwest's Overview Post-Hearing Brief and Index to Briefing Materials;
05/22/02 - Qwest's Opening Post-Hearing Brief on Paper Workshop Issues (Checklist Items 3, 7, 8, 9, 10 and 12;
05/22/02 - Qwest's Post-Hearing Brief on Workship 1: Checklist Item 1 (Interconnection, Collocation); Checklist Item 11 (LNP): Checklist Item 13 (Reciprocal Compensation); and Checklist Item 14 (Resale);
05/22/02 - Qwest's Opening Post-Hearing Brief on Emerging Services (Line Sharing, Subloop Unbundling, Packet Switching and Dark Fiber);
05/22/02 - Qwest's Opening Post-Hearing Brief on Workshop Three, Group 4 Issues - Unbundled Network Elements Report (Checklist Items 2, 4, 5 and 6);
05/22/02 - Qwest's Opening Post-Hearing Brief on General Terms and Conditions, Section 272, and Track A;
05/22/02 - Qwest's Post-Hearing Brief in Support of the QPAP;
05/22/02 - Qwest's Opening Post-Hearing Brief on the Public Interest;
05/22/02 - Qwest's Opening Post-Hearing Brief on Performance (PIDs, Actual Performance and Data Reconciliation);
05/22/02 - Qwest's Additional Exhibits;
05/22/02 - Index of Exhibits;
05/22/02 - Qwest's Exhibits 81, 81A, 82, 82A, 83, 84 and 85;
05/22/02 - AT&T's Additional Statement of Supplemental Authority;
05/24/02 - Qwest's Opposition to AT&T's Motion to Reopen Proceedings;
05/30/02 - AT&T's Reply to Qwest's Opposition to AT&T's Motion to Reopen Proceedings;
06/04/02 - AT&T's Additional Statement of Supplemental Authority;
06/04/02 - Touch America's Petition to Intervene and Motion to Reopen Issues;
06/10/02 - Qwest's January 2002 through April 2002 Performance Data as Reported under the ROC Created Performance Metrics;
06/11/02 - Qwest's Opposition to Touch America's Petition to Intervene and Motion to Reopen Issues;
06/13/02 - Touch America's Reply to Qwest's Opposition;
06/13/02 - Notice of Filings of Affidavits of Todd Lundy and Dan Hult;
06/13/02 - Request for Confidential Treatment of Information;
06/13/02 - Affidavit of Todd Lundy;
06/13/02 - Affidavit of Dan Hult;
06/13/02 - Order Admitting Nonresident Attorney (Todd Lundy);
06/17/02 - CD-Rom ROC OSS Test Final Report;
06/19/02 - Order for and Notice of Procedural Schedule and Hearing;
06/25/02 - Qwest's Motion to Amend the Scheduling Order for Review of the ROC OSS Test;
06/27/02 - Order Denying Motion to Reopen Record; Order Denying Petition to Intervene; Order Extending Briefing Schedule;
06/27/02 - Order Amending Briefing Schedule;
07/01/02 - Staff's Brief;

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	Docket No. TC01-165

ADDITIONAL STATEMENT OF SUPPLEMENTAL AUTHORITY REGARDING QWEST'S PERFORMANCE ASSURANCE PLAN

AT&T Communications of the Midwest, Inc., ("AT&T") hereby submits the Iowa Utilities Board's May 7, 2002 Conditional Statement Regarding Qwest Performance Assurance Plan as supplemental authority. AT&T is also submitting a Graph Summary of various state commission/board orders for this Commission's convenience. AT&T has submitted the various orders in previous correspondence.

Respectfully submitted on May 8, 2002.

AT&T COMMUNICATIONS
OF THE MIDWEST, INC.

By: _____
Mary B. Tribby
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Denver, Colorado 80202
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AT&T'S GRAPH/SUMMARY OF COMMISSION/BOARD QPAP ORDERS (5/8/02)

Key:

CO= Colorado CPAP (as referenced in Decision on Remand and Other Issues Pertaining to the Colorado Performance Assurance Plan which Qwest acquiesced to).
MT= Montana Final Order
NE= Nebraska Order entitled "QPAP Approved as Amended"
IA=Conditional Statement Regarding Qwest Performance Assurance Plan
ID= Idaho Commission's Decision on Qwest's Performance Assurance Plan
WA= Thirtieth Supplemental Order "Commission Order Addressing Qwest's Performance Assurance Plan"
WY=First Order on Group 5A Issues (Commission did not grant reconsideration of Order---*see* Order Denying Petition for Reconsideration and Setting Public Hearing and Procedure)

Issue:

Caps

CO No cap for Tier IX (CLEC base penalty). 36% cap for Tier IY (CLEC escalation penalty and Tier II (penalties paid to states). Sets up a monthly cap for Tier IY and Tier II penalties. If Tier IX payments exceed the cap, amount is taken from Tier IY and Tier II penalties. *See* CPAP 11.0.

MT Establishes a 36% procedural cap. MT Order at p. 7-13.

NE Establishes a 24% procedural cap and a 44% hard cap. P.5-7

IA Establishes a 36% hard cap but indicates that the cap can be changed during the six month review because the Commission maintains absolute change control. P.11-12.

ID Establishes a 36% hard cap but indicates that the cap can be changed during the six month review because the Commission maintains absolute change control. p.5.

WA: Establishes a 36% hard cap but the Commission may lift the cap or change the cap at the six month review. p.14-18. p.38

WY No cap on Tier I or Tier II p.3

Funding the QPAP

CO Funds exclusively with payments to be made to state. CPAP at §10.4

MT Funds exclusively with Tier II payments unless audit fund is depleted. If depleted, Commission will contemplate utilizing Tier I funding. P.77.

NE Audit funding shall be paid by Qwest exclusive of Tier I and Tier II payments. P.16-18.

ID Tier I payments for CLECs should not be used for administration. P.7

IA Tier I payments for CLECs should not be used for administration. P.69

WA Cost of audit should be paid with Tier II funds. If such funding is insufficient, Commission may require that Tier I funds be used.

WY No action.

Commission (as Opposed to Qwest) Change Control

CO: Commission has ultimate change control on all areas of the plan. However, there are six areas: statistical methodology, payment caps, duration of the CPAP, payment regime structure, the legal operation of the CPAP, the use of an Independent Monitor, and "any proposal that does not relate directly to measuring and/or providing payments for non-discriminatory wholesale performance" where the Commission maintains change control but such changes are stayed pending full court review. P. 23.

MT: Commission maintains change control. P. 54-55.

NE: Commission maintains change control. P. 17.

IA: Commission maintains change control. P.97-101.

ID: Commission maintains change control. P. 8-9.

WA: Commission maintains change control. P. 38-39.

WY: Commission maintains change control. P. 6.

Exclusivity and Offset

CO: Allows CLEC to seek non-contractual legal or non-contractual regulatory remedies that may be available to the CLEC.CLEC can also see wholesale service quality standards under wholesale service quality rules that do not relate "to the same performance issues addressed by the QPAP." CLECs can seek contract damages that flow from CPAP "if a CLEC can present a reasonable theory of damages for the non-conforming performance at issue and evidence of real world economic harm that, as applied over the preceding six months, establishes that the actual payments collected for

non-conforming performance in the relevant area do not redress the extent of competitive harm." P. 15. Only finder of fact may offset penalties.

MT Adopts CO approach to both exclusivity and offset. P.24-26.

NE Adopts CO approach to both exclusivity and offset. P.7-12.

IA Maintains Antonuk language related to exclusivity and offset.[1] P.32-36; 37-41.

ID Maintains Antonuk language related to exclusivity.[2] As to offset, adopts the following language: "If for any reason a CLEC agreeing to this QPAP is awarded compensation for the same harm for which it received payment under the QPAP, the court or other adjudicatory body hearing such a claim may offset the damages resulting form such claim against payments made for the same harm. P.5-6.

WA Adopts CO approach to both exclusivity and offset. P.48-52.

WY Allows CLEC to claim both contractual and non contractual remedies subject to Qwest being allowed to seek offset. P.5

Special Access Measures

CO Orders Qwest to measure performance related to pre-ordering, ordering, provisioning, and maintenance and repair functions for special access circuits. P.24.

MT Does not require special access measures. (Incorporates Antonuk Report by reference).

NE Does not require special access measures. (Incorporates Antonuk Report by reference).

IA Does not require special access measures. P.93.

ID Does not require special access measures. (Incorporates Antonuk Report by reference).

WA Qwest to measure and "report its monthly pre-ordering and repair intervals for special access circuits." (references same measures as Colorado in same time period.) p.32.

WY Does not require special access measures. (Incorporates Antonuk Report by reference).

Escalation

[1] AT&T plans to submit a Motion for Reconsideration on these issues.
[2] AT&T Motion for Reconsideration Pending.

CO No cap on escalation of Tier I penalties. All escalations penalties over twelve months shift to Tier II. P.18-19

MT No cap on escalation of Tier I penalties. P. 42.

NE No cap on escalation for both Tier I and Tier II penalties. P.14.

IA No cap on escalation of Tier I penalties. P.64-70.

ID Commission allows escalation cap at six months. P.7

WA Commission allows escalation cap at six months. P. 20.

WY No cap on escalation of penalties after six months. P.4.

Tier II Triggers

CO Two month Tier II Trigger §10.3.

MT Tier II paid when in a twelve-month period, there is non-compliance two out of three months. P.37-38.

NE No differentiation between Tier I and Tier II triggers. Tier II triggers every month. P.12

IA "All Tier 2 payments should be triggered on a monthly basis after the threshold of two out of three consecutive month of misses in a twelve month period. P. 63

ID Tier II paid when in a twelve month period, there is non-compliance two out of three months. P.7

WA No differentiation between Tier I and Tier II triggers. Tier II triggers every month. P. 24.

WY No differentiation between Tier I and Tier II triggers. Tier II triggers every month. P. 2.

100% Cap for Interval Measures

IA: Directs Qwest to remove the 100% Cap on interval measures. P.122.

WA: Directs Qwest to remove the 100% Cap on interval measures. P. 36.

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE:	DOCKET NOS. INU-00-2
U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION	SPU-00-11

CONDITIONAL STATEMENT REGARDING QWEST PERFORMANCE ASSURANCE PLAN

(Issued May 7, 2002)

On February 10, 2000, the Utilities Board (Board) issued an order initiating an investigation relating to the possible future entry of U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest), into the interLATA market. The investigation was identified as Docket No. INU-00-2.

In a filing dated May 4, 2000, Qwest encouraged the Board to consider a multi-state process for purposes of its review of Track A (competition issues),[1] various aspects of each item on the 14-point competitive checklist, section 272 (separate subsidiary) issues and public interest considerations. The Board considered the concept of a multi-state process for purposes of its review of a Qwest application to provide in-region, interLATA services, sought comment, and subsequently issued an order dated August 10, 2000, indicating that its initial review of Qwest's compliance with the requirements of 47 U.S.C. § 271 would be through participation in a multi-state workshop process with the Idaho Public Utilities

[1] *See*, 47 U.S.C. § 271(c)(1)(A).

Commission, North Dakota Public Service Commission, Montana Public Service Commission, Wyoming Public Service Commission, and the Utah Public Service Commission. Since the time of that order, the New Mexico Public Regulation Commission has also joined in the workshop process.

On October 22, 2001, The Liberty Consulting Group (Liberty) filed its Report on Qwest's Performance Assurance Plan (QPAP) and Public Interest. This conditional statement addresses only the QPAP. Public Interest was previously addressed in the Board's conditional statement dated January 25, 2002.

In August of 2000, a collaborative process was initiated with 11 of the 14 Qwest state public service commissions participating. The process was known as the Post-Entry Performance Plan (PEPP) collaborative. Between October of 2000 and May of 2001, five separate multi-day workshops were convened, numerous conference calls were placed, and a large quantity of information, proposals, and supporting data were exchanged and reviewed in an attempt to create a "consensus plan."

The PEPP collaborative ended in May of 2001 when Qwest representatives indicated a reluctance to continue with further meetings in the current format, expressing a belief that no further consensus could be reached. A final collaborative summary was prepared by MTG Consulting (MTG) and the National Regulatory Research Institute (NRRI) and distributed on June 5, 2001. This summary document

contained a list of agreements that had been reached through the collaborative process as well as a list of unresolved issues.[2]

A telephonic procedural conference was held on August 3, 2001, by Liberty to discuss the possibility of utilizing the multi-state checklist compliance proceedings (seven state commissions were at that time participating) to consider the 271-affecting aspects of the performance assurance plan that Qwest intended to file in each state. Ultimately, the seven multi-state workshop participants became a nine state workshop collaborative, with the Washington and Nebraska commissions joining the effort.

The results of that conference were used to establish a set of procedures and an appropriate schedule for producing a report that would provide the nine commissions with a series of proposed conclusions and recommendations addressing the public interest issues raised by the QPAP. The procedures allowed all participants to file comments and testimony in response to the proposed QPAP, which Qwest filed on or about July 16, 2001, in substantially the same form with all nine commissions. Qwest was then permitted to file pre-hearing responses to those comments.

Hearings were scheduled and held during the weeks of August 13 and August 27, 2001. Those hearings included direct, rebuttal, and surrebuttal testimony. In all 11 witnesses testified during seven days of hearings. Testimony was received from

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[2] This "Final Collaborative Summary" can be viewed at http://www.pes.vtech.state.edu/oss/Post271/Post271final_report.pdf.

Carl Inouye, Michael Williams, Karen Stewart, and Nancy Lubamersky of Qwest, George Ford of Z-TeL Communications, Inc. (ZTEL), John Finnegan of AT&T Communications of the Mountain States, Inc., AT&T Communications of the Midwe Inc., AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Service on behalf of its TCG Affiliates (collectively AT&T), Chad Warner of WorldCom, Inc. (WCOM), Marlon Griffing on behalf of the New Mexico Advocacy Staff (NMAS), Re Knowles of XO Utah, Inc., and XO Washington, Inc. (XO), Tim Kagele of Time Warner Telecom of Washington, LLC (Time Warner), and Timothy Peters of Electri Lightwave, Inc. (ELI). (XO, Time Warner, and ELI filed joint briefs and are referred collectively herein as ELI/Time Warner/XO.) Main briefs, due to be filed by September 13, 2001, came from the Wyoming Consumer Advocacy Staff (WCAS), Washington Public Counsel, ZTEL, Covad Communications Company (Covad), ELI/Time Warner/XO, NMAS, WCOM, AT&T, and Qwest. Reply briefs, due by September 20, 2001, came from the WCAS, ZTEL, Covad, ELI/Time Warner/XO, NMAS, WCOM, AT&T, and Qwest.

In addition to the scheduled filings, AT&T has filed four "supplemental authority" pleadings. These appear to be intended to bring to the Board's attention other state commission actions on these issues. Attached to AT&T's February 1, 2002, filing were copies of a preliminary report and request for comments issued by the Montana Public Service Commission and a "First Order" issued by the Wyoming Public Service Commission that included issues related to the QPAP. With its April 10, 2002, filing, AT&T included a copy of the Washington Utilities and

Transportation Commissions "Thirtieth Supplemental Order" which addressed the QPAP issues. With its "additional statement of supplemental authority," filed April 23, 2002, AT&T provided the Board with copies of the Montana Public Service Commission's final report on Qwest's performance plan and a "Decision on Remand" from the Public Utilities Commission of the State of Colorado. Attached to its final filing on May 2, 2002, was a copy of an order issued by the Nebraska Public Service Commission on April 23, 2002.

The Federal Communications Commission (FCC) has delineated five general characteristics that must be part of a section 271-performance assurance plan as part of a "zone of reasonableness" analysis. These include:

- Meaningful and significant incentive to comply with designated performance standards.
- Clearly articulated and pre-determined measures and standards encompassing a range of carrier-to-carrier performance.
- Reasonable structure designed to detect and sanction poor performance when and if it occurs.
- Self-executing mechanism that does not open the door unreasonably to litigation and appeal.
- Reasonable assurance that the reported data are accurate.[3]

Liberty's report outlined a total of 68 issues relating to Qwest's proposed performance assurance plan (PAP) that remained at impasse following the multi-

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[3] *See* Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 433 (1999) (*New York Order*), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

state workshops. From those impasse issue discussions, Liberty made recommendations for 29 separate changes to the QPAP.

This conditional statement addresses those issues that were identified as being at impasse and incorporates into the discussion a recommendation related to each of the separate recommended changes. Where Liberty's resolution of an issue was not disputed after the issuance of the report, the Board has provided a very short summary discussion of the issue and has adopted Liberty's resolution. For issues remaining at impasse after the issuance of Liberty's report, position summaries, analysis, and the Board's determination is given. This conditional statement will follow the same general outline that is found in the October 22, 2001, report.

To the extent that some of these issues are to be further evaluated in the Regional Oversight Committee (ROC) operational support system (OSS) test or some other proceeding, the Board will incorporate that evidence into its final recommendation to the FCC as to whether Qwest has fully complied with a checklist requirement. To the extent that an issue requires performance of some duty or activity on Qwest's part, Qwest will need to demonstrate that it adequately performs as expected in order for the Board to make a positive recommendation to the FCC following an application filed by Qwest.

IMPASSE ISSUES

I. IS THERE MEANINGFUL AND SIGNIFICANT INCENTIVE?

A. Total Payment Liability

1. The 36 Percent of Net Revenues Standard (Report pp. 12-16; Qwest initial brief pp. 3, 11-12; Qwest PAP filing pp. 5, 6; WCOM initial comments p. 32; Covad initial brief p. 36; Qwest reply brief pp. 11; ELI/Time Warner/XO initial PAP brief pp. 7, 12; AT&T verified comments p. 15; AT&T reply brief p. 7)

The QPAP places at risk each year a total of $306 million, which represents 36 percent of Qwest's 1999 net intrastate revenues (as reported to the FCC by Qwest on its ARMIS reports[4]) in the nine states combined. The ARMIS return is measured as total operating revenue less operating expenses and operating taxes. The proposed QPAP uses the 1999 figure for all at risk calculations.

Qwest argued financial risk does not have to be unlimited in order to be significant. In nine of ten section 271 applications approved by the FCC to date, the Bell operating company's (BOC) PAP had a cap on the "total" liability. In each case, the FCC found that placing 36 percent of the BOC's net return at risk constituted a meaningful incentive, despite being a cap on the level of payments. In no event has

[4] The ARMIS reports contain highly aggregated financial data reflecting the results of accounting, rate base, and cost allocation requirements prescribed in Parts 32, 64, 65, 36 and 69 of the FCC Rules. ARMIS report 43-01 is filed on a study area (jurisdiction) basis. ARMIS report 43-02 is filed on an operating company basis and collects the operating results of the carrier's total activities for every account in the USOA, as specified in Part 32 of the FCC Rules. ARMIS report 43-03 contains the breakdown of the reporting carrier's costs between regulated and nonregulated activities as defined in their Cost Allocation Manuals and Part 64 of the FCC Rules. ARMIS report 43-04 shows the separation of the reporting carrier's regulated revenues and costs between the state and interstate jurisdictions, as defined in Part 36 of the FCC Rules, and the distribution of interstate amounts among the access charge categories, as defined in Part 69 of the FCC Rules. ARMIS report 43-05 is a service quality report filed annually. ARMIS report 43-06 is a customer satisfaction report that gives the percentage of customers that are dissatisfied with various aspects of the reporting carrier's service. ARMIS report 43-07 provides data regarding the infrastructure of the reporting carrier. ARMIS report 43-08 contains statistical schedules covering individual state activities. ARMIS report 495-A displays forecasts of expected regulated and nonregulated investment usage at the study area level, for the current calendar year and the subsequent two calendar years. ARMIS report 495-B is a companion to Report 495-A and displays the actual usage of regulated and nonregulated investment at the study area level for the prior calendar year.

the FCC determined that unlimited risk of payments was necessary to provide a meaningful financial incentive to a BOC.

According to ELI/Time Warner/XO, Qwest's purported justification for caps is that the caps represent the payment level that is sufficient to provide Qwest with the necessary financial incentive to improve its performance. ELI/Time Warner/XO argues the position lacks even common sense. No cap would be necessary if the caps are set at the levels necessary to compel Qwest to perform because by definition, payments would not exceed that level. If quantifications of penalties exceed the cap, however, the payment levels obviously were not sufficient financial incentive for Qwest to improve its performance.

ELI/Time Warner/XO argues that Qwest will be able to incorporate a low QPAP cap as a cost of doing business. The total dollars represented by 36 percent of net revenues is less than the profits Qwest generates from intrastate services under its authorized rate of return in Washington and former rate of return in Utah (which Qwest now exceeds under price cap regulation). Qwest thus could continue to provide local exchange service at a profit while making the maximum payments under the QPAP for providing poor service to its competitors – without even considering the profits Qwest generates from "deregulated" services and would generate from providing interLATA services.

Under a definitive cap, AT&T contends Qwest can calculate the net cost of discrimination in order to gain market share. In addition, absolute caps send the signal that once Qwest's performance deteriorates to a particular level (i.e., reaching

the absolute cap) then further deterioration is irrelevant. The whole notion of absolute caps is antithetical to the concept of backsliding or an incentive plan. The practical application of absolute caps is that once Qwest's performance decreases to a chronic woefully deficient level, Qwest gets rewarded by no longer having to pay any financial consequences.

While AT&T opposes any absolute cap on penalties, a procedural cap for Tier 2 penalties may be useful if properly implemented. Procedural caps could establish a preset level at which Qwest could seek regulatory review of the consequences that are due. However, the cap would not automatically absolve Qwest of liability of the consequences that are due. Procedural caps avoid both problems of absolute caps. They do not provide Qwest with the opportunity to evaluate the "cost" of retaining share through non-compliance. Likewise, they do not absolve Qwest from consequences for unchecked performance deterioration.

Accordingly, AT&T believes that the QPAP Section 12.1 and 12.2 should be stricken in its entirety and changed to the following:

> There should be no cap on the total payments made by Qwest for Tier 1 or Tier 2 penalties in a calendar year. However, as to Tier 2 payments, if Qwest payments meet a figure equivalent to thirty six percent (36 percent) of the latest ARMIS Net Returns for (insert state) in a twelve-month period, Qwest shall pay the relevant payments up to the procedural cap and put the amount in excess of the cap in a escrow account earning at least the statutory interest rate for (insert state). The (insert state commission) shall decide whether and to what extent the amount in excess of the procedural cap should be paid in excess of the cap, after a public hearing commenced for that purpose. In such hearing the burden shall be on Qwest by a preponderance of the

> evidence to prove why damages shall not be paid above the set procedural cap. Pursuant to (insert State Commission) Order, Qwest shall then pay any amount in excess of the cap, including accrued interest that (insert State Commission) deems appropriate.

AT&T suggests that Qwest has deviated from the "blueprint" plan it cites (Texas Plan) on numerous occasions to the benefit of Qwest. Including, for example, provisions on offset, exclusions, dispute resolution, Tier 2 payments, late payments, six-month reviews, and audits. With all of these changes to Qwest's substantial benefit, it is hardly meritorious for Qwest to proffer that its plan passes muster to the FCC because other plans have had caps at 36 percent.

Liberty noted that the FCC considered the entire contents of the PAPs before it when deciding whether the 36 percent standard was sufficient to create a meaningful and significant incentive to other BOCs asking for the same relief as Qwest seeks here. Liberty reached the conclusion that the standard represents an appropriate starting point, to be examined again as all of the other provisions affecting Qwest's incentive to perform are addressed and determined.

Much of the debate over a cap on the obligation by Qwest centers on what the FCC has accepted in other successful 271 applications. Qwest states that its plan mirrors the approved Texas PAP. The FCC explained in the context of the Southwestern Bell Telephone Company (SWBT) performance plan that placing at risk $289 million, or 36 percent of net revenues, was adequate because:

> The performance plans adopted by the Texas Commission do not represent the only means of ensuring that SWBT continues to provide nondiscriminatory service to competing

> carriers. In addition to the $289 million at stake under this Plan, as noted above, SWBT faces other consequences if it fails to sustain a high level of service to competing carriers, including: federal enforcement action pursuant to section 271(d)(6); liquidated damages under dozens of interconnection agreements; and remedies associated with antitrust and other legal actions.[5]

Qwest, unlike SWBT, proposes its PAP as the exclusive remedy for any breach of its obligations under an interconnection agreement. Preclusion, offsets and liquidated damages are discussed in other parts of this conditional statement.

The Board agrees that the 36 percent figure arrived at by Qwest, is in line with other approved PAPs and appears to represent a reasonable starting point. The Board also agrees that even though this plan is similar to the other plans, there are differences between the plans that must be considered in connection to the 36 percent cap. That having been said, it must be noted that many of the differences between various approved plans (provisions on offset, exclusions, dispute resolution, Tier 2 payments, late payments, six-month reviews, and audits) were modified to some extent in Liberty's QPAP Report and included in the QPAP filed by Qwest on November 6, 2001. The specific changes related to these differences are discussed elsewhere in this conditional statement.

The 36 percent of net intrastate revenue from 1999 represents $306 million for the nine states with Iowa's cap in real terms set at $31 million. Rather than set a percentage cap, the Board will direct Qwest to include a fixed dollar amount cap at

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[5] *Texas Order*, ¶ 424.

the projected $31 million mark, which is equivalent to Iowa's portion of the 36 percent cap recommended by Liberty, based on ARMIS revenue data from 1999.

2. Procedural Caps -

(1) Provisions for Changing the Cap (Report pp. 16-19; AT&T initial brief pp. 19-20; WCOM initial comments pp. 8, 33; ZTEL initial brief p. 19)

The FCC requires a plan that has potential liability and provides a meaningful and significant incentive to comply with the designated performance standards. Qwest witness Carl Inouye indicated that the "purpose of the QPAP is to create significant financial risk to insure that Qwest doesn't backslide on service performance. Creating financial risk does not have to be done by creating unlimited financial risk." AT&T, along with Covad, argued that a 44 percent cap was more appropriate than the 36 percent proposed by Qwest.

ZTEL contends that when a cap has been reached, it necessarily means performance has been poor. A cap could function as a reverse incentive to the extent it creates a safe haven after a period of poor performance where continued poor performance is without immediate financial consequences for Qwest.

Like the New Mexico Commission Staff, ZTEL supports what has been called a "procedural cap." That is, once a certain level of aggregate payments has been made, a proceeding or investigation at the state commission should be initiated. As a result, ZTEL proposed in its original comments that a procedural cap be invoked when payments reach 36 percent of net revenue. Notably, ZTEL does not oppose a procedural cap equal to a smaller percentage of net revenue.

Liberty reasoned that experience would tell us much more about whether a 36 percent cap is, or is not, appropriate. The following are just a few examples Liberty noted where additional information will be provided over time:

- BOC performance baselines will become more established.
- Root cause analyses will identify the actual causes of persistent, substandard performance.
- What needs to be measured and how those measurements should be used will be enriched by growing competition.
- The trend in local market penetration by competitive local exchange companies (CLECs) will tell us whether 1999 remains an appropriate year to use as the foundation for setting total financial exposure.

Because any combination of factors such as these could support movement of the 36 percent limit in either direction, Liberty recommended the inclusion of the following cap movement principles in the QPAP:

A. An increase in the cap of a maximum of 4 percentage points at any one time (i.e., first to 40 percent) shall occur upon order by a state commission that it is appropriate to do so in cases where performance the cap would have been exceeded for any consecutive period of 24 months by that same 4 percent or more, provided that:

   a. the commission shall determine that the preponderance of the evidence shows Qwest could have remained beneath the cap through reasonable and prudent efforts, and

   b. the commission shall have made that determination after

      1. having available to it on the record the results of root cause analyses, and

2. providing an opportunity for Qwest to be heard.

B. A decrease in the cap of a maximum of 4 percentage points at any one time shall occur upon order by a state commission that it is appropriate to do so after performance for any consecutive period of 24 months which produces calculations of total payment responsibility that is 8 or more percentage points (i.e., 26 percent or less) below the cap amount for that period, provided that:

a. the commission shall determine that the preponderance of the evidence shows the performance results underlying those payment calculations results from an adequate Qwest commitment to meeting its responsibilities to provide adequate wholesale service and to keeping open its local markets, and

b. the commission shall have made that determination after providing all interested participants an opportunity to be heard.

C. The provisions of (A) and (B) above shall be applicable to the next 24-month period commencing at the completion of the first, provided that the maximum increase in the cap amount shall be 8 percentage points; the maximum decrease shall be 6 points.

As indicated in the discussion of the previous issue, the Board found the Iowa cap should be set at a fixed amount of $31million. The $31 million was the amount calculated at risk in Iowa based on Qwest's 1999 ARMIS data, with 36 percent applied and then divided among the states involved in the multi-state workshop collaborative for the QPAP issues.

Any change to a fixed dollar amount cap can be included in the six-month review of the QPAP. The Board finds that it would be appropriate for the fixed dollar amount to be revisited during any review of the QPAP so that the possible obligation can be kept in line based on new information and experience than will be gained during the operation of the QPAP.

The Board directs Qwest to eliminate any references to the Liberty recommended provisions for changing the cap from the Iowa specific QPAP.

(2) Foreclosing Recovery for CLEC Harm Occurring Late in the Year (Report pp. 19-20)

Liberty also considered that when the cap is reached, CLECs who have already suffered harm are compensated fully while those yet to suffer harm will not be compensated at all. This result is completely arbitrary and it could have devastating consequences for a CLEC that has given up its other rights to compensation in return for electing the QPAP provisions. There is a compelling public interest in assuring that compensation does not become a matter of one's place in the line – a position, by the way, that is not determined by the CLEC but by the performance that Qwest delivers. Therefore, when the cap is reached, each CLEC shall, as of the end of the year, be entitled to receive the same percentage of its total calculated Tier 1 payments. In order to preserve the operation of the cap, Liberty recommended that a percentage equalization take place as follows:

1. The amount by which any month's total payments exceeded 1/12th of the annual cap shall be calculated and apportioned between Tier 1 and Tier 2 according to the percentage that each bore of total payments for

the year to date. The result of this calculation shall be known as the "Tracking Account."

2. The Tier 1 excess shall be debited against the next ensuing payments due to each CLEC, by applying to the year-to-date payments received by each the percentage necessary to generate the required total Tier 1 amount.

3. The Tracking Amount shall be apportioned among all CLECs so as to provide each with payments equal in percentage of its total year to date Tier 1 payment calculations.

Liberty recommended that this calculation take place in the first month that payments are expected to exceed the annual cap and for each month of that year thereafter. Qwest should then recover any debited amounts by reducing payments due from any CLEC for that and any succeeding months, as necessary.

Having approved a fixed cap, this "equalization approach" seems to be a reasonable calculation to divide up the remainder of the capped amount. None of the interveners filed comments on Liberty's proposal.

Qwest accepted Liberty's approach but added clarifying language to the equalization technique to ensure all CLECs will receive an equal proportion of the payments that are due them in years where the annual cap is exceeded. Qwest states, because QPAP monthly payments may intermittently fall below or exceed the monthly cap, the calculations of the balancing account should be performed using year to date payments and a cumulative monthly cap. Additionally, Qwest proposes to apply equalization in the month when the year to date payment exceeds the monthly cumulative cap.

The Board will adopt Liberty's recommendation with the Qwest changes to the proposed language.

3. Qwest's Marginal Cost of Compliance (Report pp. 20-21; Qwest initial brief p. 14; ZTEL reply brief p. 11)

ZTEL argues that if the value to Qwest of maintaining its monopoly is less than the 36 percent figure, then the debate on this point is irrelevant. In that situation, there would be no difference to Qwest between a 36 percent 1999 net revenue cap and no cap at all because it would come into compliance well before the 36 percent cap is reached. As a result, from the standpoint of the public interest, consumers and the industry are no better off with Qwest's proposal than a procedural cap or no cap at all.

If, however, the other participants are right and the risk to Qwest of maintaining its monopoly is greater than 36 percent 1999 net revenues, there is considerable harm to the public interest if Qwest's proposal is accepted. At that point, Qwest would reach the absolute cap and pay this amount as a "cost of doing business." Further, because the cap is fixed at 1999 net revenues, the significance of this absolute cap actually diminishes over time in states where Qwest's revenues are growing rapidly.

CLECs claim that a procedural cap is necessary to prevent it from making an economic decision to continue to provide nonconforming service because it is financially advantageous. They assert that Qwest would be able to compare the level of QPAP payments to the level of operational cost that would have to be incurred to

meet the performance standards and/or the net cost of discrimination to gain market share.

Qwest responds to these claims by suggesting that such reasoning is flawed on several levels. First, such a CLEC claim would be valid only if 36 percent of net revenues were less than the marginal cost of meeting performance standards or less than the value of market share gain. CLECs have provided no evidence to show that this is the case. Without such evidence, the CLEC claim is purely hypothetical and deserves no weight. Second, Qwest argues that such a calculation cannot be a complete evaluation because of non-quantifiable costs such as regulatory risks that such noncompliance would pose to Qwest at both state and federal levels. Last, the CLEC claim ignores the cumulative effect of the cap over several years. The $306 million is not a one-time cap, but rather is an annual cap. Therefore, potential QPAP payments over five years would total $1.5 billion for the nine states.

Liberty noted that while there may certainly be theoretical appeal in the marginal cost analysis that the NMAS's witness discussed, a number of insurmountable problems are inherent in applying it. For example,

* No participant presented evidence of Qwest's marginal costs of compliance, making the equation impossible to perform from this record.

* Even with such evidence, the calculation would require the expected values of other risks faced by Qwest, such as revocation of section 271 approval, or parallel enforcement proceedings.

* Long-term investments by Qwest would reduce payments for a number of years, eliminating the possibility that the

equation could be performed by a simple comparison of a single year's costs and reduced QPAP payments.

Liberty concluded that while the proffered equation had theoretical appeal, it was ultimately not a solution here, because there was no evidence that would enable its application. Moreover, it is unlikely that an attempt to gather evidence and to use it in an analytical model would yield particularly reliable results, given the subjective nature of the other applicable risks and the judgments that would be necessary to value (on a present basis) the multi-year benefits that long-term investments would yield.

The Board agrees with Liberty that the difficulty of trying to set the cap at a marginal cost figure makes it unworkable. The true marginal cap to Qwest to either comply with the QPAP or to make a business decision on the cost of maintaining its monopoly would be difficult, if not impossible, to determine.

The Board finds that this is not an issue for Iowa because it set a fixed dollar amount as a cap for the Iowa QPAP.

4. Continuing Propriety of a Cap Based on 1999 Net Revenues (Report pp. 21-22; ELI/Time Warner/XO reply brief p. 7)

ELI/Time Warner/XO argues that the QPAP would be worthless if Qwest's costs to comply with the performance standards were higher than the payments for noncompliance. Rather, the record evidence demonstrates that Qwest's local exchange service offerings – considered in isolation from all other revenue sources – would remain profitable in Washington and Utah even if Qwest must pay 36 percent of its net revenues in QPAP payments. Although Qwest presented no evidence of

the interLATA market share it anticipates capturing, these CLECs contend that market share would not need to approach the initial 25 percent that Verizon achieved in New York to justify Qwest paying 36 percent of its other net revenues as QPAP payments in order to maintain its local market share. Qwest's proposal to freeze the net revenue calculation at 1999 (or 2000) ARMIS revenue data levels – *i.e., before* Qwest begins to generate revenues from Section 271 interLATA services – for the life of the QPAP highlights Qwest's ultimate objective according to ELI/Time Warner/XO.

Liberty suggested that this argument rests upon the implicit premise that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business. Liberty found this premise to be quite speculative. All other things being equal, the effects of access line growth would have to exceed those that result from loss of market share to CLECs. Moreover, it is not at all clear that all other things will remain equal. Liberty noted that many examples demonstrate the uncertainty:

- Local-exchange business retention strategies may produce broadly-based price concessions that lower per-access line net revenues.

- If there is cross-subsidization in certain elements of local-exchange service, current tariff prices that contain a premium above costs may not remain sustainable as competition increases.

- Financial, accounting, and operational restructuring of interstate versus intrastate services, which are by no means unlikely in the fluid marketplace and regulatory environments now existing, may alter materially how intrastate return is calculated and how much it ends up being in the future.

Liberty suggested that on the whole, it appeared preferable to rely upon the firm dollar amounts that the QPAP provides, as opposed to taking a ratcheting risk of unknown direction and unknowable magnitude.

The Board has determined that for Iowa a cap of $31 million dollars annually, based initially on a percentage of ARMIS revenue, is an appropriate starting point. As indicated in the previous discussion, invaluable information and knowledge about the working of the QPAP will be gained in the early months of the operation of the plan. Rather than changing the reference year, it would appear to be more appropriate to simply revisit the amount and appropriateness of a cap at the time of the six-month review, when the Board will have the information and experience from the actual operation of the plan to consider in making its determination on a going forward basis.

The Board directs Qwest to eliminate any language related to the automatic adjustment of the cap. Instead the Board will re-visit the appropriateness of a fixed dollar amount cap, as well as the specific amount of such a cap during the six-month review of the QPAP.

5. Likely Payments in Low Volume States (Report p. 22; Qwest reply brief p. 16; NMAS initial brief p. 23; Covad initial brief pp. 22-24)

NMAS noted that in comparison to the nine states average, New Mexico has little CLEC activity. Given the low level of CLEC activity in New Mexico, the QPAP liability amount has little significance. According to NMAS, for New Mexico, Qwest's representation that 36 percent of net revenues are at risk is hollow because few

CLEC volumes in New Mexico will prevent payments from ever approaching that amount, even if poor performance is widespread.

Qwest disagreed with the NMAS claims that a cap cannot possibly be reached in New Mexico because of alleged low CLEC volumes. Qwest argues the claim lacks any evidence or testimony to support it and appears to be pulled out of the air. Qwest suggests that low CLEC volume does not cause the QPAP to fall short of satisfying the public interest. Qwest points out that it cannot create volume; it can only respond to orders it receives.

Liberty determined that the NMAS argument, assuming its underlying factual basis is sound, does not bear directly on the sufficiency of the cap. If low CLEC order volumes comprise the reason that the cap would not be reached, then a higher hard cap or a procedural cap would likewise be unresponsive to such a concern. These higher triggers would not be met either. In the circumstances postulated, the issue becomes whether the PAP will: (a) adequately compensate CLECs with low order volumes, and (b) induce Qwest not to provide substandard service in a state with low overall order volumes. The QPAP does contain a provision for minimum payments, which will be discussed later in this conditional statement.

Liberty concluded that such a provision for minimum payments is the direct way to address the NMAS concern that low order volumes might dilute the remedy/deterrent and incentive goals of the QPAP.

Although the Board agrees with Liberty that the NMAS that small states with little CLEC activity will suffer poor performance while still not reaching the cap is not

directly related to the sufficiency of the cap, and that a higher cap would do nothing under New Mexico's low CLEC order volume premise, this is not an issue that was brought in Iowa. The Board does agree that a change in the cap would not address the concerns of minimum payments where there are low CLEC order volumes.

6. Deductibility of Payments (Report p. 20; Qwest reply brief p. 4; WCOM initial brief p. 4)

WCOM argues that if the payments under the QPAP are tax-deductible, Qwest's exposure is borne by other taxpayers and not fully realized by Qwest. WCOM urges each state commission or Board to properly characterize these payments as penalties and to determine if the payments are tax deductible as proper operating expenses of Qwest. Further, WCOM asks that a determination be made as to the sufficiency of the amounts under that scenario.

Qwest points out that the WCOM proposal that QPAP payments be defined as penalties is intended to heighten the financial impact of these payments on Qwest. Whether QPAP payments are tax deductible to Qwest is a matter properly determined by Internal Revenue Service (IRS) code, not state commissions. Furthermore, the flip side of the WCOM proposal would be a likely windfall to CLECs, *i.e.*, QPAP payments would not be taxable income to CLECs.

Liberty considered it safe to presume that the prior plans considered by the FCC were also conceived in the shadow of our ever-watchful federal government revenuers and saw no reason unique to Qwest that would justify a tax-netting factor here. Liberty expressed confidence that "what the thing is, as opposed to what those

interested in the result call it, is the more material fact bearing on the question of taxability."[6]

The Board agrees with Liberty that it is not necessary for there to be a declaration by the participants involved or for the Board to characterize the tax implications of these payments. This issue will be analyzed by and a determination made on the issue by the IRS.

The Board agrees with Liberty's position that the IRS more appropriately determines tax implications.

B. Magnitude of QPAP Payout Levels (Report pp. 22-25; Qwest initial brief pp. 7-9; AT&T initial brief pp. 22-23; Covad initial brief pp. 11-12)

Qwest presented an analysis of the payments that the QPAP would have produced for the months of February through May 2001, on the basis of the assumption that the QPAP had been in effect for at least six months prior to that February. Qwest considered these payment levels to be very substantial in light of the fact that Qwest measured its overall performance level under the applicable performance measures at 92 percent during this period. A principal premise underlying Qwest's belief in the utility of this analysis is that the prices that CLECs pay reflect a relevant measure of the value of the services that they receive for paying those prices. This premise takes the view that the price of goods or services in a free economy is a persuasive measure of their value.

[6] Report, p. 25

Qwest also presented analyses of the combined Tier 1 and Tier 2 payments it would have made for the 2001 months of February through May for unbundled loops and coordinated cuts. According to Qwest, the analysis showed that its QPAP payments for those measures would have exceeded the total revenue it would have received for the services measured by them.

Qwest additionally addressed the "significance" of payments for individual occurrences where it failed to meet the standards for which the QPAP requires payment. Qwest urged that the individual payments were significant in their own right, but suggested it is also necessary to recognize that the same order or activity could produce multiple payments. Thus, even if there were concerns that the payment set for an individual measure was insufficient to compensate a CLEC for damages, the provision of multiple payment opportunities for the same activity or closely related activities would mitigate any insufficiency.

AT&T once again argued the inadequacy of the payment structure, noting that Qwest would still have been paying substantial amounts even after escalation of payments for six months provides evidence of the inadequacy. AT&T also argued that the Qwest analysis of sample payouts for the February and March 2001 period was not truly indicative of payments that would have been made. Arguably, the calculations should have assumed that the QPAP began in February, which would have eliminated the accelerated payments and reduced the sample payouts by over 60 percent. AT&T asserts that the total payment amounts calculated by Qwest were paltry when compared with its third-quarter projected total revenue.

Covad argued that the baseline penalty amount neither compensates a CLEC for the financial ramifications of poor wholesale performance, including customer loss, nor for long-term harm to company reputation and business goodwill. Equally significant to Covad is the negative impact on its relationship with its end user customer when it tries to explain why the date for the delivery of its digital subscriber line (DSL) loop must be rescheduled.

Liberty dismissed AT&T's argument that the presentation used escalated payments beyond the six months called for in the QPAP, noting that the evidence showed that the Qwest analysis accounted for escalation, where appropriate, up to and including, but not in excess of six months.

Liberty pointed out that Qwest offered the payout information to show that its costs of noncompliance would be substantial under a fully operational and mature QPAP. Liberty concluded the calculations were useful, the intent and characteristics were overtly demonstrated, and the application of "memory" was appropriate to the use that Qwest intended.

Liberty concluded the payment presentation demonstrated that the magnitude of payout under the assumptions stated was considerable. Absent a showing to the contrary by the CLECs, the presentation spoke for itself under its outlined assumptions. The Board agrees that no evidence was presented by the CLECs to counter Qwest's presentation, and based on the evidence finds the payout levels to be adequate and appropriate at this time. However, because it is so speculative and the Board does not have the benefit of actual performance and payout information

under the QPAP as it is finally approved and operating, the Board will review this area during the six-month review, consistent with previous discussions on the appropriateness of revisiting any dollar amount cap.

C. Compensation for CLEC Damages

1. Relevance of Compensation as a QPAP Goal (Report pp. 26-28; AT&T post-report comments pp. 10-21; ZTEL initial brief pp. 27-33; Covad initial brief pp. 14, 16, 23)

ZTEL strongly disputed the characterizations that the payments provided for in the QPAP are fully compensatory. ZTEL claimed that there are several occasions in which provisions of the QPAP expressly limit payments without any reference to CLEC harm. ZTEL cited the following examples:

- The annual cap on payments (and its lack of specificity as to how CLECs would divvy up capped payments, as pointed out by Dr. Griffing and addressed in the Final Report) means that "compensation" paid to CLECs is directly limited by Qwest's net revenues – a figure entirely out of the control of the CLEC that bears no relationship to the damage incurred by the CLEC.

- Truncating interval disparities at 100 percent equates an average "miss" of two weeks to an average "miss" of two days.

- Failing to increase payments after six straight months of non-compliance fails to recognize that extended periods of non-compliance can severely whither CLEC business plans and deplete competitive entrant resources.

- The provisions of the plan that permit selective discrimination against a particular low-volume CLECs that can result in no (or very small) payments to that CLEC can nip the bud of entry and incur untold and uncompensated damage upon a new entrant.

AT&T listed a number of costs that are difficult to quantify and appears to argue that a compensation factor is needed for some of the harm. AT&T cites cost of unused AT&T personnel that would have performed the service, unused equipment cost, lost marketing costs for personnel, and literature that AT&T could not utilize due to lack of ability to perform services. Additionally, if a customer is affected, AT&T argues there are issues of goodwill, which could include a cancellation of services. If the damage to AT&T is significant enough, AT&T argues it could lose the customer for collateral services including cable, wireless (under an affiliated company with AT&T's brand name), inter/intraLATA toll, and high-speed cable Internet services. AT&T claims these damages cannot be quantified. AT&T's position is that it cannot predict the exact cost of certain damages until they occur.

Liberty reasoned that it is appropriate for the QPAP to address the question of compensating CLECs for contractual damages and it is appropriate that the QPAP liquidate such damages, given the difficulty in measuring them precisely and given that the QPAP payments approximate such damages. A central feature of this PAP, like others before it, is its ability to replace costly and protracted litigation and its uncertain results with a system that is more appropriate to creating and maintaining an efficient and balanced commercial relationship.

In addition to the goal of influencing Qwest's behavior, another purpose of the QPAP is to compensate the CLECs for contractual damages. Liquidated damages compensation relates to actions where the harm is difficult to calculate and cause difficult to assign. Unlike a liquidating commercial contract, the QPAP provides for

payments to participants other than the CLECs, in certain situations. AT&T and the CLECs argue this makes the QPAP analogous to a liquidated damages contract, but not a liquidating commercial contract. Further consideration of the QPAP as a liquidated damages contract is discussed later in this conditional statement in the context of precluding other remedies and the offsetting of other rewards.

The Board agrees with Liberty's conclusion that a relevant goal of the QPAP is to compensate the CLECs for contractual damages. However, the Board reserves the right to revisit the adequacy of the compensation at the six-month review when additional information and evidence will be available to make such a determination.

2. Evidence of Harm to CLECs (Report pp. 28-30; Qwest reply brief p. 10; AT&T initial brief p. 23; WCOM initial brief pp. 5-6)

WCOM argued that Qwest based its penalty amounts on its estimate of a CLECs loss of profit and the cost of the relevant services the CLEC requested Qwest to provide while it noted that Qwest's lost profit figure was based upon the annual loss of profit for a single analog business line (1FB) without the inclusion of any lost profits that might be derived from that single business line if that service was bundled with other services or where the CLEC customer had more than one 1FB.

AT&T contends it is impossible to quantify its intangible losses, asserting its rationale that the QPAP should not be the exclusive remedy for CLECs. According to AT&T, Qwest witness Inouye's conclusions on "price-outs" did not take into account any costs or any intangible losses that a CLEC might incur related to the goodwill of its end-user customers, for example. AT&T notes that witness Inouye admitted there

was a lot of analysis that he was unable to do because he did not have access to the data necessary to his analysis. AT&T also raised concern that Qwest's evidence of the robust nature of price-outs was based on the fact that that one "miss" would invoke up to ten performance indicator definition (PID) measures. AT&T witness Finnegan indicated that the mathematical chance of that occurring is extremely low, approximately one in 96 billion.

AT&T argued that because the nature of CLEC damages are far more than the price that CLECs pay Qwest for wholesale services, Qwest's price-outs contemplate a substantial amount of memory (escalating payments), and because of structural issues (exclusions, caps), there are numerous barriers to CLEC recovery, Qwest's price-out conclusions should carry little weight.

Qwest responded that there is no justification for payment to a CLEC unless those payments are compensation. Whether payments to CLECs are sufficiently compensatory is a matter that price-outs naturally bear upon. Only Qwest provided explanatory evidence of hypothetical price-outs. Every CLEC participating in this proceeding had access to data to price out their own performance results or the performance results of other consenting CLECs.

Covad claims that Tier 1 payments do not provide full compensation. Covad's only support is a recitation of alleged costs incurred by Covad and damage to Covad's reputation. At no time has Covad brought forth a simple accounting of its costs, real or intangible, and compared them to estimated payments under the

QPAP. Without doing so, Covad has absolutely no way of demonstrating whether its economic costs are greater or less than QPAP payments.

Covad and ELI/Time Warner/XO claim some missed orders receive no compensation under the QPAP. This argument is spurious. It apparently refers to the fact that the QPAP does not calculate payments on misses that fall within the benchmark standard. In other words, if the benchmark is 90 percent and the CLEC receives 90 percent performance, payments are not calculated on the 10 percent difference between 100 percent and 90 percent, because at 90 percent, Qwest is deemed to have met the proxy for parity. Covad and ELI/Time Warner/XO argue that compensation should be made for the 10 percent that exceeds the parity threshold; in other words, compensation for service that would exceed that which Qwest provides to itself. This argument ignores that the purpose of the QPAP is to ensure against differences between the levels of service Qwest provides to CLECs versus the levels of service it provides itself. This concept has also been referred to as the "100 percent factor" or the "one free miss."

CLECs and the NMAS claim Tier 2 payments are not high enough to provide incentive to Qwest to meet performance standards. None of these participants, however, provided any reasoned demonstration that the overall level of payments -- the combination of Tier 1 and Tier 2 -- is an insufficient financial incentive. A claim that payment levels are insufficient incentive requires identification of the level that is sufficient, as well as evidence that would support that level before the Board can consider some other level.

Liberty found Qwest's analysis to be largely based not on its own knowledge, but upon what another participant had said about CLEC profits and gave it only marginal weight in its analysis. In its complete absence, Liberty would have concluded that the suitability of the QPAP payment levels as an approximation of CLEC damages was sufficient. Thus, Liberty noted the CLEC criticisms would have made little difference in its analysis even had the argument been better developed. Liberty noted that its conclusion might have been different had CLECs chosen to present their own quantification of lost profit and other harm for comparison to the QPAP payments, indicating the record clearly would have benefited from CLEC presentations of a structured and comprehensive attempt to measure their harm. Uniformly, however, the CLECs chose not to do so. Liberty also noted that any CLEC who determined the QPAP payments to be insufficient, retained the opportunity to choose not to elect them.

The Board agrees with Liberty that determination of the suitability of QPAP payment levels, as an approximation of CLEC damages, would have benefited by a presentation by the CLECs of actual harm. The Board will endorse Liberty's conclusion that the QPAP payments appear to represent a reasonable approximation of the harm that CLECs suffer, absent evidence to the contrary.

3. Preclusion of Other CLEC Remedies (Report pp. 30-32; Qwest initial brief pp. 66, 69; AT&T reply brief p. 9)

According to AT&T, it should not have to waive any other contractual remedy to provide Qwest with the incentive to perform under the QPAP, and suggested

CLECs should be allowed to seek a contractual remedy that flows from an alleged failure to perform in an area specifically measured and regulated by the PAP once it underwent dispute resolution. Additionally the CLEC must establish to the mediator/arbiter that the CLEC can prove a reasonable theory of damages for the deficient performance at issue and evidence of real world economic harm that, as applied over the last six months, establishes that the actual penalties collected for deficient performance in the relevant area do not redress the extent of the competitive harm. This is an equitable solution, as it would allow CLEC recovery while protecting against frivolous and/or excessive lawsuits

Like traditional liquidated damages provisions, the QPAP establishes in advance payments that constitute appropriate compensation for damages due to Qwest's nonconformance. Qwest argues that this payment structure satisfies the FCC's express requirement that a performance assurance plan contain, a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal. CLECs that opt into the QPAP therefore will receive payments from Qwest for nonconformance with the QPAP metrics without ever having to claim, prove, or incur any harm.

As with many contractual promises for liquidated damages, this remedy is designed to be the only remedy under rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance. This is nothing more than the logical implication that courts have traditionally recognized of any liquidated damages provision. The intent of fixing an

indisputable amount for damages would be completely frustrated if the CLEC were entitled simply to use the liquidated damages provision as a floor in litigation seeking a more favorable amount.

Qwest's reply brief reflected a general commitment not to preclude non-contractual actions. Qwest cited the last sentence of QPAP Section 13.5, which provides that the application of the assessments and damages provided for is not intended to foreclose other non-contractual legal and non-contractual regulatory claims and remedies that may be available to a CLEC.

Liberty determined that when considered alone, this section provides protection that is comparable to that set forth in the Texas plan and in the Colorado Special Master's Report. However, Section 13.6 contains language that could be construed as contradictory:

> To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest in lieu of other alternative standards or relief. In no event is CLEC entitled to remedies under both the PAP and under rules, orders, or other contracts, including interconnection agreements, arising from the same or analogous wholesale performance. Where alternative remedies for Qwest's wholesale performance are available under rules, orders, or other contracts, including interconnection agreements, CLEC will be limited to either the PAP remedies or the remedies available under rules, orders, or other contracts and CLEC's choice of remedies shall be specified in its interconnection agreement.

Ultimately the CLECs should have the ability to recover for those additional forms of remedies, whatever the action brought to secure them. At the same time, Liberty found a need to make sure that from any such recovery there is deducted the

contract damages amount, for which the QPAP provides. Liberty recommended language should be added to accomplish the following:

- Prohibits all causes of action based on contractual theories of liability.
- Prohibits the recovery of amounts related to the harm compensable under contractual theories of liability under non-contractual causes of action that also permit the recovery of damages recoverable under contractual theories of liability.
- Allow for the recovery under noncontractual theories of liability those portions of damages allowed by the applicable theory that are not recoverable under contractual theories of liability.

To make the QPAP conform to these principles, Liberty recommended that all the quoted portions of Section 13.6, following the phrase "in its interconnection agreement with Qwest" be stricken and replaced with a simple provision requiring a CLEC to elect either: (a) the remedies otherwise available at law, or (b) those available under the QPAP and other remedies as limited by the QPAP.

Qwest filed the following changes to Section 13.6 to comply with Liberty's recommendations:

> 13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest. By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability, and any right of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a noncontractual claim, theory, or cause of action). When CLEC elects the PAP, the PAP shall

> replace any other service standards and/or accompanying liquidated damages contained in the contract for the same underlying activity or omission.

This language comports with the overall intent to make the QPAP an efficient way to quickly resolve issues that are contractual in nature between the participants. Dispute Resolution is available to the participants on issues that are contested pursuant to section 18.0 of the QPAP or section 5.18 of the statement of generally available terms (SGAT).

The Board should adopt the recommendation of Liberty and accept the language proposed by Qwest shown above.

4. Indemnity for CLEC Payments Under State Service Quality Standards (Report p. 33; AT&T initial brief p. 18; ELI/Time Warner/XO initial brief p. 11)

AT&T indicated in its comments, there is no provision requiring Qwest to remunerate CLECs for fines and penalties imposed by a governmental agency when the CLEC because of Qwest's wholesale service quality failure fails to comply with state or federal service quality rules.

According to ELI/Time Warner/XO, Qwest claims that the QPAP precludes any such indemnity because the QPAP provides the exclusive remedies "arising from the same or analogous wholesale performance." Qwest, however, produced no evidence to demonstrate that the payment levels in the QPAP account for any CLEC obligations to pay retail service quality penalties or credits to their end user customers. To the contrary, such penalties or credits easily could exceed the QPAP payment levels, particularly for credits based on retail charges for multiple services

and/or customers provisioned over a high capacity circuit or via collocation. This issue provides yet another illustration of the unreasonableness of Qwest's proposal to make the QPAP the exclusive remedy for any and all violations of its legal obligations.

Further, ELI/Time Warner/XO claim that Qwest contends that indemnification under these circumstances "would be administratively unworkable and likely lead to litigation, in contravention of one of the FCC's principal goals – certainty in application." The Joint CLECs agree that indemnification may not be self-executing and that disputes may arise, which is why this form of indemnification, like other forms of indemnification, should be governed by a separate provision of the SGAT or interconnection agreement. The issue should only arise in the context of the Commission's evaluation of the QPAP to the extent necessary to ensure that the QPAP does not preclude such indemnification.

Liberty noted that the merits of requiring such indemnification were fully addressed in prior workshops. AT&T's reasons for supporting such indemnification here are not materially different from those it advanced in earlier workshops. There is sufficient justification for precluding such indemnity in the QPAP, as it was precluded elsewhere in the SGAT.

The Board concurs in Liberty's conclusion that the issue of indemnification was already covered in Section 5.9 Indemnity of the SGAT.

5. Offset Provision (Section 13.7) (Report pp. 34-36; Qwest initial brief pp. 68-69; AT&T initial brief pp. 4-5; Covad initial brief p. 29;

WCOM initial brief p. 18; ELI/Time Warner/XO initial brief pp. 23-24; ELI/Time Warner/XO reply brief p. 11)

QPAP Section 13.7 states:

> If for any reason Qwest is obligated by any court or regulatory authority of competent jurisdiction to pay to any CLEC that agrees to this QPAP compensatory damages based on the same or analogous wholesale performance covered by this PAP, Qwest may reduce such award by the amount of any payments made or due to such CLEC under this PAP, or may reduce the amount of any payments made or due to such CLEC under this PAP by the amount of any such award, such that Qwest's total liability shall be limited to the greater of the amount of such award or the amount of any payments made or due to such CLEC under this QPAP. By adopting this QPAP, CLEC consents to such offset.

AT&T has argued that Qwest's apparent intent is to allow offsets against compensatory awards for the same activity for which payments were made or are owed under the QPAP, without consultation with the CLECs or any relevant commission. Throughout the history of the common law, the finder of fact in a judicial setting determines and contemplates what is to be offset, not the non-performing participant in a contract dispute. AT&T suggests that this is a clear example of Qwest deviating from the Texas Plan in an attempt to protect itself from paying possible appropriate remedies.

According to Qwest, any non-contractual remedies would be subject to the offset provision of the QPAP. Thus, if a CLEC were to obtain both a QPAP award and an alternative non-QPAP award for the "same or analogous wholesale performance," section 13.7 would entitle Qwest to offset the awards in either of two ways, but not both. First, Qwest may reduce such an award by liquidated amounts

already paid or due under the QPAP. Second, Qwest may reduce liquidated payments made or due under the QPAP by the amount of the compensatory portion of any such award. This second alternative is included because Qwest recognizes that a court or other body making an award may not permit that award to be offset by the amount of prior payments under the QPAP. The intent of these two offset options is to limit Qwest's total liability to the greater of the amount of the non-QPAP award or the amount of liquidated payments made or due under the PAP. Such offset provisions are well established under the law of damages. As with the election of liquidated damages under the QPAP, the offset ensures that a CLEC does not receive multiple recovery windfalls for the same underlying conduct.

Although WCOM agrees that CLECs should not be entitled to double recovery for the same conduct by Qwest, it argues that Qwest's plan proposes no recovery for analogous activity, which is too broad and will result in many disputes over what constitutes "analogous" activity. WCOM suggests that the reference to analogous activity should be deleted because it is ambiguous, undefined, and will inhibit the self-executing nature of the QPAP.

ELI/Time Warner/XO argues that if Qwest is entitled to an offset, the Commission, FCC, court, or arbitrator making the award should make that determination, not Qwest. Any offset, moreover, would be appropriate only if the QPAP payments have compensated the CLEC for the same, not "analogous" performance – again, a question of fact for the Commission, FCC, court, or arbitrator. ELI/Time Warner/XO urge that this section be removed from the QPAP or

substantially revised to provide that Qwest may request that any award of compensation for the same wholesale service covered by the QPAP be subject to an offset by QPAP payments, but that any such offset must be ordered by the entity making the award to be offset.

Liberty indicated that nothing in Qwest's proposed language gives it the right to make a nonreviewable decision about whether an offset is allowable. The issue is more accurately described as one of determining where any dispute about offsets will be resolved. Liberty concluded that the QPAP dispute resolution provisions should give adequate opportunity to challenge a decision by Qwest to reduce its QPAP payments under the offset language, while adequate interest provisions would address any time-value-of-money issues associated with delays in payments while disputes get resolved.

Liberty found that Qwest's proposed language was confusing, both in its use of the terms "analogous" and "performance." Double recovery is only an issue where the conduct that gives rise to it is the same; the use of the term "analogous" introduces vagueness and uncertainty. For example, an activity can be entirely distinct, but, for some purposes, analogous.

If the activity is distinct, it may well produce separate harm or damage, some of which should not be precluded.[7] There should be consistency between the language allowing other damages and the language addressing offsets. Liberty recommended that changing the phrase "same or analogous wholesale performance" to "same

underlying activity or omission for which Tier 1 assessments are made under this QPAP" would solve the problem.

Liberty also noted one other technical problem with the Qwest language that should be addressed. The same performance might produce liability for: (a) CLEC business loss and incentives for Qwest to perform, and (b) physical damage to property or personal injury. The QPAP has nothing to do with compensation for physical property damage or personal injury, but other SGAT provisions recommended in an earlier report from these workshops do. In order to preserve the effect of those sections, QPAP Section 13.7 should contain a provision stating:

> Nothing in this QPAP shall be read as permitting an offset related to Qwest payments related to CLEC or third-party physical damage to property or personal injury.

The Board agrees with Liberty's recommendation related to the offset issue. Section 13.7 should be modified to include the language shown above.

The Board endorses Liberty's recommendation and adopts the language of section 13.7 as filed by Qwest on November 6, 2001, which included this addition.

6. Exclusions (Section 13.3)

- Excluding Qwest Payment Responsibilities in the Case of CLEC Bad Faith (Report pp. 38-39; Qwest initial brief p. 75; AT&T initial brief p. 6; Covad initial brief pp. 30-33; ELI/Time Warner/XO initial brief pp. 13, 22)

AT&T wants to strike the exclusion for bad-faith CLEC acts or omissions on the grounds that it was ambiguous. Pursuant to QPAP Section 13.3, Qwest will not

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[7] See I.C.3. Preclusion of Other CLEC Remedies.

CLEC were to "dump" orders or applications at or near the end of a business day or in "unreasonably large batches." These terms would be interpreted on a case-by-case basis, in light of the factual circumstances. As a general matter, however, they are intended to refer to situations in which a CLEC submits orders or applications in large quantities that has the foreseeable effect of causing Qwest to miss a performance standard or where CLEC had the ability to submit the orders over multiple days or through project management.

Similarly, Section 13.3(2) provides that if a CLEC "fail[s] to provide timely forecasts to Qwest," Qwest will be excused from its Tier 1 and Tier 2 payments if the forecasts "are required to reasonably provide services or facilities." Qwest does not contend, however, that any failure to provide timely forecasts would be deemed an act of bad faith — just those that are so required.

Liberty noted that now that Qwest has described its intent in designing the QPAP section in question, we are forewarned about how Qwest may intend to apply it. Liberty suggested that we should be wary of the fact that our failure to respond to such a foreseeable application could be construed as an acceptance of a particular construction of the words that the provision uses.

Liberty recommended that the proposed language of ELI/Time Warner/XO be adopted as follows:

> Notwithstanding any other provision of this QPAP, it shall not excuse performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources reasonably required to meet foreseeable

volumes and patterns of demands upon its resources by CLECs.

Liberty concluded that the insertion of this provision as a new subsection following QPAP Section 13.3 is appropriate to assure that there is not a material dilution of the operation of the QPAP as a meaningful and significant incentive to Qwest.

The Board agrees with Liberty's assessment of the Section 13 limitations. Concepts such as good faith between participants to a contract, though presumed are not hurt by a listing in a contract of actions what would constitute a bad faith action. If listing of bad faith actions for CLECs is appropriate, then the Board also agrees with Liberty that including the language that notes a reasonable expectation of Qwest abilities to handle "foreseeable volumes and patterns of demands." Qwest has included the language in the current QPAP.

The Board endorses the recommended inclusion of the language proposed by ELI/Time Warner/XO.

- Differing SGAT and QPAP Force Majeure Provisions (Report pp. 36-39; AT&T initial brief p. 6; WCOM initial brief p. 16; ELI/Time Warner/XO reply brief p. 14)

ELI/Time Warner/XO argues that Qwest fails to justify the language, if not the substance, of the exclusions in QPAP Section 13.3. Qwest claims that the force majeure clause "comports with similar, standard clauses in commercial agreements" and is included as a stand-alone definition "because the QPAP was intended to be self-contained and not to require extensive cross-reference to other provisions of the

SGAT." If the clause is "standard," however, there is no need to include two force majeure clauses in the same interconnection agreement. The QPAP force majeure clause, moreover, materially differs from the force majeure clause in SGAT Section 5.7. The SGAT force majeure clause includes "equipment failure" as a force majeure event and provides that delays caused by third parties will always be considered force majeure events – Qwest agreed to change both of these provisions in SGAT Section 5.7 during the general terms and conditions workshops. Qwest provided no explanation, much less justification, for departing from that agreement when drafting the QPAP or for incorporating two materially different force majeure clauses in the same agreement.

WCOM suggests that under Section 13.3, Qwest has not used the force majeure language already found in Section 5.7.1 and agreed to in the SGAT. Additionally, Qwest has provided no reasons for having different force majeure language. Therefore, WCOM requests Section 13.3 be modified to cross-reference Section 5.7.1.

AT&T sought to strike the equipment failure exclusion from Section 13.3 as ambiguous, broad, and duplicative of the Section 5.7 force majeure provisions.

Liberty indicated that Qwest has not made a convincing argument that the QPAP requires its own separate and different force majeure provision. The issue is not at all about whether cross-referencing to other QPAP sections will be "extensive." It will not; what would suffice is a simple replacement of clause (1) of QPAP Section 13.3 with the following phrase: "a Force Majeure event as defined in Section 5.7 of

the SGAT." More than this has been commonly done in the SGAT on other subjects, in order to provide proper cross-referencing.

Qwest has made the changes in the QPAP to refer to the Force Majeure definition in section 5.7 of the SGAT as recommended by Liberty, rather than the definition language in the QPAP. The Force Majeure definition deleted from Section 13.3 of the QPAP is substantially the same language referenced in the SGAT Section 5.7. The Board agrees with Liberty and the CLECs on the need for one location for the Force Majeure definition.

The Board will adopt the recommendation of Liberty to exclude a separate definition of Force Majeure in the QPAP.

- Timing of Force Majeure Event Notices (Report pp. 36-39; Qwest post-report comments pp. 7-8; WCOM initial brief p. 16)

WCOM suggests that Qwest should provide notice to CLECs when a force majeure occurs and Qwest intends to exercise this exclusion to performance. Apparently, Qwest intends to provide some notice after the fact in its bill credit statement; however, such a notice is too late and does not give a CLEC a timely opportunity to challenge Qwest's use of the force majeure exclusion.

Liberty agrees that Qwest should be required by the QPAP to provide notice of its claims of the occurrence of force majeure events within 72 hours of learning of them or after it reasonably should have learned of them. It would not be appropriate to allow Qwest to search back in time for excuses after it discovers that it will not

meet standards, nor is it appropriate to require CLECs to research facts surrounding events that have become stale.

Qwest has included Liberty's recommended provision that Qwest provide notice of the force majeure events within 72 hours of the time that they occurred or that Qwest could have reasonably expected to learn of them. Qwest has added that provision in Section 13.3 of the QPAP.

The Board supports the inclusion of the force majeure notification into section 13.3 of the QPAP. The appropriateness of a force majeure exceptions claim will in all likelihood be challenged at some point, and the closer the notification is to the event triggering the claim the better a determination can be made on a challenge. The following language was added to section 13.3:

> 1) with respect to performance measurements with a benchmark standard, a Force Majeure event as defined in section 5.7 of the SGAT. Qwest will provide notice of the occurrence of a Force Majeure event within 72 hours of the time Qwest learns of the event or within a reasonable time frame that Qwest should have learned of it

The Board endorses the recommendation of Liberty and adopts the language added to section 13.3 as shown above.

- Impact of Force Majeure Events on Interval Measures (Report pp. 36-39; AT&T initial brief p. 7; WCOM initial brief pp. 16-18; Qwest post-report comments p. 8)

As the QPAP substantially deviates from a strict dispute resolution provision where only the relevant Commission would determine the appropriateness of Qwest claiming an exclusion, AT&T argues that it is especially important that there be

language establishing a nexus between the actions when Qwest would be excused from its performance and the actual Qwest performance. Qwest witness Inouye agreed that there should be a relationship between the excluding event and Qwest's performance. The issue is that there is no language actually requiring that nexus. In its comments, AT&T offered language that provided that nexus.

The Board notes that Section 13.3 has already been altered to refer back to section 5.7 for a definition of Force Majeure events. AT&T's additional proposed language is as follows:

> If a Force Majeure event or other excusing event recognized in this section only suspends Qwest's ability to timely perform an activity subject to Performance Measurement, the applicable time frame in which Qwest's compliance with the parity or benchmark criterion is measured will be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the excusing event.

WCOM asserts that a force majeure event should only apply to benchmark measures, rather than parity measures, because a force majeure event should affect Qwest and CLEC results in the same manner. Any such force majeure action should not allow Qwest to provide its retail customers with better than parity service compared to wholesale customers and then be excused from making payments. To the extent Qwest believes that the force majeure event will not affect Qwest and CLECs in the same manner, it can seek a waiver under WCOM's proposed language shown below.

WCOM contends that Qwest has the burden of proving a force majeure event. Although Qwest does include language that indicates Qwest will have the burden to

demonstrate the reason for any exclusion, it is too general and limited. More detailed and appropriate language as proposed in the Colorado final report would be more acceptable to WCOM. The following language is proposed:

> If Qwest desires a waiver of its obligation to pay any penalties it must file an application with the Commission. Any waiver request must, by a preponderance of the evidence, establish the circumstances that justify the waiver, stating any and all relevant documentation to support the request. CLECs and other interested participants would have a full opportunity to respond to any such waiver request prior to the Commission ruling. Qwest shall be required to pay any disputed amounts or place the disputed amount of money into an interest-bearing escrow account until the matter is resolved. In addition, any such waiver should only apply to a narrow period of time when the activity occurred, not months after the activity has ended.

Liberty pointed out the likelihood that in many instances Qwest could still perform up to standard, or at least closer to it, if it were to undertake extraordinary efforts that do not consider economy of resources. The burden on Qwest should be to undertake reasonable efforts to mitigate, not to accomplish the extraordinary, whatever the cost. Liberty construed the existing language to already provide for this. In addition, establishing a fixed duration on any force majeure event is: (a) not consistent with the nature of such events, (b) as likely to be over-protective as under-protective, and (c) is otherwise unnecessary, because the burden on Qwest is not only to show the existence of an event, but to show its nexus to performance failure and to demonstrate the time period during which the event and this nexus existed.

Liberty did find merit in the AT&T proposed language specifying the method for calculating the impact of a force majeure event on interval measures and

recommended that it be added to clarify the method for calculating QPAP payments when a force majeure event should have less than a completely excusing impact. Qwest has added the AT&T recommended language verbatim at the end of Section 13.3 of the QPAP.

The Board supports the inclusion of the language proposed by AT&T for the purpose of calculating the impact of a force majeure event on interval measurements. The Board agrees with Liberty and AT&T that it is important that there be language establishing a nexus between the actions when Qwest would be excused from its performance and the actual Qwest performance. The specific language added to the end of Section 13.3 in Qwest's November 6, 2001, filing is as follows:

> If a Force Majeure event or other excusing event recognized in this section merely suspends Qwest ability to timely perform an activity subject to a performance measurement that is an interval measure, the applicable time frame in which Qwest's compliance with parity or benchmark criterion is measured will be extended on an hour-for-hour or day-for-day basis, as applicable, equal to the duration of the excusing event.

The language inserted by Qwest is similar to the proposed AT&T language. The language proposed by Qwest only addresses interval measurements. This substitute language addresses directly the concerns noted by Liberty, without being overly broad.

The Board endorses Liberty's recommendation and adopts the language proposed by Qwest in its November 6, 2001, filing, for Section 13.3 of the QPAP.

- Applying Force Majeure Provisions to Parity Measures (Report pp. 38-40; AT&T initial brief p. 7; WCOM initial brief p. 16; Qwest post-report comments p. 8)

AT&T argues there is no reason Qwest should be able to claim a force majeure exception when the relevant standard is parity. If Qwest can perform the function for itself, it can perform it for the CLECs. The AT&T language proposed above also addresses this issue. (These are the same language changes offered by AT&T in the preceding issue Impact of Force Majeure Events on Interval Measures.)

WCOM maintains that any such force majeure action should not allow Qwest to provide its retail customers with better than parity service compared to wholesale customers and then be excused from making payments. To the extent Qwest believes that the force majeure event will not affect Qwest and CLECs in the same manner, it can seek a waiver under WCOM's proposed language. Qwest has the burden of proving any force majeure event.

Liberty agrees that Qwest is undoubtedly correct in observing that a force majeure event could have differential effects on the services it provides for its own end users and the services that it provides for CLECs, but suggests that nevertheless it requires that the question be asked why it should be presumed that the differential effect must always work in one direction. The differential effect would, on a basis relative to CLEC performance, sometimes lessen the quality of Qwest's service for itself and sometimes increase it.

With that in mind, Liberty suggests that it would be correct to observe that Qwest's provision only allows itself the benefit of choosing when to apply the QPAP's

force majeure provisions. While the reasonableness of declaring the necessary conditions to exist will be reviewable, nothing would allow a decision not to declare to be reviewed. That difference is sufferable as a general rule. However, it simply would deny basic fairness to permit Qwest both to: (a) avoid parity-measure payments when it decided that the impairment to service for its own end users was lesser, while (b) meeting parity standards that it might otherwise have failed when the impact on its own end users was greater. Liberty recommended that Qwest not be permitted to apply a force majeure exception to parity measurements. Qwest has incorporated the recommended changes into section 13.3 of the QPAP

The Board agrees that it would be unfair for Qwest to both (a) avoid parity-measure payments when it decided that the impairment to service for its own end users was lesser, while (b) meeting parity standards that it might otherwise have failed when the impact on its own end users was greater.

The Board endorses Liberty's recommendation and adopts the language Qwest has incorporated into Section 13.3 of the QPAP, which prohibits Qwest from applying a force majeure exception to parity measurements.

- CLEC Failures to Forecast as a Qwest Performance Excuse (Report pp. 38-41; WCOM initial brief p. 18; Covad initial brief p. 55; Qwest post-report comments p. 8)

WCOM questions Qwest's proposed exclusion in the event CLECs fail to provide required forecasts. In his oral testimony, Qwest witness Inouye admitted he did not know where the forecasting requirements were found. He agreed that CLECs should be provided the requirements, but disagreed that those requirements should

be detailed in the QPAP. WCOM suggests that this exclusion must be further defined. For example, the only mandatory forecasting requirements now found in the SGAT relate to LIS trunks and collocation. Therefore, to the extent this exclusion is retained it should be clarified to reflect that the forecasting requirements are those found in the SGAT or in an interconnection agreement.

Covad also urges that Section 13.3 be revised to make clear that any forecasts required for purposes of Section 13 of the QPAP are those forecasts required under the SGAT.

Particularly troublesome to Liberty is the provision about forecasts under state rules. Liberty notes that those rules could change over time and could involve forecasts that address interests much broader than those considered to warrant forecasts under the SGAT. There could also be arguments about whether information required in the future would constitute a "forecast" as the term is contemplated by the SGAT and the QPAP. Liberty opines it would be much better to limit the exclusion to the failure to provide properly those forecasts that are "explicitly required by the SGAT" of which the QPAP will form a part.

This change will deal as well with Liberty's other material concern about Qwest's proposed language. By definition the SGAT cannot be read to require any forecast whose provision would be "unreasonable." Therefore, Qwest's use can only be logically read as implying that the SGAT can be read as reasonably requiring additional forecasts in this particular context. It would create far too much ambiguity to include a provision that may be interpreted as authorizing the compulsion of

additional, yet unspecified forecasts under the terms of the SGAT. Identifying the specific forecasts that were to be required formed much of the debate in prior workshops. Liberty found it unacceptable to introduce a troublingly undefined and shadowy provision that might do indirectly what was intentionally prohibited.

Qwest has modified Section 13.3 of the QPAP in accordance with Liberty's recommendation.

The Board agrees with Liberty and the CLECs concern about the need to clarify the forecasts. The language change deleted the language, "such forecasts are required to reasonably provide service or facilitates," and added new language, "such forecasts are explicitly required by the SGAT," in its place.

The Board endorses Liberty's recommendation and adopts the language of modified Section 13.3 of the QPAP as filed by Qwest in its November 6, 2001, compliance filing.

7. SGAT Limitation of Liability to Total Amounts Charged to CLECs (Report p. 41; ELI/Time Warner/XO initial brief p. 25; Qwest post-report comments p. 17)

ELI/Time Warner/XO argues that the SGAT limits each participants's liability, other than for willful misconduct, "to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises," although this limitation "shall not limit the amount due and owing under any Performance Assurance Plan."[8] As currently drafted, however, QPAP payments would be

[8] *See* SGAT § 5.8.1.

included in the amounts subject to the limitation of liability, threatening to insulate Qwest from liability for any other violation of the interconnection agreement.

According to ELI/Time Warner/XO, Qwest's own evidence demonstrates that QPAP payments could exceed the total amounts a CLEC (particularly a small CLEC) pays to Qwest under its interconnection agreement. Under those circumstances, the QPAP payments would maximize Qwest's liability under Section 5.8 of the SGAT, including any obligation to pay compensation for Qwest's negligence, non-willful misconduct, or any other violation of the interconnection agreement. QPAP payments thus would be the only compensation the CLEC would receive from Qwest, even though the QPAP provides payments only for missing specified PID measures, and Qwest presented no evidence to demonstrate that such payments include compensation for any other breach of Qwest's obligations to CLECs.

Liberty concluded that the payments addressed by SGAT Section 5.8.1 and by the QPAP are mutually exclusive. Qwest's liability for property damage and personal injury should not be limited by QPAP payments, just as QPAP payments should not be limited by payments for property damage and personal injury. Therefore, SGAT Section 5.8.1 should include a provision stating that:

> payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT section.

Qwest agreed to add the language proposed by Liberty to section 5.8.1 of the SGAT Limitation of Liability.

The Board agrees with Liberty's conclusion that the payments addressed by SGAT Section 5.8.1 "Limitation of Liability" and by the QPAP are mutually exclusive. The pertinent part of Section 5.8.1 incorporating the new language is as follows:

> Each participants's liability to the other Participant for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accures or arises. Payments pursuant to the QPAP should not be counted against the limit provided for in this SGAT Section. (New language underlined)

The Board endorses Liberty's recommendation that additional language is necessary to remove any ambiguity concerning the payments and adopts the language as shown above.

D. Incentive to Perform

1. Tier 2 Payment Use

- Tier 2 Payment Use (Report p. 41; AT&T initial brief p. 10; Covad post-report comments p. 19)

According to AT&T, QPAP Section 7.5 indicates, "payments to a state fund should be used for any purpose that relates to the Qwest service territory that may be determined by the State Commission." There is no such provision in the Texas Plan. Qwest witness Inouye indicated the reason that the restriction was there is so only customers in the areas where Qwest performed services will reap the benefit of the monies.

AT&T argues that Qwest should not be allowed to determine where Tier 2 penalties should be applied by suggesting that expenditures should only be made in its service area, therefore possibly bolstering Qwest service quality. Accordingly,

Qwest should be required to strike this language, which is contrary to the FCC requirement that any plan "provide a meaningful and significant incentive to comply with the designated performance standards."

Covad suggests that a state commission permissibly may use Tier 2 funds for any purpose it believes is necessary and appropriate. That position, however, is subject to one caveat; any use to which the Tier 2 funds are put should not benefit Qwest either directly or indirectly. It would be incongruous, at best, to compel payment from Qwest and then to apply it to a purpose from which Qwest would benefit either directly or indirectly. Indeed, permitting Qwest to benefit from Tier 2 funds could create a perverse incentive on the part of Qwest in providing wholesale services to CLECs.

Liberty reasoned that the proper construction of the Qwest language is that th restriction applies only to payment amounts to be administered by a state commission. Should a state commission administer those funds, the restriction is generally appropriate given the statutory role that state commissions typically have. However, even in that case, it should not be presumed that state commission powe are so limited. There should also be no restriction on payments made to the genera fund. Therefore, Liberty recommends QPAP Section 7.5 be replaced with the following:

> Payment of Tier 2 Funds:
>
> Payments to a state fund shall be used for any purpose determined by the commission that is allowed to it by state law. If the Commission is not permitted by state law to

> receive or administer Tier 2 payments to the state, the payments shall be made to the general fund or to such other source as may be provided for under state law.

Qwest points out that the language recommended by Liberty broadens both the sources for depositing Tier 2 funds and the use of Tier 2 funds. Qwest does not object to the suggested language and has incorporated it into Section 7.5 of the QPAP as filed on November 6, 2001.

The Board, although in general agreement with the Liberty recommendation from a conceptual standpoint, determines that some changes are necessary to be useful in Iowa. Rather than payments to a "state fund," the Board directs Qwest to deposit such Tier 2 funds into a separate, Qwest controlled account, to be identified as the Iowa Tier 2 payment account, to be used to fund long-term administrative expenses of oversight activities as discussed in greater detail in the following issue (Funding Commission/Qwest/CLEC Oversight Activities). Once those expenses are met, Qwest should periodically deposit any remainder to the state's general fund.

The Board directs Qwest to propose language for Section 7.5 incorporating the provision for Tier 2 funds in Iowa as discussed above.

- Funding Commission/Qwest/CLEC Oversight Activities (Report p. 42; AT&T post-report comments pp. 22-23)

Liberty noted that these multi-state workshops have demonstrated many, if not all, of the Qwest states can find it efficient to address wholesale telecommunications services issues on a combined basis. More critically, some states simply may not have the resources necessary to carry out the many burdens that the SGAT,

interconnection agreements, QPAP, federal law, and FCC regulations impose upo them. Liberty concluded that the creation of a funding mechanism to support state commission activities represents a proper use of a portion of Tier 2 payments and, necessary, of a fraction of the escalated portion of Tier 1 payments.

Liberty suggested the QPAP provide that one-fifth of the escalation portion payments (Tier 1 payments) otherwise due to CLECs for non-compliant service in each participating state and one-third of the state's Tier 2 payments be made to a special fund that would be available for states participating in a common administration effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunications service activities determined by the participating commissions to be best carried out on a common basis. The Tier 2 payments should be first used to carry out these purposes, with any excess remaining Tier 1 payments returned to the CLECs who contributed them, on a pro-rata basis, not less than every two years. Liberty recommended that Qwest also b required to make an advance payment against future Tier 2 obligations in an amou reasonably determined by the participating state commissions to fund the precedin listed activities on an interim basis.

The Colorado Special Master's Report recommended a particular form of administrative structure for carrying out the activities listed above. Given the multi-state nature of the effort envisioned here, as opposed to the single-state process addressed in the Colorado Report, it is preferable to allow the states interested in

participating to give consideration to the best means for designing and implementing a common administrative structure.

AT&T expressed concern with the suggestion that a funding mechanism utilizing Tier 1 payments to the CLECs be used to create a "special fund" that would be available for states participating in a common administration effort to use for: (a) administrative activities, (b) dispute resolution, and (c) other wholesale telecommunication service activities determined by the participating commissions to be best carried out on a common basis.

AT&T argues that such a proposal exists nowhere in the record in this proceeding, and that the proposal involves skimming off one-fifth of certain escalation remedies that a CLEC would otherwise be entitled to. AT&T suggests this is inappropriate. CLECs already pay state taxes, certification fees, and/or regulatory fees to support the activities of the relevant state commissions. Requiring CLECs (as opposed to Qwest) to pay part of its exclusive "remedies" under the QPAP to support a vaguely articulated "common administration effort" reeks of inequity.

The Board is of the opinion that a Special Fund as described by Liberty is a practical way to fund the administrative tasks such as the arbitration, audit review, hiring of auditors, and state commission travel and time expenses. The Board does not agree that a contribution of funds by CLECs from Tier 1 payments is reasonable. Tier 1 payments to CLECs are designed to address claims of the CLECs. If Tier 2 payments are inadequate for administration of the QPAP, funding shall be

contributed as described in section 15.4 and discussed later in this conditional statement at V.A. Audit Program.

Section 11 of the QPAP outlines the payment to states of the Tier 2 funds and the funds to the Special Fund. For clarification purposes The Board proposes that the formula for the calculation of Tier 2 payments include an additional step. The "Special Fund" monies should be subtracted from the calculated Tier 2 payment, with only the remaining amount labeled as Tier 2 funds. This step would make it clear that the funds going into the state general fund are Tier 2 payments separate from the "Special Fund" monies.

The Board directs Qwest to incorporate language into Section 11 of the QPAP that will provide for the additional calculation to split the total Tier 2 funds into "Special Fund" monies for the payment of administrative expenses related to the QPAP with the remainder going to the states general fund.

2. Three Month Trigger for Tier 2 Payments (Report pp. 42-44; Qwest initial brief p. 25; AT&T initial brief pp. 11, 14; NMAS initia brief p. 11; Qwest post-report comments p. 11; AT&T post-report comments p. 23)

AT&T argued that payment should begin after a single month of non-complian performance, in order to assure that there are effective sanctions for poor performance on Tier 2 measures.

Qwest contends that because Tier 2 payments provide additional incentives and operate at a different level (*i.e.*, CLEC aggregate level) than Tier 1, it is perfectly reasonable that Tier 2 not mirror Tier 1 in terms of the trigger for payments or the

structure of the payment table. Tier 1 payments serve the dual function of compensation and incentive. Tier 2 payments, by contrast, are purely for the purpose of providing incentive. The nature of this additional payment is to motivate behavior and as such it is appropriate that the payments are triggered after a period of time in which Qwest has had an opportunity to solve nonconforming service. As Qwest pointed out during the hearings, the time delay involved in reporting results makes it all but impossible for Qwest to react to nonconforming performance until the third month after the first month miss.

The NMAS argued that Qwest's proposed limitation on Tier 2 payments would permit Qwest to provide discriminatory service to the aggregate CLEC community in two out of every three months, with no liability for payments. In that respect, Qwest's proposed QPAP is deficient. A plan that permits Qwest to maintain unsatisfactory performance to CLECs in the aggregate for two of every three months does not represent a significant incentive to provide satisfactory service.

Liberty agreed that one compliant month out of every three should not be considered adequate for measures that have no Tier 1 payment. In any 12-month rolling period in which there have been two non-compliant months out of any consecutive three months, payments for those Tier 2 payments without a Tier 1 payment obligation should be triggered by a single additional month of non-compliance.

Qwest's principal defense of the QPAP provision at issue was two-fold: (a) the need for time to identify and resolve long-term problems, and (b) consistency with

other plans that the FCC has reviewed. The time-lag issue would be resolved by the adoption of Liberty's recommended approach for triggering Tier 2 payments for measures without a Tier 1 payment counterpart. However, it does appear that the Texas plan adopts the same three-consecutive-month trigger for Tier 2 payments. Nevertheless, given the emphasis placed on Tier 2 payments as an inducement, it remains difficult to place much faith in their contribution to a performance incentive plan when they can be avoided (even under measures where there are Tier 1 payments) by concerted efforts to bring performance to minimum acceptable levels during only four months each year.

Such a program appears more likely to lead to frequent underperformance than it does to encouraging routine compliance. In the case of Tier 2 payments that have Tier 1 counterparts, the QPAP should trigger Tier 2 payments in the second consecutive month of non-performance, provided that the same two-out-of-three month condition (recommended immediately above for Tier 2 measures that have no Tier 1 counterpart) is met.

The Board agrees that the structure originally proposed for triggering Tier 2 payments could have the possible effect of eight non-compliant months out of 12. Distinguishing between Tier 2 payments that are, or are not, tied to a Tier 1 paymen appears to miss the point that the triggering of a Tier 2 payment requires a serious miss by Qwest. The Board finds that all Tier 2 payments should be triggered on a monthly basis after the threshold of two out of three consecutive month of misses ir 12-month period.

Qwest has agreed to Liberty's proposed changes to the trigger of Tier 2 payments with and without a related Tier 1 payment. The language in Section 7.3 of the QPAP currently states:

> Tier 2 payments are calculated and paid monthly based on the number of performance measurements failing performance standards for a third consecutive month, or if two out of three consecutive months in the 12 month period have been missed, the second consecutive month for Tier 2 measurements with Tier 1 counterparts and one month for Tier 2 measurements that do not have Tier 1 counterparts.

The Board directs Qwest to submit new language triggering all Tier 2 payments on a monthly basis once the initial threshold of two out of three consecutive months of misses in a 12-month period has been met.

3. Limiting Escalation to 6 Months (Report p. 44; Qwest initial brief p. 21; AT&T initial brief p. 26; ELI/Time Warner/XO initial brief p. 13; ZTEL initial brief p. 18; Covad initial brief pp. 13, 32; WCOM initial brief p. 7)

Qwest provided evidence demonstrating that continuous escalation beyond the six-month $400, $600, and $800 per occurrence payment levels in the QPAP would substantially over-compensate CLECs and give them an incentive not to invest in the facilities-based competition that forms the ultimate goal of the 1996 Act. Qwest demonstrated that the total financial incentive of the QPAP — the combination of Tier 1 and Tier 2 payments — is equivalent to giving away wholesale service for seven to 15 years. The majority of that payment will go directly to CLECs. Qwest states that, "payments at these levels in relation to the number of years of revenues

that would be generated to break even will be both compensatory to CLECs and sufficient financial incentive to Qwest."

AT&T argues that the QPAP should contain no provisions, which protect Qwest from paying appropriate penalties for chronic poor performance. In its comments, AT&T discussed that there is no reason that the QPAP caps the pena for Qwest deficient performance at six months except for Qwest to protect itself fr its own chronically poor behavior.

AT&T suggests that if Qwest could not provide non-discriminatory service within a six-month period (pre-271) when it has substantial incentive, there is no reason to anticipate an appropriate incentive, post-271. Accordingly, the QPAP should not reward Qwest for deficient service by limiting payment amounts after s month's worth of deficient performance.

ELI/Time Warner/XO agree that payments to CLECs provide some compensation, but suggest that they serve principally to encourage Qwest to imp its performance, particularly in light of the fact that Qwest finds paying CLECs an money especially distasteful. If there is a concern that CLECs might be overcompensated, these Joint CLECs would propose, along with ZTEL, that Tier payments stop escalating after six months but that Tier 2 payments begin to esca at that time. Under that structure, payments for nonperformance would continue increase after six months, but the state, rather than the CLECs, would receive the increase.

Qwest concedes that this proposal would address its concerns with overcompensating CLECs, but Qwest rejects the proposal because the result, in Qwest's view, would be over-deterrence. Qwest offered no evidence to support its view or to explain why Qwest would continue to fail to perform after six months of making escalating QPAP payments if those payment levels provide Qwest with sufficient incentive to perform. Common sense, as well as record evidence, demonstrates that Qwest will not perform unless it is more painful not to perform, and continuing to increase payment levels for successive months of failure is necessary to increase the financial pain to Qwest until that level is reached.

ZTEL indicates that when a PAP is proposed, there is no way to determine *ex ante* whether payment levels proposed will provide sufficient incentive for compliance. If the initial payment levels are too low, the ILEC will continue to provide inadequate service until those payment levels are subsequently increased. The best means of developing a comprehensive plan that seeks out and determines the proper level of incentive payments is to implement a PAP that does not contain artificial caps on payments or escalations.

ZTEL agrees that, as proposed, the QPAP does provide some correction for this possibility, but suggests that Qwest's proposal contains artificial caps and limitations on payments and escalations that undermine the effectiveness of the plan. For example, Qwest proposes to increase payment levels for each of the first six months. After six straight months of non-compliance, however, the payment levels would cease increasing – even though the frozen levels are clearly not enough to

incent compliance if non-compliance continues to be observed. Qwest also proposes that if it misses for several months in a row, but then comes into compliance, the plan should abandon the payment level that incented the performance and instead drop back to a lower level. Finally, Qwest proposes that regardless as to how poor its performance may be in any state, an absolute and arbitrary maximum cap on its payments should apply, based on a percentage of its revenues in that state.

According to Covad, there is no principled reason pursuant to which the escalated penalties should cease at some arbitrary point in time, as Qwest contends. As the Special Master to the Colorado Public Utilities Commission correctly recognized, "the incentive payment are not wholly punitive in nature because CLECs may well suffer increased harm to customer goodwill when problems continue [and, further] the initial payments may not adequately reflect harm imposed on the CLECs."

WCOM suggests that if Qwest's performance continues to be poor, remedy payments should continue to provide the relevant incentive for Qwest to fix a problem. Qwest has missed certain PID requirements for six months or more, as was addressed by witness Inouye in his discussions of and cross examination regarding Exhibit S9-CEW-CTI-2, Confidential Slides CTI-2 and CTI-3 and the corresponding slides in Exhibit S9-CEW-WCM-CTI-5 (Inouye presentation).

WCOM points out that since Qwest **has** missed measures for more than six months, Qwest's position that continued poor performance requires no increase in remedy payments is not borne out by the evidence. Witness Inouye clearly acknowledged that Qwest failed some measures for more than six months.

Apparently, the threat of proposed penalties did not induce Qwest to correct the problems that resulted in these persistent misses.

Liberty indicated that if non-compliance continues for half a year in the face of stiff financial consequences, one of the issues that would bear consideration is the achievability of the established benchmark itself. Moreover, even the parity measures, while based on a substantiated and common belief that there are no material differences between serving retail and wholesale customers, cannot be said to rest upon an absolute certainty that growing experience with the CLEC community will not show otherwise.

Liberty also noted that merely calculating comparisons of the marginal costs of compliance versus non-compliance are clearly not the only reason why problems can persist for extended periods of time. If it can be shown that six month's of escalation would create payment levels that we can generally judge to be far enough in excess of both the value of CLECs and the costs of calculating decisions to continue to under perform, then we should consider reasonable a six-month cutoff of escalation.

The Board agrees with the CLECs that a cap at six months on the escalation of the payment amounts is contrary to the hoped for incentive benefit of a QPAP. The Board disagrees with the Liberty's apparent fears that the PIDs may be, in some way, unreachable by Qwest. Qwest has never argued that it cannot meet these PIDs. Qwest should know through its military style OSS testing and its involvement in establishing the PIDs if it can reach the required compliance. This only leaves it to Qwest to decide if it is more beneficial to pay a penalty or fix a problem. An artificial

six-month cap on Tier 1 allows Qwest to make a business decision on meeting a PID they helped design and test or miss it and with its decision to miss, hinder competition. Only Qwest can decide when the level of payment penalties becomes an incentive. The Board would hope that Qwest would not let any PID be missed, and thus pay no penalties at any level. The Board is not convinced from the record that CLEC harm from lost business can be accurately measured, so the policy goal should be a QPAP that precludes any Qwest business decision that relies on an escalation cap. Moreover, the QPAP gives Qwest an ability to reduce the escalation step they are making current payments based on by simply meeting the standards in any one month.

The Board has determined that the rate of increase and decrease in the Per Occurrence and the Per Measurement for high, low, and medium payouts should change by the same amount following month six as it did from month five to month six, shown in Table 2 of the QPAP. For example, following month six in the per occurrence portion, high would increase or decrease each month by $100, medium by $100, and low by $100 for all months following the sixth month. The Per Measurement Cap of payments to any CLEC should increase/decrease in a like manner. That would mean an increase or decrease in high of $25,000, medium of $10,000, and low of $5,000 following month six.

The Board directs Qwest to filed proposed language that will eliminate any limitation on the escalation of per occurrence and per measurement payments as discussed above.

4. Splitting Tier 2 Payments between CLECs and the States (Report p. 45; Qwest initial brief p. 28)

Covad proposed that 50 percent of Tier 2 payments go to CLECs, relying entirely upon the Colorado Special Master's Final Report and Recommendation for its support. Qwest points out that the Covad quote is drawn from that portion of the Special Master's report that relates to *Tier 1.Y* payments, not Tier 2 as claimed by Covad. The QPAP equivalent of Colorado Tier 1.Y payments is the escalation portion of Tier 1 payments, which already go 100 percent to CLECs.

Liberty noted that the Colorado Special Master's Report does not support a division of Tier 2 payments between the states and CLECs. Neither does any other plan that exists under a section 271 application previously addressed by the FCC. Tier 1 payments under the QPAP are adequately compensatory for CLECs. Those CLECs that conclude otherwise may retain their rights to damage recovery through other actions. The goals of the Tier 2 payments are best served by continuing to provide that they be paid to the states.

The Board agrees with Liberty that the Tier 2 payments should go to the states. If Tier 1 payments are allowed to escalate as discussed in the previous impasse issue and Qwest fails to meet its performance commitments, CLECs will receive higher payments as long as the poor performance continues, while Tier 2 payments will be available for the states and for any administrative functions related to the QPAP.

The Board endorses the recommendation of Liberty that Tier 2 payments should not be shared with CLECs.

II. CLEARLY ARTICULATED AND PRE-DETERMINED MEASURES

A. Measure Selection Process (Report p. 46; Qwest initial brief pp. 3-4)

The PID document setting forth wholesale performance measures was developed through an extended collaborative process involving Qwest, CLECs, and state commission staff under the ROC OSS Process. The PID performance measures take into consideration the following interactions between Qwest and CLECs in the context of resale, transport, interconnection, unbundled loops, and other wholesale services:

- Gateway
- Pre-Ordering
- Ordering
- Service
- Provisioning
- Repair
- Network Performance
- Billing

No participant disputed the breadth or comprehensiveness of the PID measures that were agreed upon during the PEPP collaborative, nor that the collaborative sought to achieve a broad set of measures to include within the QPAP

payment structure. The primary dispute is whether additional measures are appropriate for inclusion.

The Board supports the PID document that was developed through the ROC OSS testing process. Suggested PID additions will be discussed individually.

B. Adding Measures to the Payment Structure

1. Requiring Payments for Canceled Orders (Report pp. 47-48; Qwest initial brief pp. 48-51; ELI/Time Warner/XO initial brief pp. 4-8)

ELI/Time Warner/XO recommended that the QPAP provide payments for canceled orders in certain circumstances, arguing that a CLEC's loss of a customer was both significant economically and not otherwise compensated under the QPAP payment structure. In order to implement their recommendation, they would count as a late installation any order canceled after Qwest misses a due date.

Covad argued that there be created a performance measure that would identify the number of orders that CLECs cancel in response to expected service cancellations by Covad customers due to long waits for orders that Qwest places in "held" status due to its lack of facilities.

Qwest responded that it cannot be fairly held responsible for all the reasons why CLECs cancel orders. Qwest argued that the QPAP already sufficiently measures order-filling performance, for so long as orders remain active. Qwest cited, for example, OP-6, which the QPAP includes and which captures Delayed Days.

Liberty noted that the QPAP should hold Qwest responsible for the consequences of its failures to perform and agreed that without question there is

some correlation between the length of delays in providing services to end users and decisions by those users to cancel requests for services from CLECs. Liberty concluded that several conditions should have to be met before deciding that added compensation is necessary to make CLECs whole in such cases. Liberty suggested that each of the following conditions should be considered.

- The degree of correlation should be shown to be high enough to demonstrate cause and effect to a reasonable degree of certainty
- It should be reasonably clear we would not be adopting a program that would provide CLECs compensation for their own business decisions to cancel orders
- The compensation for any interim sources of delay should be shown to be insufficient, given the degree of the correlation (the weaker the correlation, the more comforted we can be that payments made by Qwest already under the QPAP are sufficient).

Liberty determined that these conditions were not shown to exist. CLECs presented no evidence to demonstrate the strength of the relationship between Qwest performance and canceled orders. Liberty noted that not enough evidence was presented to demonstrate that canceled orders, whatever the reasons, are material in number. In any event, Liberty determined that there is no apparent way to craft a provision that would exclude compensation for CLEC decisions to cancel or for end user decisions to cancel for reasons unrelated to performance. The CLECs proposing this measure certainly offered no specific proposal for doing so.

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The QPAP already provides for compensation for delays during the period in which orders remain open, whether or not they are finally canceled. The record indicates that the QPAP will already serve to compensate CLECs adequately for delays in processing orders, whether or not those orders are ultimately filled.

Liberty indicated that Covad made a sound argument about the special circumstances regarding orders "held" for lack of facilities, but noted that it is not clear that such an identification should produce a separate payment responsibility, given that Covad will continue to receive interval-based payments, despite its internal policy to cancel orders 30 days after their initial due date. It just will not get them for periods of more than 30 days. The usefulness of a held order measure, which we would see as having principally and perhaps solely diagnostic use, should be addressed by presenting a proposal in the forum established for considering new and revised performance measures.

The Board should endorse Liberty's conclusion that CLECs will be adequately compensated for delays in processing orders, without requiring payments for cancelled orders.

2. Requiring Payments for "Diagnostic" UNEs (Report p. 48; Qwest initial brief p. 34; Qwest reply brief p. 23; Covad initial brief pp. 16-18; ELI/Time Warner/XO initial brief p. 10)

Several CLECs noted the importance of enhanced extended loops (EELs) to CLECs, observing that, while the QPAP provides for payments in the case of poor performance for loops and for transport, none exist for EELs, which are a combination of the two. There are no benchmark or parity standards that are applied

to EELs at present. All performance measures related to them are diagnostic in nature.

Qwest acknowledged that, as the ROC OSS collaborative changes measures from diagnostic to a firm benchmark or parity standard, they would be included in the QPAP. Qwest noted that currently line sharing and sub-loops are also excluded from the QPAP payment structure, because the performance measures for them are diagnostic in nature. Qwest stated that there had been general agreement among the CLECs to exclude line-sharing measurements for the present, but to include them under the nascent service provisions of QPAP Section 10 when a benchmark or parity standard might be adopted.

Prior workshops have made clear the importance of EELs to CLECs. Prior to those workshops, there was not an extensive experience base with EELs. The ROC OSS collaborative properly determined that EELs should be measured on a diagnostic basis for some period of time. Once EEL ordering activity increases, this measure should be subjected to a measurement base that will allow for its prompt addition to the payment structure of the QPAP.

Liberty noted that the use of a diagnostic standard reflects the fact that experience with line sharing and sub-loop elements was too limited to support a benchmark or parity standard and the same is true of EELs. Liberty recommended that EELs be included in the QPAP payment structure as soon as is practicable.

The Board endorses Liberty's recommendation that EELs should be included in the QPAP payment structure as soon as the ROC OSS collaborative changes the measures from diagnostic to a firm benchmark or parity standard.

3. Cooperative Testing (Report p. 49; Qwest initial brief p. 52; Covad initial brief pp. 51-52)

Covad noted in its brief the existence of an agreement under which Qwest will perform acceptance testing in cooperation with Covad for all xDSL loops that Covad leases. Covad testified that Qwest is failing to perform this testing in a significant number of cases. Covad argued that its need for trouble reporting after installation could be diminished if defective loops were discovered, as contemplated, beforehand, during the agreed upon testing and recommended a cooperative testing performance measure as the most effective means of minimizing trouble reports for the xDSL unbundled network element (UNE) loops that it takes from Qwest.

Qwest responded to Covad's request by noting that Covad failed to raise the cooperative testing issue at the PEPP collaborative. Further, Qwest indicated that it was not raised when the ROC OSS collaborative designed the performance measures set forth in the PID. Qwest argues that given the failure of Covad to offer any substantial reason for adding it now, the addition of a cooperative testing PID should be rejected.

Liberty noted that while it is reasonable to require measures appropriate to validate the delivery of a UNE within specifications in those cases where it cannot be taken for granted that the specifications have been met, Covad has not demonstrated

a difference in QPAP payments that would result from calculating them under maintenance and repair performance measures as opposed to calculating them under installation interval performance measures. In addition, the record doesn't indicate how direct and efficient it would be to create a cooperative testing measure that would provide for effective performance measurements and not duplicate the payments to be obtained under existing installation or repair measures.

Although Liberty agreed that it is better to prevent and detect problems at the earliest possible point, Covad should raise the issue in the forum where new or changed performance measures are identified, discussed, and resolved. Should that forum determine that a cooperative testing measure is appropriate, there can then be consideration of how its introduction into the PID should affect Qwest payment responsibilities, if at all after considering the other compensable installation and repair intervals.

The Board endorses Liberty's recommendation that any cooperative testing performance measure should be raised in a forum where new performance measures are identified, discussed, and resolved.

4. Adding PO-15 D to Address Due Date Changes (Report pp. 49-50; Covad initial brief pp. 53-54)

Covad argued that performance measure PO-15 D, which measures the number of due date changes per order, should be included in the Tier 1 payment structure. Covad said that due date changes injure CLECs, because they must

subsequently undertake efforts to re-establish reasonable expectations with customers about when service can be initiated.

Qwest noted that this performance measure is diagnostic in nature, and that neither Covad nor any other participant has heretofore offered a parity or benchmark standard that would change it to a benchmark or parity standard, which is required to allow development of a payment calculation basis.

Liberty noted that Covad offered no recommendation for what the standard should be. Without this, a diagnostic measure cannot provide a payment calculation basis. Covad needs to address this concern by raising the issue in the context of the ROC OSS testing collaborative.

The Board endorses Liberty's conclusion that Covad must address this concern in the context of the collaborative ROC OSS testing.

5. Including PO-1C Preorder Inquiry Timeouts in Tier 2 (Report p. 50; AT&T initial brief pp. 11-12)

AT&T suggested that performance measure PO-1C should be separately included as a Tier 1 payment item. This measure calculates the number of inquiries that "time out." Such an event ceases the query function that is already underway, thus requiring CLEC representatives to initiate it again. AT&T testified that some timeouts occurred after about 2.5 to 3 minutes of waiting.

Qwest found AT&T's position that its failure to raise this issue earlier was an oversight difficult to understand. The PO-1A and B payment structure is based on

intervals, while PO-1C is a percent measurement, which is structurally very different and not compatible for payment purposes.

The QPAP already provides for compensation for measures PO-1A and PO-1B, which measure response times. There was a logical basis for excluding this percent measurement from the duration measurements that were included in Tier 1. The QPAP treatment of the overall measurement (which includes 1A, 1B, and 1C) reflects a proper treatment of the issue of response times for the present. Liberty concluded that incorporating sub-measure 1C would take more information and analysis than the current record supports. It would also raise the question of how total payments, which now consist of the combination of existing 1A and 1B combined payments, should be changed, if at all, to reflect the addition of 1C.

Liberty concluded it was reasonable to construe the PAP collaborative agreement as intending not to include 1C separately. Additionally, Liberty found no reason to disturb that agreement. However, Liberty did note that should the OSS testing now underway demonstrate a high enough number of timeouts to give concern about the impact on PO-1A and 1B response times, it would be appropriate to revisit the issue.

The Board endorses Liberty's conclusion that it is currently inappropriate to incorporate sub-measure 1C into the QPAP payment structure.

6. Adding Change Management Measures (Report pp. 50-51; Covad initial brief p. 51; Qwest reply brief p. 31)

Covad requested that change management process (CMP) performance measures be added to the QPAP. Qwest has agreed to add two CMP measures, GA-7 (Timely Outage Resolution) and PO-16 (Release Notifications), after the ROC OSS collaborative establishes benchmark measures for those PIDs. Those measures are now diagnostic, but would be included as "High" Tier 2 measurements.

Liberty agreed that it is appropriate to include the measures as Qwest has proposed after benchmarks are established, given their importance and the region-wide nature of their operation and impact.

The Board concurs in Liberty's recommendation that the CMP measures, GA-7 (Timely Outage Resolution) and PO-16 (Release Notifications), be included as "High" Tier 2 measurements after the ROC OSS collaborative establishes benchmark measures.

7. Adding a Software Release Quality Measure (Report p. 51; Qwest reply brief p. 31; WCOM initial brief p. 10)

WCOM argued that the propriety of adding a software Release Quality Measure should be reviewed at the QPAP's first six-month review. Qwest objected to the addition of a software-release quality measurement (GA-7), which the ROC OSS Steering Committee rejected adding to the PID. Qwest argued that it duplicated other measures, it would tend to discourage ILECs from introducing software updates, and that such a measure is not included in any other BOC PAPs.

Liberty noted that no participant sought the inclusion of the measure at this point. The request was only to address it under established QPAP review procedures. All of WCOM's arguments in support of such a measure and all of Qwest's arguments against it can be raised in the context of the established procedures for addressing PID and QPAP changes.

The Board concurs in Liberty's conclusion that consideration of a software release quality measure should be raised in the context of the established procedures for addressing PID and QPAP changes.

8. Adding a Test Bed Measurement (Report pp. 51-52; Qwest initial brief p. 50; WCOM initial brief p. 11)

WCOM asked that a Test Environment Responsiveness measure (included in its brief as proposed performance measure PO-19) be included in the QPAP payment structure after its adoption.

Qwest argued it is premature to discuss WCOM's suggested test bed measurement because:

- The test bed has only been in existence since August 1, 2001.
- There have only been preliminary discussions about defining a performance measurement for it.
- The FCC did not consider the Texas application defective for failing to include such a measure.

Qwest's current proposal under discussion in the ROC OSS collaborative specifically provides that the measure would remain diagnostic until the six-month review.

Liberty concluded there is no basis for predicting whether a measure will be approved, what its final content might be, whether it would lay a proper foundation for a QPAP payment, or what payment level might be appropriate. It is premature to express opinions about the future inclusion of a measure that is in this state of development. There should be no presumption for or against its eventual inclusion in the QPAP under the applicable procedures for modifying the plan.

The Board endorses Liberty's conclusion that it is premature to consider the future inclusion of a test environment responsiveness measure.

9. Adding a Missing-Status-Notice Measure (Report p. 52; Qwest initial brief p. 51; Qwest reply brief p. 31; WCOM initial brief p. 11)

WCOM proposed adding a performance measure, based on a missing status notice measurement similar to one adopted in New York, to the QPAP payment structure. Qwest noted that neither WCOM nor any other CLEC proposed this measure for inclusion in the payment structure during the PEPP collaborative. Moreover, the measure currently exists in the PID only in diagnostic form. Qwest also noted that this measure (PO-10) has only been adopted in New York for a temporary period and is scheduled for deletion by the end of this year.

Liberty concluded that no proper basis was laid for establishing a measure designed to respond (and to respond only temporarily) to circumstances existing in New York. The inclusion of such a measure may be requested later and in accordance with the applicable procedures for modifying the plan.

The Board concurs in Liberty's conclusion that consideration of a missing status notice measure should be raised in the context of the established procedures for addressing PID and QPAP changes.

C. Aggregating the PO-1A and PO-1B Performance Measures (Report pp. 52-53; Qwest initial brief pp. 45-49; AT&T initial brief p. 21)

Qwest argued that the PEPP collaborative reached agreement on collapsing the seven individual measurements under PO-1A (response times for transactions under Qwest's electronic transaction interface (known as IMA-GUI) and PO-1B (response times for the same transaction types under electronic data interchange (EDI)) into two that would be subject to QPAP compensation, by averaging the response times for all seven PO-1A measures and all seven (and identical) PO-1B measures.

EDI and IMA-GUI are two different means by which CLECs can gain access to the OSS that manages the processing of CLEC orders and requests. AT&T argued at the QPAP hearings that the collapse of the individual measurements as intended by the agreement was to aggregate each of the PO-1A measurements with their PO-1B counterparts, thus producing seven compensable QPAP measures.

Qwest maintained that its interpretation of the agreement is supported by the agreement in Arizona mirroring its proposed approach. According to Qwest, the Arizona agreement was adopted without objection by any participating CLEC there. In addition, the same approach was included in the Colorado Special Master's Final Report and was not objected to by AT&T.

AT&T alleges that Qwest's interpretation of the agreement would allow Qwest to mask poor performance in certain transaction types.

Liberty concluded that the provision as proposed by Qwest provides for escalation in payments as response times increase. Qwest will still be required to report performance under each of the seven transaction types and for each of PO-1A and PO-1B. The source of any deficient performance will be known with particularity. The real issue therefore is not about masking performance, but the reasonableness of combining the types of transactions into a single payment "opportunity." The seven transaction types involved are:

* Appointment scheduling
* Service availability information
* Facility availability
* Street address validation
* Customer service records
* Telephone number
* Loop qualification

Testimony shows that the longest standard for any of these transaction types is 25 seconds; the shortest is ten seconds. The QPAP calls for maximum payments of $210,000 per month per measure; under Qwest's two collapsed measures the total monthly exposure would therefore be $420,000.

AT&T's approach of aggregating each PO-1A measure with its PO-1B equivalent would produce a maximum monthly exposure of $1,470,000. Liberty

concluded that the recommended AT&T exposure appeared to be out of balance with the Tier 2 payment amounts for other failings (e.g., how long the electronic gateways are out of service, which can mean no transactions at all, not just responses delayed by seconds). The AT&T approach would also have the greater tendency to mix unrelated performance types. It would average response times produced through two different systems. At issue are small response-time variances for each system with the maximum penalty being reached after a delay of ten seconds. These two systems are likely to produce delays for largely independent reasons.

Liberty viewed the evidence to show that the agreement reached was on the terms represented by Qwest; moreover, those terms establish both significant and balanced payment responsibilities for failure to meet standards.

The Board endorses Liberty's conclusion that the seven individual measurements under PO-1A should be collapsed into one aggregated measure and the seven individual measurements under PO-1B should similarly be collapsed into one aggregated measure as proposed by Qwest.

D. Measure Weighting

1. Changing Measure Weights (Report pp. 53-54; Qwest initial brief p. 35; Qwest reply brief p. 24; AT&T initial brief p. 25; ELI/Time Warner/XO initial brief p. 15-16)

Some CLECs requested that the weighting (and therefore the QPAP payment amounts) be increased for certain high capacity loop (DS1 and DS3) measures.

Qwest said that it could accept the AT&T approach of applying different payment structures to what AT&T called high value services (in which AT&T included

collocation, LIS trunks, unbundled dedicated interoffice transport, unbundled loops, and resold DS-1 and DS-3 services), but only if PAP payments would remain in reasonable proportion to the monthly rates that Qwest charges for those services. Qwest also specifically objected to including 4-wire unbundled loops in the high value category.

AT&T argued that it was appropriate to increase the high capacity measures, but not to decrease any others in response and maintained that Qwest's response to its request to increase the weighting on certain services was inappropriate. AT&T said that the reduced weighting on residence resale, unbundled 2-wire loops, unbundled analog loops, and business resale represented high volume CLEC services, while the services whose weight was increased were low volume. Therefore, according to AT&T, Qwest's proposal would significantly drop its overall payments under the QPAP.

Conceptually, there was no error in Qwest's efforts to rebalance payments among measures as a way of responding to AT&T's request for a higher weighting on certain services of value to AT&T. Qwest's proportionality analysis was also an appropriate overall gauge for comparing the financial consequences associated with different measures. Liberty reasoned that the issue of financial exposure here is not merely one of what a total cap might be, but also one of how fast one progresses to that cap and how likely it is that the cap will be reached. Obviously, moving measures to a higher weighting will cause a faster progression to the cap and it increase the chances that it will be met.

AT&T argued that Qwest overcompensated when it rebalanced the payments. A number of CLECs go further, implicitly arguing that there is no reason not to increase the net rate of progression toward the cap. Liberty declined to discuss that argument related to this impasse issue, deferring resolution of that issue until the six-month plan review limitations.

Liberty noted that as to the overcompensation issue, AT&T, which requested the change in the first place, failed to propose any better alternative. Therefore, given AT&T's opposition to what Qwest did to meet its stated needs and given a concern that Qwest may have overcompensated (and perhaps even to the detriment of CLECs other than AT&T, for whose benefit Qwest made this change), the best course is not to make either the weighting increases requested by AT&T or the weighting decreases that Qwest offered to address those concerns.

Liberty concluded that the QPAP was reasonable in this respect before Qwest agreed to change certain weights. It would be fair to give CLECs a choice between the two, but it would be imbalanced to allow them to take the benefit of Qwest's offer, while denying the compensating benefit sought by Qwest to keep payments in balance. As a principal supporter of the changed weights, AT&T found Qwest's change in to be imbalanced. Since no other reasonable proposal was made or accepted, the weights should return to those proposed in the QPAP that Qwest initially filed in these proceedings.

The Board adopts Liberty's recommendation that the weights for measures should be those proposed by Qwest in its initial proposal.

2. Eliminating the Low Weighting (Report pp. 54-55; Qwest initial brief p. 27; ELI/Time Warner/XO initial brief p. 18; Covad initial brief p. 34; ZTEL initial brief p. 34)

ELI/Time Warner/XO argued that all measures should be at least a medium weight, rather than being split into three groups of weighting (low, medium, and high), and further, that some should move from medium to high. Covad contended that no measures should be considered low. ZTEL suggested averaging the low and medium payment amounts to reduce the weights from three classes to two classes.

Qwest argued that no evidence was presented to support a change in measurement weighting for QPAP purposes. According to Qwest, these changes would not improve the QPAP, but would merely provide increased payments to CLECs.

Liberty found that little support was provided for these requested changes. Certainly, no case was made that the QPAP may be found inadequate for failing to incorporate them. Liberty also noted that the various proposals suffered from the same balance problem addressed in the immediately preceding section. Liberty concluded that the three categories of weights that came out of the PEPP collaborative process should remain.

The Board endorses Liberty's conclusion that the three categories of weights that came from the PEPP collaborative process should remain.

3. LIS Trunks Weighting (Report p. 55; Qwest reply brief p. 25; AT&T initial brief p. 25; ELI/Time Warner/XO initial brief p. 17)

AT&T argued link interface shelf (LIS) trunks should be considered as particularly high value services and, therefore, should carry higher non-performance payments. AT&T said that it could not sign up new customers where Qwest failed to deliver LIS Trunks. ELI/Time Warner/XO also urged LIS Trunks to be of high value.

Qwest responded that the argument that CLECs are "out of business" without LIS trunks is applicable only to the first LIS trunk order, which is not the common order. The much more typical order is for added trunks where the trunk blocking measure, N-1, would already provide payments in cases where Qwest cannot provision incremental trunks on time.

From a broad perspective, Liberty noted that it is a significant overstatement to say that LIS trunks are of particularly high value because CLECs are "out of business" if Qwest fails to deliver them. Qwest correctly indicated that trunk blocking, as opposed to an inability to take on new customers, is the more common issue. In that regard, orders for incremental LIS trunks are not categorically different from other services that Qwest may be slow to deliver. Liberty pointed out that a review of the CLEC testimony makes it appear as if what LIS trunks mean to AT&T and ELI/Time Warner/XO, high capacity loops or line sharing mean to others.

Liberty reasoned that the QPAP should address value in a more balanced way, because taking each CLEC's claim of particular importance at face value would inevitably make all measures of high weight. Liberty opined that the QPAP payment structure already reflected an adequate treatment of measure weights and recommended that no change be made.

The Board concurs with Liberty's recommendation that no change be made in the weighting of LIS trunks.

E. Collocation (Report pp. 55-56; NMAS initial brief p. 25)

The NMAS proposed that an approach similar to either the Michigan or the Georgia approach be used to determine collocation payment amounts. Qwest responded by indicating that the CLECs had represented during a May PEPP collaborative workshop that the CLEC proposal did reflect the Michigan approach. Qwest later accepted that proposal. No CLEC has argued in its briefs that Qwest's acceptance of the cited proposal is in any way inadequate.

Liberty concluded that the undisputed evidence presented by Qwest demonstrated that the collocation proposal whose acceptance it acknowledged at the hearings was both based on the Michigan proposal and acceptable to the CLECs who responded to it. No objection was made to the proposal by any CLEC. There is no reason to question the QPAP treatment of collocation payments.

The Board endorses Liberty's conclusion that no change is necessary to the approach used to determine collocation payment amounts.

F. Including Special Access Circuits (Report pp. 56-58; Qwest initial brief pp. 52-56; Qwest reply brief pp. 33-34; WCOM initial brief pp. 18-20; ELI/Time Warner/XO initial brief pp. 6-9; ELI/Time Warner/XO reply brief pp. 2-6)

WCOM requested that special access circuits be included in the PID performance measures as one of the product disaggregations and that the QPAP be changed to provide for payments associated with such circuits.

ELI/Time Warner/XO also maintained that it was important to include payments for special access circuits, in order to provide proper incentives for Qwest to support this important means by which some CLECs provide local exchange service. ELI/Time Warner/XO claimed that Qwest did not dispute the evidence that comprises the key factual support for its position. This evidence shows that

- Special access circuits are a widespread means of providing local exchange service.
- It is impracticable to procure UNEs, such as EELs, as an alternative means of providing local exchange service.
- There will be post-271 approval problems with the service that Qwest provides through special access circuits.

According to Qwest, there had been agreement to drop special access circuits from discussions by the ROC OSS collaborative that designed the PID, because section 251 did not include them. Qwest also noted that special access circuits cannot be considered a checklist item at all, according to the FCC and a number of state commissions. Qwest cited the FCC's current consideration of the complex issues involved in extending unbundling obligations to special access circuits. Qwest cited the Colorado Special Master's Report as supporting the exclusion of special access from PAP or other section 271 consideration.

In response to the claim of ELI/Time Warner/XO that Qwest failed to contest the factual issues surrounding special access, Qwest cited testimony from its

witnesses stating that virtually all-special access circuits had been purchased out of interstate tariffs.

ELI/Time Warner/XO argued that nothing that the FCC has said in prior contexts should be read as contrary to its request here. While agreeing that the ruling in the *New York Order* provided that special access circuits should not be considered in the context of a 271 review, they argue that the issue here is different. This is an issue of adopting an appropriate payment structure. These participants maintain that the structure needs to include special access circuits; in order to assure that the QPAP gives meaning to Qwest parity obligations, by encouraging adequate provisioning and repair of high-capacity Qwest facilities that serve CLECs. ELI/Time Warner/XO note that the FCC has not precluded QPAP treatment of special access circuits in any prior decision and that a number of states are now expressing concern about the issue of poor special-access-circuit service and are considering remedies.

Liberty noted that considerable time was spent examining CLEC use of special access circuits to provide local exchange service. The August 20, 2001, *Unbundled Network Elements Report* in these workshops detailed the contest over the relevant facts and the standards under which those facts should be considered.

Liberty concluded that special access circuits do not merit the treatment recommended by a number of CLECs. The evidence of record supports the conclusion that the overwhelming majority of special access circuits at issue here were purchased under federal tariffs. Remedies for failure to meet the requirements of that tariff should be addressed by the agency with jurisdiction under such tariffs;

i.e., the FCC, not state public service commissions. Similarly, the QPAP need not address failures to meet existing state tariffs; CLECs can appeal directly to state commissions for any necessary relief.

Liberty articulated that the only apparent reason for overriding the sound principle of letting the FCC and the state commissions police their own tariffs would be if there existed some inappropriate barrier that had the practical effect of requiring tariff purchases where interconnection agreement purchases should have been available. This issue was addressed in prior workshops, where some of the same CLECs arguing this issue here disputed the propriety of Qwest's historical limitations on allowing access to EELs as UNEs.

In the August 20, 2001, report, Liberty recommendations substantially eased restrictions on the conversion of special access circuits to EELs, making it possible for CLECs to bring services under the terms and conditions of an interconnection agreement or an SGAT, should they elect to do so. In that case, CLECs would have all the rights and expectations applicable under such agreements, rather than, as they would effectively do here, mixing tariff and agreement and federal and state jurisdictional purchase rights and remedies.

The Board endorses Liberty's conclusion that it is not appropriate to include special access circuits in the payment structure of the QPAP.

G. Proper Measure of UNE Intervals (Report p. 58; Qwest reply brief p. 40; Covad initial brief p. 23)

Covad argued that QPAP payments should be based on the intervals of SGAT Exhibit C, rather than on the intervals set forth in the PID. Qwest responded that there is a logical relationship between SGAT Exhibit C and the PID performance measures.

Liberty noted that this issue is similar to the one addressed as the first unresolved Loops issue (Standard Loop Provisioning Intervals) in the August 20, 2001, report. As was discussed in that document, consistency exists between PID performance measure OP-3 (percent of installations completed on or before the due date) and PID performance measure OP-4 (number of days to complete installations), and SGAT Exhibit C (Qwest's Standard Interval Guide). For the reasons expressed in the August 20, 2001, report, Liberty concluded it is appropriate for the QPAP to apply the PID performance measures, not SGAT Exhibit C, as the payment standard.

The Board endorses Liberty's conclusion that the PID performance measures are the appropriate intervals to be applied by the QPAP.

H. Low Volume CLECs (Report pp. 58-59; Qwest initial brief pp. 29-34; Qwest reply brief pp. 20-22; Covad initial brief pp. 27-30)

Covad argued that Qwest designed the QPAP primarily to compensate high-volume CLECs. The result is that lower volume CLECs, such as itself, will be under-compensated. Covad objected more particularly to the QPAP provision that it said would provide Qwest with one free miss each month in the case of CLECs with small order volumes. In order to compensate for that phenomenon, Covad recommended

setting minimum payments at five times the baseline amount for CLECs subjected t the free miss standard.

Qwest argued that the evidence refutes any claim that the QPAP's reliance upon a per-occurrence compensation structure would disadvantage CLECs with small wholesale-service volumes. Qwest presented evidence showing that a numbe of smaller CLECs, including Covad, would for the period from February through March of 2001 have received payments much larger than CLECs of greater size.

Qwest defended its "one free miss" provision as a necessary adjustment to provisions that would make its performance standard one of perfection in the case o very small order volumes, because even one miss would put Qwest below the required level of performance. For example, for order volumes of five, the best Qwest could do, unless it were perfect, would be to reach 80 percent, i.e., four out of five. Qwest said its analysis of the February to May 2001 period showed that the so-called "one free miss" standard would only have come into play 8 percent of the time which falls far short of justifying minimum payments 100 percent of the time.

Liberty found that as a general matter, Qwest provided substantial evidence that the QPAP would not serve to under-compensate smaller volume CLECs. Qwest's evidence, which was credible and which was not rebutted by CLEC evidence to the contrary, demonstrated that, for the sample period of February through May of 2001, it could not be demonstrated that there was any disturbing correlation between QPAP payment levels and CLEC order volumes, thus disproving the claim that would be relative under compensation to those with lower order volumes.

Liberty concluded that the goal of excluding one miss from compensation was to prevent (in the case measurements with CLEC volumes of five or fewer) turning a 95 percent benchmark into a 100 percent one. The flip side of Qwest's point about the problem of rounding "up" is that rounding "down" turns a 90 percent standard to an 80 percent one. Liberty reasoned that a rolling average, applied yearly, would serve much better to correct the problem of rounding. It would not, however, alone solve the issue of escalating payments for consecutive-month misses. That problem can be solved by providing that the escalation provision will be applicable in any month where any miss occurred for CLECs with order volumes at the level in question and where the annual calculation shows violation of the applicable requirement. Liberty concluded that the SGAT should incorporate these changes.

Qwest implemented the "spirit" of Liberty's recommendation in Section 2.4 of the SGAT. It did make a minor adjustment to the recommended calculation to determine missed performance measures for benchmark standards where low CLEC volumes are such that a 100 percent performance result would be required to meet the standard.

Qwest's proposed language will use the current month's results, plus a sufficient number of previous consecutive months' performance data so that 100 percent performance is not required to meet the standard. The proposed language accomplishes the goal described in Liberty's recommendation.

The Board endorses the recommendation of Liberty and adopts the proposed changes to Section 2.4 as filed by Qwest in its November 6, 2001, filing.

III. STRUCTURE TO DETECT AND SANCTION POOR PERFORMANCE A OCCURS

A. Six-Month Plan Review Limitations (Report pp. 59-60; AT&T initial p. 14; ELI/Time Warner/XO initial brief p. 27; WCOM initial brief p. Qwest post-report comments p. 13)

AT&T's most fundamental issue with the six-month review process is that Qwest would be able to control what changes would be made, or even addressed the six-month review. Pursuant to Colorado Performance Assurance Plan (CPAP §18.5, the six-month CPAP review process shall focus on refining, shifting the relative weighting of, deleting, and adding new PIDs. After the Commission considers such changes through the six-month process, it shall determine what changes should be embodied in an amended SGAT that Qwest will file in order to effectuate these changes. "CPAP Sec. 18.6 allows participants to "suggest more fundamental changes to the plan; but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review."

The Texas PAP includes the provision, "[a]ny changes to existing performa measures and this remedy plan shall be by mutual agreement of the participants a if necessary, with respect to new measures and their appropriate classification, by arbitration." (Emphasis added) The proposed QPAP includes the statement, "[c]hanges shall not be made without Qwest's agreement."

ELI/Time Warner/XO argues that the QPAP should be treated no differently than any other provision of the SGAT or a Commission-approved interconnection agreement. Either participant may request a change, and if the participants cannot

agree on that change, a participant may request Commission resolution of the dispute. As a result of the periodic review process, therefore, either Qwest or CLECs may request changes to the QPAP. If the participants can agree on changes, the Commission should approve them for implementation in the SGAT and interconnection agreements. If the participants cannot agree, the Commission should resolve the dispute and require that resolution to be implemented in the SGAT and interconnection agreements. Section 16.1 should be modified accordingly.

WCOM contends that from the language in the QPAP, Qwest wants no substantive changes to the QPAP. Rather, Qwest limits changes to the QPAP to changes in performance measures and reclassification of performance measures. Nowhere in the QPAP does Qwest establish a process to review the actual QPAP or language found in the QPAP. Finally, with the limited six-month review, Qwest retains for itself a "veto" for any change.

The Commission and participants should have the ability to modify or seek modification of the QPAP. In the event the Commission approves the QPAP or a modified QPAP, the Commission should retain the power to further modify the QPAP in the future and participants should be able to seek modification of the QPAP if it is not meeting the expectations of the Commission or the CLECs. An obvious example is if the QPAP payments are not, in fact, inducing Qwest to correct problems or systems that continue to produce failures of PID requirements. The QPAP as written does not allow the Commission to retain any power to substantively modify the QPAP.

In Liberty's opinion, the QPAP is not fundamentally different from either the Texas plan or the Colorado Special Master's Report in the matter of changing the plan. With the following changes, Liberty concluded that the present QPAP provisions could function effectively to respond to external changes, without creating insufficiently defined financial exposure to Qwest. The changes include:

- Provide for normal SGAT dispute resolution procedures in the event that there is disagreement with a six-month review process recommendation regarding proposed addition of new measures to the QPAP payment structure.
- Recognize and support multi-state efforts (should they occur) to create a Tier 2 funded method and a regular administrative structure for resolving QPAP disputes.
- Provide for biennial reviews of the QPAP's continuing effectiveness for the purpose of allowing state commissions to regularly report to the FCC on the degree to which there are adequate assurances that Qwest's local exchange markets remain and can be expected to continue to remain open.

Liberty agreed that Qwest should not be subjected to unknown changes to the QPAP, recommending only that Qwest adopt a provision similar to the Texas Plan requiring it to arbitrate disputes over the addition of new measurements arising out of the six-month review.

Liberty recommended that any disputes should be resolved through arbitration as provided for in the SGAT. Qwest has added language in Section 16.1 that implements that recommended changes. In addition, Liberty also suggested that the six-month review be conducted on a collaborative basis. Qwest has also incorporated language to implement that recommendation into its QPAP at Section

16.1 and has incorporated the recommendation for a two-year review into Section 16.2 of the QPAP.

The Board is concerned with the language of Section 16.0, which requires Qwest's agreement to any addition, deletion, or change of a PID. In both the Texas Plan and the Colorado Plan, the state commission is the final authority, not the BOC In the November 6, 2001, QPAP Qwest has added language to include making the review a common review involving all the states and further limits the changes to be considered to add/deletions, classification of only PIDs.

Section 18.7 of the Colorado Plan states:

> Participants may suggest more fundamental changes to the plan; but unless the suggestion is highly exigent, the suggestion shall either be declined or deferred until the three-year review.

In order to avoid frivolous proceedings to make changes to the QPAP, the Board will require language similar to Section 18.8 of the Colorado Plan. However, the Board is concerned that the specific language of the Colorado Plan is likely to cause unnecessary disagreements and the resultant wasted time and energy of all participants. It is only logical that any suggested modification will be for the benefit of the party making the suggestions. This provision appears to exist to **avoid** disagreements. Therefore, the Board directs Qwest to incorporate language as follows:

> If CLEC or Qwest repeatedly suggests modifications to the plan, without a reasonable level of evidentiary support for the modification, that are not for the effectiveness of the plan

itself, that Participant may be subject to sanctions at the discretion of the Commission.

The Board directs Qwest to submit for approval the addition of similar language along with deletion of the Qwest veto over changes and limitations of what may be considered in a review of its QPAP, which are currently contained in Sections 16.1 and 16.2.

B. Monthly Payment Caps (Report p. 62; AT&T initial brief p. 20; WCOM initial brief p. 53; ELI/Time Warner/XO initial brief p. 24)

AT&T argues that pursuant to QPAP Section 13.9, once the Qwest Tier 1 payment to the participating CLECs exceeds the monthly cap or $3 million per month, Qwest can place funds over the $3 million or monthly cap in escrow and file "an application demonstrating why it should not be required to pay any amount over the threshold amount in escrow."

Then, after "contractually" waiving the remedies, the CLEC may never receive any remuneration because either Qwest has exceeded the yearly cap or the money is sitting in escrow, *ad infinitum,* when the participants work through a "dispute resolution process" with an infinite number of loopholes for Qwest to avoid payment. Accordingly, AT&T (and as expressed in the proceeding, other CLECs) has substantial concerns about participating in a plan where their contractual rights would be waived with the possibility of never receiving remuneration.

Qwest proposes to be able to challenge payments under the QPAP if those payments exceed a monthly cap. ELI/Time Warner/XO expresses its opinion that, "the only reason the level would be 'too high' is because Qwest's performance is too

poor, and CLECs should not be required to incur additional time and resources, including attorneys fees, to obtain allegedly 'self-executing' remedies." This secti should be revised to delete this provision. If Qwest believes the payment levels a the result of something other than Qwest's excessively poor performance, it can r that issue in the periodic review process.

Liberty found that except for the problem of a CLEC that first experiences deficient performance late in the year, which was addressed earlier, there is no reason under the QPAP for calculating or using monthly caps. There is not a basi for relieving Qwest of the obligation to pay amounts up to the total annual cap, regardless of how quickly those amounts accumulate. There should be no other reference to the calculation or use of monthly caps in the QPAP.

The Board endorses Liberty's recommendation that the monthly caps be removed, which was incorporated by Qwest in its November 6, 2001, filing.

C. Sticky Duration (Report pp. 62-63; Qwest initial brief pp. 22-23; ZTEL initial brief p. 20)

A goal of a PAP should be to find the "right" incentive payment level that encourages Qwest to devote sufficient resources to **maintain** its performance at acceptable levels, according to ZTEL. ZTEL's sticky duration proposal accomplishe this goal, because once a payment level is found to have incented compliance on multiple occasions that payment level will remain in place. This result would require Qwest to find long-term solutions and devote sufficient resources to resolving this chronic issue. Qwest's proposal, in contrast, does not provide that incentive.

Instead, Qwest would have an incentive to selectively deploy its resources on sporadic, wholesale performance "fire drills" that are designed to bring it into compliance for certain measures for a few months so as to minimize its payment levels.

Qwest responded by pointing out that ZTEL proposes an escalation method in which Tier 1 payments **never** de-escalate or revert to the original level, notwithstanding even perfect service after the escalation, no matter how long the period of perfect service. The ZTEL proposal to freeze Tier 1 payment levels at these permanently high levels is dependent upon ZTEL's contention that payment levels should rise until Qwest achieves 100 percent compliance with all performance standards.

Qwest argues the premise underlying ZTEL's argument is wrong: The FCC has never required a BOC to provide 100 percent compliant performance across the board. There are hundreds of measurements and sub-measurements subject to payments under the QPAP. Many may address provisioning of the same service in different ways. Accordingly, Qwest may be providing perfect service under one measurement, and have problems meeting the standard of another. The fact that one measurement was not achieving 100 percent compliance with its standard would not evidence discrimination. The FCC has noted:

> The Commission may find that statistically significant differences exist [between the BOC's provision of service to competing carriers and its own retail customers], but conclude that such differences have little or no competitive significance in the marketplace. In such cases, the

> Commission may conclude that the differences are not meaningful in terms of statutory compliance. Ultimately, the determination of whether a BOC's performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before the Commission.

The presumption that consecutive monthly misses are a priori evidence that payment levels are insufficient completely ignores the reality of the business world.

Liberty agreed that the ZTEL proposal is wholly inappropriate, noting that it purports to spring from the premise that the best test of the sufficiency of a payment structure is Qwest's performance while operating under it. Then it proceeds to add penalties for multiple failures by Qwest no matter how far apart in time they occur. It is disingenuous because it would ignore entirely successful performance by Qwest however long Qwest provided it. The proposal is draconian because its new baseline payment levels, when multiplied by the still applicable escalation levels, could produce payments by Qwest that are an order of magnitude higher than those contemplated by the QPAP before ZTEL's amendment.

Qwest and CLECs participating in the ROC PEPP collaborative agreed to a reasonable escalation of payments and appropriate symmetrical de-escalation in subsequent months when Qwest provides conforming performance. This provision is more stringent than the Texas PAP provision, in which the escalated payments revert to the first-month level after just one month of conforming performance. The Board feels this change to the current escalation structure unnecessary to provide Qwest with adequate incentives if the escalations are capped at six months or not. Part of

the incentive to Qwest is the possibility of lowering the payment levels when performance is improved. Sticky duration would take this carrot and stick approach and remove the carrot.

The Board endorses the current escalation structure without incorporating the sticky duration proposal of ZTEL.

D. Low Volume Critical Values (Report pp. 64-65; Qwest initial brief p. 41; WCOM initial brief p. 32; ZTEL initial brief p. 23).

According to ZTEL's brief, in response to its proposal to apply the 1.04 critical value consistently across all measures, rather than arbitrarily applying 1.04 to select measures, Qwest has responded once again with the same tired refrain: Qwest would pay more. ZTEL's response is the same: this fact is not relevant. ZTEL is adamant that the QPAP must contain a methodology consistent with its public policy goal, which is to deter and prevent discriminatory conduct. This goal is better served if robust and statistically valid procedures are adopted, rather than potentially adequate procedures applied in an arbitrary fashion.

Qwest argues that the statistical agreement reached in the ROC PEPP collaborative process is fair to Qwest and the CLECs because it is balanced. On the one hand, the K-Table was eliminated from the QPAP and the 1.04 critical value will be applied to 1,519 parity tests. On the other hand, critical values higher than 1.645 will be applied to 1,917 parity tests. Acceptance of the WCOM and ZTEL proposal would create a dramatic imbalance given the distribution of CLEC volumes. The 1.04

critical value would apply in 10,368 parity tests, while critical values higher than 1.6 would continue to apply in 1,917 parity tests.

ZTEL wishes to frame the issue as being strictly an issue of statistical theory which, according to Qwest, is far from the case. As noted above, the statistical agreement was not born solely from statistical theory, but rather included consideration of the distribution of CLEC volumes. Putting the broader consideratio aside, it is worth noting that in the Verizon-New York 271 application, the FCC considered arguments to balance Type I and Type II errors at an 85 percent confidence level and concluded that there was not sufficient evidence "to determine that setting the confidence level at 85 percent will in fact balance the probability of Type I and Type II errors."

As Liberty pointed out, the need to reach some compromise in this case appears not to arise from a dispute about statistical theory per se, but rather about what to do in cases where statistical theory may fail those who must deal with practical realities. As ZTEL noted in its comments, certain statistical errors occur when statistical techniques are applied to small sample sizes. These are not errors in the data, but errors in what the application of statistical techniques indicates that we should conclude from the data. The use of the alternate 1.04 (versus 1.65) value does not even eliminate those errors; as ZTEL said in its comments, it merely provides a "rough approximation."

No participant disputed the fact that those participants who did agree to the modified statistical approach at the PEPP collaborative did so in major part to

balance out, in terms of numbers of measures, cases where the value to be used increased from 1.65 with cases where the value to be used was reduced from 1.65. In other words, what ZTEL and a number of others (including some who apparently were in accord with the agreement reached at the PEPP collaborative) appear to want to do now is to apply economic theory to adjust a decision reached through compromise. That is not fair. It would require this process to begin again, without the compromise solution previously reached in the ROC PEPP process, if we are to resolve this through debates about the relative superiority of competing theories. There was no suggestion in reply briefs that Qwest misread the FCC decision with respect to the application of statistical methods in prior cases. No reason presented convinced Liberty that it was appropriate to upset the balanced, compromise approach that met with substantial agreement at the PEPP collaborative.

The Board endorses Liberty's conclusion that the compromise approach for small sample sizes agreed upon at the ROC PEPP collaborative should be incorporated into the QPAP absent evidence showing the approach is inappropriate.

E. Applying the 1.04 Critical Value to 4-Wire Loops (Report pp. 65-66; Qwest initial brief p. 44; AT&T reply brief pp. 17-18)

AT&T assets that Qwest is applying revisionist history to its view of whether the 1.04 critical value applies to 4-wire unbundled loops, arguing that Qwest willingly and voluntarily agreed in ROC that the retail analog for a non-loaded loop (4-wire) is parity with Retail DS1 private line. Qwest now strains credulity by arguing that what it agreed to in ROC was not that DS-1 private line was the retail analog for a non-

loaded loop (4-wire), but that it agreed that DS-1 "stands as a proxy for a retail analog and is the retail comparable to the 4-wire unbundled loop, because it represents an acceptable provisioning interval, without any regard to the value of the service to the CLEC."

AT&T translates what it refers to as "Qwest's mumbo jumbo," by insisting Qwest was fine with agreeing that the retail analog to a 4-wire unbundled loop was a DS1 private line when it meant that the standard for the 4-wire loop would be the longer interval DS1 private line rather than the shorter interval plain old telephone service (POTS). When the standards and retail analogs were being established in ROC, Qwest made no complaint that the retail analog for unbundled 4-wire loops should not be DS1 private line and instead should be a POTS type service. Now when it is time to establish payment levels, Qwest wants to treat 4-wire unbundled loops like a POTS service.

Urging the Board to apply the 1.04 critical value to 4-wire loops, AT&T complains that Qwest cannot have it both ways by arguing that for the purpose of setting provisioning and repair standards the 4-wire unbundled loop retail analog is DS1 but for the purpose of setting payment levels and statistical tests a 4-wire unbundled loop should be treated like a POTS type service. For the purpose of statistical testing and payment levels, the QPAP should treat 4-wire unbundled loops like the other unbundled loops that CLECs use for DS1 services.

Pointing to a Qwest statement that "it would be impossible for Qwest to even implement AT&T's proposal," AT&T argues that Qwest has apparently

misunderstood what is a very simple AT&T proposal. AT&T's proposal is that for sample sizes less than 11, the 1.04 critical value would apply for all 4-wire unbundled loops. To implement that proposal for 4-wire unbundled loops is no more or less difficult than in implementing it for other services.

Qwest dismisses AT&T's argument as untenable, because not all 4-wire loops are used at the DS-1 rate. It is the CLEC that determines how the 4-wire loop can be, or is, used by adding electronics to the loop. Qwest cannot control or even know when a CLEC chooses to turn a 4-wire loop into a high capacity service. Thus, it would be impossible for Qwest to even implement AT&T's proposal.

The evidence shows that the agreement made in the ROC PEPP collaborative was to apply the 1.04 critical value to various types of high-value services. Four-wire loops could be used at DS-1 levels or they could not. Whether or not DS-1 loops are or are not the correct analog for 4-wire loops with respect to provisioning intervals does not have a self-evident connection with the reason why special groupings were established for purposes of applying the 1.04 critical value. What is relevant are the answers to the two following questions: (a) is there a feasible way to include 4-wire loops that are used at the DS-1 level into the identified group, which would make it logical to conclude that such loops were intended to be included under the agreement to be reached; and (b) if not, whether there is a sound reason for including them anyway.

The answer to the first question is that, unlike loops provisioned by Qwest with the capability to provide DS-1 services, 4-wire loops take after-the-fact action by

CLECs to make them DS-1 capable. Qwest has neither knowledge nor control ove those actions; therefore, the only way feasibly to include them would be to assume that all (or the overwhelming majority at least) of the 4-wire loops are made DS-1 capable by CLEC additions of electronics to them. This assumption has not been supported by evidence; therefore, we should not make it. The agreement made should be read as excluding 4-wire loops, particularly since the participants were knowledgeable enough of the capabilities issue to have addressed it had they wish to do so.

As to the second question, no sound reason for adding 4-wire loops has yet been shown to exist. Increasing payment levels to CLECs is not per se a sound reason. Their addition would either impose undue PAP administration requirements or require an unsound assumption that all 4-wire loops are DS-1 loops.

Liberty underscored that its conclusion was based upon the lack of evidence from AT&T to show that there is a very high rate of use of 4-wire loops for deliverin high value services. Should there later be clear and convincing evidence during application of the QPAP amendment procedures that such use is made of 4-wire loops in excess of 75 percent of such loops leased as UNEs, the issue should be reconsidered during the application of the QPAP amendment procedures.

The Board endorses the conclusion reached by Liberty. The current record does not indicate a good way to determine if a 4-wire UNE will be used as DS-1 special access circuits, something that is within the control of the CLEC, not Qwes

F. Measures Related to Low Volume, Developing Markets (Report p. 66; Qwest initial brief p. 29; Covad initial brief pp. 34-37; Qwest reply brief p. 23)

In Section 10.1 of the QPAP, Qwest limits its determination of "low volume, developing market" measures/sub-measures to CLEC aggregate data. Covad maintains that Qwest's aggregation approach is improper. If Qwest's concern in drafting this section is to ensure that CLECs with low volume order for "developing market" services receive some compensation in Tier 1, then the focus should be on Qwest's performance for each individual CLEC rather than on an aggregate basis. Not only does this ensure that each individual CLEC actually receive the appropriate Tier 1 compensation, but also it eliminates Qwest's ability to discriminate between CLECs and yet mask such discrimination by focusing only on CLEC aggregate performance.

Qwest responds to Covad's argument by suggesting that Section 10.0 of the QPAP ensures that certain services in "developing markets" receive extra compensation by application of a $5,000 minimum payment if Qwest misses a performance standard when aggregate CLEC volumes are greater than ten, but less than 100. Covad and ZTEL propose that the provision apply when individual CLEC volumes, as opposed to the aggregate CLEC volume, are less than 100. Covad's and ZTEL's proposal defies the distribution of CLEC volumes that was discussed extensively in the ROC PEPP collaborative and would cause the low volume, developing market provisions to apply long after markets are neither low volume nor developing, and, therefore, is not appropriate. For example, the actual CLEC data

(from February to May 2001) demonstrate that 96 percent of the time ordering and provisioning (OP) and maintenance and repair (MR) performance measurements have a CLEC volume of less than 100. The proposal is thus inconsistent with the concept of low volume, developing markets and is simply another attempt to extract additional money from Qwest. ZTEL's proposal is unprincipled and would result in what could be seen as discriminatory conduct, compensating some CLECs under one QPAP provision and other CLECs according to another QPAP provision merely because their monthly volumes are different.

Liberty concluded Section 10.0 of the QPAP has been designed to provide a minimum level of compensation in developing markets. The section provides for minimum payments of at least $5,000 per month for non-compliant service in cases where aggregate CLEC volumes are between 11 and 99. The ZTEL and Covad proposals would serve to change the nature of QPAP Section 10.

Aggregating CLEC volumes keeps the provision focused on developing markets. Making minimum payments to individual CLECs based on their individual order volumes would extend its applicability to small CLECs operating in very well developed markets.

Liberty concluded Qwest's design for Section 10 is an appropriate method for providing Qwest with an added incentive to perform in developing markets.

The Board endorses Liberty's conclusion that using aggregate volume numbers, under current Section 10.0, is a reasonable approach to keeping the focus of the compensation on developing markets.

G. Minimum Payments (Report pp. 67-68; Qwest initial brief pp. 32-34; WCOM initial brief pp. 34-35; Qwest post-report comments p. 13)

Small order counts will not produce significant payments under Qwest's PAP, according to WCOM. However, such discrimination may not have small consequences and could be a significant impediment to competition. A simple solution is to incorporate a minimum remedy of at least $2,500 per occurrence with no restrictions on sample size or products. Duration and severity factors would also be applied to allow for payments to adjust to the appropriate effective level.

Hypothetically, according to WCOM's argument, a CLEC having problems with Qwest's provisioning of its first 100 loops is going to delay a plan to launch 10,000 loops in two months and create even more customer dissatisfaction. The per occurrence remedies would be a small cost compared to what Qwest gains from slowing the competitor's ramp-up plans. In fact, Qwest may even make a profit from the CLEC even if it paid penalties for missing all of the 100 initial loop orders because of the monthly collocation charges that the CLEC pays whether the loops ever connect paying customers to those collocations sites.

A combined per occurrence and per measure approach is best for opening new markets to competition and ensuring that CLEC's new service offerings are not crushed at introduction with no substantial financial risk to Qwest.

Covad suggests, to the extent the state commissions permit Qwest "one free miss" for smaller sample sizes, such permission must be accompanied by the recognition that even one "miss" by Qwest easily could be enough to cause the

CLEC's customer to cancel service or decide not to initiate service with the CLEC. Thus, accommodation must be made in the QPAP for the fact that, for CLECs with fewer orders, the "miss" by Qwest is even more competitively significant. Without such accommodation, the QPAP will have limited utility to protect smaller CLECs from the adverse competitive impact of Qwest's discriminatory performance. At a minimum, therefore, where a CLEC has smaller sample sizes, the QPAP must include a minimum monthly payment to CLECs in the event there are any misses under a particular PID. Covad suggests that the particular Commission establish such minimum at five (5) times the baseline penalty amount selected.

Covad's justification for a minimum payment is based on its misconception of the QPAP provisions, according to Qwest. Covad claims that the QPAP gives Qwest "one free miss." The claim apparently refers to the mathematical adjustment in the QPAP that adjusts benchmark standards so as to prevent the standard from becoming 100 percent when CLEC volumes are five or less. For example, when there is a 90 percent standard but volumes of only five or less, a 90 percent performance level cannot be mathematically achieved. (At a monthly volume of five, only the performance levels of 100 percent, 80 percent, 60 percent, etc., are mathematically possible.) Under Covad's view, by not allowing one miss, the standard would effectively become 100 percent, *i.e.*, absolutely perfect performance.

Data from February to May 2001 showed that the "one miss" benchmark standard applied to less than 8 percent of all Tier 1 measurements. A situation that may or may not happen 8 percent of the time is no justification to apply a minimum

payment 100 percent of the time. Or put another way, Covad has offered no rationale whatsoever for applying minimum payments in 92 percent of the cases — quite apart from the well accepted statistical adjustment employed in the remaining 8 percent of the cases where it is applicable.

WCOM's proposal strays far from its small CLEC justification and is simply disingenuous. WCOM attempts to justify a minimum payment with speculation as to what might happen to a small CLEC with low volumes. However, its proposal is for a minimum payment that would apply to all CLECs, large and small, and for all ranges of CLEC volumes, low and high.

Moreover, a $2,500 per occurrence payment for the late installation of a service that sells for $20 per month would provide CLECs with a payment equal to over ten years of service for one miss. This would be equivalent to requiring a car dealer to give a customer the use of a leased vehicle for ten years if the dealer was a day late in delivering the car.

In its analysis, Liberty notes that it takes a relatively small number of instances of noncompliance to affect a very large portion of a small CLECs business operation. Thus, the ability to merely stay in business in Qwest's region can be more severely threatened by smaller numbers of noncompliant performance instances. However, compensating for that risk on a monthly basis and applying escalated payments to a higher base level of compensation are not rationally related to this risk factor. Thus, it would be appropriate to set an annual minimum payment that is a function of the number of months in which Qwest fails to meet performance standards.

Liberty noted that applying WCOM's revised 100 orders per month would produce a ceiling of 1,200 orders per year, above which minimum payment provisions should not apply. A minimum payment of $2,000 is more appropriate and should be applied per month for each month in which Qwest missed any measure applicable to such CLECs. The minimum payment should not be applied on a per measure basis. The minimum payment should also account for months in which volumes were more substantial, in order to assure that order placement is not influenced by month-end considerations. All QPAP payments to such CLECs for that month should count against that minimum. Liberty recommended the QPAP provide as follows:

> For each CLEC with annual order volumes of no more than 1,200, Qwest shall perform at the end of each year a minimum payment calculation. Qwest shall multiply the number of months in which at least one payment would be required to such CLEC by $2,000. To the extent that actual CLEC payments for the year are less than the product of the preceding calculation, Qwest shall make annual payments equal to the difference.

For example, if the total amount due to a qualifying CLEC before the application of this provision, counting escalation, were $5,000, and if there were nine months in which Qwest failed to meet a Tier 1 compensable standard for that CLEC, the additional amount that Qwest would pay to such CLEC at the end of the year (with other payments due for service during the month of December) would be 9 x $2,000 -$5,000 = $13,000. This approach also responds to the Qwest concern about the multiplying effect of escalation on minimum payments.

Qwest states that it vigorously disagrees with the need for any additional payment opportunities for small CLECs, but agreed to incorporate the changes into the QPAP at Section 6.4. The Board finds that Liberty's approach is a good balance between the relatively higher importance of each order for a small CLEC and over compensating all CLECs with some type of escalating minimum structure.

The Board should endorse Liberty's recommended change to QPAP Section 6.4 as incorporated by Qwest in its November 6, 2001, filing.

H. 100 percent Caps for Interval Measures (Report pp. 68-70; Qwest initial brief pp. 17-18; AT&T initial brief p. 26; ELI/Time Warner/XO initial brief p. 14; ZTEL initial brief p. 9; AT&T post-report comments pp. 35-39)

AT&T and ZTEL argue that the 100 percent cap on CLEC misses for interval measurements is unreasonable. However, Qwest suggests that both CLECs ignore that the 100 percent cap is intended to prevent CLECs from receiving payments for orders that they did not place. It is fundamental in a per occurrence payment structure that CLECs be compensated for no more than the number of units, *e.g.*, orders, firm order confirmations (FOCs), trouble reports, that they actually had. Otherwise CLECs would be compensated when these essential units never existed and at levels that are inconsistent with the pre-determined per unit payment amount. For example, if CLECs place 100 total orders and Qwest misses a two-day performance standard by three days for the entire batch, Qwest will be deemed to have missed the standard by 150 percent. Since the number of orders is then multiplied by the percentage of the miss (100 x 150 percent), Qwest will be liable for 150 missed orders, clearly an absurd result when CLECs only placed 100 orders.

Thus, the 100 percent cap merely prevents CLECs from recovering for orders that they did not place.

AT&T articulates the CLEC argument as being that the per-occurrence scheme for interval measurements should be sensitive to both the monthly volume of the CLEC orders and the deviation of Qwest's average monthly performance to a CLEC from the Qwest average monthly performance to itself. According to AT&T, the CLEC argument was not that the per-occurrence scheme should measure the number of individual misses and then to assign a severity level to each miss.

The issue at hand is with respect to the severity of Qwest's deviation of its average monthly performance to CLECs from its average monthly performance to itself. All participants recognize that severely poor Qwest performance to CLECs and the use of a per occurrence scheme can result in the number of payment occurrences exceeding the number of orders completed in a month. The issue is whether or not the payment occurrences should be capped at the number of CLEC orders. Qwest argues that they should be capped "to prevent the illogical result of CLECs being paid on more orders than they actually submitted." AT&T argued alternatively maintaining a cap "inappropriately protects Qwest from its own extremely poor and severe performance to CLECs."

The report recognizes ZTEL's argument that "eliminating Qwest's truncation is necessary to make sure that, as the severity of Qwest's non-compliant performance increases, so will the financial consequences associated with it." The CLEC's simple

argument, as indicated by AT&T's post-report brief, is that the worse the Qwest performance, the more Qwest should pay.

ELI/Time Warner/XO suggests that the AT&T and ZTEL proposals to eliminate caps are similar to service quality assessments that state commissions have used historically to encourage Qwest to improve its performance. Such assessments often take the form of a charge or credit (usually the recurring and/or nonrecurring rate for the service) that applies periodically (often every few days or hours, depending on the standard interval) until Qwest provisions the order or repairs the service. Far from demonstrating that that this well-established assessment mechanism results in excessive payments, Qwest's calculation of payment levels without caps demonstrates just how poor Qwest's performance has been. As is true of all payments under the QPAP, Qwest controls how much it makes in payments to CLECs. Once Qwest provides service to CLECs that is at least equal to the service Qwest provides to itself, Qwest will not have to make any payments for poor performance, including uncapped payments for held orders or delayed repairs.

ZTEL continues to argue that the QPAP places an artificial cap on its assessment of the severity of this disparity by truncating the difference in the means at 100 percent. In other words, consider OP-4, which will measure the average installation intervals for UNEs, a metric of critical concern to ZTEL, and assume that Qwest's average retail installation interval is one day. Under Qwest's proposal, its provision of service to CLECs an average of two days *would be treated the same as* providing service to CLECs an average of ten or even 20 days. Generally, the

sanction should be commensurate with the degree of severity. In the QPAP, that relationship does not exist.

According to ZTEL, Qwest justifies this irrational result with two arguments – both illegitimate. Qwest first argues that CLECs should not be compensated for more than 100 percent of its orders, as if the severity calculation for interval measures actually measured occurrences. As pointed out repeatedly by ZTEL's submissions, this argument is a non-sequitor. In short, the percentage difference between two averages in no way provides a measure of occurrences. Indeed, payment for a 400 percent means-difference (e.g., five days versus one day average installation interval) is quite different than paying a set amount for each "late" installation. Qwest's basis for objection simply makes no sense.

ZTEL continues by noting that Qwest's second argument articulates the core of their objection – they should not have to pay more than 100 percent disparity because CLECs are adequately compensated by that payment. This argument again is non-responsive. First, as discussed above, compensation to CLECs is not and should not be the focus of a PAP – providing an adequate incentive to comply with the law is the appropriate focus. As a result, a proper PAP should increase the penalties paid when Qwest's "miss" is "worse." Further, a simple solution to overpaying CLECs would be to direct funds to Tier 2. Qwest's failure to propose this obvious remedy is evidence that "overcompensating CLECs" is not a genuine concern – rather, Qwest simply wants to limit the effectiveness of the plan.

Volume issues make it necessary to somehow reflect in the payment calculations the number of occurrences involved. Liberty concluded that the CLEC who oppose the truncation incorporated into the QPAP implicitly accept this need, they do not explicitly acknowledge it. In this regard, there is some irony in their allegations that Qwest's approach improperly seeks to introduce the concept of occurrences where it does not fit mathematically. According to Liberty, the better argument against Qwest's approach is that it fails to measure both the number of individual misses and then to assign a severity level to each of those individual misses.

Liberty noted that no CLEC who objected to the 100 percent truncation took this tack. Rather, having accepted the mathematical anomaly with which the QPAP begins, they chose instead a truncation approach as well; i.e., to cut off Qwest's continued use of per-occurrence based thinking on a measure that does not tell us anything about occurrences. Liberty suggested the following to demonstrate this problem: if a CLEC has ten orders and if the average Qwest interval for serving them is two days, we have no way of knowing (to list but two examples out of a vast number of possible ones) whether each of the ten was served in two days, or if nine were served in one day, while the other was served in 11 days. Yet this is precisely the kind of distribution information we would need to know if we were to accomplish what is the logically correct thing to do if the CLECs are right, which is to pay only for the misses and to create and pay for each miss according to an intelligently arrived at scale that escalates payments for the degree of the miss.

Liberty agreed that it may well prove to be the case that the actual distribution of numbers of misses and their extent makes the QPAP a less effective motivator of compliant performance than some other formula might. Evidence addressing number and length distribution would, in that presumed case, have gone a long way to supporting CLEC claims that different QPAP treatment would be appropriate to detect and to sanction poor performance. As we have none here, no change is yet appropriate. However, such distribution information and any recommended QPAP changes resulting from it should be open to consideration during plan amendment processes.

It appeared that Liberty missed the basic premise of the CLEC argument, which was that a 100 cap on interval measurements removes a payment increase factor that would incorporate the severity of the misses.

The Board directs Qwest to submit proposed language to remove the 100 percent cap on interval measurements from Section 8.2.1.2.

3. Assigning Severity Levels to Percent Measures (Report pp. 70-71; Qwest initial brief pp. 18, 20-21; ZTEL initial brief pp. 7, 12; Covad initial brief pp. 11, 16-17)

As discussed by Dr. Ford in his surrebuttal testimony, ZTEL argues that where a 95 percent benchmark has been established, it is to be expected that the CLEC will design its systems and processes on the assumption that Qwest will operate as specified with near certainty. Alternatively, with a 50 percent benchmark, the CLEC recognizes that the reliability of performance is akin to a coin toss, and the CLEC will design its systems and procedures accordingly. Obviously, Qwest's failure to deliver

on a 99 percent standard will wreck more havoc on the CLEC's systems and processes than a failure of the same difference magnitude on a 50 percent standard.

Further, ZTEL argues, the irrationality of Qwest's proposal is demonstrated if one simply re-states a benchmark from "percent on-time" to "percent late." That is, a "99 percent on-time" benchmark could just as easily be stated as a "1 percent late" benchmark. In this situation, being late on 5 percent of CLEC orders for this measurement indicates that Qwest had provided five times worse service than the benchmark prohibits, or 5x. In contrast, in the 50 percent benchmark measurement, a 5 percent miss represents only 0.1x – or fifty times less significant than a 5 percent miss on a 1 percent benchmark.

To account for this fact, ZTEL proposed a method to compute disparity for percent measures with the following equation:

$$\text{DISPARITY} = [A + B\,(X_O - 0.50)] \times (X_O - X_C)$$

Increased penalties based on both the severity of the missed performance, and the duration of the missed performance, are both required, according to Covad, because both are material. Severity increases clearly are necessary, but do not have to be complex to compute. For example, for severity increases for percentage measures, every additional 5 percent off the required percentage would get an increased penalty. Similarly, for interval measures every period past the interval would get an increased penalty. It is common sense that for bigger disparities in performance, there should be bigger penalties. Further, to recognize the severe impact to a CLEC of extremely high disparities in performance, once the severity gets

to a certain level (such as 30 percent worse than the required standard), the penalty should increase by a greater amount.

Covad urges no principled reason exists pursuant to which the escalated penalties should cease at some arbitrary point in time, as Qwest contends. The Special Master to the CPUC correctly recognized, "the incentive payments are not wholly punitive in nature because CLECs may well suffer increased harm to customer goodwill when problems continue [and, further] the initial payments may not adequately reflect harm imposed on the CLECs."

Qwest responded by noting that ZTEL proposes a specific mathematical formula to make Tier 1 payments more dependent upon the degree of miss from performance standards. ZTEL's suggested formula includes values equal to ten for "A" and 30 for "B." Qwest notes that at the hearing, ZTEL's witness, Dr. Ford, unequivocally disputed the notion that ZTEL proposed a specific formula with values for "A" and "B." Witness Ford described his testimony as merely putting forth "conceptual ideas." Qwest suggests this is the case because witness Ford has abandoned any defense of a specific recommendation and did not provide any rational economic justification for his formula or for the choice of numerical values for "A" and "B," the ZTEL proposal merits no consideration in this proceeding.

Qwest produced a quantitative analysis of the ZTEL proposal using actual CLEC performance results for the nine states that proves that the ZTEL proposal will produce nothing but a windfall to CLECs. Overall, applying the ZTEL mathematical formula and the ZTEL proposal to eliminate the 100 percent cap would have caused

annual Tier 1 payments alone to exceed the nine state 36 percent annual cap even though Qwest met 92 percent of all performance standards for the period February to May 2001. Qwest asserts its evidence proves without any doubt that the ZTEL proposals are entirely unreasonable and are designed solely to produce windfalls to CLECs. Witness Ford's attempt at the hearings to distance himself from the formula in his verified statement reflects his inability to refute the accuracy of Qwest's quantitative analysis. Qwest proposes that witness Ford's abandonment of his formula should end any consideration of the ZTEL proposal.

Liberty concluded that the dispute between Qwest and ZTEL over this measure did not focus on the correctness of ZTEL's formula in capturing the severity of misses of performance measures expressed as percentages. Rather, the problem appeared to be that the PEPP collaborative negotiated payment amounts that did not use this formula, and applying it now would have the effect of significantly increasing payment amounts. It would be inappropriate to graft the ZTEL formula as proposed onto base payment amounts negotiated at the collaborative. Had it been clear at the time of the PEPP collaborations that the base penalty amounts would be subjected to such a formula, it is reasonably certain to conclude that Qwest would not have agreed to those amounts.

Liberty agreed with ZTEL, that inserting different "A" and "B" values into the formula could substantially moderate its impact on the total payments that would be produced under Qwest's approach. Nevertheless, ZTEL made a specific proposal that has been shown to produce results that are: (a) out of keeping with the

negotiations at the PEPP collaborative, and (b) beyond reason in their financial impact. Had that proposal not so far overreached in its financial consequence, it might merit closer consideration for adoption at the present time. As it did, however, the forum for addressing QPAP changes on an ongoing basis should consider whether there are means for introducing the correlation ZTEL seeks between payments and severity of misses, without unduly altering the total payment expectations that came out of the PEPP collaborative process.

Liberty concluded it was not reasonable to expect the recommendation to be made by it to fine-tune the QPAP payment engine without the aid of input and comment from the whole range of interests who would be affected. In other words, open-ended, conceptual proposals were not looked on with favor. Liberty determined that in this case, the better approach was to allow that consideration to be made in a forum better suited to a full and detailed examination of how differing formulas would affect all of the participants. The Qwest proposal for the present provides an adequate means to detect and sanction poor performance in meeting measures expressed as percentages. For the future, QPAP review and amendment procedures will provide a suitable place for full debate about and consideration of a more adequately defined ZTEL formula.

The Board agrees with Liberty's conclusion that the addition of the ZTEL formula to the "payment engine" without a thorough consideration and input from those it would affect should not be incorporated at the last moment. Additionally, as was demonstrated by Qwest, using the ZTEL formulas with the weights that ZTEL

had assigned, would have hit the 36 percent cap on Qwest payments within six months even if Qwest were at 92 percent compliance. The Board finds that adjustments to the weight factors could be made to lessen the impact of the formula but agrees with Liberty that the six-month review will allow the opportunity for a full debate and consideration of a more defined formula if needed.

The Board endorses Liberty's conclusion that it would be inappropriate to add the mathematical formula proposed by ZTEL to the quantification of Tier 1 payments.

IV. SELF-EXECUTING MECHANISM

The QPAP provides for self-executing Tier 1 payments to CLECs and Tier 2 payments to individual states (either state commissions or state general funds) in amounts that are based on monthly performance results. Qwest designed the Tier 1 payments to provide compensation to CLECS and to provide performance incentives to Qwest; the Tier 2 payments are intended to address the Qwest incentives goal. The payments under the QPAP are to be provided monthly, without any required showing of harm.

In each month, payments would first go to Tier 1, with any excess over those, up to 1/12th of the yearly cap amount (if a monthly cap is incorporated), going to Tier 2. Any excess Tier 1 and Tier 2 monthly amounts would roll forward for payment by the end of the year, subject to the annual cap.

A. Dispute Resolution (Section 18) (Report pp. 71-72; Qwest initial brief pp. 79-80; Qwest reply brief pp. 52-55; AT&T reply brief pp. 28-30; Qwest post-report comments p. 13)

Qwest added a dispute resolution provision specifically applicable to the QPAP. It would allow the general SGAT dispute resolutions to apply, but only in the event of disputes arising under QPAP Sections 13.3, 13.3.1, 13.7, 13.9, 15.1, 15.2, and 15.9.

ELI/Time Warner/XO argued that the limitations on the QPAP sections to which dispute resolution provisions would apply begs the question of how other disputes under the QPAP get resolved and recommended that all QPAP disputes to be resolved under the provisions of the SGAT or the applicable interconnection agreement. AT&T proposed that the Texas Plan language replace what Qwest proposed, and that the dispute resolution provision should apply to all the QPAP, not just the sections proposed by Qwest.

Qwest did not propose a dispute resolution mechanism for QPAP disputes that involve QPAP sections other than those it listed. All SGAT provisions, the QPAP included, require some method for independent resolution. Those resolution methods are not necessary (or appropriate) for changing the meaning of the SGAT or QPAP, but for interpreting what those provisions mean and how they should be applied when the participants differ.

Liberty noted that Qwest has accepted the use of the general SGAT dispute resolution provisions for the specified sections. Those provisions have no explicit exception for "de minimis" disputes. Qwest's indicated rationale for the separate

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QPAP dispute resolution proposal, although there is no reason for concluding that disputes are likely to be less numerous or more substantial when applied to the SGAT.

Liberty found no reason the general SGAT dispute resolution sections are any less suitable for addressing QPAP provisions beyond those listed by Qwest. Therefore, it should be clear that the dispute resolution provisions of the SGAT apply to QPAP disputes involving CLECs who use the SGAT in its entirety or act to make the QPAP part of their interconnection agreements (i.e., the unique dispute resolution provisions of interconnection agreements should not apply).

Liberty concluded that AT&T's recommendation should not be accepted, because the Texas agreement refers to dispute resolution procedures that are a function of Texas Commission procedural rules and therefore may contemplate steps not applicable before the commissions participating here.

Qwest added the following language as Section 18.0 in its November 6, 2001, filing:

> For the purpose of resolving disputes over the meaning of the provisions of the PAP and how they should be applied, the dispute resolution provisions of the SGAT, section 5.18, shall apply whether the CLEC uses the SGAT in its entirety or elects to make the PAP part of its interconnection agreements (i.e., the unique dispute resolution provisions of interconnection agreements should not apply).

No participant filed comments following the report.

The Board adopts the recommendation of Liberty and approves the language of Section 18.0 shown above.

B. Payment of Interest (Report pp. 72-73; Qwest initial brief p. 39; Qwest post-report comments p. 16; AT&T post-report comments pp. 39-40)

As originally filed, the QPAP did not provide for interest on late payments. Qwest agreed that interest at the one-year Treasury rate would be appropriate on late payments, provided that the same rate would apply to overpayments and to underpayments. AT&T noted this agreement, but observed that Qwest had offered no provision incorporating it into the QPAP.

Liberty recognized that any payment delayed is certainly payment partially denied after the time value of money is considered, but determined that Qwest's proposal goes only part of the way to address the problem. It falls short insofar as it applies the United States Government's cost of money, when the value that must be replaced is that of commercial telecommunications entities. Their cost of money includes a mix of equity, long-term debt, and short-term debt. Short-term debt rates probably represent the best indicator of payments temporarily delayed through error in billing or the pendency of disputes.

The need for a reliable pubic benchmark led Liberty to the conclusion that th QPAP interest rate should be the prime rate published daily by one of the numerou services or publications respected in the industry. Liberty opined the QPAP should provide for such interest as so posted for any payments made after the date due fc any reason.

Qwest incorporated the recommended interest rate into Section 11.1 of its November 6, 2001, post-report comments.

AT&T argues that each state's statutory interest rate, or alternatively a rate s by the state commission as Qwest's cost of money, be inserted in lieu of the one-ye Treasury rate, which AT&T said was likely to be low.

The Board directs Qwest to include language that provides for interest at the prime rate for payments made after the due date.

C. Escrowed Payments (Report p. 73; Qwest initial brief pp. 39, 77)

Covad argued that Qwest should either have to pay pending dispute resolution or to make payments to an interest-bearing escrow account. Having agreed to pay interest, Qwest objected to being required to place funds in escrow pending dispute resolution.

Liberty reasoned the provision for interest resolves the issue of the time value of money, absent concerns about credit-worthiness. Liberty did suggest there would be no harm and some potential benefit in including a provision that would allow a participant to require the other to make payments into escrow where the requesting participant can show cause, perhaps on grounds similar to those provided by the Uniform Commercial Code for cases of commercial uncertainty but did not include this as one of the recommended changes to the QPAP.

As determined in the immediately preceding issue, the Board directs Qwest to include language providing for interest for late payments. However, the Board does not see a need, at this time, for payments to be made into escrow.

D. Effective Dates

1. Initial Effective Date (Report pp. 73-75; Qwest initial brief pp. 8(83; Qwest reply brief pp. 27, 40-44; AT&T initial brief p. 28; WCOM initial brief p. 16; Qwest post-report p. 17)

AT&T and WCOM asked that the QPAP become effective when a state public service commission issues its consultative report to the FCC. The stated goal of such a requirement is to prevent backsliding while the FCC considers a Qwest 271 application. ELI/Time Warner/XO and Covad argued that the QPAP should become effective immediately.

Qwest proposed that the QPAP be effective state-by-state as of the date wher FCC approval of an application for authorization to provide in-region interLATA services is received for that state. Qwest proposed this date because it offered the QPAP as a means for assuring compliance after it gets such approval, and because there are significant issues concerning the statutory authority of the state commissions to order its application under state law, independent of section 271 considerations. Qwest noted that the QPAP is self-executing; it does not even require a complaint.

There are sufficient methods for addressing Qwest performance pending FCC consideration of a 271 application. As Qwest pointed out, there already exists an opportunity for states and CLECs to supplement the record made in these workshops with evidence that is current through the comment period at the FCC. Qwest also argued that it will have more than sufficient incentive not to backslide while its 271 application is pending before the FCC.

Qwest suggests Covad erred in arguing that the Telecommunications Act of 1996 gives states authority to impose self-executing payment programs. Qwest also objected to Covad's claim that Qwest's consent to impose the QPAP generally could be inferred; Qwest cited the explicit condition it has placed on its agreement to be bound; i.e., its prior receipt of in-region, InterLATA authority under section 271.

ELI/Time Warner/XO claimed the issue of state commission authority to order institution of the QPAP was not material, because the state commission role in approving a SGAT and providing a consultative recommendation to the FCC would allow it merely to withhold approval or endorsement failing Qwest's agreement to make the QPAP effective immediately. As a minimum provision, ELI/Time Warner/XO suggested the state commissions should require monthly reports of payments that would have resulted under the QPAP had it been in effect earlier than 271 approval.

Liberty concluded that Qwest's consent to the immediate effectiveness of the QPAP could not be implied from any action it has taken, but did not see that such consent was necessary, because the issue is not whether state commissions can implement something like the QPAP under their own authority. The issue more accurately stated is whether the state commissions should tell the FCC that they consider the QPAP sufficient to meet the public interest standard even if it is not made effective prior to FCC approval of a 271 application.

Liberty noted that PAPs were not part of the landscape when BOC obligations were being addressed in the context of mediations, arbitrations, and SGAT

approvals. No participant has cited FCC support for such a thing outside the context of 271 approval. The very reason cited by the FCC in support of the adoption of a PAP is the need for assurance that local exchange markets will remain open **after** Qwest may receive the power to provide in-region interLATA service. Given the reasonably long history of operating without PAPs in the pre-271 context and given the purpose ascribed to them, it is logical to conclude that it should become effective when the QPAP proposes, absent special circumstances.

The only circumstances cited that might suggest that an early effective date is appropriate were by the NMAS, which argued that there is a risk of deteriorating performance because Qwest can present a dated record of more adequate performance to the FCC, while allowing more current performance to deteriorate. No other participant cited any special circumstances. The risk of short-term backsliding is mitigated by the fact that current information can and presumably will be provided to the FCC should it be relevant. The virtual certainty that such information will become a part of the FCC's deliberations means that there is no change in Qwest's current incentives.

Liberty next considered the issue of whether Qwest should report performance and presumed payment levels before any grant of 271 approval. Liberty found that recommendation to be sound, suggesting that it would provide focus to the interim performance information that was of concern to the NMAS. Liberty also opined that such interim reporting would be helpful in acclimating CLECs to the QPAP reports, to their independent confirmation efforts, and to the general relationship that exists

between the performance they are receiving and the payments they are getting. Liberty therefore recommended the QPAP require Qwest to provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

Qwest has been providing, on a monthly basis, reports as recommended by Liberty. Attached to this memo as Attachment B are the most recent reports provided by Qwest for Iowa performance under its proposed QPAP (as filed November 6, 2001).

The Board agrees with the Liberty recommendation that Qwest provide monthly QPAP reports as if the QPAP were currently effective, but does not see the addition of this requirement to the language of the QPAP to be necessary. Adding a requirement to a document that something be provided prior to the effective date of that document would technically have no effect. Qwest has agreed and is providing the monthly reports. It would be more appropriate to simply direct Qwest to continue to provide the monthly reports, without requiring the addition of the requirement to the language of the QPAP.

The Board directs Qwest to continue to provide monthly reports as if the QPAP were currently in effect. No payments would be made, or obligation incurred, under the QPAP until it becomes effective following approval by the FCC of an application under section 271 of the 1996 Telecommunications Act.

2. "Memory" at Initial Effective Date (Report p. 78; Qwest initial brief pp. 83-84; Qwest reply brief p. 44; AT&T initial brief pp. 23-24; AT&T reply brief p. 31; AT&T post-report comments pp. 40-41)

AT&T argues that once the QPAP becomes effective it should effectively calculate performance for as many prior months as are necessary to provide that escalated, rather than baseline, payments apply from the first month. WCOM claims that without this "memory" of pre-effective date performance, there would be insufficient incentive to Qwest and a failure to meet the FCC requirement that poor performance be sanctioned when it occurs.

Qwest opposes such "memory" requirements as being no different conceptually from one recommending the imposition of QPAP payment requirements before 271 approval.

Having decided that the QPAP should be limited to performance post-dating section 271 approval and that other remedies apply before that time and thereafter for CLECs not opting into the QPAP for compensation purposes, Liberty determined it would be inappropriate to start the QPAP payment structure in "mid-stream." The Board agrees with Liberty's conclusion that the effect of such a requirement would be to mix remedies inappropriately, given that CLECs retain for the historical period in question (i.e., prior to Qwest's 271 approval) whatever remedies are applicable under their existing interconnection agreements.

The Board endorses Liberty's conclusion that it would be inappropriate to reach back to "pre-271" performance to provide for escalated payments in the first month the QPAP is effective.

3. PAP Effectiveness if Qwest Exits InterLATA Market (Report p. 75; AT&T initial brief p. 14; ELI/Time Warner/XO initial brief p. 21)

AT&T and ELI/Time Warner/XO recommended that Qwest be required to continue the QPAP payment obligations should Qwest exit the in-region, interLATA market.

For the same reasons that the QPAP should only be effective upon entry by Qwest into that market, Liberty determined the QPAP should terminate upon the end of Qwest's authority to serve that market. No participant filed comments following the issuance of Liberty's report.

The Board agrees with Liberty's conclusion that continuing QPAP payment obligations following an exit by Qwest of the in-region, interLATA market would be inappropriate.

E. QPAP Inclusion in the SGAT and Interconnection Agreements (Report p. 76; WCOM initial comments p. 3; Qwest post-report comments p. 17)

WCOM noted that Qwest failed to address the question of how the QPAP should be made a part of the SGAT in its initial QPAP proposal.

Liberty agreed with the need for some SGAT context for the QPAP. Liberty also suggested there should be clarity about the scope of what a CLEC with an interconnection agreement would be required to elect. Liberty recommended that Qwest's post-report comments address these issues.

Qwest responded in its post-report comments by indicating its intention that the QPAP will become Attachment K to the SGAT. Alternatively, if a CLEC wishes to

opt into the QPAP, Qwest suggests it must do so through an amendment to its interconnection agreement. The amendment must include both Attachment K (the QPAP) and Attachment B (in lieu of other contractual standards and remedies), at a minimum.

The Board adopts the process outlined in Qwest's post-report comment for inclusion of the QPAP in the SGAT as well as its stated process for adoption of the QPAP as an amendment to current interconnection agreements.

F. Form of Payment to CLECs (Report p. 76; Qwest initial brief p. 39; Qwest reply brief pp. 28-29; WCOM initial brief p. 14; Covad initial brief p. 40; Qwest post-report comments p. 16)

As initially proposed, the QPAP provided for QPAP payments to be made by bill credit, rather than by cash or check. Qwest argued that it would not be administratively efficient to provide for payment by check. Qwest agreed, in its reply brief, to commit to a sample bill credit format, which it said would obviate any concern about the ability to identify the source and calculation of the credits. Qwest also pointed out that the QPAP provides for the use of wire transfers in cases where a CLEC's PAP credit exceeds the amount it owes Qwest.

WCOM recommended that QPAP payments be made by monthly checks. Covad requested that payment forms be limited to cash or check. Covad also asked that there be no offset of any payments due for unrelated debts of CLECs.

Liberty concluded the CLEC arguments about the administrative convenience of requiring payment by the equivalent of cash were not persuasive, suggesting that the CLECs missed the point that it would be inappropriate to require Qwest to make

payments to CLECs in cases where CLECs were not current in paying Qwest for the same kinds of services. Liberty determined the QPAP provision was appropriate, in that it provides for a cash-equivalent transfer when there is not a sufficient CLEC amount due to offset the credit.

Liberty indicated its conclusion that Covad's concern about other CLEC debts was not pertinent to this discussion. The crediting approach applies to the bills issued under the SGAT or interconnection agreement. Any other arrangements between Qwest and a CLEC must be addressed by the terms of those agreements, not the QPAP. Liberty recommended the QPAP require Qwest to provide credit information in substantially the form of the sample it provided as Exhibit S-9-QWE-CTI-4 during the multi-state workshop process, absent state commission consent to change it.

Qwest filed the following amended Section 11.2, incorporating Liberty's recommendation:

> Payment to CLEC shall be made via bill credits. Bill credits shall be identified on a summary format substantially similar to that distributed as a prototype to the CLECs and the Commissions. To the extent that a monthly payment owed to CLEC under this PAP exceeds the amount owed to Qwest by the CLEC on a monthly bill, Qwest will issue a check or wire transfer to CLEC in the amount of the overage. Payment to the State shall be made via check or wire transfer.

The Board adopts the recommendation of Liberty and approves the language submitted by Qwest in its November 6, 2001, post-report filing.

V. ASSURANCES OF ACCURACY OF REPORTED DATA

A. Audit Program (Report pp. 77-82; AT&T initial brief pp. 15-16; Covad initial brief pp. 34-36; Qwest post-report comments pp. 14-15)

AT&T suggests that quite possibly the most major deviation from the Texas Plan surrounds the issue of audits. Pursuant to § 6.6 of the Texas Plan, once the participants have consulted with each other in an attempt to resolve any data accuracy or integrity issues, the CLEC may have "an independent audit conducted, at CLEC expense, of (the ILEC's) performance measurement data collection, computing, and reporting processes." If the audit determines that there was a problem or issue with the ILEC data, the ILEC would reimburse the CLEC for the audit. This is in addition to the review and revision process found elsewhere in the Texas Plan.

The QPAP, as proposed by Qwest, would substantially limit "(the possibility of a performance data audit) to two audits per calendar year for the entire Qwest Region per CLEC." Further, the limitations would also be restrained to no more than two performance measurements per audit. Further, unlike the Texas Plan, "Qwest may request an independent audit."

Liberty reasoned that given the nature of Qwest services and performance measurement systems and processes, it is reasonable to conclude that there will be substantial commonality among the states making it appropriate for the QPAP to support common efforts to provide the assurances that Qwest's measurements remain reliable. Liberty recognized the need for each state to retain the ability to

assure attention to its particular needs and circumstances, noting that this objective could be met without unnecessary duplication of testing efforts by designing and implementing them on a common basis.

Liberty suggested there be a process for brief, regular meetings (i.e., once per quarter) between Qwest and the independent auditor (whose selection and responsibilities are more fully discussed below). The purpose of these meetings between Qwest and the independent auditor should be to allow Qwest to report on and the auditor to ask questions about changes made in the Qwest measurement regimen. The meetings should then produce reports by the auditor to the state commissions and, where the state commissions deem it appropriate, other participants.

Liberty suggests that the results of the meetings would permit the auditor to make an independent assessment of the materiality and propriety of any Qwest proposed change, including, where necessary, testing of the change details by the auditor. These meetings would supplement, but not replace, the other change management and notification methods by which Qwest would make other participants aware of what it considered to be significant changes to its measurement regimen. Other participants would be free to communicate with the selected auditor any concerns about such changes.

With respect to auditing and testing, Liberty noted that Qwest has accepted the two-year planning cycle proposed by Liberty as part of its performance measures audit (as part of the ROC OSS testing process). Liberty's recommended approach

contemplated the adoption of a formal plan identifying the specific aspects of performance measurement to be tested, the specific tests to be conducted, and the entity to conduct them. Central to the planned and cyclical approach is that higher risk areas should be audited more frequently, but that even lesser causes of risk should periodically be tested. Each two-year cycle would examine risks likely to exist across that period and the past history of testing, in order to determine what combination of high and more moderate areas of risk should be examined.

Liberty recommends that the audit planning and auditor retention work should provide for Qwest and CLEC input to the state commissions, in order to promote their confidence in the work to be performed and the resources performing it. In some cases, however, the audit plan might require confidentiality for certain test activities where advance notice could compromise their efficacy.

Another role of the auditor, recommended by Liberty, should be to assess the need for individual audits proposed by CLECs. Those audits should be available for CLEC-specific concerns or issues not otherwise addressed by the plan for the current cycle. Qwest's testimony recognized the need to avoid unnecessary duplication, but its method of minimizing it was arbitrary. The independent auditor should review CLEC requests for audits, with dispute resolution available to any participant questioning the auditor's recommendation. Absent dispute, the auditor would carry out any CLEC-requested audits whose need the auditor accepted; the participants could ultimately accept or challenge results or the determination of need for the audit

through available dispute resolution methods. The auditor's tasks should include determining:

- General applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the ones causing test initiation).
- Magnitude of any payment adjustments required.
- Cost responsibility for the tests performed, with the test being the materiality and clarity of any Qwest non-conformance with measurement requirements (no pre-determined variance is appropriate, but should be based on the auditor's professional judgment).

Liberty suggested the states address their individual needs during the planning process and could, should they choose to do so, require additional testing in the event that a commonly derived plan fails to meet the state commissions needs, although Liberty would not anticipate that such a unilateral approach would be often requested or required.

Liberty concluded payment of audit program costs constitutes a sound use of Tier 2 payments and recommended Qwest fund in advance the costs of the first two-year cycle, with amounts to be refunded from Tier 2 payments as they accumulate. In the event that this Tier 2 funding should prove insufficient to meet the requirements of the program, half of any uncompensated amount advanced by Qwest should be returned from the ensuing two-year cycle's Tier 1 escalated payments, to be shared by CLECs according to their pro rata share of Tier 1 escalated payments from that prior cycle. Qwest should absorb any leftover amounts not capable of recompense out of Tier 2 and escalated Tier 1 payments as described above.

Qwest indicated in its post-report comments that it has incorporated the details and the spirit of the audit provisions outlined by Liberty. There are, however, specific areas of concern on Qwest's part, which resulted in the insertion of several key concepts in Qwest's November 6, 2001, filing which were not included in Liberty's recommendation.

Qwest added a section which requires the independent auditor to coordinate with other audits so as to avoid duplication and not impede Qwest's ability to meet the requirements of other provisions of the QPAP. Of greatest concern to Qwest is that an audit might impede Qwest's ability to operate under the time lines and due dates for collecting and processing data, publishing performance results, and calculating QPAP payments. Qwest stresses that it is imperative that the audit plan and its operation not be such as to impede Qwest's day-to-day performance under the QPAP regime.

The conduct of, and the results from, the independent audit certainly have the potential to be subject to disputes. It would appear reasonable that the audit provisions provide a process for handling such disputes.

With respect to decisions of the independent auditor as to whether to conduct or not conduct a CLEC proposed audit, Liberty did not propose a decision criteria based on materiality. Qwest added such a materiality criteria as it relates to data discrepancies. It would be reasonable that small data discrepancies, alone, should not be the basis for an audit.

While it was not specified in Liberty's recommendation, Qwest added a provision that a CLEC proposed audit would not begin while a dispute resolution process was pending. The Board agrees that such a provision would appear to be logical.

Qwest also added a provision that a CLEC may not propose an audit of data more than three years old. Such a provision is in keeping with the provision in Section 14.4 of the QPAP that Qwest not be required to keep data beyond three years. This addition appears to be appropriate.

The following is a summary of the various recommendations of Liberty and the insertion by Qwest of language into the QPAP on the various audit issues and suggestions:

- Audits of the PAP shall be conducted in two-year cycles under the Auspices of the Commissions. (15.1)
- The Commissions will form an oversight committee of Commissioners who will choose the independent auditor and decide any disputes over choice of auditor or disputes. (15.1.1)
- The audit plan will give priority to high risk areas identified in the OSS report. (15.1.2)
- Coordination with other audit plans being conducted by other state commissions to avoid duplication. (15.1.3)
- Qwest may make management processes more accurate or more efficient at Qwest discretion but must make the auditor aware of changes in quarterly meetings between only Qwest and the auditor, but the information from these meetings will be made available to the Commissions. (15.2)

- If Qwest or CLECs disagree on any issue regarding the accuracy or integrity of data collected, generated or reported pursuant to the PAP, Qwest and the CLEC will attempt in good faith to resolve the issue. After 45 days upon a demonstration of good cause (e.g., evidence of material errors), either participant at their expense may request an independent audit to be conducted. The dispute resolution provisions of section 18 are available to any participant questioning the independent auditors decision whether or not to conduct an audit. (15.3)

- Expenses for the audits will paid out of Tier 2 funds in the Special Fund and any remaining expenses will be paid by one half from Tier 1 funds in the Special Funds and one half by Qwest. (15.4)

With regards to the sections outlined above, the Board is in agreement. This audit structure allows for independence of the auditor and final review authority to the Board. The Board agrees with Liberty's conclusion that an oversight committee of the state commissions should coordinate the data audit.

The Board has concerns related to Section 15.5 as filed by Qwest in that it sets up Qwest to be the final judge of a Qwest initiated investigation of any second Tier 2 misses. Section 15.5 states:

> Qwest will investigate any second consecutive Tier 2 miss to determine the cause of the miss and to identify the action needed in order to meet the standard set forth in the performance measurements. To the extent an investigation determines that a CLEC was responsible in whole or in part for the Tier 2 misses, Qwest shall receive credit against future Tier 2 payments in an amount equal to the Tier 2 payments that should not have been made. The relevant portion of subsequent Tier 2 payments will not be owed until any responsible CLEC problems are corrected. For the purposes of this sub-section, Tier 1 performance measurements that have not been designated, as Tier 2 will

> be aggregated and the aggregate results will be investigated pursuant to the terms of this Agreement.

The Board is concerned about decision power being accorded to Qwest on Qwest's own investigation as well as the credits which Qwest would be given control over. The Board will direct Qwest to submit language that require findings from its investigations be submitted to the auditor who reports to the committee of state commissions and that the auditor then decide the merits of the Qwest findings.

The Board approves Qwest's proposed language as filed on November 6, 2001, which incorporates the goals, objectives and proposed procedures recommended by Liberty, except for the language of Section 15.5 related to Qwest's ability to incorporate bill credits based on its own investigations. The Board directs Qwest to file proposed language incorporating the additional requirement that it submit findings from its investigations to the auditor who would then make a determination regarding the appropriateness of bill credits.

B. PUC Access to CLEC Raw Data (Report pp. 82-83; Qwest initial brief p. 78; AT&T initial brief p. 28; Covad initial brief p. 33)

AT&T notes that in the QPAP proceeding, Qwest witness Inouye indicated that he did not have an issue with the need for CLEC-specific performance data to be protected and treated as confidential. In fact, witness Inouye agreed that there should be some provision in the QPAP to protect such CLEC data. AT&T raises concern that Qwest refused to strike the portion of QPAP Section 14.2 related to distributing individual CLEC raw data to the relevant state commission. AT&T is concerned that there are no provisions for the confidentiality of that data during or

after the transfer. AT&T argues that state commissions have provisions to obtain CLEC specific data directly from the CLECs, thus making it unnecessary for Qwest to provide such information. AT&T requests that the provision in question be stricken.

Pursuant to Section 14.2, the CLECs would authorize Qwest, upon a state commission's request, to provide the state commission with CLEC data so that the state commission is able to analyze the QPAP results and evaluate whether Qwest is performing adequately. AT&T argues that Qwest should not be permitted to provide the CLEC data to the state commissions; rather, the state commissions should be required to approach the various CLECs directly to gather this information.

Qwest suggests that since it is Qwest's compliance with the QPAP that will be at issue, Qwest must be allowed to provide the information directly, without the concern of tampering or a delay in the information being provided. Because Qwest recognizes that portions of these performance results may contain confidential CLEC information, however, Qwest did not oppose adding language to Section 14.2 to indicate that the information would be provided to the state commission on a confidential basis. Of course, once the state commissions receive the information, Qwest would have no control of, nor responsibility for, the Commission's continued treatment of the data as confidential.

Liberty acknowledged that state commissions have legitimate needs for the data at issue and found no sound reason for subjecting them to the potentially significant burdens of seeking such information from individual CLECs. Each state has existing procedures for the treatment of confidential information. Moreover, each

state should retain existing authority to determine what kinds of information ultimately will remain confidential. Liberty addressed a similar issue regarding the provision of confidential CLEC data to state commissions in connection with the unresolved issue Access of Qwest Personnel to Forecast Data in its September 24, 2001, report.[9] Liberty previously recommended language for SGAT Section 5.16.9.1.1, which the Board adopted. Liberty recommended that similar language be inserted into the QPAP, specifically:

> Pursuant to the terms of an order of the Commission, Qwest may provide CLEC-specific data that relates to the QPAP, provided that Qwest shall first initiate any procedures necessary to protect the confidentiality and to prevent the public release of the information pending any applicable Commission procedures and further provided that Qwest provides such notice as the Commission directs to the CLEC involved, in order to allow it to prosecute such procedures to their completion.

Qwest added the recommended language to Section 14.2 of the QPAP in its November 6, 2001, post-report comments. In addition, Qwest inserted the following sentence:

> Data files of participating CLEC raw data, or any subset thereof, will be transmitted, without charge, to the Commission in a mutually acceptable format, protocol, and transmission form.

No CLEC commented on Liberty's recommendations. The Board endorses the recommendation of Liberty, as well as the addition of the language in Section 14.2 of the QPAP by Qwest.

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[9] Addressed by the Board in its Conditional Statement issued March 12, 2002, at pages 37-39.

The Board approves the new Section 14.2 as filed by Qwest on November 6, 2001.

C. Providing CLECs Their Raw Data (Report p. 83; Qwest initial brief p. 63; WCOM initial brief p. 14; AT&T reply brief p. 21; Covad reply brief p. 14)

WCOM argued Qwest should be required to store all CLEC records with specific data relevant for QPAP measurement and payments purposes, including exclusions, in an easy-to-access electronic form for three years after such records have been produced and for an additional three years in an archived format. According to WCOM, a CLEC should have the right to request access to the raw data and business rules used to generate the reports as part of the data reconciliation process.

AT&T raises concern that in its brief and throughout the proceeding, Qwest refused to place a timeframe on its proffering of raw CLEC data suggesting that Qwest compiles this data in many different formats apart from the regulatory context and a timeframe to provide the data is required. Without such a time requirement, AT&T argues the provision is meaningless since Qwest could provide the data three years from the date of request and still be in compliance. AT&T suggests the damage to CLECs is obvious. CLECs are requesting the data for a purpose, to assure that Qwest is complying with the requirements of its interconnection agreement and the Act. If Qwest prolongs the provision of the underlying data, CLECs will not have access to data that could establish the violation of Qwest's contractual and/or regulatory obligation. Accordingly, additional damages could be

accruing while the CLECs await the data. AT&T proposed that Qwest be required to provide the data within two weeks of a request.

Covad requests that "code and process" documentation be provided during the data reconciliation process arguing in the absence of the basic information that determines how Qwest captures its data and then reports it under the PIDs, there is no way by which a CLEC can reconcile its data with Qwest's data. Even more egregious, according to Covad, is that by refusing to provide this information, Qwest forces a CLEC to incur the costs of an audit to obtain basic information necessary to reconcile data, thereby creating the substantial possibility that Qwest will evade any data challenges due to CLEC financial resource constraints.

Qwest agreed to make CLEC raw data available upon CLEC request. However, Liberty determined that it is unreasonable to set an arbitrary deadline (and accompanying payment for failure to meet that deadline) by which Qwest must provide the data. The time needed to produce the raw data is dependent upon a number of factors, including ones beyond Qwest's control, including the circumstances of the request, the timing of the request, and the extent of data requested. AT&T has provided no evidence that Qwest's proposal to provide data within a mutually acceptable time frame is unreasonable. Moreover, AT&T has failed to identify any harm that a CLEC could incur if it receives the data after two weeks. AT&T's arbitrary two-week deadline and late report type payment is simply unreasonable and has no relationship to the FCC's expectation that a PAP will contain assurances of accurate data.

Liberty concluded that Qwest should be obligated to provide the data as soon as it feasibly can, but reasoned that more specific deadline language would not respond to the need for flexibility given the size or nature of the requests that Qwest may face. Nothing in the QPAP limits those requests sufficiently to justify firm response deadlines.

Liberty determined that the QPAP should provide retention periods for underlying records. In considering the appropriate period of retention, Liberty pointed out that the three years recommended by WCOM appeared at first blush to be a very long period, considering the kinds of information and the potentially vast amounts of it, but recognized that the auditing and testing work to be made a part of the QPAP may uncover not only needs for future changes, but may lay a basis for CLEC requests for recalculation of prior payments.

Liberty recommended the QPAP should allow payments to be recalculated retroactively for three years (from the later of the provision of a monthly credit statement or payment due date) and it should require Qwest to retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculation efforts should be made reasonably contemporaneously with Qwest measurements. Liberty concluded it is sufficient to require Qwest to maintain the records in a readily useable form for one year, with the remainder of the required records retained in archived format for another two years.

Liberty found Covad's request for computer code and process information to be overly broad, but did recommend that the QPAP include a provision that Qwest's distribution of CLEC-specific data be in a form that will allow CLECs to be able to identify its nature and content, and that it be in a form that will allow CLECs to undertake the same kinds of calculations performed by Qwest.

The Board agrees that Qwest should make the CLECs data available to it as soon as possible following a request for the data, to enable a CLEC to begin its own reconciliation of Qwest's calculation. Though Liberty states that Qwest is obligated to respond quickly to such requests, it recommended that specific timeframes should not be set. Liberty suggests that flexibility is required in response time to provide this data because of the possibility of a large number and size of requests. The Board will accept this approach, however, specific timeframes in the future may be necessary should this flexibility become problematic.

The Board agrees that a retention time of one year in a readily usable form followed by a period of retention in an archived format is sufficient. Qwest has agreed to this provision and has added language at Section 14.4 of the QPAP, as follows:

> To the extent that Qwest recalculates payments made under this PAP, such recalculations shall be limited to the preceding three years (measured from the later of the provision of a monthly credit statement or payment due date). Qwest shall retain sufficient records to demonstrate fully the basis for its calculations for long enough to meet this potential recalculation obligation. CLEC verification or recalculations efforts should be made reasonably contemporaneously with Qwest measurements. In any

> event, Qwest shall maintain the records in a readily usable format for one year. For the remaining two years, the records may be retained in archived format. Any payment adjustments shall be subject to interest rate provisions of section 11.1

The Board adopts the recommendation of Liberty and the language filed by Qwest as shown above.

D. Late Reports (Report pp. 84-86; Qwest initial brief pp. 37-38; ZTEL initial brief p. 34; Covad initial brief p. 45; AT&T reply brief p. 16; WCOM reply brief p. 3)

Qwest's proposed Section 14.3 included a provision for a per-day late report payment of $500, which it viewed as providing sufficient incentive to report on time. Qwest pointed to the number of states for which payments would be required and the relationship between payment amounts and the number of days that reports are late. Qwest cited as an example the $70,000 total payment that would apply across the 14 states for a report filed ten days after the end of the grace period provided for in the QPAP.

WCOM proposed the following payment schedule for late, incomplete, and incorrect reports:

- $5,000 per day for late reports
- $1,000 per day for incomplete reports
- $1,000 per day for reports later revised by Qwest
- $1,000 per day for reports for which a CLEC cannot gain access to its data underlying the reports due to reasons within Qwest's control.

WCOM argued that its proposal would not unduly penalize Qwest, noting that the QPAP contains a five-day grace period and an opportunity to escape penalties when it can show that the cause of the delay was outside its control. WCOM also noted that the Texas commission set a $5,000 per day payment for Texas alone, even though SBC also serves in other states that could apply additional penalties.

ZTEL urges the QPAP be modified to provide an incentive to provide all reports to CLECs on a timely basis suggesting the current proposal does not provide an incentive to complete as many reports as possible on-time. ZTEL insists that Qwest has the incentive to file all reports to a CLEC late when it becomes apparent that one report will be late. To repair this incentive, ZTEL has proposed that Qwest pay $100 for each day that each individual report is late.

Covad demanded that in addition to penalties for late reporting, the QPAP must be revised to require the imposition of mandatory penalties where Qwest provides inaccurate reports, even where later corrected. Covad states the cornerstone to an effective, reliable and durable PAP is accurate reporting. In the event that Qwest erroneously reports its results under the PIDs, whether intentionally or not, Qwest simultaneously opens the door to escaping the liability to which it is fully and fairly subject, while closing the door on competition in its local markets. Moreover, the potential for erroneous reporting, corrected by a CLEC but without the provision of any compensation, unfairly places the burden on CLECs to ensure correct and accurate reporting. Finally, without creating any incentive on the part of Qwest to ensure accurate and reliable reporting, Covad suggests CLECs are cast in

the roll of "bird dogging" Qwest, continually responsible for reviewing and monitoring Qwest's monthly performance reports.

AT&T proposed the adoption of the Texas approach, which would include higher payments and would eliminate the grace period provided for in the QPAP.

Qwest responded by noting that the CLEC proposal to apply the penalty to each report (counting unique CLEC and state reports) could produce a $4.2 million payment for the same ten-day example that would cost Qwest $70,000 under Section 14.3 as now written.

Qwest indicated that WCOM was in error in asserting that the Texas Plan included payments for the revision of data or for data access. Qwest also pointed out that the $5,000 per day payment would yield a $700,000 (ten times the QPAP amount as proposed) for a single monthly set of reports that were filed ten days after the end of the grace period and suggested the CLEC proposals provided compensation well out of proportion with the related harm, because QPAP payments were due independently of a report's filing. Qwest noted CLECs could still get access to their underlying data and request audits, regardless of whether reports arrived on time.

Liberty concluded that requiring payments for inaccurate reports was troublesome. Noting the vast number of measures required by the QPAP, Liberty reasoned it is not realistic to expect that no report would ever contain a measure that would later require restatement. Additionally, Liberty raised concern that the CLEC proposals provided no guidance in determining what is an adequate level of

accuracy; i.e., the level at which no payment would be required and the payment scale that would properly correlate to the severity of any inaccuracy.

Moreover, Liberty contended the QPAP should **encourage** correction where warranted, not discourage it by imposing potentially severe penalties. The better way to deal with the accuracy of reports is to include the issue of report accuracy into the risk analysis used to formulate audit plans.

Liberty was similarly skeptical of liquidated payments for an inability to meet deadlines for providing a CLEC with its specific data and concluded such payments were unwarranted. Liberty recommended the auditing program consider CLEC-specific and CLEC-aggregate data in its planning.

As to the appropriate payment levels, Liberty concluded that ZTEL's proposal would produce penalties that are unreasonable on its face. While it found the Texas payment approach to bear a much closer relationship to what is reasonable, it also considered the fact that Qwest, unlike SBC (which includes both the old Southwestern Bell and Ameritech states), is approaching its 271-authorization process on a regionwide basis. The Texas Commission and the FCC may not yet have considered the effect of accumulating payments from the same reporting process, but that does not mean that they will not consider this issue if the number of SBC states where 271 approvals have been granted grows.

Liberty thus found it reasonable to examine payments in the context of the way that Qwest will make reports, which is on a 14-state consolidated basis, rather than on an individual report basis. Assuming all 14 states, the payment levels that Qwest

proposes are substantial, but Liberty suggested that a question still existed about whether an inducement of even that magnitude would be sufficient. The $70,000 payment that Qwest used as an example is not large when compared with the amount of time and effort that will be necessary to produce QPAP monthly reports. Liberty concluded that payments at that level should be sufficient to deal with small delays, but should escalate over time. Recognizing that the QPAP already includes a grace period of one business week (five days), Liberty recommended the payments escalate as follows:

- Second-week reports: $500/day
- Third-week reports: $1,000/day
- Subsequent-week reports: $2,000/day.

Liberty reasoned that Qwest would still remain protected against undue growth in payments by virtue of its ability to seek a waiver of late-report payments.

The Board agrees with Liberty regarding the penalty assessment for reports that are on time but are missing performance results. Qwest would be required to pay to the State a total of one-fifth of the late report amount for each missing performance measurement, subject to a cap of the full late report amount. The Board also agrees that assessment for late reports should be limited to only one payment per report and not multiplied by the number of states and number of CLECs because the payment amounts clearly become too large.

The Board finds that assessments for inaccurate data would be difficult to set and might discourage corrections of inaccuracies discovered by Qwest. The Board is

in agreement that omissions and inaccuracies could be better addressed as part of the independent auditors area of coverage if this becomes an issue. The final payment scheme proposed by Liberty and incorporated into Section 14.3 by Qwest seems reasonable and provides an escalation process that should incent Qwest's performance.

The Board endorses the various recommendations of Liberty and approves the language of section 14.3 filed by Qwest on November 6, 2001.

VI. OTHER ISSUES

A. Prohibiting QPAP Payment Recovery in Rates (Report p. 86; Qwest initial brief p. 72; Qwest reply brief p. 47; AT&T initial brief pp. 29-30; AT&T post-report comments pp. 41-42)

In response to AT&T's argument that specific language should be added which would preclude Qwest from recovering any QPAP payments in rates, Qwest suggested such language is not necessary, because the FCC has already made it clear in prior 271 orders that PAP payments may not be recovered in interstate rates. Qwest also noted that the requirement that wholesale rates be set according to prescribed FCC pricing methods also precludes the inclusion of QPAP payments in SGAT or interconnection agreement prices.

Liberty concluded that neither the FCC nor the state commissions require guidance in how or when to determine what to do about QPAP payment recovery in rates and that no specific language need be added to the QPAP.

In its post-report comments, AT&T again urges the Board to require inclusion of the following language in the QPAP:

> 13.10 Any payments made by Qwest as a result of the PAP should not: 1) be included as expenses in any Qwest revenue requirement, or 2) be reflected in increased rates to CLECs for services and facilities provided pursuant to Section 251(c) of the Telecommunications Act of 1996 and priced pursuant to Section 252(d) of the Telecommunications Act of 1996.

AT&T directs the Board's attention to the *New York Order* at paragraph 443, where the FCC concluded that any attempt by a BOC to recover PAP fines through increased rates would "seriously undermine the incentive meant to be created."

The Board agrees with Liberty's conclusion that no specific language is necessary to provide guidance in this matter. This is more properly an issue for consideration in a rate case. As such, a state commission or board should consider this issue on a case-by-case (state-by-state) basis and AT&T should make its arguments at that time.

The Board endorse Liberty's conclusion that no specific language relating to rate recovery is necessary within the QPAP.

B. No-Admissions Clause (Report pp. 86-87; ELI/Time Warner/XO initial brief pp. 22-23; Covad initial brief pp. 44-45; Qwest reply brief pp. 51-52)

ELI/Time Warner/XO and Covad argued that measurements under the PID document and payments based on them should be admissible as evidence in other proceedings. Covad suggests that the prohibition on use of evidence relating to Qwest's payments under the QPAP is nothing more than an attempt to impose a "gag order" on CLECs.

Liberty agreed that the objective information set forth in the performance reports is strong evidence of the characteristics of Qwest's performance and that the use of that information to show what Qwest's performance actually was should not be constrained. However, Liberty concluded the language included in the QPAP does not do so. Instead, the restrictions found in section 13.4.1 apply only to the existence of the QPAP and to the making of payments thereunder. Given the multiple purposes of the QPAP and given the availability of the underlying performance data for use as evidence, this narrowly drawn provision constitutes a reasonable approach.

The specific language of Section 13.4.1 is as follows:

> CLEC may not use: 1) the existence of this enforcement plan; or 2) Qwest's payment of Tier 1 "liquidated damages" or Tier 2 "assessments" as evidence that Qwest has **discriminated in the provision of any facilities or services** under Sections 251 or 252, or has **violated any state or federal law or regulation.** Qwest's conduct underlying its performance measures, however, are not made inadmissible by its terms.

The Board finds that the language of Section 13.4.1 specifically indicates that Qwest's conduct can be used by the CLEC to show Qwest's performance level. The restriction is very limited and specific and the Board finds the restriction to be appropriate. As Qwest notes, many of the standards used to determine payment obligations under the QPAP exceed obligations it would otherwise be required to meet.

The Board endorses the recommendation of Liberty and adopts the language of Section 13.4.1 as shown above.

C. Qwest's Responses to FCC-Initiated Changes (Report p. 87; Qwest initial brief pp. 40-41; Qwest post-report comments p. 16)

Qwest proposed three changes it maintained were the result of informal FCC input. These included:

- Eliminating two families of OP-3 sub-measurements, so that no missed order would go uncompensated (accomplishable by striking footnote "c" to QPAP Attachment 1).
- Removing the adjustment for Commission rate orders, which adjustments had the effect of reducing the total amount at risk under the QPAP.
- Making two changes in the statistical values used to test Tier 2 parity measurements.

There were no objections to these changes by any participant. They should be incorporated into the QPAP.

The Board should endorse the recommendation of Liberty that these changes be incorporated into the QPAP.

D. Specification of State Commission Powers (Report p. 87; Qwest post-report comments p. 16)

Section 12.3 provides that a state commission may recommend to the FCC that Qwest be prohibited from offering in-region interLATA services to new customers in the event that the annual cap is reached.

Liberty noted that apart from the QPAP, a state commission could recommend such relief for innumerable reasons other than the fact that Qwest reaches an

arbitrary cap in a performance plan. A state commission could also recommend some other relief when Qwest reaches a cap. Liberty viewed this section as utterly valueless in providing state commissions with any power that they do not already possess.

Further, Liberty suggested that it could only be read as an indication that a state commission approving the plan has agreed in advance that it would self limit its authority to respond to future circumstances. That not being the case, the provision should be stricken in order not to cloud the legitimacy of or weight to be given to any future state commission action other than the ones recited in the QPAP.

The Board endorses the recommendation of Liberty that Section 12.3 (as proposed by Qwest in its initial filing) be eliminated.

SUMMARY

Assuming Qwest implements each of the conclusions as directed by the Board throughout this conditional statement, the Board is prepared to indicate at this time that the QPAP will provide assurance that the local market will remain open after Qwest receives approval from the FCC to provide in-region interLATA service in Iowa. Additionally, the QPAP is likely to provide incentives that are sufficient to foster post-entry checklist compliance. This conditional statement indicating these

requirements are satisfied is subject to the same limitations noted earlier in this statement related to other proceedings and processes.

UTILITIES BOARD

/s/ Diane Munns

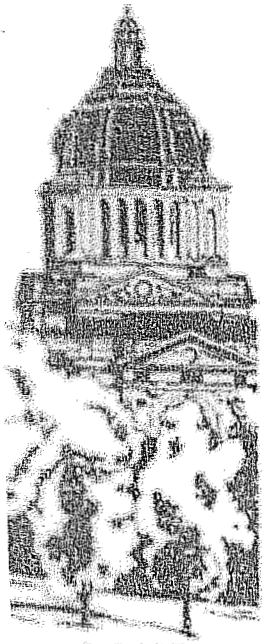
/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 7th day of May, 2002.



South Dakota Public Utilities Commission

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Keith Senger
John Smith
Rolayne Ailts Wiest

May 9, 2002

Cheri McComsey Wittler
Precision Reporting Ltd.
105 S. Euclid Ave.
Pierre, SD 57501

RE: In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996
TC01-165

Dear Ms. McComsey Wittler:

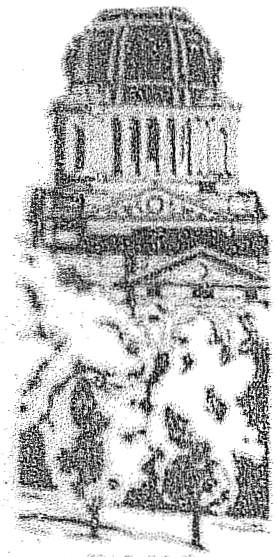
Enclosed please find Staff's exhibit #5. This is a late-filed exhibit that is being submitted pursuant to a request for information at the above referenced hearing. By a copy of this letter and exhibit, I am serving the parties of record. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Karen E. Cremer

Karen E. Cremer
Staff Attorney

cc: Parties of Record



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South Dakota

Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

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MAY 13 2002

SOUTH DAKOTA PUE
UTILITIES COMMISS

May 9, 2002

Debra Elofson
Executive Director
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

RE: In the Matter of the Investigation into Qwest Corporation's Compliance
Section 271 of the Telecommunications Act of 1996
TC01-165

Dear Ms. Elofson:

During the hearing of the above-captioned matter the question of the time pe
pertaining to Verizon's 80,000 lost orders was asked of Mr. Stacy, Staff's wi
Staff's response is as follows:

> The 80,000 orders were lost within the first month after 271 relief.

Please file this in the above referenced docket.

Sincerely,

Karen E. Cremer

Karen E. Cremer
Staff Attorney

cc: All parties of record

EXHIBIT
Staff
5
5-13-02 CW

ride the light

Qwest

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SOUTH DAKOTA PU
UTILITIES COMMIS

May 10, 2002

Ms. Rolayne Ailts-Wiest, General Counsel
Public Utilities Commission
State Capitol Building
Pierre, South Dakota 57501

Dear Ms. Wiest:

Qwest Corporation is attaching to this letter Exhibit 80 to be included in the record of the 271 proceedings. This exhibit was offered by William Richardson on April 30, 2002.

Sincerely,

Colleen E. Sevold

Colleen E. Sevold
Manager-Policy & Law

CC: Mary Hobson
Greg Bernard
Dave Gerdes
Karen Cremer
Buster Griffing
Mark Stacey
Steve Weigler

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION
Case No. USW-T-00-3

In the Matter of U S WEST Communications, Inc.'s Motion for an Alternative Procedure to Manage the Section 271 Process

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD
Docket No. INU-00-2

IN RE:
U S WEST COMMUNICATIONS, INC.

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA
Docket No. 20000.5.70

IN THE MATTER OF the Investigation Into
U S WEST Communications Inc.'s Compliance with
Section 271 of the Telecommunications Act of 1996

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION
Case No. Docket C-1830

IN THE MATTER OF QWEST CORPORATION FILINGS ITS
NOTICE OF INTENTION TO FILE SECTION 271(C)
APPLICATION WITH THE FCC AND REQUEST FOR
COMMISSION TO VERIFY QWEST CORPORATION'S
COMPLIANCE WITH SECTION 271(C)

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION
Utility Case No. 3269

IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S SECTION
271 APPLICATION AND MOTION FOR
ALTERNATIVE PROCEDURE TO
MANAGE THE SECTION 271 PROCESS

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Case No. PU-314-97-193

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U S WEST Communications, Inc.
Section 271 Compliance
Investigation

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING
Docket No. 70000-TA-00-599

IN THE MATTER OF THE APPLICATION OF
QWEST CORPORATION REGARDING 271 of
THE FEDERAL TELECOMMUNICATIONS ACT
of 1996, WYOMING'S PARTICIPATION IN A
MULTI-STATE SECTION 271 PROCESS, AND
APPROVAL OF ITS STATEMENT OF
GENERAL AVAILABLE TERMS

BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

Docket No. UT-003022
In the Matter of the Investigation Into

U S WEST COMMUNICATIONS, INC.'s

Compliance With Section 271 of the
Telecommunications Act of 1996

Docket No. UT-003040
In the Matter of

U S WEST COMMUNICATIONS, INC.'s

Statement of Generally Available Terms Pursuant to
Section 252(1) of the Telecommunications Act of 1996

VOLUME 10

Pursuant to agreement, the Technical Works was held at 8:04 a.m., August 27, 2001, at The Warwick Hotel, Denver, Colorado, before facilitator John Antonuk.

APPEARANCES

(As noted in the transcript.)

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record now. We'll break for 15 minutes.

(Recess taken from 4:33 p.m. to 4:55 p.m.)

MR. ANTONUK: Let's resume with Ms. Reily.

MR. DIXON: I want to note I will be leaving the workshops for Tuesday and Wednesday and I understand things can go on. Mr. Warner may try and be present but I don't want anybody to think that I snubbed anybody; I just have to go to another job.

MS. REILY: We'll struggle on.

DIRECT EXAMINATION

BY MS. REILY:

Q Dr. Griffing, will you state your full name and business address for the record, please?

MR. ANTONUK: Have you been sworn?

MR. GRIFFING: Earlier workshops not this one.

MR. ANTONUK: Let's start again in case it's getting a little stale.

MARLON GRIFFING,

having been first duly sworn, was examined and testified as follows:

MR. ANTONUK: Okay, Ms. Reily, I'm sorry.

Q (BY MS. REILY) Now, could you please state your true name and business address for the record, please?

MR. ANTONUK: None of that false identity you were going to give us a minute ago.

A I am Dr. Marlon Griffing. I am commonly known as Buster, a name that precedes my birth and my mom still loves me and I love her. I live at 1735 Crestline Drive in Lincoln, Nebraska.

Q And you are the Dr. Marlon Griffing that prefiled testimony regarding Qwest QPAP in this case on behalf of the New Mexico advocacy staff?

A Yes.

Q Could you briefly summarize your background and witness qualifications, leaving your mother out of it, please?

MR. ANTONUK: Although I'm dying to hear what she's got to do with it.

MR. DIXON: She probably helped prepare

the testimony.

THE WITNESS: She could, but she didn't.

A I have a Ph.D. in economics from the University of Nebraska, Lincoln. I worked two years as an economic analyst at the Nebraska Public Service Commission before going to work as a senior analyst for QSI Consulting. The New Mexico Public Regulation Commission advocacy staff has hired QSI and I'm providing consulting services under that contract.

Q In addition to your prefiled testimony, do you have testimony responsive to the live testimony given by Qwest's witnesses in session 9 week before last?

A I do; I have some responses to the testimony of Carl Inouye. Sorry, that goes back to it's Inouye but -- but the senator from Hawaii and the Watergate hearings, it's like a duck seeing its mother or something.

There are three issues that relate to economics I would like to discuss and one other about

21 governance.

22 Mr. Inouye in his testimony focused a lot

23 on the costs or the payments to CLECs relative to the

24 cost of CLECs and I would like to state that the

25 better rule here, the first rule in economics is we

1 look at marginal benefit versus marginal cost of the

2 economic agent we're trying to change the behavior of

3 or influence the behavior of.

4 And first and foremost, that's Qwest. So

5 we need to look at Qwest's marginal benefit and its

6 marginal cost of certain actions in this case whether

7 or not they comply with a QPAP standards of

8 performance for various performance measures.

9 This rule is often stated as marginal

10 revenue equals marginal costs. In economics you get

11 it in principles, you get it in intermediate and you

12 get it in graduate school and it goes from text to

13 graphs to calculus but the point is the same. You

14 compare the cost of the actor to the benefits of the

maximizing company, we would expect Qwest to go ahead and not comply.

Now, how do we determine what is enough in the form of payment? We could do extensive studies, we could do market share analysis and predict that Qwest will gain X number of customers or retain X number of customers from non-compliant behavior. We could compare that to the costs or we can let payment penalties for individual performance measures and overall that is not have a cap on overall payments rise to meet the level necessary.

The advantage of that is it's administratively much simpler. You don't have to devote teams of people like me or marketing specialists or whoever to try and predict the future. You let the actions occur as necessary.

If Qwest, just for example, not saying

this will happen, continues to perform below a compliance standard for a particular performance

measure for six, seven, eight consecutive months, it's probably a safe assumption that with the rising costs their marginal revenues from that non-compliance are greater than their marginal costs.

So if we let the costs rise to meet the revenues, the problem will take care of itself. The same with a total cap. If you cap the total payments, you've set a cap on the marginal cost to Qwest. It's a rule of economics that if you have something priced too low, they will -- or they will produce too much of it in relation to the revenues.

So I think it's important that we don't have caps on either of the form of a top payment for individual performance measures capped after six months of consecutive performance or for an overall cap.

Moving to the second point, and this is where Qwest may have a point. There is a concept in economics called moral hazard. That's where you get economic agents undertaking actions, especially when they cannot be monitored contrary to what would otherwise be expected of them or what is contrary to public policy.

Qwest's point has been that CLECs if the payments for Tier 1, payments get too high, CLECs will have an incentive to cause non-compliance, they'll gain the system somehow, save up all their orders, send them all in at once, take actions that they otherwise wouldn't do with supposedly the incentive that they'll gain more from having failure than they will have having Qwest comply.

This is possible. It could happen. But again, you would have to do extensive studies of what CLEC costs were to pin those down and get a good number.

MR. ANTONUK: Aren't you looking at exactly the other side of the same coin in terms of looking at marginal cost versus marginal benefits if Qwest incentives can be said to be a matter of netting gain and loss? Isn't that exactly true for CLECs if you get a penalty structure that sort of gets out of proportion to their costs?

THE WITNESS: It is. Let me go on a little bit.

MR. ANTONUK: Go ahead.

THE WITNESS: It's certainly possible. However, I think it's only a short-term strategy. A phone company gets in, hits and runs and takes the

money off. I don't think if you're in the business for the long run, a strategy of causing poor performance for your own customers is going to work.

I think you start to lose more customers and your profits start to fall faster than any additional profits you get from payments being too high relative to your costs.

MR. ANTONUK: And again, though, isn't there an analog on Qwest's side which is if they are out of compliance for more than fairly brief and fairly temporary periods of time, they start to get into a whole series of long-range problems, too, like losing credibility with the FCC, losing 271 authority

all together, initiating -- having seen and the federal government initiate a whole host of parallel enforcement actions. Qwest has some of that same kind of limits on its behavior as well, don't they?

THE WITNESS: Yes.

MR. ANTONUK: The reason I'm asking you about this because I sort of -- I think when someone was testifying last week I forget who it was, I started to get this whole sense that there is to some degree a two-way street here in terms of incentives and in terms of collateral harms on, you could die worst, so I will, immoral behavior and I'm not suggesting

that there is an equation there but it seems to me a lot of this stuff does cut both ways.

THE WITNESS: Sure. The damage from publicity of a year's worth of consecutive non-compliance might hurt as much as the rising payment. It's fairly easy to quantify the rise in payment and to let it rise. In fact, you can let it rise and

assume there's an unknown component that represents this bad publicity, the threat of other actions being taken, and that's your total cost, not just the explicit cost. But it's also possible if you cap the explicit cost, the combined cost, the unknown part and the explicit part won't rise to the level where the marginal revenue to Qwest is exceeded.

MR. ANTONUK: Do you think anybody on this record has presented convincing evidence of where the CLECs' breakpoint is and where Qwest's breakpoint is before we start to sort of talk about these sort of secondary limiters?

THE WITNESS: No, I don't. And it's hard. I think that's one reason it hasn't happened. That's why I'm not -- I wouldn't advocate spending a lot of time trying to calculate the exact profit margins, the exact costs, when you've got this easy mechanism of no caps on either performance and exposure or

overall payments that you can just let go to sort of

a this isn't really a market but it works sort of like a market price, it will rise to the point it needs to to stop Qwest from being non-compliant.

MR. ANTONUK: And I understand your point very much. Let me just sort of -- I'm really testing out some things I've been thinking on you here. Things tend to float to an equilibrium. And it seems to me if we were to be able to take as a given that every performance measure that has financial cost was set at a level that reflects some kind of economic equilibrium, there would be potentially a great deal of appeal in what you're saying. But here is my problem with that. The parity measures I think I can at least see conceptually why they reflect sort of an equilibrium because they reflect kind of the same ways and cost of doing business for CLECs that Qwest does for itself. Where I think I struggle a lot is the fact some of the performance measures are set as benchmarks, and I'm not sure those benchmarks were set at all with reference to kind of the economic costs of meeting them.

It's almost as if you're coming into the game in the second quarter and saying from here on

25 out; let's let economics rule but did economics rule

1 and are the -- did economics rule when those
2 benchmark measures were set, not the parity ones.
3 Now I'm talking about the ones that specifically say
4 90 percent within X days, so many seconds, so many
5 days. Tell me what you think about that part of it.
6 Because that's where in exploring the theory that
7 you're talking about now I think I run into a
8 stumbling block for me.
9 You know, if those can't float at some
10 level and change to some degree based on experience,
11 then I'm not sure you can assume that Qwest is
12 violating a rule merely because it's cheaper to do
13 that while it still makes a profit. It may be
14 cheaper to do it, but it may not be possible for
15 Qwest to compete if it has to meet those standards
16 with ever-increasing penalty levels. Does that make
17 any sense?
18 THE WITNESS: Yes. And my reply would be

the benchmarks were set in the OSS test collaborative. Qwest agreed to every one of those because I think subject to correction, certainly the great majority of them in negotiations between -- with the CLECs and the states being present, thus as an economist you can say Qwest looked at this, factored in its cost because it knows its own costs

better than anyone else and said the benefit from getting 271 approval which we will get only by this OSS test, and they must have known the trend in place at the time that OSS tests would turn into or at least heavily influence the QPAP's structure would say, now we know it's going to cost us this down the road. We're going to have to put this much into programming, this much into personnel and so on. But you know that carrot out there is enough to make it worth it.

MR. ANTONUK: But that's my point. I don't think they did know when they said 90 percent

is okay or X days is okay. They didn't know how much it was going to cost them. They knew I'm sure at least to some degree operationally what it was going to mean to have to comply with that. But if the price they have to pay to do that, what you're saying is it could be in an order of magnitude higher of what they ever could have conceived of?

THE WITNESS: That can happen to anyone. You can miss, underestimate your costs going in. Any business that can happen to. I don't think it's our role to correct Qwest's underestimation of its own cost if in fact that's what has happened.

MR. ANTONUK: Well --

THE WITNESS: And there are mechanisms or there should be, will be, the six-month review and other things, procedural caps if they're included that would cut both ways. I don't see those as just opportunities for CLECs to make Qwest pay more.

If we get a record where Qwest is going

out of business because they're, I don't know, paying $100 million a month in QPAPs it's not designed to even allow for that but something outlandish like that we've got the procedural cap that triggers a review. And if it turns out the payments have been set too high, they can go down.

MR. ANTONUK: Okay.

A Returning to moral hazard for a moment. If indeed the CLEC payments are too high relative to what their costs are, the appropriate response is not to just lower the Tier 1 payments but to lower them, remove the moral hazard, the wrong incentive for CLECs, but at the same time look at or definitely raise the Tier 2 payments because what Qwest looks at when it calculates its marginal costs of the action is not just Tier 1 but Tier 1 plus Tier 2.

And there is another good economic case of why costs or profits to CLECs might be less than costs or profits to Qwest for the same customer, the

CLECs would be as they gain customers, the market would become more competitive, everybody's profits would be falling. Qwest is a monopolist. It starts out at a higher profit per customer level. They've got more to lose.

Therefore, you've got this disconnect. You've got to somehow bridge this gap between CLEC gain and Qwest gain in order to get Qwest's attention. That's part of at least the rationale behind the Tier 2 payments. That's one of the things that is not easy to measure. Simply said, Tier 2 will make up that gap.

So if you're going to lower Tier 1, at the same time you ought to think about raising Tier 2 or at least let the sum of them rise so that the joint marginal cost of Tier 1 and Tier 2 payments for Qwest can rise if it's necessary, if a record of noncompliance continues, non compliance ensues.

We've only seen Qwest suggest that Tier 2 payments should be reduced. Not any of the discussion like this. If you're going to talk about reducing Tier 1 payments then you've got to talk about allowing Tier 2 payments to rise.

23 about allowing Tier 2 payments to rise.

1 behavior to be motivated by a desire for its own gain
2 or for a desire to penalize a competitor
3 economically, by moving into Tier 2, you're not
4 taking Qwest off the hook at all but you're removing
5 at least half of that two-pronged potential CLEC
6 incentive?
7 THE WITNESS: Right, right.
8 MR. ANTONUK: Okay. I understand now.
9 A The third economic point, the effective
10 date of the QPAP, I advocate a QPAP that goes into
11 effect before approval by the FCC of Qwest 271
12 application in any state. There is going to be a gap
13 of at least four months by my calculations, which
14 I'll go through, following the completion of OSS
15 testing, which Mr. Inouye said served as an incentive
16 for Qwest to get its compliance rate up. And I agree
17 completely with that. Then once they get approval,

Black Hills Corporation
Energy, communications...and you

LINDEN R. EVANS, P.E.
Associate Counsel

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RECEIVED
MAY 13 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

May 7, 2002

Ms. Debra Elofson
Executive Director
Public Utilities Commission
Capitol Building, First Floor
500 E. Capital
Pierre, South Dakota 57501-5070

Re: In the Matter of the Analysis Into Qwest Corporation's Compliance With Section 271(C) of the Telecommunications Act of 1996
Docket No. TC01-165

Dear Ms. Elofson:

Enclosed for filing are the original and ten copies of a Notice of Appearance of Additional Counsel on Behalf of Intervenor Black Hills FiberCom, L.L.C., copies of which have been served upon all parties of record as indicated on the Certificate of Service.

Thank you very much and please call me with any question you may have.

Sincerely,

BLACK HILLS CORPORATION

Linden R. Evans

LRE/ls

Enclosure

Cc: Gregory J. Bernard (w/encl)
Karen Cremer (w/encl)
Mary S. Hobson (w/encl)
Steven H. Weigler (w/encl)
David A. Gerdes (w/encl)
Harlan Best (w/encl)

RECEIVED
MAY 13 2002
SOUTH DAKOTA PUBL
UTILITIES COMMISSIC

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	**Docket No. TC01-165**

NOTICE OF APPEARANCE OF ADDITIONAL COUNSEL ON BEHALF OF INTERVENOR BLACK HILLS FIBERCOM, L.L.C.

Intervenor Black Hills FiberCom, L.L.C. hereby submits notice of the appearance of additional counsel in this matter, and requests that all future pleadings, correspondence (including emails) and contacts related to this matter be directed to the following counsel as one of the attorneys on behalf of Intervenor Black Hills FiberCom, L.L.C.:

Linden R. Evans

(Street Address)
Black Hills Corporation
625 Ninth Street, 6th Floor
Rapid City, SD 57701

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Black Hills Corporation
P.O. Box 1400
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Tel: 605.721.2305
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Dated this the 14 day of May 2002.

BLACK HILLS CORPORATION

By: Linden R. Evans

Linden R. Evans
P.O. Box 1400
625 Ninth Street, 6th Floor
Rapid City, SD 57701

Attorney for Black Hills FiberCom, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May 2002, true and corrected copies of NOTICE OF APPEARANCE AND SUBSTITUTION OF COUNSEL ON BEHALF OF INTERVENOR BLACK HILLS FIBERCOM, L.L.C. were sent to the following:

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Lindon R. Evans

CONTINUATION

[3]

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RECEIVED
MAY 14 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

May 13, 2002

Via Overnight Mail

Debra Elofson
Executive Director
SD Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

Re: In the Matter of the Analysis into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, TC01-165

Dear Ms. Elofson:

Enclosed for filing are the original and ten copies of an AT&T's Motion to Reopen Proceedings. Please call me if there are any questions.

Sincerely,

Gary B. Witt/jb

Gary B. Witt

GBW/jb

Enclosure

cc: Service List

RECEIVED
MAY 14 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	**Docket No. TC01-165**

AT&T's MOTION TO REOPEN PROCEEDINGS

AT&T Communications of the Midwest, Inc. ("AT&T") submits the following Motion to Reopen Proceedings in the above-referenced docket. By this Motion, AT&T seeks an order from this Commission reopening the record in these 271 proceedings in order to allow admission of additional evidence relating to certain unfiled, secret agreements between Qwest and some new entrants. These agreements relate directly to the provision of interconnection services by Qwest, but were not filed as they should have been in accordance with 47 U.S.C. §§251 and 252. As grounds for this Motion, AT&T states as follows:

BACKGROUND

In February, 2002, the Minnesota Department of Commerce ("DOC") filed a complaint against Qwest Corporation before the Minnesota Public Utilities Commission ("MPUC").[1] The DOC's complaint alleges that between July 14, 1999, and July 3, 2001, Qwest Corporation and its predecessor U S WEST (collectively and separately "Qwest") entered into a series of confidential agreements with competitive local exchange carriers ("CLECs") that Qwest was required to file with the MPUC under 47 U.S.C. §252. The complaint identifies eleven (11) such agreements containing twenty-four (24)

[1] *See In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation Regarding Unfiled Agreements*, Before the Minnesota Public Utilities Commission, MPUC Docket No. P-421/C-02-197, OAH Docket No. 6-2500-14782-2.

independent provisions that Qwest was required to file, but failed or refused to file. The complaint alleges that by making the terms and conditions set forth in these agreements available only to the party CLEC and not to other CLECs, Qwest violated the nondiscrimination provisions of the federal Telecommunications Act (the "Act") found at 47 U.S.C. §251(b) and 47 U.S.C. §251(c).

The complaint further alleges that Qwest's violations of 47 U.S.C. §§251 and 252 were knowing and intentional. Accordingly, the complaint asks for a finding that Qwest engaged in anticompetitive conduct, and for penalties and other remedies.

At present, none of the agreements which are the subject matter of the DOC's complaint are currently on the record here. However, AT&T submits here that such agreements should be considered in these instant proceedings, because they directly relate and refer to: a) Qwest's inability and lack of willingness to provide interconnection on a nondiscriminatory basis; b) violations of federal law by Qwest, which carry public interest implications affecting Qwest's application for authority to provide interLATA services under 47 U.S.C. 271; and c) the silencing of Qwest's opponents in these and other section 271 proceedings, which Qwest specifically bargained for and sought, and which now impugns the completeness and integrity of the record in this case.

AT&T's Motion seeks to reopen these proceedings so that the Commission may take further evidence and decide whether and to what extent these agreements may have hindered or otherwise adversely affected the Commission's decision-making on various

checklist items, and the public interest determination.

ARGUMENT

A. The agreements at issue here directly reflect upon Qwest's unwillingness and inability to provide interconnection on a nondiscriminatory basis.

AT&T's review of the agreements at issue here reveals that each of them directly reflects upon Qwest's unwillingness and inability to provide interconnection to CLECs on a nondiscriminatory basis. More specifically, AT&T finds the following terms and conditions, while not by any means an exhaustive list, to be among the best examples of preferential treatment of some CLECs by Qwest:

1. Qwest offered Eschelon a dedicated on-site provisioning team, while offering AT&T only a single individual representative, with off-site presence, multiple additional responsibilities, and limited availability.

2. Qwest also offered Eschelon the opportunity to "consult" with Qwest in exchange for a ten percent reduction in "aggregate billed charges for all purchases made by Eschelon from Qwest," while at the same time denying AT&T's request for UNE-P testing accommodation in Minnesota.

3. Qwest provided Eschelon a $13.00 per-line per-month credit (which it later increased to $16.00) ostensibly as compensation for Qwest's failure to provide accurate recording of access minutes through its daily usage files ("DUF"), while AT&T and other carriers struggled in vain to obtain accurate recording in order to properly bill access usage.[2]

4. Qwest provided a similar $2.00 per-line per-month credit to Eschelon for intraLATA toll traffic terminating to Eschelon's switch, where Qwest knowingly provided inaccurate access records to Eschelon for this type of traffic, while forcing other carriers to negotiate each such instance from the ground up.

5. Qwest agreed to provide Covad with more favorable service interval terms than any other carrier, including AT&T.

6. Qwest offered the so-called "small CLEC coalition" in Minnesota the ability to adopt the terms of any effective interconnection agreements that

[2] AT&T is informed, and believes, that Eschelon disputes Qwest's characterization of this payment, and maintains instead that the additional $3.00 payment per line is compensation for poor service quality.

were voluntarily negotiated throughout Qwest's service territory, while requiring AT&T and other carriers to negotiate such adoption on a state-by-state basis only.

In each of these instances, Qwest provided important and useful interconnection services to one CLEC without making the same services available to others. Thus it is clear that Qwest has engaged in discrimination and preferential treatment of one group of CLECs over another. What remains unclear is the extent to which other acts of discrimination have also occurred. Without a thorough investigation into the agreements at issue here, any Commission decision on Qwest's application for 271 authority will be based on an incomplete record. AT&T therefore motions to the Commission to reopen the record in this matter, and conduct the necessary investigation to determine the extent to which these agreements have resulted in harm to competitors, and to competition within the state.

B. These agreements show Qwest's willingness to violate federal law, and that in turn carries public interest implications.

Aside from the discrimination inherent in these agreements, there is also the matter of Qwest's failure and refusal to file and seek Commission approval of the agreements, in violation of 47 U.S.C. 252(e). This in turn carries important implications for the public interest analysis of Qwest's 271 application. To quote the FCC directly in this regard:

> Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anti-competitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence

> that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.[3]

As the FCC has noted, the very success of the federal Act depends on BOC compliance; however, that compliance is absent here. The negotiation and implementation of these special agreements, in secret and away from the prying eyes of competitors and regulators alike, not only undermines the potential for the Act to be successful, but also undermines the authority of this Commission, and the integrity of the record in this case.

Qwest has repeatedly asserted on the record that it is providing nondiscriminatory interconnection throughout the state. Indeed, that is one of the fundamental elements of its 271 application.[4] Yet, the evidence here is suddenly to the contrary. Interconnection is in fact not being provided in a nondiscriminatory manner. Moreover, other carriers—unaware of the existence of these special agreements—were unable to contradict the assertions of Qwest in this regard. As a result, the record here misrepresents the true state of competition. Furthermore Qwest is responsible for that misrepresentation, because Qwest has the burden, under the Act, to file these agreements and seek Commission approval for them. By failing to do so, and then representing itself as being in compliance with the federal Act, Qwest is attempting to deceive not only this Commission, but its competitors and the public at large as well.

In addition, the simple fact is that by failing and refusing to file these agreements and seek approval for them, Qwest has also flaunted the authority of the Commission.

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[3] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997), at para. 397.

and undermined the Commission's ability to properly regulate a monopoly carrier, in accordance with the public interest.

At the very least, the discovery of these special agreements warrants further investigation. The question of whether these proceedings have been tainted by misrepresentations by the applicant Qwest is of vital importance to maintaining the Commission's integrity, and a proper respect for the truth.

C. The attempt by Qwest to silence its opponents in these and other proceedings impugns the integrity and completeness of the record in this case.

In at least one instance, Qwest bargained for and received a promise from one of its competitors—Eschelon—to be silent and refrain from opposing Qwest's 271 application in all fourteen states. Thus, by giving preferential treatment to one of its competitors, Qwest not only discriminated against its other competitors, but silenced an important critic in the very proceedings intended to open the local market to all competitors.

This is yet another reason for concern over the integrity and completeness of the record in this case. Qwest's actions here have actively precluded the Commission from hearing evidence from a potential witness or group of witnesses.

Now that these agreements have been made public in Minnesota—in other words, now that it is no longer subject to Qwest's gag order—Eschelon has come forward with evidence of Qwest's anticompetitive conduct, including:

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[4] For example, the testimony of David L. Teitzel purports to provide details of the various interconnection agreements entered into between Qwest and new entrants. Then, relying upon these facts, Qwest claims to have fulfilled the public interest and track A requirements of the Act.

- The continuing failure of Qwest over a period spanning a year and a half to convert resale lines to UNE-E, in violation of its interconnection agreement;
- A lack of proper support and training for Qwest personnel handling orders for UNE-E service;
- A failure by Qwest to provide accurate daily usage files ("DUF") from which Eschelon can bill interexchange carriers access charges;
- Qwest's reporting of Eschelon's UNE-E lines as UNE-P lines for purposes of the Regional Oversight Committee ("ROC") Performance Indicator Definition ("PID") data, even though the conversion from UNE-E to UNE-P has not yet occurred.
- Qwest's reporting of nearly perfect billing accuracy rate in the PID data, despite the fact that all of the UNE-E rates billed to Eschelon from Qwest are inaccurate.
- Harm to Eschelon and to end-users resulting from Qwest's misrepresentation of UNE-P's availability.
- Harm to consumers and competitors as a result of Qwest's refusal to provide adequate and timely testing.[5]

AT&T believes that the inclusion of evidence from Eschelon and other similar carriers is vital to maintaining the integrity of the record in this case. So long as that record is flawed as the result of Qwest's actions, a proper decision concerning Qwest's 271 application simply will not be possible.

[5] *See* Affidavit of J. Jeffery Oxley, attached here as Exhibit A.

Indeed, the credibility of this Commission is at stake here as well. It is up to the Commission to correct the situation which has developed here.

CONCLUSION

For all of the foregoing reasons, AT&T seeks an order from this Commission reopening these proceedings so that the Commission may take further evidence and decide whether and to what extent these referenced agreements may have hindered or otherwise adversely affected the Commission's decision-making on various checklist items, and the public interest determination.

Respectfully submitted this 13th day of May, 2002.

AT&T COMMUNICATIONS
OF THE MIDWEST, INC.

By: _____

Mary B. Tribby
Gary R. Witt
Steven H. Weigler
AT&T Law Department
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202
(303) 298-6163

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF MINNESOTA

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis Reha	Commissioner

In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation	PUC Docket No. P-421/C-01-391 OAH Docket No. 12-2500-14382-2

AFFIDAVIT OF
J. JEFFERY OXLEY

I, J. Jeffery Oxley, being duly sworn, state:

1. I am Vice President, General Counsel, and Corporate Secretary for Eschelon Telecom, Inc. I am testifying to facts that show the harm caused to Eschelon, other Competitive Local Exchange Carriers (CLECs), and customers by Qwest's conduct in delaying AT&T's UNE-P test and engaging in anti-competitive conduct.

UNE-P Lines

2. Eschelon has less than 200 UNE-Platform ("UNE-P") lines in Minnesota. Throughout the states in which Eschelon operates in Qwest territory, Eschelon has less than 350 UNE-P lines, including the UNE-P lines in Minnesota.

UNE-E or UNE Star Lines

3. The remainder of Eschelon's Off-Net lines[1] are virtually all priced according to a product that has been referred to as UNE-Eschelon ("UNE-E") or UNE Star.[2] Eschelon orders UNE-E from Qwest pursuant to the Interconnection Agreement Amendment Terms between Qwest and Eschelon dated November 15, 2002.

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[1] Eschelon has its own switch in Minneapolis for providing voice service. When using its switch to serve its customers, Eschelon orders collocation, loops, etc., from Qwest. In some cases (particularly when a customer is outside of the area served by Eschelon's switch), Eschelon also orders UNE-E, UNE-P, or resale from Qwest to serve customers. Eschelon often refers to customers and lines served through Eschelon's own switching facilities as "On-Net" or "On-Switch" and customers and lines served through UNE-E, UNE-P, or resale as "Off-Net." Roughly 40% of Eschelon's lines in Minnesota are Off-Net.

[2] Qwest refers to the product as "UNE Star" or, when provided to McLeodUSA, as UNE-McLeod ("UNE-M"). *See* Qwest Corporation's Verified Answer to the Complaint of the Minnesota Department of Commerce, *In re. Complaint of the Minnesota Department of Commerce Against Qwest Corporation*, Docket No. P-421/C-02-197, ¶ 7, p. 12 (March 1, 2002). Qwest indicated that "Eschelon and McLeodUSA are the only two CLECs that operate in Minnesota" that have UNE Star lines. *See id.*

("UNE-E Amendment"), and two amendments dated July 31, 2001, all of which were approved by the Minnesota Public Utilities Commission ("PUC" or the "Commission") (collectively "UNE-E Amendments"). UNE-E was presented as an alternative combination with rates lower than resale that would allow Eschelon to bill and collect access charges, which is not available with resale.[3] Unlike UNE-P-POTS (for which service is measured), UNE-E is flat rated up to a certain number of minutes (*i.e.*, there is no usage component for local usage). *See* UNE-E Amendment, Att. 3.2, pp. 9-10.[4]

4. The UNE-E Amendment required Qwest to convert Eschelon's base of customers to UNE-E. *See* UNE-E Amendment ¶¶ 2.1 & 3.1. Nonetheless, nearly a year and a half later, Eschelon still receives resale bills for those lines, instead of accurate UNE-E bills. Eschelon orders a business line per the UNE-E Amendments, but Qwest provides Eschelon with a bill that does not reflect any of the UNE-E rates in the UNE-E Amendments. Instead, the bill shows rates that reflect the retail rate minus the wholesale discount. The UNE-E price is then determined by a mathematical calculation to reconcile the resale bills to the UNE-E price. The application of the calculation has been the subject of debate, and the amount due has had to be negotiated. The amount due using this process is an approximation and not an accurate rendering of the correct rate. Qwest instructed Eschelon to pay the resale bill. Qwest would issue credits to Eschelon for the difference between the resale bill and the smaller amount that Eschelon should have been billed for UNE-E lines. In other words, no conversion occurred, and in reality, UNE-E is the same as resale from an ordering, provisioning, and billing perspective. UNE-E is different from resale only in that the UNE-E pricing is applied with a mathematical calculation, and Eschelon is entitled to bill for access (although Eschelon is not getting complete information to do so, as discussed below).

5. The manual calculation and negotiation process for UNE-E bills was supposed to be an interim process. When Qwest and Eschelon first entered into the UNE-E Agreement in November of 2000, Qwest said that Eschelon would continue to receive a resale bill until Qwest implemented a process for UNE-E billing. Qwest estimated that this process would be in place by at least the first quarter of 2001. But, the process is still not in place, and Eschelon continues to receive resale bills for UNE-E lines today. One hundred percent of the bills rendered to Eschelon for UNE-E lines have been wrong.

6. Qwest has provisioned the UNE-E product using a manual process with a known 50% - 70% error rate. From August through October of 2001, Eschelon reviewed service order completion notices to identify order errors and identified an error rate of approximately 50%. Qwest rejected orders in error or removed features without Eschelon's knowledge, and Qwest's translations personnel were unfamiliar with the proper process for translating the UNE-E product in the switch. Many of the errors

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[3] Although UNE-P allows CLECs to receive access payments and has lower rates than resale, UNE-P was not, as a practical matter, available to Eschelon, based on Eschelon's experience with the UNE-P trial orders. *See infra* ¶¶ 13-19.

[4] There are usage charges for originating and terminating long distance calls for UNE-E, as for UNE-P, the CLEC pays only originating access. In addition, although UNE-E was supposed to be distinguishable from UNE-P because it is flat-rated, Eschelon has learned that UNE-E Centrex is also flat-rated. *See* http://www.qwest.com/wholesale/pcat/megapartner.html ("Until Qwest systems are able to record and bill actual usage information, Shared Transport Originating MOU and Local Switching Originating MOU will be billed at a flat monthly rate based on assumed MOU.").

resulted in adverse end-user customer impact (including repair issues, because the customers did not always experience the impact of the error until some time after the order activity). Eschelon objected to the adverse customer impact and the amount of resources that Eschelon had to expend on dealing with these errors. Eschelon was forced to escalate virtually every problem. In November of 2001, Qwest took over the resource-intensive manual review of the UNE-E service orders. I attended a meeting during which Toni Dubuque and Chris Siewart of Qwest told Eschelon that, in November, Qwest's error rate for UNE-E service orders was approximately 70%. Qwest has not reported an error rate to Eschelon since then. Although the error rate is high, Qwest's internal review has substantially reduced the number of errors that adversely impact end-user customers. Some customer-affecting problems still occur, however. As long as Qwest continues the review of the UNE-E service orders,[5] the adverse customer impacts should not occur as frequently. If Qwest discontinues its review, however, experience shows that the problems will re-surface.

7. Eschelon was experiencing even more provisioning problems when first using UNE-E. UNE-E essentially provides Centrex functionality on a POTS product. Initially, Qwest required Eschelon to order the needed Centrex-line features on a IFB. Significant problems arose when a customer was moving to UNE-E from a Qwest IFB, often because the features did not interact properly. Qwest told Eschelon that these problems would be addressed by ordering the IFBs with Custom Calling Management System (CCMS). On July 31, 2001, Qwest and Eschelon entered into two amendments to the interconnection agreement (relating separately to recurring and non-recurring charges) to modify the product to allow ordering of IFBs with CCMS. *See* UNE-E Amendments. These amendments were supposed to alleviate the provisioning problems without requiring a change in platform, for which Qwest charges higher rates. The majority of Eschelon's UNE-E lines require use of IFB with CCMS. After signing the Amendments, Qwest operational personnel informed Eschelon that CCMS is an old product that the product manager actually wanted to retire and that few people at Qwest are knowledgeable about it. This is consistent with the problems that Eschelon has experienced. Both the service order and the translations personnel at Qwest appear untrained to provide the UNE-E product. Provisioning the product is requiring additional resources and manual effort by both Qwest and Eschelon. Qwest has indicated that UNE-E orders will never flow through. From a provisioning and pricing perspective, Eschelon would have been far better off using UNE-P rather than UNE-E, but for the fact Qwest could not provide UNE-P. *See infra* ¶¶ 13-19.

8. Other than some job aids, Qwest has provided little documentation to describe and support the UNE-E product. UNE-E, or UNE Star, is not identified in Qwest's Product Catalog on Qwest's wholesale website. (*See, e.g.*, http://www.qwest.com/wholesale/pcat/unep.html.)

9. Qwest is not providing complete and accurate Daily Usage Files (DUF) from which Eschelon can bill interexchange carriers access charges for UNE-E

[5] Qwest is required to continue this review process under the terms of the March 1, 2002, Settlement Agreement, which provides in paragraph 3(e) that: "Qwest shall make the UNE-E offering and existing business processes related to the UNE-E offering available to Eschelon through the current term of the Interconnection Agreement Amendment Terms dated November 15, 2000."

customers.[6] As an example, if a Qwest retail customer who has selected Qwest as the intraLATA toll PIC calls an Eschelon UNE-E local customer, Qwest should provide a record of that intraLATA toll call to Eschelon, so that Eschelon can bill Qwest for terminating access. Eschelon needs an accurate report of switched access minutes of use ("MOU"), so that Eschelon may properly bill interexchange carriers for access.

Reporting of Lines

10. On March 1, 2002, Eschelon and Qwest entered into a Settlement Agreement.[7] Paragraph 3(f) provides that Qwest and Eschelon will form a team for the purpose of developing a plan "to convert UNE-E lines to UNE-P." That conversion has not yet occurred.

11. Nonetheless, Qwest is already reporting Eschelon's UNE-E lines as UNE-P lines for purposes of the Regional Oversight Committee (ROC) Performance Indicator Definition (PID) data. Previously, Qwest reported these lines as business lines, which is how the lines appear on the bill received by Eschelon. In reviewing the PID data recently, Eschelon found that Qwest's reporting of the lines changed from business lines to UNE-P lines in approximately November of 2001. *See* Exhibit A.[8] At that time, Qwest changed its reporting not only on a going forward basis, but also retroactively to January of 2001 so that months previously reported as business lines were then reported as UNE-P lines. *See id.* Eschelon was not notified in advance of this change.

12. Qwest is reporting a nearly perfect billing accuracy rate in the PID data. One hundred percent of the UNE-E rates billed to Eschelon from Qwest for UNE-E lines, however, are inaccurate. If Qwest is able to report a nearly perfect billing rate under these circumstances, a legitimate question exists as to whether the measure accurately reflects the CLEC experience. Additionally, the PID measures do not capture the UNE-E problems that result from service order writing issues. Qwest is manually handling the UNE-E orders, which means that a Qwest service order writer re-types the order after Eschelon has typed and submitted it. Orders submitted by Eschelon are often not typed correctly by Qwest's order writer. As a result, problems occur, such as features not being provisioned properly. When this happens, an Eschelon customer will report a trouble, because the feature is not working properly. Qwest will close the trouble ticket and indicate "No Trouble Found," because Qwest takes the position that the problem is a service order issue, even though Eschelon's initial order was submitted correctly. Therefore, the trouble does not appear to be captured in the PID data.

---

[6] This is true for On-Net customers as well.

[7] Paragraph 6 of the Settlement Agreement provides that the Settlement Agreement will be filed with the state commissions in states where Eschelon is certified and has an interconnection agreement. Qwest is to take care of the filing.

[8] Although separate categories are used for other products (such as UNE-P/POTS), separate categories were not created for UNE-E products (such as UNE-E/POTS). See Exhibit A.

Efforts to Move to UNE-P in 2000 Failed Because Product Was Not Ready, Causing Need to Move to UNE-E

13. In mid-May of 2000, Eschelon began efforts to prepare to order UNE-P lines. At that time, Qwest did not provide information about feature availability with UNE-P on its web-site, and it took more than four months for Eschelon to extract that information from Qwest. When Eschelon finally obtained a list of available features, the list was incomplete and unclear.

14. In the absence of receiving a definitive list of available features for UNE-P from Qwest and in the process of compiling its own list of USOCs for ordering, Eschelon attempted to test availability of various features and USOCs by placing trial orders (using employee lines) in Minnesota. The UNE-P trial orders resulted in denial and loss of features, including Qwest deletion of features without notice to Eschelon; unclear, changing, and discriminatory processes; and customer-affecting service problems. Minnesota UNE-P trial order customers experienced:

- complete outages, with no dial tone, for a day or more
- inability to call out locally
- inability to place long distance calls
- loss of features
- inability to forward calls between central offices

15. End-user customers were harmed. Eschelon was also harmed. Such problems harm a CLEC's reputation and cause the CLEC to incur unnecessary expenses due to the time and resources needed to resolve the problems.

16. Eschelon described these problems in 55-page comments filed with the Arizona Corporation Commission on September 21, 2000. See Eschelon's Comments Addressing UNE Combinations, *In re. U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Arizona Docket No. T-00000A-97-0238 (Sept. 21, 2000) ("Arizona UNE-P Comments"); *see also* Verification of Garth Morrisette (same). During the week of October 9, 2000, Karen Clauson and Garth Morrisette of Eschelon participated in a workshop in Arizona, during which they raised the serious problems with Qwest's UNE-P offering.

17. On October 12, 2000, I provided to Qwest a draft Complaint against Qwest to be filed with the Minnesota Commission alleging that Qwest had failed to provide Eschelon with reasonable and nondiscriminatory access to UNE-P.[9] I provided the draft Complaint in a 3-ring binder that also contained an annotated copy of Eschelon's Arizona UNE-P Comments and 42 exhibits supporting Eschelon's claims. I personally handed this binder of materials to Qwest attorney Jim Gallegos during a meeting with Qwest in Denver. Qwest's Senior Vice President of Wholesale Markets, Audrey McKenney, and others from Qwest were also present at the meeting and aware of the UNE-P issues and draft Complaint. In addition, during a break in the Arizona 271 workshop the same week, Ms. Clauson informed Qwest attorney Andrew Crain of the draft Complaint and supporting materials being provided to Qwest in Denver.

[9] The Complaint also alleged discriminatory conduct with respect to coordinated cutovers.

18. On November 15, 2000, Eschelon and Qwest executed the UNE-E Amendment. The problems with UNE-P were not solved at that time. Instead, Eschelon was promised that its customer base would be moved to another product to avoid those problems. One of the advantages of the UNE-E Amendment was supposed to be that Qwest would convert Eschelon's base to UNE-E without the necessity of Eschelon placing individual Local Service Requests (LSRs) to convert each customer. As described above, however, although Eschelon is receiving at least an approximation of the UNE-E pricing, Qwest has failed to convert the lines to UNE-E billing.

19. Now, due to billing, provisioning, and pricing issues with UNE-E, Eschelon must, at this late date, begin the process of placing individual LSRs to convert customers to UNE-P. Although Eschelon has been entitled under its interconnection agreement to UNE-P pricing since before 2000, Eschelon will not receive the benefits of UNE-P pricing until the lines are converted. The plan to convert the lines has just been completed. It will take a minimum of seven months and eighteen full-time employees, as well as additional resources, to complete. If Qwest does not handle the conversion does not go well, Eschelon will likely lose customers and revenues also. Eschelon must hope that, through the diligent, resource-intensive, and valuable efforts of larger CLECs, Qwest has been forced to make sufficient improvements in the UNE-P product to allow the transition to work much more smoothly than Qwest's attempt to provision UNE-P in 2000.

Lack of Early UNE-P Test Has Caused Serious Harm to Competitors and Customers

20. According to the ALJ findings adopted by the Commission in this docket, in September of 2000, AT&T asked Qwest to conduct a UNE-P test. *See* Findings of Fact, Conclusions of Law, and Recommendation by Administrative Law Judge, at ¶ 36, p. 10, in above-captioned docket, Feb. 22, 2002. On information and belief, AT&T asked to begin the test in January of 2001. Unlike Eschelon's test ordering, which was limited to trial orders to test provisioning, AT&T's proposed test plan was more comprehensive and would have addressed issues such as billing and access as well.

21. If AT&T had been allowed to conduct its test at that time, parties with the resources to perform such a test would have had an opportunity to identify, confirm, and devote resources to resolving the problems with UNE-P at an earlier date. If UNE-P worked properly, Eschelon would have been spared many of the significant costs and problems associated with UNE-E, a make-shift "product" that succeeded only in diverting Eschelon's efforts from obtaining UNE-P. From November of 2000 through the first quarter of 2001 – when AT&T would have been conducting its UNE-P test – Qwest was telling Eschelon that the conversion to UNE-E that was supposed to address Eschelon's concerns would be completed very soon. Instead, as we know now, the conversion never occurred. Qwest was delaying both AT&T and Eschelon, simply in somewhat different ways. If the AT&T test had concluded at the same time that Eschelon was learning that the promised first quarter of 2001 conversion to UNE-E was not happening, Eschelon would have had more information and the benefit of the learning from that test to determine the next steps. Eschelon's own conversion to UNE-P would have had a better chance of being completed by now, instead of just starting to commence

at this late date. Although Qwest may claim now that CLECs cannot prove that the problems would have been identified or resolved as a result of an earlier AT&T test, Qwest prevented that knowledge from being acquired by delaying the test.

22. Identifying and solving the problems earlier would have benefited other CLECs, in addition to AT&T. For example, upon information and belief, the AT&T test identified that Qwest is not providing complete and accurate DUF records from which CLECs can bill interexchange carriers access charges for platform customers, when AT&T was finally allowed to test the UNE-P product. Missing switched access minutes represents a loss of revenue to CLECs. Based on the number of minutes that Eschelon believes are missing from the DUF records, Eschelon believes the lost revenue is substantial. In addition, Eschelon has already spent more than $500,000 on an audit in an attempt to address this issue. This is in addition to the other, substantial resources that Eschelon has had to expend as a result of this problem. If AT&T had been able to conduct its test as requested, Eschelon should never have had to incur this expense or to lose the significant revenues that it has lost because of this issue. The problem would have been verified earlier and steps could have been taken to correct the problem at that time. Now, the problem is still unresolved.

23. The issue of missing switched access minutes affects all CLECs, and the harm created by missing minutes is significant. Here is an example of the potential magnitude of the switched access issue:

Assume Qwest Access Lines: 18M

Assume 5% CLEC facility based market share: 900K access lines (18M * 5%)

Assume Missing Usage per Line: 420 MOUs expected / 300 MOUs receiving each month = 120 missing MOUs

Assume Jan-01 as Date that missing usage began - 15 months as of March 2002

Assume composite access rate of $0.0210

900K A/L * 15 months * 120 missing MOUs per month * $0.0210

= **$34 million impact** to CLEC industry from Qwest not providing all usage records to CLECs

24. Qwest may claim that these numbers have not been proven. Of course, that is the point. These numbers have not been proven, because Qwest delayed a test that would have exposed the problem much earlier and led to information necessary to prove and correct the issue.

25. The delay in the AT&T UNE-P test caused harm by itself. In addition, competitors and competition are harmed by the fact that Qwest was able to effectively engage in anti-competitive conduct over a long period of time. This is not the first time that Qwest has been able to do so, as the previous successful complaints by MCImetro (now WorldCom) in Minnesota and Washington show. Qwest's anti-competitive

conduct sends a message to CLECs that goes beyond the delay in a particular case. After all, if the objectives of a company the size of AT&T can be delayed or defeated by Qwest, smaller CLECs have even less prospect for overcoming such conduct.

26. Eschelon and other CLECs have been harmed by Qwest's conduct. Ultimately, Minnesota end-user customers are the losers. Qwest has delayed their ability to receive the full benefits of competition.

FURTHER AFFIANT SAYETH NOT.

Dated this 18th day of April 2002.

J. Jeffery Oxley

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

SUBSCRIBED AND SWORN TO before me this 18th day of April, 2002 by J. Jeffery Oxley, who certifies that the foregoing is true and correct to best of his knowledge and belief.

Witness my hand and official seal.

Notary Public

My commission expires:

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May 2002, the original and 10 copies of AT&T's Motion to Reopen Proceedings were sent by overnight mail to:

Debra Elofson
Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

and a true and correct copy was sent by U.S. Mail on May 13, 2002 addressed to:

Colleen Sevold
Manager – Regulatory Affairs
QWEST Corporation
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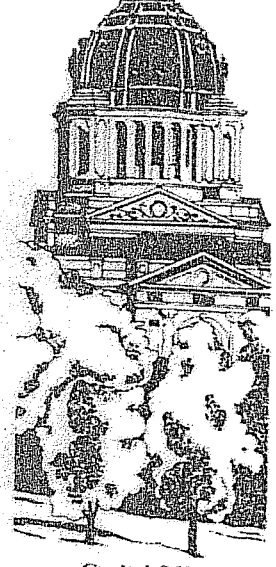
Janet Browne



South Dakota Public Utilities Commission

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Amy Kayser
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Keith Senger
John Smith
Rolayne Ailts Wiest

May 17, 2002

Debra Elofson
Executive Director
Public Utilities Commission
500 E. Capitol
Pierre, SD 57501

RE: In the Matter of the Investigation into Qwest Corporation's Compliance w
Section 271 of the Telecommunications Act of 1996
TC01-165

Dear Ms. Elofson:

During the hearing of the above-captioned matter the question of the level of Qwest's payment made to Dr. Hausman for his study was asked of Qwest's witness. Qwest has submitted its response in writing which I have attached as Staff's Exhibit #6 to this letter.

Please file this in the above referenced docket.

Sincerely,

Karen E. Cremer

Karen E. Cremer
Staff Attorney

cc: All parties of record

505 339-5390 (fax)

Larry Toll
Vice President – South Dakota

Qwest
RECEIVED
SOUTH DAKOTA PU
UTILITIES C

May 13, 2002

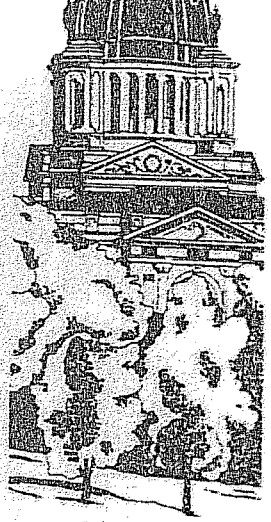
Ms. Karen Cremer, Staff Attorney
Public Utilities Commission
State Capitol Building
Pierre, South Dakota 57501

Dear Ms. Cremer:

In the 271 proceeding that was held April 22-26, Qwest Corporation was asked to provide to the Commission the level of Qwest's payment to Dr. Harcourt, a consulting firm. Qwest made a payment to Dr. Harcourt's consulting firm in the amount of $156,000 for this study.

Sincerely,

Larry Toll



Public Utilities Commission

State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota 57501-5070

May 17, 2002

Cheri McComsey Wittler
Precision Reporting Ltd.
105 S. Euclid Ave.
Pierre, SD 57501

RE: In the Matter of the Investigation into Qwest Corporation's Compliance wi
Section 271 of the Telecommunications Act of 1996
TC01-165

Dear Ms. McComsey Wittler:

Enclosed please find Staff's exhibit #6. This is a late-filed exhibit that is being submitted pursuant to a request for information at the above referenced hearing. By a copy of this letter and exhibit, I am serving the parties of record. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Karen E. Cremer

Karen E. Cremer
Staff Attorney

cc: Parties of Record

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Gregory A. Rislov
Keith Senger
John Smith
Rolayne Ailts Wiest

Steven H. Weigler
Senior Attorney
Law & Government Affairs

[redacted]

May 16, 2002

Via Overnight Mail

RECEIVED
MAY 17 [redacted]
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Debra Elofson
Executive Director
SD Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

Re: In the Matter of the Analysis into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, [redacted]

Dear Ms. Elofson:

Enclosed for filing are the original and ten copies of an Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan. Please call me if there are any questions.

Sincerely,

Steven H. Weigler

SHW/jb

Enclosure

cc: Service List

Recycled Paper

RECEIVED
MAY 17 2002
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	Docket No. TC01-165

ADDITIONAL STATEMENT OF SUPPLEMENTAL AUTHORITY REGARDING QWEST'S PERFORMANCE ASSURANCE PLAN

As stated in previous Statements of Supplemental Authority submitted by AT&T, in the States of Montana, Nebraska, Iowa, Idaho, Washington and Wyoming, the relevant commissions have ordered that they maintain ultimate change control authority to the plan without limitation.

On May 15th, the Federal Communications Commission issued its Memorandum Opinion and Order on the BellSouth Georgia and Louisiana Order.[1] In that Order, the FCC explicitly stated as follows:

> We also recognize that the development of performance measures and appropriate remedies is an evolutionary process **that requires changes to both measures and remedies over time**. ...We anticipate that these state Commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect actual commercial performance in the local marketplace. We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's SQM from their respective pending six-month reviews. We anticipate that these state Commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect actual commercial performance in the local marketplace[2] ....Both the Georgia and Louisiana Commissions will continue to subject BellSouth's performance metrics to rigorous scrutiny in their on-going proceedings and audits; thus, it is not unreasonable for us

[1] *Memorandum Opinion and Order, In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147 (rel. May 15, 2002).
[2] *Id.* at ¶294(footnote omitted)

to expect that these commissions could modify the penalty structure if BellSouth's performance is deficient post approval.[3]

The FCC's Order speaks for itself and is completely contrary to Qwest's position that it and not the relevant public utilities commission should enjoy change control under the QPAP.

Respectfully submitted on May 16, 2002.

AT&T COMMUNICATIONS OF THE MIDWEST, INC.

By: _____

Mary B. Tribby
Steven H. Weigler
AT&T Law Department
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202
(303) 298-6057

[3] *Id.* at ¶300.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May 2002, the original and 10 copies of AT&T's Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan were sent by overnight mail to:

Debra Elofson
Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

and a true and correct copy was sent by U.S. Mail on May 16, 2002 addressed to:

Colleen Sevold
Manager – Regulatory Affairs
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125 South Dakota Avenue, 8th Floor
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Cheyenne, WY 82009

Linden R. Evans
Black Hills Corporation
P.O. Box 1400
Rapid City, SD 57709

Janet Browne

PRECISION REPORTING
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MAY 2 2 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

May 20, 2002

South Dakota Public Utilities Commission
Attn: Karen Cremer
500 East Capitol Avenue
Pierre, SD 57501

Dear Ms. Cremer:

Enclosed is the exhibit that you sent to me to be marked as Staff's Exhibit 6.

If you have any questions, please feel free to call.

Sincerely,

Cheri M. Wittler

Cheri McComsey Wittler, RPR

Enclosure

(605) 945-0573 FAX (605) 224-8269 (888) 814-9302
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Qwest Corporation
125 S. Dakota Ave., 8th Floor
Sioux Falls, SD 57194
605 339-5411 (phone)
605 339-5390 (fax)

Larry Toll
Vice President – South Dakota

RECEIVED
MAY 15 2002
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

May 13, 2002

Ms. Karen Cremer, Staff Attorney
Public Utilities Commission
State Capitol Building
Pierre, South Dakota 57501

Dear Ms. Cremer:

In the 271 proceeding that was held April 22-30, Qwest Corporation was asked to provide to the Commission the level of Qwest's payment to Dr. Harkness' consulting firm. Qwest made a payment to Lexecon (Dr. Harkness' consulting firm) in the amount of $156,000 for his study.

Sincerely,

Larry Toll

EXHIBIT

Qwest
1801 California Street, Suite 4900
Denver, Colorado 80202
Phone 303 672-2823
Facsimile 303 295-7069

John L. Munn
Senior Attorney

Qwest

RECEIVED
MAY 21 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

May 21, 2002

Debra Elofson, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

Re: IN THE MATTER OF THE ANALYSIS OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996 - Docket No. TC01-165

Dear Ms. Elofson:

Enclosed please find an original and ten copies of:

- Qwest Corporation's Overview Post-Hearing Brief and Index to Briefing Materials
- Qwest Corporation's Opening Post-Hearing Brief on Paper Workshop Issues (Checklist Items 3, 7, 8, 9, 10, and 12);
- Qwest Corporation's Post-Hearing Brief on Workshop 1: Checklist Item 1 (Interconnection, Collocation); Checklist Item 11 (LNP); Checklist Item 13 (Reciprocal Compensation); and Checklist Item 14 (Resale);
- Qwest Corporation's Opening Post-Hearing Brief on Emerging Services (Line Sharing, Subloop Unbundling, Packet Switching , and Dark Fiber)
- Qwest Corporation's Opening Post-Hearing Brief on Workshop 3, Group 4 Issues - Unbundled Network Elements Report (Checklist Items 2, 4, 5, and 6);
- Qwest Corporation's Opening Post-Hearing Brief on General Terms and Conditions, Section 272, and Track A;
- Qwest Corporation's Post-Hearing Brief In Support of the QPAP;
- Qwest Corporation's Opening Post-Hearing Brief on the Public Interest;
- Qwest Corporation's Opening Post-Hearing Brief on Performance (PIDs, Actual Performance, and Data Reconciliation); and
- Qwest Corporation's Notice of Additional Exhibits.

Also included are the following Exhibits:

- Qwest Exhibit 81 — Revised South Dakota SGAT (May, 2002)
- Qwest Exhibit 81A — Redline copy of Revised South Dakota SGAT (May, 2002)
- Qwest Exhibit 82 — Revised South Dakota Qwest Performance Assurance Plan (May, 2002)
- Qwest Exhibit 82A — Redline copy of Revised South Dakota Qwest Performance Assurance Plan (May, 2002)
- Qwest Exhibit 83 — Matrix of Disputed Issues from Facilitator's Reports
- Qwest Exhibit 84 — Matrix of Consensus Issues from Facilitator's Reports
- Qwest Exhibit 85 — Supplemental Affidavit of Lori A. Simpson—Checklist Item 8—White Pages Directory Listings

Thank you for your consideration of this matter.

Sincerely yours,

John L. Munn

Enclosures

Cc: Steven Weigler
David A. Gerdes
Gregory J. Bernard
Colleen Sevold
Tom Welk

RECEIVED
MAY 21 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (c) OF THE TELECOMMUNICATIONS ACT OF	**Docket No. TC01-165** **CERTIFICATE OF SERVICE**

I, John L. Munn, do hereby certify that I am an attorney for Qwest Corporation, and on this 21st day of May, 2002, true and corrected copies of:

- Qwest Corporation's Overview Post-Hearing Brief and Index to Briefing Materials
- Qwest Corporation's Opening Post-Hearing Brief on Paper Workshop Issues (Checklist Items 3, 7, 8, 9, 10, and 12);
- Qwest Corporation's Post-Hearing Brief on Workshop 1: Checklist Item 1 (Interconnection, Collocation); Checklist Item 11 (LNP); Checklist Item 13 (Reciprocal Compensation); and Checklist Item 14 (Resale);
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• Qwest Exhibit 83	Matrix of Disputed Issues from Facilitator's Reports

- Qwest Exhibit 84 — Matrix of Consensus Issues from Facilitator's Reports
- Qwest Exhibit 85 — Supplemental Affidavit of Lori A. Simpson—Checklist Item 8—White Pages Directory Listings

that was filed with the South Dakota Public Utilities Commission on May 21, 2002, were sent to the following intervenors:

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Qwest

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MAY 22 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

May 21, 2002

Steven H. Weigler
AT&T Communications of the Midwest
1875 Lawrence Street
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503 S. Pierre St.
Pierre, SD 57501-0160

Re: Docket No. TC01-165

Dear Counsel:

Enclosed please find:

- Qwest Corporation's Overview Post-Hearing Brief and Index to Briefing Materials
- Qwest Corporation's Opening Post-Hearing Brief on Paper Workshop Issues (Checklist Items 3, 7, 8, 9, 10, and 12);
- Qwest Corporation's Post-Hearing Brief on Workshop 1: Checklist Item 1 (Interconnection, Collocation); Checklist Item 11 (LNP); Checklist Item 13 (Reciprocal Compensation); and Checklist Item 14 (Resale);
- Qwest Corporation's Opening Post-Hearing Brief on Emerging Services (Line Sharing, Subloop Unbundling, Packet Switching , and Dark Fiber)
- Qwest Corporation's Opening Post-Hearing Brief on Workshop 3, Group 4 Issues – Unbundled Network Elements Report (Checklist Items 2, 4, 5, and 6);
- Qwest Corporation's Opening Post-Hearing Brief on General Terms and Conditions, Section 272, and Track A;

- Qwest Corporation's Post-Hearing Brief In Support of the QPAP;
- Qwest Corporation's Opening Post-Hearing Brief on the Public Interest;
- Qwest Corporation's Opening Post-Hearing Brief on Performance (PIDs, Actual Performance, and Data Reconciliation); and
- Qwest Corporation's Notice of Additional Exhibits.

Also included are the following Exhibits:

• Qwest Exhibit 81	Revised South Dakota SGAT (May, 2002)
• Qwest Exhibit 81A	Redline copy of Revised South Dakota SGAT (May, 2002)
• Qwest Exhibit 82	Revised South Dakota Qwest Performance Assurance Plan (May, 2002)
• Qwest Exhibit 82A	Redline copy of Revised South Dakota Qwest Performance Assurance Plan (May, 2002)
• Qwest Exhibit 83	Matrix of Disputed Issues from Facilitator's Reports
• Qwest Exhibit 84	Matrix of Consensus Issues from Facilitator's Reports
• Qwest Exhibit 85	Supplemental Affidavit of Lori A. Simpson—Checklist Item 8—White Pages Directory Listings

Sincerely yours,

John L. Munn

Enclosures

BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

RECEIVED
MAY 22 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	DOCKET TC 01-165

QWEST CORPORATION'S OVERVIEW POST- HEARING BRIEF AND INDEX TO BRIEFING MATERIALS

Introduction

Qwest Corporation's (Qwest's) opening post-hearing briefs provide a summary of and a roadmap for the South Dakota Public Utilities Commission ("Commission") in this matter in which Qwest seeks the Commission's positive recommendation to the Federal Communications Commission (FCC) to provide in-region InterLATA service to customers in South Dakota. Qwest filed its *Petition for Commission Recommendation that the FCC Grant Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act of 1996* ("Petition") on October 24, 2001[1]. Qwest prefiled twenty-five direct affidavits of twelve witnesses. Three intervenor Competitive Local Exchange Carriers ("CLECs"), Midcontinent Communications ("Midco"), Black Hills FiberCom ("FiberCom") and AT&T Communications of the Midwest, Inc. ("AT&T"), and the Commission Staff submitted prefiled testimony or comments in response to Qwest's Petition. Following submission of rebuttal affidavits for Qwest, this matter came before the Commission for hearing beginning April 22, 2002.

[1] A copy of Qwest's Petition was entered into the hearing record as Qwest Ex. 29.

The Section 271 Requirements

Section 271 of the Telecommunications Act of 1996 ("the Act") sets forth the criteria under which Qwest may be granted authority to provide in-region interLATA services originating in the state of South Dakota. 47 U.S.C. §271. Pursuant to that section, Qwest must apply to the FCC for authorization to provide interLATA services originating in any in-region state. Before making its determination, the FCC is required to consult with the relevant state commission regarding Track A and the competitive checklist[2]. Qwest's purpose in this proceeding has been to provide this Commission with sufficient information to enable it to verify Qwest's compliance.

Although the FCC's duty to consult with the state commissions is more limited, Qwest is presenting evidence on all aspects of 271 compliance to provide the Commission a full picture. This evidence demonstrates that Qwest:

(1) meets the requirements of the 14-point competitive checklist; 47 U.S.C.§271(c)(2)(B);

(2) offers a section 271-compliant statement of generally available terms and conditions ("SGAT"); 47 U.S.C.§271(c)(2)(A);

(3) faces sufficient facilities-based competition in the South Dakota local exchange market (i.e. meets the "Track A" test); 47 U.S.C. §271(c)(1)(A);

(4) passed independent testing of its Operations Support Systems ("OSS");

(5) provides service to its wholesale customers at parity with its retail customers by meeting rigorous performance standards established for this purpose;

(6) along with its separate long distance affiliate, Qwest Communications Corp., will comply with all elements of section 272 of the Act; and

(7) has established that approval of Qwest's application is consistent with the South Dakota public interest, convenience and necessity and that a Qwest Performance

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[2] See section 271(d)(2)(B).

Assurance Plan ("QPAP") has been developed to prevent potential future backsliding. 47 U.S.C.§271(d)(3)(C).

This Commission is perhaps unique because it opted to conduct a single hearing for the purpose of evaluating Qwest's section 271 compliance. As a result, all of the matters listed above, with the exception of item four regarding OSS testing, are now before this Commission for its consideration. Therefore, the post-hearing briefing that Qwest provides to this Commission must cover the broad range of section 271 subjects and guide the Commission to those parts of the voluminous record relevant to the matters that remain for Commission resolution.

The Multi-state Proceeding

In presenting its case to this Commission, Qwest relied heavily on the work completed in several Qwest jurisdictions that had already considered various aspects of Qwest's section 271 compliance. In particular, Qwest and the Commission Staff reviewed the multi-state collaborative workshop process conducted by the Idaho Public Utilities Commission, Montana Public Service Commission, Iowa Utilities Board, New Mexico Public Regulation Commission, North Dakota Public Service Commission, Utah Public Service Commission, and Wyoming Public Service Commission (the "Multi-state Proceeding"). In the Multi-state Proceeding, the participating state commissions retained Mr. John Antonuk of The Liberty Consulting Group to act as Facilitator. Mr. Antonuk was charged with conducting workshops, establishing a record for filing in each state, and making recommended findings regarding Qwest's compliance with section 271.

The Multi-state Facilitator divided consideration of Qwest's compliance with the 14 point competitive checklist items into four groups:

- "Paper" Checklist Items: Checklist Item 3 (Access to Poles, Ducts, Conduits, and Rights of Way); Checklist Item 7 (911/E911, Directory Assistance, Operator Services); Checklist Item 8 (White Pages Directory Listings); Checklist Item 9 (Numbering Administration); Checklist Item 10 (Call-Related Databases and Signaling); and Item 12 (Local Dialing Parity).

- Group 1 Checklist Items: Checklist Item 1 (Interconnection); Item 1 (Collocation); Checklist Item 11 (Local Number Portability); Checklist Item 13 (Reciprocal Compensation); and Checklist Item 14 (Resale).
- Emerging Services: line sharing, subloops, packet switching, and dark fiber.
- Unbundled Network Elements ("UNEs"): Checklist Item 2 (Unbundled Network Elements); Checklist Item 4 (Access to Unbundled Loops); Checklist Item 5 (Access to Unbundled Local Transport); and Checklist Item 6 (Access to Unbundled Local Switching).

During these workshops, Qwest and the intervening parties had ample opportunities to file testimony, rebuttal testimony, comments, replies and briefs. An important function of this process was for Qwest and the intervening parties to negotiate section 271-compliant SGAT provisions addressing each of the checklist items, which provisions would ensure Qwest's ongoing, concrete legal obligations to provide wholesale customers with service at parity with that provided to Qwest's retail customers.

As each workshop concluded, and upon reviewing the respective positions of Qwest and the intervening parties, the Facilitator filed a report[3] with the participating state commissions scrutinizing the evidence adduced during the workshop process and making final recommendations. The reports separately discussed the issues initially identified and subsequently resolved by participants during the process, and the remaining issues upon which some disagreement continued to persist (or where it was unclear that agreement had been reached). For the issues that remained subject to disagreement, the reports summarized the participants' positions and provided recommended resolutions to the state commissions.

In addition to addressing the 14-point checklist, the Multi-state Proceeding also addressed other 271-related compliance issues. The Facilitator assembled issues relating to Track A, section 272, and general terms and conditions in a fifth report. Finally, in separate reports released October 22, 2001, Mr. Antonuk addressed the public interest issues and the Qwest Performance Assurance Plan (QPAP).

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[3] The Multi-state Facilitator's Reports have been admitted as Qwest Exs. 27-28.

Throughout these South Dakota proceedings, and almost without exception, Qwest and the Commission Staff have urged this Commission to adopt the consensus results of the Multi-state Proceedings and to adopt the Facilitator's recommendations on those issues that were disputed in the Multi-state Proceedings and that remained disputed here.

Based on this history, Qwest's briefing submitted to the Commission is organized around the categories and groupings that Mr. Antonuk used for his various reports. Thus, Qwest submits one brief on Paper Workshop issues, another on Emerging Services and so on. This manner of presentation represents Qwest's effort to ensure that the briefing is accessible and useful to the Commission as it considers the issues in the context of the vast amount of work in other jurisdictions that preceded this docket.

Finally, although Mr. Antonuk did not specifically address Qwest's performance under the checklist requirements in a separate report, Qwest is submitting a brief on that topic that encompasses the development by the Regional Oversight Committee (ROC) of performance measurements called Performance Indicator Definitions (PIDs), Qwest's South Dakota performance under those measures and the work that has been performed to reconcile data collection and reporting to assure Qwest's reports of its levels of performance are accurate.

Index to Qwest's Briefs

Qwest provides this index to assist the Commission in finding specific topics in Qwest's briefs. In addition, each brief contains a complete table of contents.

- Qwest Corporation's Opening Post-Hearing Brief on Paper Workshop Issues (Checklist Items 3, 7, 8, 9, 10, and 12);
- Qwest Corporation's Post-Hearing Brief on Workshop 1: Checklist Item 1 (Interconnection, Collocation); Checklist Item 11 (LNP); Checklist Item 13 (Reciprocal Compensation); and Checklist Item 14 (Resale);
- Qwest Corporation's Opening Post-Hearing Brief on Emerging Services (Line Sharing, Subloop Unbundling, Packet Switching, and Dark Fiber)
- Qwest Corporation's Opening Post-Hearing Brief on Workshop 3, Group 4 Issues – Unbundled Network Elements Report (Checklist Items 2, 4, 5, and 6);

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- Qwest Corporation's Post-Hearing Brief In Support of the QPAP;
- Qwest Corporation's Opening Post-Hearing Brief on the Public Interest; and
- Qwest Corporation's Opening Post-Hearing Brief on Performance (PIDs, Annual Performance, and Data Reconciliation)

Dated this 21st day of May, 2002.

RESPECTFULLY SUBMITTED,

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RECEIVED
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	DOCKET TC 01-165

QWEST CORPORATION'S OPENING POST- HEARING BRIEF ON PAPER WORKSHOP ISSUES

(Checklist Items 3, 7, 8, 9, 10, and 12)

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I. INTRODUCTION

This brief addresses Qwest's compliance with six of the 14 checklist items in section 271(c)(2)(B) of the Telecommunications Act of 1996 ("Act"). Specifically, this brief addresses Qwest's compliance with the checklist items addressed in the Multi-state Facilitator's Paper Workshop Report, issued March 19, 2001:[1] Checklist Item 3 (access to poles, ducts, conduits, and rights-of-way), Checklist Item 7 (access to 911/E911, operator services, and directory assistance), Checklist Item 8 (white pages directory listings), Checklist Item 9 (number administration), Checklist Item 10 (access to signaling and call-related databases), and Checklist Item 12 (dialing parity). As set forth herein, Qwest satisfies the requirements of these checklist items in South Dakota.

II. DISCUSSION

A. Qwest Complies with the Requirements of Checklist Item 3, Access to Poles, Ducts, Conduits, and Rights-of-Way.

Section 271(c)(2)(B)(iii) of the 1996 Act requires BOCs to provide "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."[2] Section 224(f)(1)

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[1] Multi-state Paper Workshop Report (Qwest Ex. 22).

[2] *See* 47 U.S.C. § 271(c)(2)(B)(iii). The Act amended § 224 in several respects to ensure that telecommunications carriers as well as cable operators have access to poles, ducts, conduits, and rights-of-way owned or controlled by utility companies, including LECs. *See* Memorandum Opinion and Order, *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State Texas*, CC Dkt. No. 00-65, 15 FCC Rcd 18354 ¶ 243 n. 684 (rel. June 30, 2000) ("*SWBT Texas Order*"). The FCC also has interpreted § 251(b)(4) as requiring LECs to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way for competing providers of telecommunications services in accordance with the requirements of section 224. *SWBT Texas Order* ¶ 243 (citing First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Dkt. Nos. 96-98 & 95-185, 11 FCC Rcd 15499 ¶ 1156 (1996) ("*Local Competition Order*").

states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it"[3] and that a utility may deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[4] Section 224 also provides that the FCC has jurisdiction to regulate rates, terms, conditions, and access to poles, ducts, conduits, and rights-of-way, unless a state regulates such matters.[5]

Upon receipt of a request for access to poles, ducts, conduits, and rights-of-way ("PDROW") from a CLEC, FCC rule 1.1403(b) provides in pertinent part:

> If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.[6]

By contrast, apart from the general prohibition on discrimination, there is no set interval for the completion of any work required to make-ready available space for CLEC access to PDROW.[7]

Third parties have attached to approximately 7,000 poles in South Dakota.[8] As set forth in the testimony of Thomas R. Freeberg, Qwest employs a nondiscriminatory process in

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[3] 47 U.S.C. § 224(f)(1). Section 224(a)(1) defines "utility" as any entity, including a LEC, that controls "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).

[4] 47 U.S.C. § 224(f)(2); *see also* Memorandum Opinion and Order, *Applications by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Dkt. No. 99-295, 15 FCC Rcd 3953 ¶ 383 (rel. Dec. 22, 1999) ("*Bell Atlantic New York Order*") (citing § 224(f)(2) and *Local Competition Order* ¶¶ 1175-77).

[5] 47 U.S.C. §§ 224(b)(1), 224(c)(1).

[6] 47 C.F.R. § 1.1403(b).

[7] *See Local Competition Order* ¶¶ 1143, 1145, 1149.

providing access to PDROW that it owns or controls in South Dakota.[9] Generally, a request for access to PDROW is comprised of two phases: a review of Qwest's records regarding the request for access (called an "inquiry review") and a physical inspection of the facilities to be accessed (called a "field verification").

Inquiry Review: To assist CLECs with determining whether Qwest owns or controls PDROW along the CLEC's identified route, Qwest compares a CLEC's proposed route map to Qwest's plats, maps, and other records.[10] Qwest provides the CLEC schematic diagrams of Qwest's plant along the route once the CLEC has submitted a general map of its desired route and a description of the facilities the CLEC seeks to install.[11] Qwest generally provides this information within 10 business days.[12] Qwest also provides CLECs with access to the same records Qwest engineering personnel use to design their own construction projects.[13] These records may include maps in either electronic or hard-copy (paper) form.[14]

Field Verification: If the CLEC wishes to pursue access to Qwest PDROW along the route, it may perform its own field verification or it may request that Qwest conduct the field verification. Qwest attempts to complete field verifications within 35 days. Consistent with the FCC's rules,[15] in the event Qwest cannot grant a request for access, Qwest's processes provide

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[8] *See* 4/23/02 Tr. (Freeberg) at 14. Qwest is unaware of South Dakota CLECs occupying Qwest duct space except perhaps in conjunction with collocation. *Id.* at 15.

[9] *See generally* Affidavit of Thomas R. Freeberg re: Checklist Item 3, filed on October 24, 2001 ("Freeberg Direct re: Checklist Item 3") (Qwest Ex. 16).

[10] *Id.* at 9-11.

[11] *Id.*

[12] *Id.* at 11.

[13] *Id.* at 9-10.

[14] *Id.*

[15] *See* 47 C.F.R. § 1.1403(b).

that Qwest will provide specific written denials to the requesting CLEC on or before the 45th day of the process.[16] Information on the application process is available on Qwest's wholesale services website.[17]

As set forth in Mr. Freeberg's direct filed testimony, Qwest's SGAT, and KMC agreement, the processing of CLEC requests for access to PDROW is, by its very nature, collaborative and iterative, in that the parties explore alternatives when pathways identified in a CLEC's initial request are, for one reason or another, unavailable.[18] Upon receipt of appropriate executed forms and payment of any necessary make-ready work charges, Qwest assigns the CLEC's requested space and initiates any required make-ready work, which is completed on a first-come, first-served basis.[19]

Only AT&T challenged Qwest's compliance with this Checklist Item, and AT&T raised only two hypothetical concerns: (i) the process for CLECs to obtain access to Qwest's agreements with owners of multiple tenant environments ("MTEs") and (ii) whether Qwest may seek a waiver from this Commission of the 45-day requirement to respond with a denial to a request for access. On both issues, the Multi-state Facilitator proposed SGAT language to resolve the disputes,[20] and Qwest incorporated his recommended SGAT language into the South Dakota SGAT. Staff witness, Dr. Marlon Griffing, recommends that Qwest complies with Checklist Item 3 and recommends that the Commission adopt the Multi-state Facilitator's resolution of these issues. As Dr. Griffing, notes, Qwest did propose additional language for SGAT § 10.8.2.27 relating to access to MTE agreements beyond that recommended by Mr.

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[16] *See* Freeberg Direct re: Checklist Item 3 (Qwest Ex. 16) at 12-13.

[17] *Id.* at 10.

[18] *See id.* at 12.

[19] *See id.* at 18.

[20] Qwest Ex. 22 at 21, 28.

Antonuk in the report on Checklist Item 3. However, Dr. Griffing agreed that Qwest's additional language was appropriate.[21] Furthermore, Dr. Griffing endorsed the Facilitator's resolution of the 45-day response time that permits Qwest to request a waiver in the event of an unusually large request for access.

1. Qwest's Process for Access to MTE Agreements Is Appropriate.

Section 10.8.2.27 and Exhibit D to the SGAT and KMC Agreement provide a straightforward process for obtaining copies of both recorded and non-recorded agreements between Qwest and third-party property owners of MTEs to enable CLECs to determine whether Qwest has duct/conduit or rights-of-way in an MTE over which it has ownership or control. Qwest has agreed to disclose to CLECs its non-recorded agreements with third-party property owners, including agreements with owners of MTE buildings ("MTE agreements"), that provide Qwest with access to property to enable CLECs to determine whether Qwest has ownership or control rights it can convey.[22] Much of the dispute on this issue has been centered on how to balance confidentiality concerns of third-party property owners (who have not participated in these proceedings and who may oppose having their negotiated agreements disclosed to potential negotiating rivals) with the CLECs' interest in access to the information contained in the MTE agreements regarding conduits and rights-of-way. The Multi-state Facilitator determined that CLECs should have access to Qwest's agreements with MTE owners for the purposes of determining the extent to which Qwest has ownership or control rights it can convey. He rejected AT&T's position, however, that such access should be unfettered.

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[21] 4/30/02 Tr. (Griffing) at 132 ("I just want to make sure the Commissioners understand on this issue I support what Qwest has proposed, which is changes to the SGAT that prohibit access by CLEC marketing and sales personnel to certain information in the landowner agreements").

[22] *See* Freeberg Direct re: Checklist Item 3 (Qwest Ex. 16) at 14; Rebuttal Affidavit of Thomas R. Freeberg re: Checklist Item 3, filed April 2, 2002 ("Freeberg Rebuttal re: Checklist Item 3") (Qwest Ex. 17) at 5-7.

> One of [AT&T's] arguments for securing the underlying agreements with landowners is to allow it to bargain for its own access with knowledge of the terms that a landowner has already agreed to with Qwest. This argument misses the point of why access to these agreements is material under the Act. Access is material as it relates to access to Qwest facilities, and its particular relevance is on the issue of allowing a CLEC to make its own determination of the sufficiency of Qwest rights to support the CLEC's occupancy.
>
> * * *
>
> The CLEC information needs that Qwest must meet are not related to providing commercial information that CLECs can use to make their own more economical or efficient arrangements with those who supply needed goods, services, or the like. The pertinent issues are not economic ones, but concern issues such as, for example, questioning a Qwest claim that no rights exist or that existing rights are not sufficient to accommodate CLEC access. We should be careful not to construe the Act as allowing a form of discovery whose purpose is to give CLECs superior bargaining position vis-à-vis landowners.[23]

The Facilitator recognized that Qwest faces a potential risk in the event a property owner opposed disclosure of its agreement with Qwest.[24] Accordingly, to accommodate these competing interests, the Facilitator determined that Qwest should provide CLECs with access to non-recorded MTE agreements under one of two options: consent of the third-party property owner or indemnification by the CLEC for any potential legal action by the property owner.[25] Qwest has incorporated this resolution into the South Dakota SGAT.

AT&T nevertheless opposes this compromise. Its position on this issue, however, is internally inconsistent. While on the one hand AT&T claims that it is concerned about "frivolous

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[23] Qwest Ex. 22 at 20-21.

[24] *Id.* at 21.

[25] *Id.* at 21.

litigation that is brought by landowners,"[26] on the other hand it claims that Qwest faces no risk from disclosure because property owners have no interest in the non-disclosure of their agreements.[27] In the General Terms and Conditions Report, the Facilitator again addressed AT&T's arguments, and soundly rejected them:

> There are several problems with AT&T's argument. First, it shifts between two mutually inconsistent grounds: (a) that there are few or no occasions where landowners will have protected rights, thus suggesting that Qwest should bear the risks involved, and (b) that CLECs will face extensive competitive barriers if they have to bear the risk of defending these lawsuits that will virtually always be "frivolous," according to AT&T.
>
> * * *
>
> The material question to ask is not how much the costs are or what the risks entail, but who has caused the costs to be incurred or the risks to arise. The 'causer' should pay the costs and that principle does not at all depend on what the magnitude of the costs or risks may be. It is profoundly clear from AT&T's comments that it considers lawsuits to be a risk of doing business. There is no merit in placing them at the feet of Qwest. Those who want Qwest to provide the information should bear the risk. Two acceptable CLEC options for managing those risks have been provided: (a) get landowner releases, or (b) give Qwest relief if the CLEC finds the first option burdensome. In any competitive vendor/customer marketplace, it would be inconceivable to expect the vendor to bear uncompensated risks. Asking CLECs to find a way to bear and mitigate risks associated with a service (the provision of information that Qwest is unquestionably required to offer them) perfectly mirrors what would be expected in normal commercial circumstances.[28]

Moreover, contrary to Mr. Wilson's claim at page 10 of AT&T Ex. 13, a CLEC selecting the indemnification option is not faced with a "negotiation" and significantly elevated costs of

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[26] Affidavit of Kenneth L. Wilson Re: Checklist Item 3: Rights-of-Way and Checklist Item 7-911/E911 on behalf of AT&T, filed March 18, 2002 ("Wilson Affidavit re: Checklist Items 3 and 7") (AT&T Ex. 13) at 10.

[27] *Id.*

[28] Multi-state Report on General Terms and Conditions, Section 272 and Track A Report (Qwest Ex. 26) at 16.

entry. Qwest has prepared a sample letter of indemnification[29] that is available on Qwest's wholesale website. A CLEC may execute this letter or negotiate modifications with Qwest. A CLEC need only sign one letter for all of the requests it may submit during the period of its interconnection agreement with Qwest. The indemnification option creates almost no delay or additional cost to the CLEC for access to non-recorded MTE agreements that include rights-of-way.

In short, on the issue of access to MTE agreements, the approaches outlined in the SGAT and KMC agreement strike a reasonable middle ground between the competing interests of all parties involved by acknowledging that CLECs should be permitted to view MTE agreements to verify the scope of Qwest's ability to provide access, while at the same time recognizing that some property owners may oppose disclosure of their agreements with Qwest.[30]

2. Qwest Should be Permitted to Request a Waiver of the 45-Day Requirement When Circumstances Warrant.

As set forth above, the FCC generally requires that if Qwest cannot provide CLEC-requested access to its PDROW, it must deny the request in writing within 45 days.[31] However, contrary to AT&T's contention that the FCC's 45-day interval for responding to PDROW requests is inflexible, no matter how large or complex the request, state commissions in Idaho, Iowa, Montana, Nebraska, New Mexico, Utah, and Wyoming, on the recommendation of the

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[29] *See* Ex. TRF-POLES-1 to Freeberg Rebuttal re: Checklist Item 3 (Qwest Ex. 17).

[30] Staff agrees with the Multi-state Facilitator's resolution of this issue and Qwest's SGAT amendments. However, if the Commission were to disagree, Qwest would be willing to make additional concessions as outlined in Mr. Freeberg's Rebuttal Affidavit on Checklist Item 3 (Qwest Ex. 17) at 5-10. Because Qwest's SGAT currently complies with the Facilitator's recommendations, Qwest has not incorporated these concessions in its updated SGAT. If the Commission adopts that concession language, Qwest will then incorporate it as well as any of AT&T's stylistic changes to which Qwest has agreed into the SGAT.

[31] *See* 47 C.F.R. § 1.1403(b).

Multi-state Facilitator, have ruled that Qwest may seek a waiver of the 45-day interval where circumstances warrant such relief.

AT&T witness Mr. Wilson claims that in *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*,[32] the FCC rejected Qwest's position that FCC rules permit utilities more than 45 days when faced with unusually large requests for access.[33] Mr. Wilson misreads *Cavalier*. In *Cavalier*, the FCC endorsed a rolling approval process for large requests for access to poles, ducts, and conduits.[34] In *Cavalier*, the FCC expressly addressed the question of unusually large orders and held that pole owners are "required *to act on* each permit application" within 45 days of receiving the request. "To the extent that a permit application includes a *large* number of poles, [the pole owner] is required to *approve access as the poles are approved, so that* [the requesting carrier] *is not required to wait until all the poles included in a particular permit are approved prior to being granted any access at all.*"[35]

Thus, for large requests, Qwest must "act" within 45 days, meaning that it must respond to some subset of the large request (as much of the request as it has been able to complete) within 45 days. After the 45th day, Qwest must "approve access *as the poles are approved*, so that [a CLEC] *is not required to wait until all poles included in a particular permit are approved* prior to being granted access at all."[36] The Facilitator agreed:

> The *Cavalier* decision cannot be logically read as requiring access to all poles in a large order to be determined within 45 days. Otherwise, it stands for the odd proposition that if a CLEC orders 3 poles, it may have to wait

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[32] 2000 FCC LEXIS 2933, 15 FCC Rcd 9563 (June 7, 2000).

[33] *See* Wilson Affidavit re: Checklist Items 3 and 7 (AT&T Ex. 13) at 12-13.

[34] *See* 15 FCC Rcd 9563 ¶ 15.

[35] *Id.* (footnotes omitted; emphasis added).

[36] *Id.* (emphasis added).

> 45 days for responses on all of them: however, it can get decisions on a number greater than 3 if it submits a large order.[37]

The Facilitator concluded that section 2.2 of Exhibit D to the SGAT should contain the following language:

> In the event that Qwest believes that circumstances require a longer duration to undertake the activities reasonably required to deny or approve a request, it may petition for relief before the Commission or under the escalation and dispute resolution procedures generally applicable to this SGAT.[38]

The language is consistent with the FCC's rules and decisions on this issue. Furthermore, as Mr. Freeberg explained at the hearing, there are good reasons why Qwest should be permitted to request a waiver of the 45-day time period from this Commission.[39] For example, a carrier might request access to a line of poles that span the state.[40] Reviewing the records for such an expansive request would likely take longer than normal as the records for so many poles may not be kept in the same location. Furthermore, Qwest must physically inspect the poles to determine their ownership and if they can support additional equipment.[41] On such an expansive request, Qwest may not be able to complete the field verification in 35 days. Similarly, with large duct requests, Qwest faces obstacles that may prevent it from meeting its commitments. For example, Mr. Freeberg explained that it is not uncommon for manholes to be paved over.[42] Simply finding the manholes may be difficult. Nor is it uncommon to find that the duct is crushed. AT&T's

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[37] Qwest Ex. 22 at 27.

[38] *Id.* at 28.

[39] 4/23/02 Tr. (Freeberg) at 62-64.

[40] *Id.* at 62.

[41] *Id.* at 62-63.

[42] *Id.* at 63.

unduly rigid application of the 45-day interval permits no consideration of real-life impediments that, though exceptional, may warrant a waiver.

Importantly, as the KMC agreement and SGAT make clear, Qwest is not seeking an automatic waiver of the 45-day interval. Rather, Qwest asks only for the opportunity to bring to the Commission's attention a large or otherwise unusual request as to which the Commission may *or may not* grant to Qwest a waiver of the generally applicable interval. The Commission, therefore, remains the arbiter of whether an exception is warranted.

AT&T's position on this issue is not grounded in law or common sense, nor is it supported by circumstances or events occurring in South Dakota. It should be rejected, and the Commission should recommend that Qwest meets the requirements of Checklist Item 3 in South Dakota.

B. Qwest Complies with the Requirements of Checklist Item 7, Access to 911/E911, Operator Services, and Directory Assistance.

1. Checklist Item 7(I) – 911 and Enhanced 911

Section 271(c)(2)(B)(vii) of the Act requires BOCs to provide "nondiscriminatory access to – (I) 911 and E911 services."[43] Section 271 requires a BOC to provide CLECs access to the BOC's 911 and E911 services in the same manner that a BOC obtains such access, or as parity.[44] To satisfy Checklist Item 7(I), a BOC "must maintain the 911 database entries for competing [local exchange carriers] with the same accuracy and reliability that it maintains the database entries for its own customers."[45]

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[43] 47 U.S.C. § 271(c)(2)(B)(vii)(I).

[44] *SWBT Texas Order* ¶ 343; *Bell Atlantic New York Order* ¶ 349.

[45] *SWBT Texas Order* ¶ 343; *Bell Atlantic New York Order* ¶ 349.

Qwest demonstrated its compliance with the requirements of Checklist Item 7(I) in the direct and rebuttal affidavits of Margaret S. Bumgarner and the exhibits thereto.[46] As set forth below, Qwest has a legally binding commitment to provide E911 services to CLECs in a nondiscriminatory manner and is providing E911 services to South Dakota CLECs in accordance with the requirements of the Act and FCC orders.[47]

E911 services provide carriers with the ability to aggregate, switch, and transport end user emergency calls to a Public Service Answering Point ("PSAP"), which is operated by the government agency legally responsible for public safety in a particular state.[48] This government agency (not Qwest) determines the type of emergency service (Basic 911 or Enhanced 911), service specifications and configurations, trunking arrangements, and the funding that will be implemented. Basic 911 service routes all emergency calls made through a given central office to a single PSAP. Enhanced 911 service incorporates the Automatic Number Identification ("ANI") feature to forward the end user's telephone number to the PSAP. E911 service uses the ANI information to retrieve the end user's name and street address from the Automatic Location Identification ("ALI") database and then forwards it to the PSAP. Intrado, Inc., formerly SCC Communications Corp., manages the ALI database for Qwest and provides E911 database management services for Qwest and other local exchange carriers.

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[46] Affidavit of Margaret S. Bumgarner re: Checklist Item 7(I), filed October 24, 2001 ("Bumgarner Direct re: Checklist Item 7(I)") (Qwest Ex. 32); Rebuttal Affidavit of Margaret S. Bumgarner re: Checklist Item 7(I), filed April 2, 2002 ("Bumgarner Rebuttal re: Checklist Item 7(I)") (Qwest Ex. 33).

[47] *Id.*

[48] Bumgarner Direct re: Checklist Item 7(I) (Qwest Ex. 32) at 7. During the hearing, Staff inquired why E911 service was not offered in certain identified communities. 4/23/02 (Bumgarner) Tr. at 99-100. During the hearing, Staff inquired why E911 service was not offered in certain identified communities. Qwest has followed up on Staff's question and learned that with respect to Morristown, McIntosh, Milbank, and Ft. Pierre these localities have enhanced 911 ("E911") service. Timberlake does not have E911 service. Harding and Jones are not served by Qwest; they receive service from independent carriers.

Qwest provides reseller CLECs and CLECs that purchase unbundled switching with the same 911 and E911 service that Qwest provides to its own customers, using the same shared transport for 911/E911 call delivery, the same service arrangements, and the same standards that Qwest uses.[49] Qwest provides Intrado with updates of customer records for resellers and CLECs using unbundled local switching using the same procedure and at the same time that it provides updates for its own retail customer records.[50]

Qwest also provides facilities-based CLECs with access to its E911 services, E911 database, and E911 interconnection at parity with that of Qwest in its provision of E911 services to its own retail customers. CLEC and Qwest emergency calls use the same selective router and the same E911 trunking facilities from the selective router to the PSAP.[51] The ROC has developed several performance measures to evaluate Qwest's trunk installation, installation quality, and maintenance and repair performance.[52] Qwest commits to provide trunking, including taking corrective action to alleviate E911 trunk blockages, on a nondiscriminatory basis.[53]

With respect to the ALI database, facilities-based CLECs that use their own switching facilities are responsible for providing Intrado with their customer information so that Intrado can properly maintain the ALI database.[54] Qwest does not have the relevant customer information for facilities-based CLEC customers. For error detection and correction in the ALI database, facilities-based CLECs interface directly with Intrado. The CLEC and Intrado may negotiate a

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[49] *Id.* at 13.

[50] *Id.*

[51] *Id.* at 15-16.

[52] *Id.* at 16-17.

[53] *See id.* at 19-20.

[54] *Id.* at 17-18.

variety of arrangements to address record updates and error detection and correction based on the individual needs of the CLEC.[55]

Qwest's methods and procedures for providing CLECs with access to E911 services are based on the industry guidelines and standards developed by the National Emergency Number Association ("NENA"). Qwest's processes are documented for CLECs in the Product Catalog ("PCAT"), which is updated periodically to incorporate new legal requirements, enhancements, and changes to NENA guidelines and standards.[56]

Qwest has included in its contract with Intrado requirements that Intrado provide ALI database management services to all CLECs and independent companies operating in the Qwest region in a manner that is competitively neutral to, and at parity with, that provided to Qwest.[57]

For reseller CLECs and CLECs using Qwest unbundled switching, the provision of E911 services involve the same facilities, system edits, and commingled, batch update processes. For facilities-based CLECs, the facilities-based CLEC makes direct arrangements with Intrado for the submission of their E911 database records and updates; Qwest is not involved in the submission of those records or updates. Liberty Consulting Group confirmed that Qwest's processes and performance measures for E911 service are appropriate, and no CLEC has challenged Liberty's determination in the data reconciliation process. For these reasons, Qwest demonstrates that it provides CLECs with nondiscriminatory access to E911 service.

a. Qwest proactively implemented NENA-recommended guidelines for addressing locked E911 records.

Only one CLEC — AT&T — raised issues regarding Checklist Item 7(ii). Although it is unclear whether AT&T really challenges Qwest's compliance with this Checklist Item, it commented on Qwest's practices regarding unlocking customer records when a customer changes

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[55] *Id.*

[56] *Id.* at 9; The PCAT is available on the Qwest website at: www.qwest.com/wholesale/pcat/.

[57] *Id.*

service providers or moves, but chooses to retain his or her telephone number at the availability of PS/ALI.

When a customer changes service providers, industry procedures provide that the customer's information is *not* removed from the ALI or E911 database.[58] For reseller CLECs or CLECs using Qwest unbundled switching, the end user's existing database record will remain unchanged unless the end user is changing its telephone number, name or address. For facilities-based CLECs (CLECs that use their own switch), Intrado also does not remove a customer's record from the E911 in the event the customer switches carriers.[59] Instead, when Qwest sends a disconnect, or migrate, order to indicate that a customer has switched service providers, Intrado "unlocks" the record in the ALI database. The "unlocked" record remains unchanged in the database. The new service provider then sends a corresponding connect, or migrate, order to Intrado that "locks" the record to the new service provider and makes the new service provider responsible for the record.

Under the new process developed by NENA that Qwest has implemented, Intrado will validate that the port has been activated (and, thus, the new carrier is providing service) and immediately unlock the previous carrier's record to process the migrate order. Only unsuccessful migrates, such as where Intrado finds that the new service provider has not activated the service, will be returned to the new service provider for investigation. In this instance, the new service provider will need to investigate why it has sent a migrate record update for a telephone number that has not been ported.[60]

Qwest is committed to ensuring reliable 911 services. Hence, it proactively adopted these industry recommendations to address the issue of locked E911 records. During its December 6-

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[58] *Id.* at 12-13.

[59] *Id.*

[60] Bumgarner Rebuttal re: Checklist Item 7(ii) (Qwest Ex. 33) at 9-10.

11, 2001 meetings, NENA developed draft recommendations to address locked records.[61] Although those guidelines had not been finalized, Qwest acted immediately to implement them. Shortly after the December 2001 NENA meeting, Qwest began negotiations with Intrado to implement the NENA-recommended process to unlock Qwest records based on validation in NeuStar's number portability database that the CLEC has activated the number port. Qwest entered into its contract with Intrado on January 30, 2002,[62] and Intrado began implementation of the unlock process on February 25, 2002.[63] Under this process, if the new service provider's E911 database update (migrate order) is unsuccessful because of a locked record, Intrado will access the Local Number Portability ("LNP") database, NeuStar's Number Portability Administration Center ("NPAC") database, to determine if the new service provider has activated the port. If the CLEC has activated the port subscription in the NPAC, Intrado will then unlock the record and process the migrate order to update the E911 database. Qwest has authorized Intrado to unlock its customers' records based on validation of a port activation in the NPAC.[64] Qwest has sent notification to CLECs regarding this new process through the Change Management Process ("CMP") process.[65] Although AT&T speculates that it is unsure whether the NENA-approved process Qwest has implemented will resolve its allegations regarding "locked" records, it presented no evidence to suggest otherwise. For example, AT&T presented no evidence of any locked records in South Dakota either before or after Qwest initiated the NENA-approved solution. Furthermore, Qwest presented testimony that since implementation of

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[61] *Id.* at 10. The NENA standards are attached to Bumgarner Rebuttal re: Checklist Item 7(ii) (Qwest Ex. 33) as Ex. MSB-911-7.

[62] *Id.* The Letter Agreement between Qwest and Intrado relating to implementation of the NENA-recommended process is attached to Bumgarner Rebuttal re: Checklist Item 7(ii) (Qwest Ex. 33) as Confidential Ex. MSB-911-13.

[63] *Id.*

[64] *Id.*

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

the process, Intrado has cleared 100% of the valid migrates each day. Faced with this uncontradicted evidence, even AT&T admitted that the NENA-approved process Qwest employs has significantly reduced locked records regionwide.[66]

CLECs will also benefit from Qwest's proactive efforts. Qwest has arranged for Intrado to unlock a CLEC's customer's records, if authorized to do so by the CLEC.[67] Intrado has sent notification to all of the service providers' 911 database administrator contacts regarding this process.[68] Accordingly, Qwest anticipated and implemented the NENA requirements to address 911 record locks *and* ensured that CLECs are able to take advantage of this process as well. Ms. Bumgarner testified that Intrado had cleared 100 percent of the valid migrate orders since it began implementation of the unlock process.[69] Intrado is also auditing and reporting its performance under this process.[70]

AT&T claims that the current PIDs do not capture its concerns regarding unlocked records. Qwest notes that under the Intrado process, CLECs will receive reports directly from Intrado auditing and reporting upon Intrado's performance.[71] Thus, CLECs will be able to monitor Intrado's performance directly. Although Qwest does not believe additional PIDs are necessary, to the extent AT&T has additional concerns, the ROC Technical Advisory Group ("TAG") is the forum agreed upon by Qwest, CLECs, and ROC state commissions to address modifications to the PIDs.

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[66] 4/29/02 Tr. (Wilson) at 154.

[67] Bumgarner Rebuttal re: Checklist Item 7(1) (Qwest Ex. 33) at 15.

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

[69] *Id.* at 15.

[70] *Id.* at 17.

[71] *Id.*

b. Qwest stands ready to provide PS/ALI to all South Dakota CLECs.

Private Switch/Automatic Location identification ("PS/ALI") service permits the PSAP to "look behind" a PBX to determine the extension or floor from which a 911 call has been placed. Although Qwest has provisioned PS/ALI for CLECs in other states, no South Dakota CLEC has requested that Qwest provide it PS/ALI service. Indeed, AT&T (the only CLEC commenting on the availability of this product) is one of the CLECs to which Qwest has provided this product.[72] What is clear is that Qwest is ready to provide PS/ALI to any CLEC that requests it, with or without a contract amendment. Qwest has documented its commitment to provide CLECs with PS/ALI service in both its PCAT and in proposed contract language included in Ex. MSB-911-6 to Qwest Ex. 33 and in the SGAT filed concurrently with this brief. The PCAT describes the service and provides the information necessary for a CLEC to order this service for its customers. Qwest has processes and documentation in place for CLECs to order, provision, update records, update number ranges, as well as documentation on how to handle billing for both the CLEC and the CLEC's end user customer.[73] Both the PCAT and Qwest proposed contract language were posted for CLEC comments pursuant to procedures agreed to in the CMP. Qwest responded to the CLEC comments, and both the PCAT and the proposed contract language have been updated to reflect CLEC input. Today, both updated documents are on the Qwest wholesale website.[74]

AT&T has intimated that PS/ALI may be available in the PCAT, but not available in actuality. Since Qwest has provided PS/ALI to two AT&T customers in the past,[75] this claim is a bit remarkable coming from AT&T. Additionally, no South Dakota CLEC has even requested the service. Therefore, AT&T has no basis for its speculation. The indisputable facts are that

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[72] Bumgarner Rebuttal re: Checklist Item 7(I) (Qwest Ex. 33) at 7.

[73] *Id.* at 6.

[74] *Id.*

[75] *Id.* at 6-7.

PS/ALI is available in the PCAT and the revised South Dakota SGAT, and interested CLECs (AT&T included) have, in fact, been able to order it, without seeking a contract amendment. Indeed, AT&T's witness did not question Qwest's testimony that Qwest makes the product available today.[76] Therefore, there is no remaining issue with respect to the availability of PS/ALI.

Staff[77] and the Multi-state Facilitator[78] recommend that Qwest meets the requirements of Checklist Item 7(I). The Commission should adopt those recommendations.

2. Checklist Item 7(II) and 7(III) -- Access to Operator Services and Directory Services.

Section 271(c)(2)(B)(vii)(II) of the Act requires local exchange carriers to provide directory assistance services to allow the other carrier's customers to obtain telephone numbers. Section 271(c)(2)(B)(vii)(III) requires local exchange carriers to provide "operator call completion services." In addition, section 251(b)(3) of the Act imposes on local exchange carriers "the duty to permit all competing providers of telephone exchange service and telephone toll service to have nondiscriminatory access to . . . operator services, directory assistance . . . with no unreasonable dialing delays."[79] In order for a BOC to be in compliance with the

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[76] 4/29/02 Tr. (Wilson) at 171.

[77] Direct Testimony of Marlon Griffing, Ph.D, filed March 18, 2002 ("Griffing Direct") (Staff Ex. 1) at 17.

[78] Qwest Ex. 22 at 32-35.

[79] Sections 251(b)(3) and 271(c)(2)(B)(vii)(II) refer to nondiscriminatory access to "directory assistance." Section 251(b)(3), however, refers to nondiscriminatory access to "operator services," while Section 271(c)(2)(B)(vii)(III) refers to nondiscriminatory access to "operator call completion services." 47 U.S.C. §§ 251(b)(3) and 271(c)(2)(B)(vii)(III). The FCC noted that for section 271 compliance purposes, "operator call completion services" is a subset of or equivalent to "operator service." *SWBT Texas Order* ¶ 346, n. 968 (citing Memorandum Opinion and Order, *Application of BellSouth Telecommunications, Inc. and Bell South Long Distance, Inc. for Provision of In-Region, Inter-LATA Services in Louisiana*, CC Dkt. No. 98-121, 13 FCC Rcd 20599 ¶ 240 n. 763 (rel. Oct. 13, 1998) ("*Second BellSouth Louisiana Order*")).

requirements of sections 271(c)(2)(B)(vii)(II) and (III), a BOC must be in compliance with the regulations implementing section 251(b)(3).[80]

The FCC defines operator services as "any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call."[81] Under the FCC's orders, nondiscriminatory access to operator services means that a telephone service customer, regardless of the identity of his or her local telephone service provider, is able to connect to a local operator by dialing "0" or "0 plus" and the desired telephone number. The FCC held that LECs have no duty, apart from factors within their own control, to ensure that a competing provider's customers can in fact access the services.[82] In addition, the FCC held that the phrase "nondiscriminatory access to directory assistance and directory listings" means "the customers of all telecommunications service providers should be able to access each LEC's directory assistance service and obtain a directory listing on a nondiscriminatory basis, notwithstanding: (1) the identity of a requesting customer's local telephone service provider; or (2) the identity of the telephone service provider for a customer whose directory listing is requested."[83]

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[80] *See SWBT Texas Order* ¶ 324.

[81] Second Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt. No. 96-98, 11 FCC Rcd 19392, ¶ 1084 (1996) ("*Local Competition Second Report and Order*").

[82] *See Local Competition Second Report and Order* ¶ 114.

[83] *Id.* ¶¶ 130-35. Although the FCC originally concluded that incumbent LECs must provide directory assistance and operator services on an unbundled basis pursuant to sections 251 and 252 of the Act, the FCC removed directory assistance and operator services from the list of required unbundled network elements in the *UNE Remand Order*. *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-98, FCC 99-238, ¶ 442 (rel. Nov. 5, 1999) ("*UNE Remand Order*"). The FCC reasoned that where incumbent LECs provide customized routing, "lack of access to the incumbent's directory assistance and operator services on an unbundled basis does not materially diminish a requesting carrier's ability to offer telecommunications service." *See Id.* ¶ 443. The FCC further determined that a wholesale market for the provision of operator services and directory assistance services exists and that there are ample opportunities for self-provisioning of operator services and directory assistance. *Id.* ¶¶ 447-49, 464.

Qwest provides CLECs with nondiscriminatory access to its operator services and directory assistance services in compliance with the Act and the FCC's rules. CLECs in South Dakota have several options in securing nondiscriminatory access to operator services and directory assistance via Qwest's network: a CLEC may (a) purchase and provide Qwest's operator services or directory assistance services to its end users; (b) provide operator services or directory assistance services itself; or (c) provide operator services or directory assistance services using a third party's facilities and personnel.[84] When reseller CLECs and CLECs that use unbundled network platform ("UNE-P") combinations, or that use stand-alone unbundled switching, purchase access to Qwest's operator services or directory assistance services, they purchase access to the same operator services or directory assistance services, using the same facilities and configurations and dialing the same numbers that Qwest uses to provide operator services and directory assistance to its retail end users.[85] Likewise, CLECs that use their own switching facilities may purchase access to the same Qwest operator services and/or directory assistance services that Qwest provides to its retail end users.[86] CLECs that use their own switching facilities have the option of either allowing their end user customers to dial the same numbers to access directory assistance and operator services that Qwest end users dial, or selecting different numbers by which their end users may access Qwest's operator services and directory assistance services.[87]

Qwest provides the same directory assistance and operator services to CLEC customers that Qwest provides to its own customers. Qwest performs operator services and directory assistance for CLEC end users in accordance with the operating methods, practices, and

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[84] Affidavit of Lori A. Simpson regarding Checklist Item 7(II) and (III), filed October 24, 2001 ("Simpson Direct re: Checklist Item 7(II) and (III)") (Qwest Ex. 49) at 8.

[85] *Id.* at 9.

[86] *Id.* at 9-10.

[87] *Id.*

standards applicable to Qwest end users and is committed to provide the same priority of handling for CLEC end user calls as for its own end user calls.[88] Specifically, calls to Qwest's operator services and directory assistance are handled on a first-come, first-served basis, without regard to whether calls are originated by CLEC or Qwest end users.[89] Qwest also provides directory assistance and operator services branding for CLECs. Branding is the practice of identifying a local service provider's name on calls to Qwest directory assistance or operator services. CLECs have three choices for how they may brand their calls to Qwest directory assistance and operator services: CLECs can use Qwest's brand, can choose to have a generic brand (e.g., "Thank you for using your local telephone company."), or can brand the calls with their own name.[90] Qwest currently provides generic branding of directory assistance calls for three South Dakota CLECs and customized CLEC-specific branding for one South Dakota CLEC. Qwest currently generically brands the operator services calls of two South Dakota CLECs and provides CLEC customized branding for operator services calls for two South Dakota CLECs.[91]

No CLEC raised issues regarding Qwest's provision of operator services. Accordingly, there is no dispute that Qwest complies with the requirements of Checklist Item 7(III). One CLEC, Black Hills FiberCom ("FiberCom"), raised issues with Qwest's compliance with Checklist Item 7(II), access to directory assistance -- specifically, provision of branding for directory assistance. FiberCom claimed that Qwest had delayed provisioning of branding for directory assistance. As Ms. Simpson explained, however, much of the delay of which FiberCom complained was either unavoidable or attributable to FiberCom's own request to delay the

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

[89] *Id.* at 14-15.

[90] Tr. 4/24/02 (Simpson) at 10.

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

implementation of branding. In June 2001, when FiberCom requested branding, FiberCom was routing and transporting its directory assistance calls to Qwest's directory assistance service through Qwest's Sioux Falls switch, which is not capable of providing multiple directory assistance brand messages.[92] In September 2001, however, Qwest implemented a remote directory assistance switch in South Dakota that has the capability for multiple brand messages.[93] Accordingly, pursuant to FiberCom's June branding request, Qwest notified FiberCom by telephone on September 18, 2001 that Qwest could provide the requested CLEC-specific branding via the remote directory assistance switch, and that FiberCom should transport its directory assistance calls to the remote switch.[94] On October 18, Qwest received orders from FiberCom for installation of trunks from FiberCom's switch to Qwest's remote directory assistance switch. On November 8, Qwest received a valid and correct order for branding from FiberCom, and on November 12, Qwest sent FiberCom a firm order confirmation ("FOC") confirming the standard due date of December 11, for installation of the directory assistance trunks.[95]

On the due date, December 11, Qwest called FiberCom and spoke to a FiberCom employee named "John," who advised Qwest that FiberCom was not ready to accept the trunks at that time. "John" requested that Qwest put the trunk order on hold until "after the holidays."[96] On January 30, 2002, Qwest again called FiberCom and spoke to someone it believed to be the same employee, who stated that Qwest should hold the trunk order until February 4. On

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[92] Rebuttal Affidavit of Lori A. Simpson re: Checklist Item 7(II) and (III), filed April 2, 2002 ("Simpson Rebuttal re: Checklist Item 7(II) and (III)") (Qwest Ex. 50) at 5-7; Tr. 4/24/02 (Simpson) at 13.

[93] Tr. 4/24/02 (Simpson) at 13.

[94] Simpson Rebuttal re: Checklist Item 7(II) & (III) (Qwest Ex. 49) at 6.

[95] *Id.*; Tr. 4/24/02 (Simpson) at 14.

[96] Simpson Rebuttal re: Checklist Item 7(II) & (III) (Qwest Ex. 49) at 6.

February 4 or shortly thereafter, FiberCom, not Qwest, asked that the new trunks be reconfigure in a different arrangement. Qwest agreed to FiberCom's request. According to FiberCom, on February 13, the branding was working properly.[97] During the hearing, FiberCom presented no evidence to contradict Qwest's chronology of the installation. Indeed, it did not introduce its pre filed testimony or present a witness on this topic.

Qwest met FiberCom's branding request, and that service is up and running to FiberCom' satisfaction.[98] This isolated delay does not affect Qwest's compliance with Checklist Item 7(II). Staff[99] and the Multi-state Facilitator[100] agree that Qwest satisfies the requirements of Checklist Items 7(II) (directory assistance) and (III) (operator services).

C. Qwest Complies with the Requirements of Checklist Item 8, Access to White Pages Directory Listings.

Section 271(c)(2)(B)(viii) of the Act requires BOCs to provide CLECs with "[w]hite pages directory listings for customers of the other carrier's telephone exchange service."[101] Section 251(b)(3) of the Act requires local exchange carriers, including Qwest, to

> permit all [competitive local exchange carriers] to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing [sic], with no unreasonable dialing delays.[102]

The FCC has concluded that the term "white pages" in section 271(c)(2)(B)(viii) refers to the local alphabetical directory that includes the residential and business listings of the customers

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[97] *Id.*

[98] *Id.*

[99] Griffing Direct (Staff Ex. 1) at 17.

[100] Qwest Ex. 22 at 35-41.

[101] 47 U.S.C. § 271(c)(2)(B)(viii).

[102] 47 U.S.C.§ 251(b)(3).

of the local exchange provider.[103] In addition, the FCC has concluded that "the term 'directory listing,' as used in section 271, includes, at a minimum, the subscriber's name, address, telephone number, or any combination thereof."[104] According to the FCC, a BOC

> satisfies the requirements of Checklist Item 8 by demonstrating that it: (1) provides nondiscriminatory appearance and integration of white page directory listings to competitive LECs' customers; and (2) provided white page listings for competitors' customers with the same accuracy and reliability that it provides its own customers.[105]

1. Qwest Provides Nondiscriminatory Access to White Pages Listings.

As set forth in the direct and rebuttal affidavits of Lori A. Simpson on this item, Qwest provides white pages directory listings in compliance with sections 251 and 271 of the Act, and in accordance with the FCC's rules and orders implementing those provisions. Qwest's white pages listings service includes: (1) placing and updating the names, addresses, and telephone numbers of CLEC end user customers in Qwest's listings databases consistent with the CLEC's instructions, and (2) furnishing listings to Dex and third-party directory publishers on a nondiscriminatory basis for use in publishing local directories, also consistent with the CLEC's instructions.[106]

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[103] *See SWBT Texas Order* ¶ 353; *Bell Atlantic New York Order* ¶ 358.

[104] *See* Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, FCC 02-63, App. D (Statutory Requirements) ¶ 60 (Feb. 22, 2002) ("*Verizon Rhode Island Order*") (citing *Second Bell South Louisiana Order* ¶ 255).

[105] *Id.*

[106] *See* Affidavit of Lori A. Simpson re: Checklist Item 8, filed on October 24, 2001, ("Simpson Direct re: Checklist Item 8") (Qwest Ex. 51) at 6-9.

Qwest offers several types of white pages directory listings to CLECs, including primary, premium, and privacy listings.[107] No party has challenged the evidence presented by Qwest that these options are exactly the same listings options provided to Qwest's retail end users and that Qwest handles the listings and the underlying customer data the same regardless of whether the end user is served by a CLEC or by Qwest. Neither has any party contested that, as evidenced by section 10.4.2.1 of Qwest's SGAT in South Dakota, Qwest provides one primary listing for each main telephone number at no charge to CLECs.[108]

The record is uncontroverted that Qwest provides CLECs with white pages listings that are nondiscriminatory in both appearance and integration[109] as required under Qwest's South Dakota SGAT. Specifically, the SGAT obligates Qwest to provide listings that are nondiscriminatory in appearance and integration for all end users and require that CLEC listings appear in the same font, size, and typeface, and without any separate classification or distinguishing characteristics from Qwest end user listings.[110] In short, the record establishes that white pages listings for CLEC end users are provided on a nondiscriminatory basis, are integrated alphabetically with Qwest retail end user listings, and are indistinguishable from Qwest's listings.[111]

a. Qwest has implemented processes to minimize CLEC listings errors.

The record also establishes that Qwest's processes provide nondiscriminatory access to white page listings. As with the integration prong of the analysis under this Checklist Item, no

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[107] *Id.* at 6-7.

[108] *Id.* at 7; SGAT (Qwest Ex. 21) § 10.4.2.1.

[109] *See* Simpson Direct re: Checklist Item 8 (Qwest Ex. 51) at 7-8.

[110] *Id.* at 8; *see also* SGAT (Qwest Ex. 21) §§ 10.4.2.8, 10.4.2.10.

[111] *See* Simpson Direct re: Checklist Item 8 (Qwest Ex. 113) at 8-9; *see also* Tr. 4/24/02 (Simpson) at 17.

CLEC in South Dakota contends that Qwest fails to provide white pages listings with the same level of accuracy and reliability that it provides to its own customers.[112] As Ms. Simpson explains, Qwest processes CLEC end user listings using the same or similar systems, databases, methods, procedures, and personnel used by Qwest for its retail end user listings.[113] Qwest and CLEC end user listings are commingled in Qwest's listings database, and Qwest submits a single daily listings file containing commingled listings to its directory assistance database for purposes of updating that database, and to its official directory publisher, Dex, for inclusion in white pages directories under the terms and conditions of the publishing contract between Qwest and Dex.[114] Qwest provides to CLECs extensive and detailed training materials on its website and in-person instruction at various locations through Qwest's 14-state region.[115]

Moreover, consistent with FCC directives, Qwest has implemented in South Dakota "procedures that are intended to minimize the potential for errors in the listings provisioned for the customers of competing LECs."[116] Interfaces used to process listings (i.e., IMA-EDI and IMA-GUI systems), the listings database, and/or the service order processor identify errors in

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[112] Although one CLEC, Midcontinent Communications, raised concerns (addressed in full below) about its listings in South Dakota, no CLEC asserted that the listings Qwest provides for its own customers are more accurate or reliable than those Qwest provides for customers of CLECs.

[113] *See* Simpson Direct re: Checklist Item 8 (Qwest Ex. 51) at 8, 11; *see also* Tr. 4/24/02 (Simpson) at 17-18.

[114] *See* Simpson Direct re: Checklist Item 8 (Qwest Ex. 51) at 11; *see also* Tr. 4/24/02 (Simpson) at 17-18.

[115] *See* Simpson Direct re: Checklist Item 8 (Qwest Ex. 51) at 13-14; *see also* Tr. 4/24/02 (Simpson) at 19.

[116] Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, FCC 01-269 ¶ 115 (rel. Sept. 19, 2001) ("*Verizon Pennsylvania Order*") (citing *Second BellSouth Louisiana Order* ¶ 257).

CONTINUATION

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listings submitted by both CLECs and Qwest retail operations.[117] CLECs also can access Qwest's web-based Directory Listings Inquiry System ("DLIS") at any time to review their listings as they appear in Qwest's listings database.[118] In addition, Qwest gives CLECs the opportunity to review for accuracy end user listings as they appear in the listings database by providing to CLECs monthly "verification proofs."[119] These proofs enable CLECs to review and, if necessary, correct end user listings prior to the close date for publication of the white pages directory. These proofs are in addition to the so-called "on-demand" listings reports that are available to CLECs, which contain all of a CLEC's listings contained in Qwest's listings database as of the date of the request.[120] The listing correction process is the same for CLECs and Qwest alike.[121]

In short, as detailed above, South Dakota CLECs receive "instructions" and training regarding the white pages listings provisioning processes, and they are offered a "reasonable opportunity to verify the accuracy of the listings" and a procedure to review and edit listings prior to publication in the directory.[122] Such evidence is especially persuasive in demonstrating compliance with Checklist Item 8.[123] The evidence adduced in this proceeding demonstrates that Qwest's efforts to implement a process that, by design, delivers nondiscrimination have been successful.

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[117] *See* Simpson Direct re: Checklist Item 8 (Qwest Ex. 51) at 12, 14.

[118] *See* Simpson Rebuttal re: Checklist Item 8 (Qwest Ex. 52) at 7; *see also* Tr. 4/24/02 (Simpson) at 18.

[119] *See* Simpson Direct re: Checklist Item 8 (Qwest Ex. 51) at 14-15; Simpson Rebuttal re: Checklist Item 8 (Qwest Ex. 52) at 7; *see also* Tr. 4/24/02 (Simpson) at 18.

[120] *See* Simpson Direct re: Checklist Item 8 (Qwest Ex. 51) at 15.

[121] *Id.* at 15-16.

[122] *See Second BellSouth Louisiana Order* ¶ 258.

[123] *See Verizon Pennsylvania Order* ¶ 115.

b. Qwest's performance demonstrates that it is providing nondiscriminatory access to white pages listings.

Qwest measures its performance in providing listings for CLECs and Qwest retail end users. The specific PIDs used to measure Qwest's performance were developed in the ROC collaborative section 271 performance measures workshops, which involved Qwest and numerous CLECs, and was conducted under the auspices of the ROC performance measures committee, composed of representatives of 13 state commissions, including this Commission.[124] The two PIDs (DB-1 and DB-2) for white pages directory listings call for an aggregated performance result for listings provided for CLECs and for Qwest retail operations since Qwest's processes for listings provide parity by the design of the processes.[125]

In the fall of 2001, an independent, third-party auditor – the Liberty Consulting Group – retained as part of the ROC OSS test, completed its audit of Qwest's PIDs and issued its "Final Report on the Audit of Qwest's Performance Measures." Liberty reported that the applicable PIDs accurately and reliably report actual Qwest performance."[126] Moreover, South Dakota performance data indicate that, as of August 2001, updates were completed in 0.10 seconds and that Qwest completed 92.33 percent of listings updates without error.[127] Despite Qwest's offer to do so, no party has elected to conduct data reconciliation regarding these results, nor has any

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[124] *See* Rebuttal Affidavit of Lori A. Simpson re: Checklist Item 8, filed on April 2, 2002, ("Simpson Rebuttal re: Checklist Item 8") (Qwest Ex. 52) at 5.

[125] *See id.* at 5-6; *see also* Direct Testimony of Michael G. Williams re: Performance Measures, filed on October 24, 2001 ("Williams Direct re: Performance Measures") (Qwest Ex. 71) at Ex. MGW-PERF-6 (PIDs).

[126] *See* Simpson Rebuttal re: Checklist Item 8 (Qwest Ex. 52) at 6; *see also* Williams Direct re: Performance Measures (Qwest Ex. 71), Ex. MGW-PERF-2 (Liberty Final Report) at 2-3, 121-127.

[127] *See* Simpson Direct re: Checklist Item 8 (Qwest Ex. 51) at 10.

party questioned the accuracy of the performance results included in Ms. Simpson's direct testimony nor those of the Liberty Final Report.[128]

2. Midcontinent Communications' Concerns Regarding Listings Have Been Addressed.

Midcontinent Communications ("Midco") is the only CLEC to raise any issues regarding Qwest's compliance with Checklist Item 8. According to W. Thomas Simmons, of Midco, "[a] review of records in January and February, 2002 revealed 80 separate problems with [Midco's] residential directory listings."[129] As demonstrated by Ms. Simpson, however, any concerns Midco may have regarding listings have been addressed. Further, even assuming that Mr. Simmons is correct as to the number of errors Midco has experienced, Qwest's performance in South Dakota, while not perfect, provides parity or better performance as between CLECs and Qwest's own customers.

First, Qwest has addressed Midco's concerns. In an effort to meet Midco's white pages listings needs, Qwest's account team and Midco representatives meet monthly to discuss listings and other issues.[130] In late 2001, Qwest agreed to audit 10 percent of Midco's service orders as they appear in Qwest's service order processor compared to the local service requests submitted to Qwest by Midco.[131] Any errors found are corrected, and more importantly, Qwest's personnel are trained on correct procedures. Midco has acknowledged in the meetings with the Qwest account team that it has seen improvement in the number of errors.[132]

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[128] *Id.* at 11.

[129] Direct Testimony of W. Thomas Simmons, filed on March 18, 2002 ("Simmons Direct") (Midco Ex. 38) at 4-5.

[130] *See* Simpson Rebuttal re: Checklist Item 8 (Qwest Ex. 52) at 4; *see also* Tr. 4/24/02 (Simpson) at 20-21.

[131] *See* Simpson Rebuttal re: Checklist Item 8 (Qwest Ex. 52) at 4.

[132] *See id.*; *see also* Tr. 4/24/02 (Simpson) at 21.

Furthermore, even if Mr. Simmons is correct as to the number of listings errors Midco has experienced in South Dakota, Qwest is providing parity or better performance to Midco. As Ms. Simpson explained at the hearing, even assuming the accuracy of Mr. Simmons' statements on this issue, the listings errors identified by Mr. Simmons account for less than one percent of Midco's total number of listings; 99 percent of Midco's listings are accurately provided.[133] Indeed, as Ms. Simpson notes, considering the overall quantity of Mico's listings, the errors highlighted by Mr. Simmons indeed represent a "minuscule percentage" of the listings.[134] In short, Qwest strives to provide error-free listings, but it may make some listings errors in CLECs' and Qwest's retail listings. The standard for listings accuracy and timeliness for CLECs is parity with Qwest's retail listings accuracy and timeliness.[135] As discussed above, Qwest meets this standard.[136]

Moreover, under the FCC's 271 orders, Midco's isolated and statistically rare listings errors cannot provide a basis for a finding of noncompliance on Checklist Item 8. The FCC has noted that "[i]solated cases of performance disparity" generally will not result in findings of noncompliance on a given Checklist Item.[137] In this regard, the FCC has further declared:

> Although anecdotal evidence may be indicative of systemic failures, isolated incidents may not be sufficient for a commenter to overcome the BOC's *prima facie* case. Moreover, a BOC may overcome such anecdotal evidence by, for example, providing objective performance data that demonstrate that it satisfies the statutory nondiscrimination requirement.[138]

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[133] *See* Tr. 4/24/02 (Simpson) at 28-29, 32.

[134] *Id.* (Simpson) at 31. In addition, as Ms. Simpson pointed out, for approximately 11 months, Qwest provided Midco with verification proofs, review of which by Midco should have uncovered the alleged errors. *See id.* (Simpson) at 37-38.

[135] *See, e.g.*, Tr. 4/24/02 (Simpson) at 32.

[136] *See, e.g.*, Simpson Rebuttal re: Checklist Item 8 (Qwest Ex. 52) at 5-6.

[137] *Verizon Massachusetts Order* ¶ 122.

[138] *Bell Atlantic New York Order* ¶ 50.

As noted above, the record evidence establishes that Qwest provides CLECs in South Dakota with nondiscriminatory access to white pages listings. CLEC listings are fully integrated into and are indistinguishable from Qwest listings, and CLEC listings are at least as accurate and reliable as those Qwest provides for its own customers.

3. Qwest's Pricing of White Pages Listings is Consistent with the Act.

As explained above in connection with operator services, directory assistance, and directory assistance listings, items that are not UNEs under the FCC's orders need not be priced at forward-looking, TELRIC-based rates.[139] White pages listings are not a UNE, and therefore need not be priced according to TELRIC principles.

As set forth in Ms. Simpson's testimony, Qwest's rates for white pages listings are simply the mathematical product of two Commission-approved rates: Qwest's retail rates less Qwest's avoided costs as reflected in the Commission-approved wholesale discounts.[140] By definition, because these rates are approved by the Commission, they were just, reasonable and nondiscriminatory.

Qwest provides nondiscriminatory access to white page listings pursuant to Checklist Item 8 under the Act. Every state commission to consider Qwest's compliance with this checklist item has found that Qwest satisfies the requirements of the Act, subject to the satisfactory performance in the ROC OSS test. On the record in this proceeding, the Commission should recommend that Qwest satisfies Checklist Item 8.

D. Qwest Complies with the Requirements of Checklist Item 9, Numbering Administration.

Section 271(c)(2)(B)(ix) of Act the requires BOCs to provide CLECs with "nondiscriminatory access to telephone numbers for assignment to the other carrier's exchange service customers" until such time as telecommunication numbering administration guidelines,

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[139] *See, e.g., UNE Remand Order* ¶¶ 441-42 and discussion, *supra*.

[140] *See* Simpson Direct re: Checklist Item 8 (Qwest Ex. 51) at 16-17.

plan or rules are established.[141] Thereafter, the BOC is required to comply with such guidelines, plan or rules. The direct and rebuttal affidavits of Margaret S. Bumgarner[142] describe Qwest's compliance with Checklist Item 9.

Qwest complies with the Checklist Item 9 requirements by adhering to both the industry guidelines and the FCC's rules regarding numbering administration. Qwest ceased performing any North American Numbering Plan ("NANP") numbering administration or assignment functions on September 1, 1998, when the FCC transferred those functions to Lockheed Martin, and subsequently to NeuStar. NeuStar now acts as the North American Numbering Plan Administrator ("NANPA"). Both before and after the transfer of the numbering administration functions to the NANPA, however, Qwest complied and continues to comply with all industry guidelines and FCC rules applicable to carriers with respect to numbering administration. Qwest's SGAT and Commission-approved interconnection agreements establish that Qwest has concrete legal obligations to comply with industry guidelines and FCC rules regarding numbering administration, including those sections requiring the accurate reporting of data to the NANPA.

Qwest complies with the industry guidelines and FCC rules in reporting numbering data to the NANPA. Qwest also provides the national Local Exchange Routing Guide ("LERG") with accurate and complete information regarding routing information, rating information, and effective dates for NXX codes assigned to Qwest.

During the workshop process that took place prior to Qwest's filing in South Dakota, Qwest agreed to modifications to its SGAT relating to Checklist Item 9 to accommodate CLEC competitive concerns. All of these modifications have been included in the South Dakota

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[141] 47 U.S.C. § 271(c)(2)(B)(ix).

[142] *See* Affidavit of Margaret S. Bumgarner regarding Checklist Item 9, filed October 24, 2001, ("Bumgarner Direct re: Checklist Item 9) (Qwest Ex. 34) and Rebuttal Affidavit of Margaret S. Bumgarner regarding Checklist Item 9, filed April 2, 2002, ("Bumgarner Rebuttal re: Checklist Item 9) (Qwest Ex. 35).

SGAT.[143] In the Multi-state Paper Workshop Report, the Facilitator states that for Checklis 9: ". . . Qwest has supported a finding that this checklist requirement has been met, subject completion and commission consideration of the results of any OSS testing that may related the item."[144]

Qwest has devoted resources and implemented processes to ensure that it completes t programming of its switches necessary to recognize new NXX codes and accurately route call telephone numbers in those NXX codes prior to the NXX code activation dates. Qwest also h implemented performance measures to ensure timely and accurate NXX code activations. Th PIDs were developed in the ROC collaborative section 271 performance measures workshops and were audited by an independent third party as part of the ROC OSS test.[145] The ROC developed one performance measure for Checklist Item 9, PID NP-1, which measures the timel activation of NXX codes.[146] For each month of reportable results under this PID for South Dakota, Qwest's performance has been at 100 percent.[147]

No party introduced evidence disputing Qwest's compliance with Checklist Item 9. Dr. Griffing concluded that he agreed with the Multi-state Facilitator's conclusion that Qwest complies with this checklist item.[148] For these reasons, the Commission should recommend that Qwest satisfies the requirements of Checklist Item 9.

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[143] Section 13 of the SGAT (Qwest Ex. 21) addresses numbering administration.

[144] Qwest Ex.22 at 7.

[145] Bumgarner Rebuttal re: Checklist Item 9 (Qwest Ex. 35) at 2.

[146] 4/23/02 Tr. (Bumgarner) at 81.

[147] *Id.*

[148] Griffing Direct (Staff Ex.1) at 21.

E. Qwest Complies with the Requirements of Checklist Item 10, Access to Databases and Associated Signaling.

Section 271 of the 1996 Act requires a BOC to provide "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion."[149] To satisfy the requirements of Checklist Item 10, a BOC must demonstrate that it provides requesting carriers with nondiscriminatory access to "signaling networks, including signaling links and signaling transfer points."[150] In addition, the BOC must demonstrate that it provides requesting carriers with "nondiscriminatory access to: . . . (2) certain call-related databases necessary for call routing and completion, or in the alternative, a means of physical access to the signaling transfer point linked to the unbundled database; and (3) Service Management Systems (SMS)."[151] The FCC concluded that a BOC must design, create, test, and deploy AIN-based services through a service creation environment ("SCE").[152]

Qwest demonstrated its compliance with the requirements of Checklist Item 10 in the direct and rebuttal affidavits of Margaret S. Bumgarner.[153] Qwest provides CLECs with unbundled, nondiscriminatory access to its signaling network, including signaling links and STPs.[154] CLECs can interconnect with Qwest's signaling network to facilitate signaling among

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[149] 47 U.S.C. § 271(c)(2)(B)(x).

[150] *SWBT Texas Order* ¶ 362 (citing *Second BellSouth Louisiana Order* ¶ 267); *Bell Atlantic New York Order* ¶ 365.

[151] *SWBT Texas Order* ¶ 362 (citing *Second BellSouth Louisiana Order* ¶ 267); *see also Bell Atlantic New York Order* ¶ 365.

[152] *SWBT Texas Order* ¶ 362 (citing *Second BellSouth Louisiana Order* ¶ 272); *see also Bell Atlantic New York Order* ¶ 365.

[153] *See* Affidavit of Margaret Bumgarner re: Checklist Item 10, filed on October 24, 2001 ("Bumgarner Direct re: Checklist Item 10") (Qwest Ex. 36) and Affidavit of Margaret Bumgarner re: Checklist Item 10, filed on April 2, 2002 ("Bumgarner Rebuttal re: Checklist Item 10") (Qwest Ex. 37).

[154] Bumgarner Direct re: Checklist Item 10 (Qwest Ex. 36) at 2.

their switches, to Qwest's end office and tandem switches or call-related databases, and to other carriers' switches that are connected to Qwest's signaling network.[155]

Qwest uses a Signaling System 7 ("SS7") signaling network, which is a common channel signaling network. Qwest's signaling network and processes are based on industry guidelines and standards.[156] Reseller CLECs and CLECs using unbundled local switching have the same access to Qwest's signaling network that Qwest uses to provide services to its own retail customers. CLECs that purchase unbundled switching from Qwest obtain access to Qwest's signaling network in the same manner using the same facilities, equipment, and procedures, that Qwest uses to provide such access to itself.[157]

CLECs that use their own switching facilities can access Qwest's signaling network by self-provisioning or purchasing unbundled signaling links to facilitate signaling among their own switches, Qwest end office and tandem switches, the switches of other carriers connected to the Qwest SS7 network, and call-related databases.[158] Facilities-based CLECs with their own switching facilities can access Qwest's STPs by interconnecting their switches directly to Qwest's STPs or interconnecting their STPs with Qwest's STPs. CLECs also can interconnect with Qwest's signaling network through a third party signaling network provider. Regardless of the interconnection method the CLEC chooses, the CLEC's call routing and database queries are handled in the same manner as Qwest's call routing and database queries.[159]

Qwest provides CLECs with nondiscriminatory unbundled access to its call-related databases, signaling transfer points, and SMS. Qwest also designs, creates, tests, and deploys

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[155] *See* Qwest Ex. 21, SGAT § 9.13.1.1.

[156] *Id.* § 21.0.

[157] Bumgarner Direct re: Checklist Item 10 (Qwest Ex. 36) at 8-9.

[158] *Id.* at 9.

[159] *Id.*

AIN-based services for CLECs through a SCE.[160] Reseller CLECs have the same access to Qwest databases that Qwest provides to its own retail customers. Carriers purchasing unbundled switching access Qwest's signaling network as part of the switching UNE and therefore query Qwest's databases via Qwest's SS7 network in the same manner and over the same facilities as Qwest. CLECs that use their own switching facilities also query Qwest's databases in the same manner as Qwest.

Qwest's SS7 network and Qwest's call-related databases provide parity by design. For example, Qwest's SS7 network and call-related databases automatically handle all queries in the same manner and by using the same facilities, equipment, and procedures, regardless of whether a query originates on a CLEC network or Qwest's network.

Qwest demonstrated that it provides nondiscriminatory access for updating and maintaining the call-related databases as part of the ROC development of its performance measures and the audit of its performance measures performed by an independent auditor, Liberty Consulting Group.[161] The numerous CLEC participants in the ROC performance workshops determined that the call-related database update process is "parity by design" and developed the PID measure for the LIDB database updates. Liberty Consulting Group also supports that conclusion. During its audit, Liberty's objective was to ensure not only that Qwest reported its results accurately, but also to "verify that, where required, comparable wholesale and retail processes will by the nature of their design and operation provide parity."[162] This consensus determination is well supported by the facts: Qwest's SS7 network and call-related databases handle all queries, Qwest or CLEC, in the same manner and use the same facilities.

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[160] Bumgarner Rebuttal re: Checklist Item 10 (Qwest Ex. 37) at 8.

[161] *See* Bumgarner Direct re: Checklist Item 10 (Qwest Ex. 36). In addition, the performance measure, DB-1B, for the call-related database updates is identical to the measure developed and approved by the 13 states participating in the ROC performance workshops.

[162] Ex. MGW-PERF-2 at 1, attached to Williams Direct re: Performance Measures (Qwest Ex. 71).

equipment and procedures.[163] All database queries, Qwest and CLEC, are commingled, and all database queries are handled on a first-come, first-served basis.[164] Updates to Qwest's LIDB/ICNAM database are also commingled.[165]

The Multi-state Facilitator recommended that Qwest complies with the requirements of Checklist Item 10. In addition, no CLEC has challenged Qwest's performance in providing access to its signaling network and call-related databases or questioned the negotiated PIDs for this checklist item in South Dakota. Dr. Griffing, on behalf of Staff, also found that there are no disputed issues with regard to Qwest's compliance with Checklist Item 10.[166] Accordingly, the Commission should conclude that Qwest complies with Checklist Item 10.

F. Qwest Complies with the Requirements of Checklist Item 12, Dialing Parity.

Section 271(c)(2)(B)(xii) of the Act requires a BOC to provide "[n]ondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3)."[167]

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[163] Bumgarner Direct re: Checklist Item 10 (Qwest Ex. 36) at 11.

[164] *Id.*

[165] *Id.* at 12.

[166] Griffing Direct (Staff Ex. 1) at 21.

[167] *SWBT Texas Order* ¶ 373; *Bell Atlantic New York Order* ¶ 372. Based on the FCC's view that section 251(b)(3) does not limit the duty to provide dialing parity to any particular form of dialing parity (i.e., international, interstate, intrastate, or local), the FCC adopted rules in August 1996 to implement broad guidelines and minimum nationwide standards for dialing parity. *SWBT Texas Order* ¶ 373 n.1041 (*citing* Second Report and Order and Memorandum Opinion and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas; Administration of the North American Numbering Plan; Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, CC Docket Nos. 96-98, 95-185 and 92-237, FCC 96-333, 11 FCC Rcd 19392, ¶ 25 (rel. Aug. 8, 1996) ("*Local Competition/Area Code Relief Second Report and Order*")); First Order on Reconsideration, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas; Administration of the North American Numbering Plan; Proposed 708 Relief Plan and 630 Numbering*

Section 251(b)(3) imposes upon all local exchange carriers ("LECs") "[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with no unreasonable dialing delays."[168] Section 153(15) of the Act defines "dialing parity" as follows:

> . . . a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation . . . .[169]

Qwest's compliance with Checklist Item 12 was established by the direct and rebuttal affidavits of Margaret S. Bumgarner.[170] Qwest has concrete and specific legal obligations to provide local dialing parity. Qwest provides dialing parity pursuant to section 14 of its SGAT and its Commission-approved interconnection agreements.[171] Qwest's SGAT has been updated as the result of consensus reached in collaborative workshop processes, conducted on an open basis with full, active, and equal participation by competitors and state commission staffs.

With respect to intraLATA toll dialing parity (1+ equal access dialing), this Commission ordered the implementation of the FCC's dialing parity rules for intraLATA toll calls by July 22, 1999.[172] In accordance with this order, Qwest completed the implementation of toll dialing parity for intraLATA toll calls pursuant to a Commission-approved plan in South Dakota on July

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Plan Area Code by Ameritech-Illinois, CC Docket No. 96-98, 95-185 and 92-237, FCC-99-170, 14 FCC Rcd 16559 (rel. July 19, 1999) ("*Local Competition/Area Code Relief First Order on Reconsideration*").

[168] *SWBT Texas Order* ¶ 373; *Bell Atlantic New York Order* ¶ 372 *(citing* 47 U.S.C. § 251(b)(3)).

[169] 47 U.S.C. § 153(15).

[170] *See* Affidavit of Margaret S. Bumgarner re: Checklist Item 12, filed October 24, 2001 ("Bumgarner Direct re: Checklist Item 12") (Qwest Ex. 40) and Rebuttal Affidavit of Margaret S. Bumgarner re: Checklist Item 12 ("Bumgarner Rebuttal re: Checklist Item 12") (Qwest Ex. 41).

[171] Bumgarner Rebuttal re: Checklist Item 12 (Qwest Ex. 41) at 2.

[172] This Commission is asked to take administrative notice of its order in Docket No. TC99-030, *In the Matter of the FCC Order Establishing New Deadlines for Implementation of IntraLATA Dialing Parity by Local Exchange Carriers*, issued June 22, 1999.

22, 1999.[173] Qwest implemented intraLATA toll dialing parity in all of its switches in South Dakota using the "full 2-PIC" subscription method for intra- and interLATA presubscribed carriers. All of Qwest's switches in South Dakota, therefore, provide local and toll dialing pari to competitors.

Under the FCC's rules implementing the dialing parity requirements of section 251(b)(3 of the Act, customers of competing carriers must be able to dial the same number of digits as th BOC's customers dial to complete a local telephone call.[174] Consistent with these rules, there a no differences in the number of digits that Qwest or CLEC customers must dial to complete any type of call, regardless of the identity of the service provider of either the calling or called party. Qwest does not impose any requirement or technical constraint that requires CLEC customers to dial access codes or a greater number of digits than Qwest customers dial to complete the same type of call. From a customer's perspective, the interconnection of Qwest's network and the networks of CLECs is seamless.

CLEC and Qwest customers dial the same number of digits without any access codes, and can use the same dialing patterns, to place calls to a Qwest customer, a CLEC customer, directory assistance, or operator services. Moreover, Qwest provides dialing parity for access to operator and directory assistance services not only when Qwest provides those services for a CLEC, but also when a CLEC uses customized routing to provide operator and directory assistance services itself or by using a third party provider.[175]

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[173] The FCC granted Qwest's (formerly U S WEST) Petition for Waiver in Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Petition of U S WEST Communications, Inc. for Waver of Dialing Parity Dates Established in March 23, 1999, Dialing Parity Order, CC Docket No. 96-98, NSD File No. 98-L-121, 1999 FCC LEXIS 4863, (rel. Oct. 1, 1999 ("*Dialing Parity Order*"). The FCC allowed Qwest to delay implementing intraLATA toll dialing parity in three central offices until November 30, 1999. Qwest actually completed implementation in these three central offices October 18, 1999.

[174] *SWBT Texas Order* ¶ 374; *Bell Atlantic New York Order* ¶ 373 (*citing* 47 C.F.R. §§ 51.205, 51.207).

[175] Customized routing is available in SGAT § 9.12 (Qwest Ex. 21).

The FCC's rules implementing the dialing parity requirements of Section 251(b)(3) of the Act also state that customers of competing carriers must not suffer inferior quality of service, such as unreasonable dialing delays, as compared to the BOC's customers.[176] Consistent with these rules, Qwest provides CLEC end users with the same quality of service that Qwest provides to its own end users with no additional post-dialing delays. This is so, first, because Qwest does not impose any requirement or technical constraint that would cause CLEC customers to experience longer post-dialing delays or inferior quality service.

Second, the design of Qwest's systems and processes ensures equal treatment of all end user calls. The processing of calls in Qwest's central offices is the same for both CLEC and Qwest customers. Calls from all types of service providers, including Qwest, are intermingled on Qwest's switching facilities. Calls from CLEC end users to a central office are processed in accordance with the same technical requirements and standards as calls from Qwest end users.[177] Dialed digits transmitted or received by Qwest's switches utilize the same translations and routing tables for completing a call, regardless of whether the call originates on Qwest's network or a CLEC's network.[178] Qwest's switches cannot distinguish between calls from CLEC end users and calls from Qwest end users.[179] The design of Qwest's network, therefore, ensures that all customers receive the same dialing intervals and quality of service, regardless of who the customer's service provider may be. As a result, participants in the ROC collaborative workshops developing performance metrics and OSS testing requirements determined that

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[176] 47 C.F.R. § 51.207 (requiring same number of digits to be dialed); *Local Competition/Area Code Relief Second Report and Order* ¶¶ 4-15.

[177] Bumgarner Direct re: Checklist Item 12 (Qwest Ex. 40) at 7.

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

[179] *Id.* at 8.

performance metrics and testing are not necessary for this checklist item. The FCC has also determined that performance measures are not necessary for this checklist item.[180]

In the Multi-state Paper Workshop Final Report, the workshop Facilitator states that "the FCC determined that performance measures are unnecessary for this checklist item, and therefore, the ROC has not established any for it. Therefore, there are no unresolved issues concerning this checklist item."[181] In addition, every state commission to consider Qwest's compliance with Checklist Item 12 has found that Qwest complies.[182]

No party presented evidence disputing Qwest's compliance with Checklist Item 12. Dr. Griffing also agreed with the Multi-state Facilitator's conclusion that Qwest complies with Checklist Item 12.[183] The Commission should also find that Qwest satisfies Checklist Item 12.

III. CONCLUSION

For the foregoing reasons, and those set forth in Qwest's testimony and exhibits, the Commission should recommend that Qwest meets the requirements of Checklist Items 3, 7, 8, 9, 10, and 12 in South Dakota.

Dated this 21st day of May, 2002.

RESPECTFULLY SUBMITTED,

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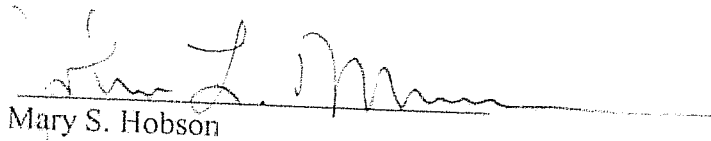
[180] *Local Competition/Area Code Relief Second Report and Order* ¶ 162.

[181] Qwest Ex. 22 at 8.

[182] Bumgarner Direct re: Checklist Item 12 (Qwest Ex. 40) at 9.

[183] Bumgarner Rebuttal re: Checklist Item 12 (Qwest Ex. 41) at 3.



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SOUTH DAKOTA PU
UTILITIES COMMIS

BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C)- OF THE TELECOMMUNICATIONS ACT OF 1996	))))	DOCKET TC 01-165

QWEST CORPORATION'S POST-HEARING BRIEF ON WORKSHOP 1: CHECKLIST ITEM 1 (INTERCONNECTION, COLLOCATION); CHECKLIST ITEM 11 (LNP); CHECKLIST ITEM 13 (RECIPROCAL COMPENSATION); AND CHECKLIST ITEM 14 (RESALE)

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I. INTRODUCTION

Qwest Corporation ("Qwest"), formerly U S WEST Communications, Inc., submits this brief to the South Dakota Commission ("Commission") in support of its compliance with the competitive checklist items in section 271(c)(2)(B) of the Telecommunications Act of 1996 (the "Act"): checklist items 1 (Interconnection and Collocation), 11 (Local Number Portability ("LNP")), 13 (Reciprocal Compensation), and 14 (Resale). As set forth in Qwest's testimony and demonstrated in this brief as well as in the various phases of these proceedings, Qwest meets the requirements of these checklist items.

Several parties filed testimony with this Commission and participated in the hearing addressing Qwest's compliance with checklist items 1, 11, 13 and 14. Qwest has made significant efforts to resolve disputes with participating competitive local exchange carriers ("CLECs") regarding these checklist items and has modified its SGAT to accommodate many of its competitors' requests. In several instances, Qwest has agreed to modifications that were unnecessary for compliance purposes, but which avoided disputes or promoted the competitive goals of CLECs. Although a very small number of disputes remain, the Commission should note that these issues relate more to the mechanics of Qwest's SGAT rather than Qwest's compliance with section 271 of the Act. Section 271 proceedings are not the proper forum for the creation of new requirements under the Act. Qwest respectfully requests that the Commission approve Qwest's proposed language as it comports with the Act, FCC regulations, and Commission rules even if the CLECs might favor slightly different wording.

In passing the Act, Congress intended to "open[] up local markets to competition, and permit[] interconnection on just, reasonable, and nondiscriminatory terms." The FCC has recognized that incumbent LECs and CLECs alike will benefit from competition resulting from

operating efficiencies: "We believe they [economies of scale] should be ...ted in a way th... permits the incumbent LECs to maintain operating efficiency to further fair competition, and ... enable the entrants to share the economic benefits of that efficiency in the form of cost-bas... prices." Accordingly, Congress did not intend to create a vehicle by which new entrants cou... gain an unfair advantage by misusing the Act's requirements. Qwest submits that, at least wi... respect to some of the issues being raised by a small subset of the CLECs, this is precisely wh... is occurring. Some of the CLECs in these proceedings have made demands upon Qwest th... have no foundation in the Act, such as, for example, a demand for blanket indemnification fro... Qwest. As this brief demonstrates, none of the issues that remain in dispute refutes Qwest... showing that it complies with the requirements of the Act.

Qwest satisfies all 14 of the section 271(c) checklist items. Specifically with respect ... the requirements of each checklist item, the Federal Communications Commission ("FCC") ha... stated that, in order to establish a *prima facie* case of compliance, a Bell Operating Compan... ("BOC") must demonstrate

> 1. that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms for each checklist item, and
>
> 2. that it is currently furnishing, or is ready to furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality.[1]

Thus, for each item, Qwest must show first that the terms of its Statement of General... Available Terms and Conditions ("SGAT") or interconnection agreements obligate it to provi...

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[1] Memorandum Opinion and Order, In the Matter of Bell Atlantic New York for Authorization to Provi... In-Region, InterLATA Services in the State of New York, CC Docket No. 99-295, FCC 99-404, 15 FC... Rcd at 3973-74, ¶ 52 (rel. Dec. 22, 1999) ("New York 271 Order") (numbering supplied).

the item in a manner that complies with the statute and with the FCC's rules, policies, and precedents regarding that item. Second, Qwest must show both (a) that it is furnishing (or ready to furnish) the item in reasonable, commercial quantities, and (b) that it is doing so at an acceptable level of quality.

Qwest satisfies the requirements of the competitive checklist in South Dakota.

II. WORKSHOP 1 CHECKLIST ITEMS

A Checklist Item 1 – Interconnection

1. Legal standard

Checklist item 1, 47 U.S.C. § 271(c)(2)(B)(i), requires Qwest to provide interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1). The FCC has defined "interconnection" as "the linking of two networks for the mutual exchange of traffic."[2] The traffic exchanged is local, toll, and a variety of specialized traffic, including directory assistance, operator services, and 911.

The Telecommunications Act of 1996 ("the Act") requires incumbent local exchange carriers, including Qwest, to provide competitive local exchange carriers ("CLECs") with interconnection (1) "at any technically feasible point within the carrier's network"; (2) "that is at least equal in quality to that provided by the local exchange carrier to itself"; and (3) "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[3]

The FCC has identified six "technically feasible" points of interconnection: the line-side of a local switch, the trunk-side of a local switch, the trunk interconnection points for a tandem

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[2] 47 C.F.R. § 51.5; *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15590, ¶176 (rel. Aug. 8, 1996) ("*Local Competition Order*"); *Arkansas/Missouri 271 Order*, App. C, ¶ 17.

switch, central office cross-connection points, signal transfer points, and points of access to unbundled network elements.[4]

2. Compliance

Qwest satisfies the requirements of checklist item 1. As of October 24, 2001, the South Dakota Utilities Commission had approved 34 interconnection agreements between Qwest and CLECs in South Dakota, and another 31 agreements were pending approval.[5]

Qwest offers interconnection to all competitors pursuant to its Statement of Generally Available Terms and Conditions ("SGAT"). Qwest originally filed its SGAT in South Dakota on November 22, 2000, and amended it in October 2001 in response to the collaborative workshops hosted by the commissions of Idaho, Iowa, Montana, New Mexico, North Dakota, South Dakota, Utah and Wyoming and facilitated by John Antonuk. Qwest amended its SGAT again before the hearings in South Dakota to reflect the advice of Dr. Marlon Griffing on behalf of this Commission.[6]

As of April 25, 2002, CLECs had more than 10,000 interconnection trunks in service.[7] A trunk is simply a transmission path between the trunk-side switch port of a CLEC at one end and the trunk-side switch port of an incumbent local exchange carrier ("incumbent LEC") like Qwest

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[3] 47 U.S.C. § 251(c)(2).
[4] 47 C.F.R. § 51.305(a)(2).
[5] Affidavit of Thomas R. Freeberg re: checklist item 1, filed on October 24, 2001 ("Freeberg Direct re: checklist item 1") (Qwest Ex. 14) at 1.
[6] Freeberg Direct re: checklist item 1 (Qwest Ex. 14) at 1; Rebuttal Affidavit of Thomas R. Freeberg re: checklist item 1, filed on April 2, 2002 ("Freeberg Rebuttal re: checklist item 1") (Qwest Ex. 15) at 2-3.
[7] Tr. 4/23/02 (Freeberg) at 12.

at the other.[8] By January 2002 Qwest was exchanging 70 million minutes of local calls each month with six CLECs over local interconnection trunks.[9]

Qwest has made available several arrangements to accomplish interconnection of networks, including (1) a Qwest-provided facility; (2) physical or virtual collocation associated with a CLEC-provided facility; (3) mid-span meet point of interface ("POI") facilities; (4) and other technically feasible methods of interconnection, including single point local interconnection at access or toll tandem switches.[10] Qwest provides for exchange of many types of traffic at the six feasible points of interconnection identified by the FCC.[11]

To ensure nondiscrimination, Qwest provisions interconnection trunks with the same equipment, interfaces, technical criteria, and service standards as Qwest's "retail" trunks between pairs of its own switches. Retail trunks may also carry the calls of a CLEC's subscribers.[12]

Qwest is measuring its performance against performance indicator definitions ("PIDs") developed in collaborative workshops before the Regional Oversight Committee ("ROC") and the Arizona Corporation Commission. The performance data during the six months prior to October 2001 show that Qwest was meeting CLECs' demand for interconnection at the required level of quality,[14] and its performance has only improved since then.[15]

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[8] *Id.* at 11.
[9] *Id.* at 12.
[10] Freeberg Direct re: checklist item 1 (Qwest Ex. 14) at 2.
[11] *Id.*; *see* 47 C.F.R. § 51.305(a)(2).
[12] Freeberg Direct re: checklist item 1 (Qwest Ex. 14) at 2.
[13] The PIDs are identified as Qwest Ex. 71.
[14] Freeberg Direct re: checklist item 1 (Qwest Ex. 14) at 3.
[15] *See* Tr. 4/23/02 (Freeberg) at 13-14.

CLECs in South Dakota have, and will continue to have, access to the fundamental prerequisite of local exchange competition – the ability to readily send their retail customers local calls to, and receive local calls from, retail customers of the incumbent carrier.

a. Qwest has a concrete legal obligation to provide interconnection to competitors in South Dakota

Qwest is obligated to provide interconnection to CLECs in South Dakota pursuant to its SGAT.[16] Section 7.0 of the SGAT describes Qwest's obligation to interconnect with CLEC networks for the purpose of exchanging local switched traffic.[17] To the extent CLECs have interconnection agreements that differ from the current SGAT, they may incorporate terms of the SGAT into their agreements upon request to Qwest.[18]

b. Qwest is fulfilling significant CLEC demand for interconnection

Currently, Qwest provides interconnection trunking to six facilities-based CLECs in South Dakota. As of September 1, 2001, CLECs had 7,949 interconnection trunks in service in South Dakota.[19] Of those, 4,990 connected CLEC end offices with Qwest end offices, and 3,959 connected CLEC end offices with Qwest tandem offices. Sixty-four percent of the interconnection trunks (6,600) were two-way trunks. Listed below are the types and number of trunks in service.

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[16] Qwest Ex. 21.
[17] *See id.* § 7
[18] Freeberg Direct re: checklist item 1 (Ex. 14) at 4-5
[19] *Id.* at 12. This number had increased to 10,000 by April 29, 2002. In re 271 Checklist at 15.

Trunk Type	Trunks in Service
E911	22
Local	5,378
Operator	67
Toll	1,584
Total	7,049[20]

In August 2001, a typical month, Qwest exchanged more than 53 million minutes of local calls with CLECs over interconnection trunks.[21] The volume of local traffic exchanged with CLECs continues to grow.[22]

c. Qwest is provisioning, maintaining, and repairing interconnection trunks in accordance with the ROC's performance measures

The ROC, after extensive workshop input from CLECs and Qwest, adopted specific PIDs to measure Qwest's success in providing interconnection to CLECs. The PIDs address trunk provisioning, network blocking, and trunk repair. Each month, Qwest collects and reports detailed performance results for each PID.[23]

The Liberty Consulting Group ("Liberty") conducted a thorough audit of Qwest's performance results. For each PID, Liberty examined Qwest's data collection systems to ensure that Qwest was accurately capturing, calculating, and reporting performance results. Liberty conducted an end-to-end analysis of sample data sets to verify that the data collection systems worked as

[20] Freeberg Direct re: checklist item 1 (Qwest Ex. 14) at 12.
[21] *Id.*
[22] This number had increased to 70 million minutes per month by the time of the hearings in April 2002. Tr. 4/23/02 (Freeberg) at 12.
[23] Freeberg Direct re: checklist item 1 (Qwest Ex. 14) at 13.

designed; and independently calculated certain performance results to corroborate Qwest's results. In its final report, issued on September 25, 2001, Liberty concluded that, "The audited performance measures accurately and reliably report actual Qwest performance."[24]

The ROC generally decided to use a "parity" standard rather than a benchmark standard for each of the interconnection performance measurements. The following subsections will briefly describe each of the areas for which the ROC developed PIDs and Qwest's performance under these PIDs.[25] These results show that Qwest has provided interconnection trunking on a nondiscriminatory basis.

i. Trunk provisioning

CLECs order local interconnection trunks with a well-known form called an Access Service Request ("ASR"),[26] which was created by the Ordering and Billing Forum of the Alliance for Telecommunications Industry Solutions. Instructions for use of this form are provided on Qwest's website and in the publicly available Access Service Ordering Guidelines.[27]

The ROC requires Qwest to measure certain aspects of the trunk provisioning process. For example, Qwest tracks the percentage of time it installs a trunk on or before the due date ("commitments met") and the average installation interval.[28] For both of these indicators, Qwest also collects data for its own interoffice trunks for comparison.

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[24] *Id.* at 14.
[25] *Id.* at 13 and Performance Results for South Dakota: March 2001 – August 2001, attached as Ex. TRF-INTER-2.
[26] SGAT (Qwest Ex. 21) § 7.4.1.
[27] Freeberg Direct re: checklist item 1 (Qwest Ex. 14) at 15.
[28] *See id.* and attached Ex. TRF-INTER-2 at 1, OP-3, OP-4.

The performance data from March through August 2001 show that Qwest has installed trunks for CLECs in timeframes and at percentages that are similar to comparable retail performance. Qwest met 100% of its installation commitments to CLECs. The CLEC average installation interval was 42 days. Although that was longer than the average retail interval of 15 days, the difference was the result of CLEC requests for intervals longer than the standard.[29] Since October 2001 provisioning intervals have decreased to an average of approximately 20 days.[30] Overall, from March through August 2001, installation quality was very good - 88% of new trunks were installed without a CLEC filing a trouble report.[31]

ii. Trunk forecasting and blockage

Section 7.2.2.8 of the SGAT defines the parties' responsibilities regarding interconnection forecasting, including matters such as forms and format, required information, forecast cycle, joint planning meetings, Qwest's Trunk Group Servicing Request ("TGSR") process, and trunk group resizing guidelines.

CLECs and Qwest share estimates of the future size of each trunk group. Requirements are typically projected for a two-year period. These forecasts aid the parties in identifying the best available interconnection options and constructing inventory in anticipation of orders.[32]

Trunk groups are sized to operate at service objectives. The performance metric for assessing trunk group service performance is call "blockage," which are calls that cannot be further advanced toward their destination due to equipment shortage or network failure.[33]

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[29] Freeberg Direct re: checklist item 1 (Qwest Ex. 14) at 17.
[30] Tr. 4/23/02 (Freeberg) at 14.
[31] Freeberg Direct re: checklist item 1 (Qwest Ex. 14) at 17.
[32] *Id.*
[33] *Id.* at 18.

Trunking theory assumes that not all customers will seek to use the network at the sam time. If Qwest or any telephone company were to design its network so that no call was ev blocked, a separate path would be needed between each telephone in the network. For network of more than a few telephones, this design would be cost-prohibitive. The solution is to provid switches and fewer paths (trunks between switches) that many telephones can access at will This design creates a probability that some calls will be blocked. Qwest's network is based upo the application of these longstanding principles.[34]

Qwest satisfies the service-blocking objective for interconnection trunking and for it embedded trunking by providing facilities and equipment in sufficient quantities to connect the number of people who might, under busy-hour conditions,[35] simultaneously attempt to pass calls between networks. Designing for 1% blocking on final routes achieves an industry-accepted balance between caller expectation and economic efficiency. Day-to-day variations in the level of busy-hour traffic can cause anomalous blocking of service beyond the design criterion. If unexpected trunk blockage occurs, either party may initiate a request for additional trunks.[36]

Qwest has generally considered blocking on local trunk groups below a 1% threshold to be incidental. A CLEC may choose another threshold and build interconnection trunks with Qwest to accommodate its desired design. Primary or high-use (non-final) trunk groups are designed to block at higher rates since overflow calls are not blocked, but are handled by alternate-final groups.

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[34] *Id.*; *see also* Tr. 4/23/02 (Freeberg) at 39-40.

[35] "Busy hour" is the sixty minute interval that on each day during a one-month period carries the heaviest traffic load.

[36] Freeberg Direct re: checklist item 1 (Qwest Ex. 14) at 18.

The ROC concluded that blockage less than or equal to 1% is always acceptable. The ROC also determined that, if blockage exceeds 1%, the blockage on interconnection trunks must be the same or better than on Qwest's own interoffice trunks.[37] The defined "acceptable" level of blockage on both direct trunks and tandem trunks resulted from exhaustive traffic studies, probability theory, technological advances, and the use of economic models.

Qwest's performance in controlling blockage has been outstanding. From March through August 2001, the average trunk blockage on CLEC interconnection to Qwest tandem offices in South Dakota was 0.20%, with no blockage whatsoever in the last four months.[38] Trunk blockage on CLEC interconnection to Qwest end offices averaged 0.12%.[39] These results are far below the ROC's 1% benchmark.

iii. Trunk maintenance and repair

After interconnection trunks have been installed, Qwest and CLECs participate in periodic joint planning meetings to establish trunk re-design and servicing requirements. The parties provide forecast information to each other to ensure reliable call completion.[40]

The ROC adopted specific performance measures for maintenance and repair of interconnection trunks. These include the overall trouble report rate, the percentage of trouble reports cleared within four hours, and the mean time to restore service.[41]

Qwest has achieved great success in maintaining and repairing interconnection trunks. The rate of CLEC trouble reports for interconnection trunks has been very low, with an average

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 22.

of 0.06%.[42] Qwest cleared 78% of those trouble reports within four hours.[43] The mean time to restore service was comparable for wholesale and retail trunks.

3. Disputed issues

a. Indemnification

AT&T seeks to impose broad new indemnification language relating to interconnection provisioning.[44] This language is unneeded and unsupported by CLECs actually doing business in South Dakota. Contrary to the thrust of AT&T's unfounded allegation, every interconnection trunking order submitted by *any* South Dakota CLEC in the relevant past has been completed by Qwest on or before the CLEC's requested due date.[45] Since November 1, 2001, there have not been any provisioning delays for *any* CLEC orders for interconnection trunks in South Dakota, and since March 1, 2001, only two orders have been delayed. In addition, Qwest has completed *every* interconnection trunking order submitted by South Dakota CLECs in the relevant past in *less than 20 days.* AT&T's proposal for new indemnification language relating to interconnection provisioning has no factual support. It is not based on accurate data, and is a flawed concept.[46]

Black Hills Fiber and Midcontinent Communications – CLECs that are actually operating in South Dakota's local exchange market – have not expressed any concerns about interconnection trunk provisioning and do not propose the type of onerous, unnecessary

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[42] Id. at 4, MR-8
[43] *Id.*, MR-5
[44] Affidavit of Kenneth L. Wilson Regarding checklist items 1 and 14 – Interconnection, Collocation and Resale – filed on March 18, 2002 ("Wilson Direct re: checklist items 1 & 14") (AT&T Ex. 10) at 6.
[45] Rebuttal Affidavit of Michael Williams filed on April 2, 2002 ("Williams Rebuttal") (Qwest Ex. 75); *see* performance measures OP-3, OP-6 or OP-15.
[46] Freeberg Rebuttal re: checklist item 1 (Qwest Ex. 15) at 3-4.

provision AT&T has proposed. Indeed, Kenneth Wilson admitted that he is unaware of an instance in which this issue has ever arisen in South Dakota.[47]

Qwest previously objected to this language in the Multi-state proceeding on several grounds, including the fact that it would duplicate Quality Performance Assurance Plan ("QPAP") incentives, there are no controlling FCC rulings to support the language, there is no precedent for considering the issue in other 271 hearings, and there already is adequate indemnification in the General Terms and Conditions portion of the SGAT.[48] As Dr. Griffing properly points out, the Multi-state Facilitator's Report recommends against the AT&T proposal.[49] Dr. Griffing accurately observes that the AT&T proposal seeks to transfer responsibility for all deficient performance onto Qwest, even when Qwest isn't responsible for the deficient performance.[50] Qwest agrees with Dr. Griffing's recommendation that the Commission adopt the Facilitator's recommendation.

b. Entrance facilities

Contrary to AT&T's claim,[51] Qwest has routinely provided CLECs with dedicated trunking to CLEC-selected POIs both inside and outside Qwest central office buildings. A CLEC may choose a POI location anywhere in Qwest's incumbent LEC territory.[52] For example, when Midcontinent Communications submitted Access Service Requests (local interconnection trunking orders), it named a POI associated with equipment collocated inside a Qwest central

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[47] Tr. 4/29/02 (Wilson) at 142-43.
[48] Freeberg Rebuttal re: checklist item 1 (Qwest Ex. 15) at 4.
[49] Direct Testimony of Marion Griffing on Behalf of the Staff of the Public Utilities Commission of South Dakota, filed on March 18, 2001 ("Griffing Direct") (Staff Ex. 1) at 23.
[50] *Id.* at 24.
[51] Wilson Direct re: checklist items 1 & 14 (AT&T Ex. 10) at 8.
[52] *See* KMC interconnection agreement at 7.1.2, attached as Ex. LBB-QTC-1 to Rebuttal Testimony of Larry B. Brotherson re: General Terms and Conditions, filed on April 2, 2002 (Qwest Ex. 36)

office building in Sioux Falls.[53] Midcontinent has stated that it incurred no significant problems in establishing interconnection at this site. The KMC interconnection agreement and SGAT section 7.1.2.2 confirm CLECs' ability to avoid entrance facilities when interconnecting. When trunking is configured to a POI associated with collocation, the entrance facility component of interconnection is avoided.[54]

Contrary to AT&T's suggestion, when a CLEC has selected a POI in a non-Qwest building, Qwest has routinely arranged a dedicated interconnection trunk group from one or more Qwest switches to that POI. In these cases, Qwest may have to construct a new facility from Qwest's nearest central office building to the building that houses the POI selected by the CLEC. This Qwest-provided transport is subject to reciprocal compensation and has been labeled an "entrance facility." This transport system often provides a path for direct trunk groups. This clearly does not mean that Qwest somehow "dictates the location of the POI as somewhere on the CLEC network, not on Qwest's network." In fact, the POI should be on both carriers' networks. The POI marks the edges of *both* carriers' local interconnection networks and is at the junction of each. Contrary to AT&T's claim, Qwest does not "tell the CLEC that their POI will be at the CLEC switch or somewhere on the CLEC network, and not where the CLEC chooses the POI to exist *on Qwest's network.*"[55]

Once again, AT&T has identified a non-problem. Kenneth Wilson admitted that he was unaware that an issue concerning entrance facilities has ever arisen in South Dakota.[56]

("Brotherson Rebuttal re: General Terms and Conditions"); *see also* SGAT (Qwest Ex. 31).

[53] *See* Midcontinent Communications' Testimony filed on March 18, 2002 ("Midcontinent Testimony") (Midcontinent Ex. 38).

[54] Freeberg Rebuttal re: checklist item 1 (Qwest Ex. 15) at 5.

[55] Wilson Direct re: checklist items 1 & 14 (AT&T Ex. 10) at 9.

[56] Tr. 4/29/02 (Wilson) at 143.

AT&T also expresses an unfounded concern associated with reciprocal compensation:

> Furthermore, Qwest's Exhibit A purports to charge CLECs DS1 and DS3 rates for the entrance facility even though that facility is on Qwest's side of the POI where the POI resides on the CLEC network.[57]

If AT&T is pointing out what it considers to be a Qwest fault here, Qwest disagrees. Most Qwest interconnection agreements[58] and section 251(b)(5) itself state that carriers will compensate one another for the transport that they provide on their side of the POI in order to complete terminating local calls. AT&T seems to indicate its awareness of this, as evidenced by its quote of the following FCC statement in its testimony:

> Moreover, because competing carriers must compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect.[59]

The KMC agreement and the SGAT state clearly that transport costs on either side of the point of interface are subject to reciprocal compensation.

AT&T also states:

> In contrast, AT&T and other CLECs have, for some time and in accordance with the Act, designated their chosen points of interconnection, and paid for interconnection trunks that run from their points of presence ("POP") or switches to the designated POI *in the Qwest network*.[60]

A CLEC that is also an interexchange carrier may place an Access Service Request (interconnection trunking order) that designates the local interconnection POI at the same

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[57] Wilson Direct re: checklist items 1 & 14 (AT&T Ex. 10) at 9.

[58] *See, e.g.*, KMC interconnection agreement § 7.1.2, attached as Ex. 1BB-GTC-1 to Brotherson Rebuttal re: General Terms and Conditions (Qwest Ex. 56) or SGAT (Qwest Ex. 21) § 7.3.1.1.3.

[59] Wilson Direct re: checklist items 1 & 14 (AT&T Ex. 10) at 13, *quoting Local Competition Order* ¶ 209.

[60] Wilson Direct re: checklist items 1 & 14 (AT&T Ex.10) at 10.

location as the POP. It may also choose a local interconnection POI at a location other than the POP. If an interexchange carrier who has become a CLEC chooses a local interconnection POI such that both of the interconnected local carriers provide an "entrance facility" to the other, the symmetric bills should net a zero sum. This fact makes AT&T's concern moot. The KMC agreement and the SGAT allow for this.[61] AT&T's suggested changes to section 7.1.2.1 and 7.3.2.1.1 are not necessary.[62]

Dr. Griffing observes that AT&T expressed this same concern in the Multi-state proceedings. Dr. Griffing noted that when a CLEC chose a POI such that both an entrance facility and direct trunked transport were involved in the trunking of local calls, the configuration did not give CLECs direct access to UNEs, and did not allow commingling of local and interexchange traffic, and so could be more expensive than necessary. In response, Qwest agreed to allow access to UNEs via an entrance facility, but opposed commingling and the ratcheting of *rates*.[63] To be clear, Qwest does allow commingling of trunks, but not ratcheting of rates.[64]

Qwest has complied with the Facilitator's recommendation by changing the SGAT to permit entrance facilities to be used for access to UNEs.[65] Dr. Griffing recommends that the Commission accept this resolution.[66] This matter should be considered closed.

c. Expanded interconnection channel termination (EICT) charges

As Dr. Griffing reports, AT&T recommended a change to the SGAT section 7.1.2.2 to: (a) eliminate the requirement that CLECs pay for Interconnection Tie Pairs, and (b) remove EICT

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[61] SGAT (Qwest Ex. 21) § 7.3.1.1.3.1.
[62] Freeberg Rebuttal re: checklist item 1 (Qwest Ex. 15) at 7-8.
[63] Griffing Direct (Staff Ex. 1) at 24.
[64] *See infra* section D(3).
[65] Qwest changed a prohibition to permission at SGAT (Qwest Ex. 21) §§ 7.1.2.1 and 7.1.2.3.
[66] Griffing Direct (Staff Ex. 1) at 24.

charge references from section 7.3.1.2.[67] He noted that Qwest accepted the resolution of this issue as proposed in the Washington 271 proceedings and that Mr. Antonuk confirmed that the Washington order reflected a resolution of this issue that is in accord with FCC requirements and comports with AT&T's request.[68] Dr. Griffing recommended[69] that the Commission accept Mr. Antonuk's recommendation. Qwest already has complied.[70]

d. Transport in excess of 50 miles

AT&T voices concern about SGAT section 7.2.2.1.5 by suggesting that it "shifts the burden to build Qwest's network to the CLEC."[71] AT&T misrepresents that this language improperly limits interconnection under the Act. It does not. Section 7.2.2.1.5 of the SGAT says:

> If direct trunked transport is greater than fifty (50) miles in length, and existing facilities are not available in either Party's network, and the Parties have not been able to resolve the issue through mid-point arrangements, and the Parties cannot agree as to which Party will provide the facility, the Parties may bring the matter before the Commission for resolution on an Individual Case Basis."[72]

There is no improper "shift of burden" to the CLEC, as AT&T suggests. If the CLEC places an interconnection order that names a point of interface between the carriers such that Qwest must construct new and lengthy facilities, the SGAT simply provides that Qwest *may* bring the matter before the Commission, but only if the parties are unable to reach an agreement.[73] If there is a

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[67] *Id.* at 25.
[68] *Id.*
[69] *Id.*
[70] Freeberg Rebuttal re: checklist item 1 (Qwest Ex. 15) at 9.
[71] Wilson Direct re checklist items 1 & 14 (AT&T Ex. 10) at 12.
[72] This section does not appear in most of Qwest's interconnection agreements in South Dakota. Freeberg Rebuttal re checklist item 1 (Qwest Ex. 15) at 10.
[73] Freeberg Rebuttal re: checklist item 1 (Qwest Ex. 15) at 10-11.

need to build beyond 50 miles, Qwest simply would like to reserve the right to submit the question to the Commission.[74]

In his prefiled testimony Dr. Griffing initially suggested that this Commission accept Mr. Antonuk's recommendation to delete this section,[75] but at the hearing he acknowledged that "Qwest has since offered something that I do find acceptable."[76] This is the single instance where Qwest suggested a resolution of interconnection issues different than one proposed by Mr. Antonuk.[77] The commissions in Washington, Colorado, Oregon, Nebraska, Iowa, Utah, New Mexico, Montana, Idaho, Arizona and Wyoming have all agreed with Qwest and Dr. Griffing.[78] Many of these states were among those comprising the Multi-state case. These state commissions found that the qualified nature of the SGAT language, coupled with the FCC's advice about an incumbent LEC's "limited build-out of facilities"[79] obligation, justified the continued inclusion of this SGAT language. Qwest is aware of the important obligation to provide interconnection, coupled with possible enormous transport distance in a one-LATA state such as South Dakota. Qwest respectfully asks this Commission to follow the examples of these other commissions and permit Qwest to raise this issue before it on an appropriate case-by-case basis.

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[74] Tr. 4/23/02 (Freeberg) at 62; *see* Tr. 4/29/02 (Wilson) at 143.
[75] Griffing Direct (Staff Ex. 10) at 26-28.
[76] Tr. 4/30/02 (Griffing) at 161.
[77] Tr. 4/23/02 (Freeberg) at 34.
[78] Freeberg Rebuttal re: checklist item 1 (Qwest Ex. 15) at 11.
[79] *Local Competition Order* ¶ 552; *see* Tr. 4/23/02 (Freeberg) at 34.

e. Trunk forecasting

AT&T noted that Qwest included an updated version of SGAT section 7.2.2.8.6.[80] This version was based on Colorado Commissioner Gifford's August 2001 advice on this matter in Qwest's Colorado section 271 proceeding. This language now appears in Qwest's agreement with KMC in South Dakota and is therefore available to any South Dakota CLEC that desires to adopt it.[81] AT&T now proposes to modify section 7.2.2.8.6 to add the phrase "through the Dispute Resolution process" to section 7.2.2.8.6.1 and to delete section 7.2.2.8.6.2.[82] Qwest does not object to entering into an agreement with AT&T that contains these modifications to the language in the KMC agreement, but Qwest thinks it best not to modify the SGAT as AT&T suggests. Instead Qwest will do as Dr. Griffing suggests.

Dr. Griffing reported that CLECs in the Multi-state proceedings wanted Qwest to build trunking capacity per their forecasts. He noted that Qwest said that CLEC forecasts are typically too high and that Qwest incurs unrecoverable costs when it builds capacity that is not used. Qwest offered to build to its own forecasts of interconnection trunking needs, or to build to the CLEC forecast, but to require a deposit in the latter case. Qwest offered to return the deposit if trunk usage reached 50% of the forecasted level.[83]

As Dr. Griffing reported, Mr. Antonuk's Report said Qwest could require a deposit to protect itself against incurring installation costs it may never recover.[84] Mr. Antonuk clarified that the basis for returning the deposit should be 50% usage of trunks installed, not forecasted, and that the usage should include that of all CLECs, not just the company making the deposit.

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[80] Wilson Direct re checklist items 1 & 14 (AT&T Ex. 10) at 13-14.
[81] Freeberg Rebuttal re: checklist item 1 (Qwest Ex. 15) at 11-12.
[82] Wilson Direct re checklist items 1 & 14 (AT&T Ex. 10) at 14.
[83] Griffing Direct (Staff Ex. 10) at 28-29.

The Report proposed language in section 7.2.2.8.6.2 that implements the two findings. Dr. Griffing recommended that this Commission accept Mr. Antonuk recommendations.[84]

In order to close this issue, Qwest has re-filed the South Dakota SGAT to specifically track Mr. Antonuk's suggested language within section 7.2.2.8.6.

f. Access tandem interconnection

This issue is addressed in the section of this brief that addresses checklist item 13 – reciprocal compensation.

g. Confidentiality of forecasts

AT&T recommended that section 7.2.2.8.12 of the SGAT be removed.[85] Qwest concurred and did so.

h. Oversized trunks groups

AT&T asks that SGAT section 7.2.2.8.13 be amended.[86] Qwest agreed to include the version of this section that AT&T desires. That language says that CLECs need only provide Qwest a reason for maintaining an oversized trunk group. The language is offered here with the new wording underlined.

> 7.2.2.8.13 If a trunk group is consistently utilized (trunks required over trunks in service) at less than fifty percent (50%) of rated busy hour capacity each month of any consecutive three (3) month period, Qwest will notify CLEC of Qwest's desire to resize the trunk group. Such notification shall include Qwest's information on current utilization levels. If CLEC does not submit an ASR to resize the trunk group *or provide Qwest with its reasons for maintaining excess capacity* within thirty (30) calendar days of the written notification, Qwest may reclaim the unused facilities and rearrange the trunk group. When reclamation does occur,

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[84] *See Id.* at 29.
[85] *Id.*
[86] Wilson Direct re checklist items 1 & 14 (AT&T Ex. 10) at 16.
[87] *Id.* at 17-18.

> Qwest shall not leave the trunk group with less than twenty five percent (25%) excess capacity. Ancillary trunk groups are excluded from this treatment.

Qwest expects that this resolves the matter from AT&T's perspective. Mr. Antonuk considered this issue and found Qwest's language, without the AT&T addition, to be appropriate.[88]

i. Commingling

In its prefiled testimony AT&T claims that SGAT section 7.2.2.9.3.2 demands that CLECs use separate trunk groups for interLATA, 1 + long distance calls and for local calls.[89] section 7.2.2.9.3.2 does not, by any interpretation, say that. Section 7.2.2.9.3.2 of the SGAT provides:

> 7.2.2.9.3.2 Exchange Service (EAS/Local) Traffic and Switched Access Traffic including Jointly Provided Switched Access Traffic, may be combined on the same trunk group. If combined, the originating Carrier shall provide to the terminating Carrier, each quarter, Percent Local Use (PLU) factor(s) that can be verified with individual call record detail. Call detail or direct jurisdictionalization using Calling Party Number information may be exchanged in lieu of PLU if it is available."

This language explicitly permits the combining that AT&T argues is the most efficient.[90] The KMC interconnection agreement with Qwest also contains this language and is available to CLECs that seek this language within their agreements.

AT&T claims that it is not asking to commingle local and long distance traffic on the same trunk.[91] If AT&T were, SGAT section 7.2.2.9.3.2 would allow that. When interconnected

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[88] *See* Freeberg Rebuttal re: checklist item 1 (Qwest Ex. 15) at 14.

[89] Wilson Direct re checklist items 1 & 14 (AT&T Ex. 10) at 18.

[90] This willingness on Qwest's part goes beyond what Dr. Griffing properly understood was Qwest's position in May 2001 with regard to a Ninth Circuit Court ruling. *See* Griffing Direct (Staff Ex. 50) at 24.

carriers choose this option, usage-sensitive charges are apportioned via (1) application of a percentage local use (PLU) factor or (2) via call-by-call application of either TELRIC-based local rates or tariff-based toll rates. Contrary to AT&T's suggestion, Qwest has not assessed tariff-based, usage-sensitive charges to local calls.[92]

4. Conclusion

Qwest has satisfied each of the requirements of the Act with regard to interconnection. Qwest has a concrete and specific legal obligation to continue to provide interconnection under the SGAT and interconnection agreements between Qwest and CLECs in South Dakota. Qwest has fulfilled considerable CLEC demand for interconnection across the state. Qwest's trained personnel are well prepared to meet future demand for interconnection.

The procedures Qwest has in place for establishing and expanding interconnection to CLECs ensure that the requirements of the Act have been, and will continue to be, satisfied in South Dakota. The performance data show that Qwest provisions interconnection trunks to CLECs on a nondiscriminatory basis, with a comparable percentage of commitments met, and that trunk blockage is within reasonable limits. All of Qwest's processes, procedures, capabilities, and performance for interconnection provide efficient carriers with a reasonable opportunity to compete.

Qwest satisfies the requirements of the Act, the Communications Act of 1934, as amended, and the FCC's orders on interconnection. The Commission should find that Qwest has satisfied the requirements of checklist item 1, interconnection, of section 271(c)(2)(B) of the Act.

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[91] Wilson Direct re checklist items 1 & 14 (AT&T Ex. 10) at 19.
[92] Freeberg Rebuttal re: checklist item 1 (Qwest Ex. 15) at 16.

B. Checklist Item 1 – Collocation

1. Legal standard

Qwest satisfies the requirements of section 271(c)(2)(B)(i) of the Telecommunications Act of 1996 ("1996 Act"), and the Federal Communications Commission ("FCC") with respect to collocation. Qwest provides collocation on rates, terms and conditions that are just, reasonable and non-discriminatory. Qwest has a concrete and specific legal obligation to provide collocation pursuant to its Statement of Generally Available Terms and Conditions ("SGAT") and in the various Commission-approved interconnection agreements with CLECs in South Dakota.

In addition, Qwest is actually providing collocation to CLECs in South Dakota. As of August 31, 2001, Qwest had collocation arrangements with seven CLECs in South Dakota. Qwest was providing fourteen units of physical collocation and one unit of virtual collocation in five central office buildings. These central offices represent 50.8 percent of Qwest's retail access lines within South Dakota. Additionally, two of these central office buildings (38.6 percent of the retail access lines) currently house three or more collocators' equipment.[93]

Carriers use collocation as one means of obtaining interconnection and access to UNEs. The existence of collocated CLECs – and the locations selected by those carriers for their collocation – provide a strong indicator of the existence of, and the potential for, facilities-based competition. Additionally, CLECs have chosen to collocate in South Dakota wire centers that serve a large portion of the business and residential lines provided by Qwest. Thus, through

[93] Affidavit of Margaret S. Bumgarner re checklist item 1: Collocation, filed on October 24, 2001 ("Bumgarner Direct re checklist item 1") (Qwest Ex. 30) at 20.

collocation, facilities-based CLECs have positioned themselves to compete directly for a significant number of the customers, both business and residential, currently served by Qwest.

South Dakota performance data demonstrates that Qwest has met or exceeded the required benchmark objectives.[94] Quantifiable evidence is provided in Qwest's performance measure results in South Dakota.[95]

Commission Staff, Midcontinent and AT&T filed comments and testified regarding collocation issues. There was a general consensus that Qwest was meeting its obligations, although there were some specific questions raised by the witnesses, to which Qwest has responded fully.

2. Commission staff recommendations

The Commission Staff's independent expert, Dr. Griffing, again evaluated Qwest's obligations and performance relating to the checklist items. Dr. Griffing examined the testimony of Ms. Bumgarner, Qwest's performance data and the South Dakota SGAT and found that Qwest is meeting its collocation obligations. Dr. Griffing recommended that the Commission find Qwest in compliance with all of its checklist item obligations, including collocation.[96]

3. Midcontinent's concerns have been fully addressed

Midcontinent initially raised a couple of isolated incidents in its prefiled testimony, but acknowledged at the hearing that it was satisfied with the attention that had been given to Midcontinent's concerns.[97] Margaret Bumgarner addresses the issues raised by Midcontinent

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[94] *Id.* at 20-23.
[95] *See also id.* at MSB-COLLO-3.
[96] Tr. 4/25/02 (Griffing) at 114.
[97] Tr. 4/30/02 (Simmons) at 17.

and details the mutually agreeable solutions worked out between the parties in her pre-filed testimony.[98] Midcontinent did not offer any contradictory testimony.

Midcontinent also expressed that it continued to have a strong relationship with the Qwest team assigned to it and that the Qwest personnel had in fact gone to "extraordinary lengths" to assist Midcontinent.[99] Midcontinent's experience and testimony supports a finding that Qwest complies with its collocation obligations.

4. AT&T's issues have been largely resolved; the remainder are unsupportable

Mr. Kenneth Wilson of AT&T testified on a number of collocation issues. Many of them had already been resolved by agreement of the parties, which Mr. Wilson apparently unintentionally neglected to mention to the Commission in his oral reiteration of his prefiled testimony (which had predated these resolutions). None of the concerns identified by Mr. Wilson were based on South Dakota data or experience. Most importantly, Mr. Wilson failed to raise any issues in his summary that were not answered in full in the rebuttal testimony of Margaret Bumgarner.[100] Nevertheless, for the Commission's convenience Qwest will briefly address Mr. Wilson's concerns.

a. Product approach to collocation

Mr. Wilson complains that Qwest treats collocation as a product and sometimes there are differences between Qwest documents and actual practices.[101] Mr. Wilson offers no examples in support of this concern within the last year,[102] and Qwest has made it clear that it is committed to

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[98] *See* Bumgarner Rebuttal re checklist item 1: Collocation, filed on April 2, 2002 ("Bumgarner Rebuttal re checklist item 1") (Ex. Qwest 31).
[99] Tr. 4/30/02 (Simmons) at 17.
[100] *See generally* Bumgarner Rebuttal re checklist item 1.
[101] Tr. 4/29/02 (Wilson) at 117-18.
[102] *See* Bumgarner Rebuttal re checklist item 1 at 8-9.

ensuring that both its practices and its documents are fully compliant. In particular, the Change Management Process is designed to address CLEC concerns of this nature and Mr. Wilson does not refute its effectiveness.[103] No other CLEC in South Dakota raised this issue or expressed concern over the consistency of Qwest's internal documents.

b. Cross-connection at multi-tenant environments ("MTE")

While Mr. Wilson raised this issue in his prefiled testimony and then again in his oral summary,[104] he apparently neglected to read any of the submissions by Qwest that occurred subsequent to his prefiled testimony, and thus failed to recognize that Qwest actually conceded this issue.[105] The revised SGAT language addressing AT&T's issue was provided in Ms. Bumgarner's testimony and will be incorporated into the revised South Dakota SGAT.

c. Collocation intervals

Mr. Wilson also challenged the collocation intervals proposed by Qwest[106], opposing a collocation interval that is tied to CLEC forecasting.[107] Qwest agreed to a significant compromise on this issue and reached a resolution in the Arizona proceedings.[108] The compromise proposal abandoned forecasting as a trigger for a longer interval and adopted in the alternative longer intervals when conditioning of space or major infrastructure modifications are required (all parties had already reached consensus on the latter issue). This compromise reflects the reality that a longer interval is warranted when conditioning or major construction is required since that work necessarily takes additional, unexpected time to complete.

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[103] *See* Bumgarner Rebuttal re checklist item 1 (Ex. Qwest 31) at 7-10.
[104] (Tr. 4/29/02 (Wilson) at 118).
[105] Bumgarner Rebuttal re checklist item 1 (Ex. Qwest 31) at 12.
[106] Tr. 4/29/02 (Wilson) at 119.
[107] Affidavit of Kenneth Wilson re checklist items 1 and 14, filed March 18, 2002 ("Wilson Direct re checklist items 1 and 14") (AT&T Ex. 10) at 31-35.

Dr. Griffing supports this resolution.[109] AT&T offers no compelling argument against the compromise collocation intervals.[110] Accordingly, Qwest respectfully recommends that the compromise solution proposed by Qwest and supported by Dr. Griffing be adopted.

d. Channel regeneration

Mr. Wilson argues that Qwest should not be allowed to charge for channel regeneration cost, even when such regeneration is required through no fault of Qwest.[111] AT&T does not dispute that channel regeneration sometimes is simply unavoidable. Nor can AT&T take issue with the fact that Qwest is entitled to recover its costs of collocation, especially in circumstances when there is no alternative. Qwest has adopted the Multistate Facilitator's recommended SGAT language, which reflects the circumstances under which such charges would be appropriate, specifically when lack of space requires Qwest to place the collocation at a distance that requires regeneration.[112] Dr. Griffing supports Mr. Antonuk's and Qwest's resolution of this issue.[113]

e. ICB pricing of collocation

Mr. Wilson continues to assert that Qwest should be held to an inflexible standard price for the potentially highly variable costs that can be associated with remote and adjacent collocation.[114] As Ms. Bumgarner testified, however, there is very little demand for remote or adjacent collocation and therefore virtually no experience on which to set a standard price.[115] No evidence was introduced into the record that a collocation priced on an Individual Case Basis

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[108] *See* Bumgarner Rebuttal re checklist item 1 (Qwest Ex. 31) at 21-24.
[109] Tr. 4/25/02 (Griffing) at 114; Affidavit of Marlon Griffing, filed on March 18, 2002 ("Griffing Direct") (Staff Ex. 1) at 41-42.
[110] *See* Bumgarner Rebuttal re checklist item 1 (Ex. Qwest 31) at 21-25.
[111] Tr. 4/25/02 (Wilson) at 119.
[112] Bumgarner Rebuttal re checklist item 1 (Ex. Qwest 31) at 17-18.
[113] Griffing Direct (Ex. Staff 1) at 39.
[114] Tr. 4/29/02 (Wilson) at 119.

("ICB") was unfair or incorrect.[116] Under the circumstances, Qwest submits that ICB pricing – at least until the parties have sufficient experience on which standard pricing can be based – is both appropriate and fair.

In summary, Qwest is providing collocation on a non-discriminatory basis to all CLECs who request it. Therefore, Qwest respectfully submits that the South Dakota Commission should conclude that Qwest is in compliance checklist item 1: Collocation.

C. Checklist Item 11 – Local Number Portability

1. Legal standard

Qwest satisfies the requirements of section 271(c)(2)(B)(xi) of the 1996 Act and the FCC's regulations for number portability. "Number portability is the ability of an end-user to retain at the same location their existing telephone numbers when switching from one service provider to another."[117] Qwest has deployed number portability for 100 percent of its access lines in South Dakota. As of the end of February, 2002, Qwest had ported 28,440 telephone numbers in South Dakota and over 2.5 million telephone numbers region-wide.[118]

Qwest performance in South Dakota with regard to LNP has been excellent. Each of the issues raised by the various CLEC commentators and the South Dakota Commission's own consultant Dr. Griffing have been fully and adequately satisfied by Qwest.[119] All evidence in the record supports the conclusion that Qwest has demonstrated compliance with Checklist Item 11.

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[115] Bumgarner Rebuttal re checklist item 1 at 13.
[116] *See generally id.*
[117] Tr. 4/23/02 (Bumgarner) at 84.
[118] Tr. 4/23/02 (Bumgarner) at 84.
[119] *See* Affidavit of Margaret Bumgarner re checklist item 11, filed October 24, 2001 ("Bumgarner Direct re checklist item 11") (Qwest Ex. 38); Affidavit of Margaret Bumgarner re checklist item 11, filed April 2, 2002 ("Bumgarner Rebuttal re checklist item 11") (Qwest Ex. 39).

Specifically, Qwest has complied with the FCC's (a) long term number portability ("LNP") implementation schedule; (b) performance criteria; (c) technical, operational, architectural, and administrative requirements; and (d) cost recovery rules for number portability. Number portability is available to CLECs in South Dakota under Qwest's SGAT and Qwest's Commission-approved interconnection agreements.

Qwest has also complied with the FCC's LNP performance criteria through its deployment of LNP utilizing the Location Routing Number ("LRN") method in conformance with industry guidelines. The FCC has recognized the LRN method as consistent with the FCC's LNP performance criteria.

In addition, Qwest has complied with the FCC's technical, operational, architectural, and administrative requirements by (a) integrating National Portability Administration Center ("NPAC") Service Management System ("SMS") Provisioning Process Flows into its number porting functions and operational support systems ("OSS"); (b) implementing number portability in compliance with the NPAC SMS Functional Requirements Specification ("FRS") and Interoperable Interface Specification ("IIS"); (c) developing processes to port reserved numbers in compliance with North American Numbering Council ("NANC") policies; (d) complying with the NANC's change management process; (e) designing Qwest's network to perform database queries as the N-1 carrier; and (f) integrating a process for the "snapback" of disconnected ported numbers to the service provider listed in the national Local Exchange Routing Guide ("LERG").

Finally, Qwest has complied with the FCC's cost recovery rules for number portability by establishing monthly number portability charges and number portability query charges in its FCC Tariff No. 1. The FCC found the number portability charges in this tariff to be reasonable and lawful in an order released July 16, 1999.

2. Performance

a. Performance measures and data

Qwest's performance with regard to LNP is exemplary. The regional oversight committee has developed five performance indicators for LNP: OP-8B and 8C (LNP timeliness with loop coordination and without loop coordination, respectively), OP-17 (timeliness of disconnect), and MR-11 and 12 (timeliness of clearing LNP trouble reports). Qwest's performance data for number portability demonstrate that Qwest is performing well above the 95 percent performance benchmark for PIDs OP-8B and 8C.[120] Performance data shows that Qwest sets LSM triggers prior to loop cutover 100 percent of the time.[121]

b. No substantive LNP issues remain

Perhaps due to this solid performance by Qwest, there are no issues with regard to checklist item 11 that have not already been fully and satisfactorily addressed by Qwest. Dr. Griffing did not contest Qwest's compliance with checklist item 11 in light of Qwest's adoption of the Facilitator's recommendation from the Multi-State LNP workshops.[122] Midcontinent stated that it has "no major problems porting numbers."

i. Number reassignment

Black Hills FiberCom described previous instances when certain ported numbers were reassigned to a Qwest retail customer. The occurrence rate of such reassignment is extremely low – the incidents identified by Black Hills comprise less than 0.01 percent of the total numbers ported by Qwest during the relevant period. Reassignment of ported numbers is a rarity, and

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[120] Bumgarner Direct re checklist item 11 (Qwest Ex. 38) at 11-13.
[121] Tr. 4/23/2002 (Bumgarner) at 86.
[122] Tr. 4/25/02 (Griffing) at 114

does not detract from Qwest's otherwise stellar performance record. Qwest is in full compliance with checklist item 11.

This near perfect performance notwithstanding, Qwest has taken the issue raised by Black Hills FiberCom very seriously. Qwest has launched an investigation of the reassignments identified in 2001, and has taken appropriate and timely corrective action.[123] Qwest has also taken affirmative steps to protect against reassignment in the future. In January 2002, Qwest implemented a mechanized system enhancement for checking and cross checking the status of numbers against existing accounts and also against LNP databases prior to assignment on a service order. Qwest assures that ported numbers are marked as unavailable for reassignment.[124] There is no evidence and Qwest is not aware of any instances of reassignment since the mechanized system was implemented. Furthermore, Qwest meets with Black Hills FiberCom on a weekly basis and Black Hills FiberCom has not presented any new occurrences.

ii. Coordination of LNP with a CLEC-provided loop

Qwest preprovisions LNP, and establishes a trigger which a CLEC may activate after the CLEC has provisioned its customer. (As mentioned above, the performance data shows that in South Dakota, Qwest has established these triggers prior to the date scheduled for cutover 100 percent of the time.) The trigger remains active until midnight the day after the date that a CLEC has scheduled to provision the loop (a commitment defined in the South Dakota SGAT), at which time the pre-ported route is discontinued.

Mr. Ken Wilson on behalf of AT&T raised the concern that if the CLEC failed to meet the scheduled cutover, and subsequently failed to inform Qwest that the cutover did not occur on

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[123] Tr. 4/29/02 (Bumgarner) at 87-88.
[124] Tr. 4/29/02 (Bumgarner) at 87.

time, then the CLEC customer may be disconnected when the pre-ported route is discontinued. There is no merit in this concern. First, Mr. Wilson could not identify, nor does the record reflect, a single instance where the hypothetical he raised actually occurred in South Dakota with regard to AT&T or any other CLEC. Qwest's is meeting 100 percent of its delayed disconnect commitments each month in South Dakota.[125] Second, Qwest has agreed to postpone the disconnect for an additional 24 hours to provide CLECs with the opportunity to notify it in the event that a CLEC has failed to provision the loop at the time it initially committed to do so, and further failed to provide timely notification to Qwest of the problem. Both the Facilitator Mr. Antonuk, and the Commission's own consultant Dr. Griffing, have found this safety net to be more than adequate to satisfy Qwest's obligations under this checklist item. Mr. Wilson also expressed a concern that relevant PID, OP-17, does not adequately measure the untimely notification given to CLECs.[126] Subsequent to the hearing, the ROC TAG approved an advisory PID, OP-17A, that will capture the notification performance. AT&T agreed to this PID in the ROC.[127]

3. Conclusion

Qwest has demonstrated that it fulfills its obligations to provide local number portability. Qwest respectfully submits that the South Dakota PUC should conclude that Qwest is in compliance checklist item 11.

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[125] Tr. 4/23/2002 (Bumgarner) at 89.

[126] Wilson Affidavit re checklist items 4 & 11 at 66-67.

[127] A copy of the revised PID is attached as Exhibit 1.

D. Checklist Item 13 – Reciprocal Compensation

1. Legal standard

Checklist item 13, 47 U.S.C. § 271(c)(2)(B)(i), requires Qwest to enter into "Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)." In turn, pursuant to section 252(d)(2)(A), "a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[69]

Section 251(b)(5) of the Act requires all local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The FCC has defined reciprocal compensation as consisting of two components – "transport" and "termination." When two carriers collaborate to complete a local call, the originating carrier is compensated by its end user, and the terminating carrier is entitled to compensation from the originating carrier pursuant to section 251(b)(5) of the Act. Reciprocal compensation is the payment between Qwest and interconnecting carriers for the transport and termination of local traffic on their respective networks.

2. Compliance

Qwest satisfies checklist item 13. Specifically, as part of its commitment to interconnection, Qwest provides reciprocal compensation arrangements under terms and conditions that "provide for the mutual and reciprocal recovery by each carrier of costs associated

with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and that are "a reasonable approximation of the additional costs of terminating such calls."[128]

Qwest is under a specific and concrete legal obligation to provide reciprocal compensation to CLECs and other local carriers in South Dakota under its Commission-approved interconnection agreements and SGAT. Qwest is exchanging local calls with six local carriers in South Dakota.[130] Agreements with three of these carriers provide for standard reciprocal compensation, the agreement with one carrier provides strictly for bill-and-keep, and the agreements for the other two provide for bill-and-keep while local traffic is approximately in balance and conventional reciprocal compensation when it is not.[131] This Commission has approved all of these agreements pursuant to sections 252(a) or (b) of the Act.[132]

Qwest's SGAT and interconnection agreements have evolved not only on a state-by-state basis, but holistically across its 14-state region. Workshops and proceedings were conducted on an open basis with the full, active, and equal participation by CLECs and many state commission staffs. During this process Qwest responded to concerns about reciprocal compensation raised by CLECs, and it revised the SGAT to address these concerns and regulators' advice. Qwest's South Dakota SGAT reflects this collaboration.[133] Indeed, with only one exception, Qwest has embraced the recommendations of the Facilitator in the Multi-state proceedings.[134]

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[128] 47 U.S.C. § 252(d)(2)(A).
[129] *See* 47 U.S.C. § 252(d)(2)(A).
[130] Tr. 4/23/02 (Freeberg) at 17.
[131] *Id.* at 17, 23.
[132] Affidavit of Thomas R. Freeberg re: checklist item 13, filed on October 24, 2001 ("Freeberg Short re: checklist item 13") (Ex. 18) at 5.
[133] *Id.*
[134] Tr. 4/23/02 (Freeberg) at 34. The one exception involves the length of feature that Qwest must

Qwest's SGAT provides for Qwest to pay CLECs symmetrical rates for the transport and termination of local telecommunications traffic.[135] The SGAT complies with section 51.711(b) of the FCC's rules, which provides that "[r]ates for transport and termination of local telecommunications traffic shall be symmetrical." "Symmetrical" rates mean that the interconnecting local carrier is entitled to charge rates for the transport and termination of local telecommunications traffic that are identical to Qwest's rates. Section 51.711(a) of the FCC's rules permits interconnecting local carriers to charge a higher rate if they have prepared a forward-looking cost demonstration regarding their own network costs. However, no competitive carrier in South Dakota has made a forward-looking cost showing with regard to its own network costs to justify higher transport and termination rates.[136]

a. Qwest reciprocally provides the "transport" component of transport and termination

For purposes of reciprocal compensation, section 51.701(c) of the FCC's rules defines the "transport" component of transport and termination as:

> the transmission and any necessary tandem switching of local telecommunications traffic subject to Section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.[137]

Local carriers may choose to use either direct trunked transport, tandem switched transport, or a combination of the two, for exchanging interconnected local traffic with Qwest. Qwest uses these same approaches to routing in its own local network. Although Qwest makes

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build without compensation to provide transport. *See supra* section A(3).

[135] *See* SGAT (Qwest Ex. 21) §§ 7.3.2.2. (symmetrical compensation for direct-trunked transport); SGAT §§ 7.3.4, 7.3.7.1 (symmetrical compensation for tandem-switched).

[136] *See* Freeberg Direct re: checklist item 13 (Qwest Ex. 16) at 3.

available transport arrangements over one-way interconnection trunking facilities as well as over two-way facilities.[138] 0.4% of the existing interconnection trunking between Qwest and local carriers in South Dakota is two-way. The parties may purchase transport service from each other, a third party, or from a third party that has leased a PLTS facility from Qwest.[139]

1. Direct trunked transport

Direct trunked transport is a reciprocal compensation charge for Qwest's provision of an uninterrupted path between the switches of two different carriers. Direct trunks can link a Qwest end office to another Qwest end office or to a CLEC end office. Direct trunked transport extends from a Qwest serving wire center near the carriers' point of interconnection to the terminating call's tandem or end office switch. Switching is not generally performed at a Qwest serving wire center. The rates for direct trunked transport are listed in Exhibit A of the SGAT.[140]

Qwest's SGAT complies with section 51.709(b) of the FCC's rules:

> The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.[141]

Consistently, the SGAT provides that when, in response to a CLEC request, Qwest provides one-way trunking for transport of local traffic, the rate Qwest recovers for the use of such facilities is reduced by a "relative use factor" reflecting the proportion of local traffic that flows from Qwest to the CLEC over the trunk.[142]

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[138] 47 C.F.R. § 51.709(a)

[139] SGAT (Qwest Ex. 21) § 7.2.2.1.3.1

[140] *Id.* § 7.2.2.1.2.2.

[141] Freeberg Direct w/ checklist item 13 (Qwest Ex. 10) at 8.

[142] 47 C.F.R. § 51.709(b).

[143] *See* SGAT (Qwest Ex. 21) § 7.3.1.1.3.1 (two-way offering); *id.* § 7.3.2 (one-way offering).

For example, if 70% of the local traffic over the trunk flows from Qwest customers to CLEC customers and 30% flows from CLEC customers to Qwest customers, then Qwest will be responsible for 70% of the forward-looking cost of the transport. Thus, when Qwest provides the local transport, CLEC pays the cost-based rate of the trunk, less 70%, which effectively places responsibility for 30% of the cost on the CLEC just as if it were providing its own one-way trunks. Conversely, if the CLEC provides the transport facilities for two-way trunk groups used in an interconnection arrangement, Qwest pays for a proportion of the transport cost reflecting the relative use of the capacity (*i.e.*, the proportion of the capacity used for local traffic from Qwest customers to CLEC customers, 70% in this case).[143]

ii. Tandem switched transport

Tandem switched transport allows calling between a CLEC's switch and a Qwest end office through an intermediate switch. This path may be an alternate route or the only route for a call between two carriers' networks. When a CLEC requests tandem switched transport, a dedicated transport facility extends from the serving wire center or the point of interconnection between the carrier's network to Qwest's local tandem switch. Common trunks connect the tandem switch to many end office switches in the LATA. These trunks are considered common trunks because the trunks are not dedicated to one CLEC's use, but instead are used "in common" by many carriers, including Qwest retail, independent local exchange carriers, wireless carriers, and CLECs. The combination of tandem switching and common transport is known as "tandem switched transport." Tandem switched transport enables an interexchange carrier to

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trunked transport).

[143] SGAT (Qwest Ex. 21) §§ 7.1.1.1.1 and 7.1.2.2.1 include in the calculation of the "relative use factor" only local telecommunications traffic, and exclude traffic that is originated by the Internet. This is consistent with the SGAT's treatment of Internet-bound traffic.

establishing just one new trunk group. Tandem transmission rates apply to compensate for costs from the tandem office to the end office.[144]

The SGAT provides that when a party "terminates traffic to a remote switch, tandem transmission rates will be applied to the mileage between the host switch and the remote switch when the identity of each is filed in the NECA 4 Tariff."[145] This treatment recognizes that trunks between a host and remote central office switch are "common" like the trunks between tandems and end offices. The same treatment would apply symmetrically to traffic terminating to a CLEC. The tandem switching rate is not charged for the switching of the call at the host switch because the host is not (usually, or de facto) a tandem. This mirrors the interexchange access tariff handling of the same circumstance.[146]

Qwest's SGAT complies with section 51.711(a)(3) of the FCC's rules:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.[147]

Specifically, the SGAT defines CLEC switches to be tandem office switches "to the extent such switch(es) serve(s) a comparable geographic area as Qwest's Tandem Office Switch."[148] A Commission's fact-based consideration of geography is used to classify a CLEC switch. Local calls routed through either carrier's tandem switch originate and terminate in the same local calling area. The SGAT further provides that traffic delivered to Qwest is subject to the tandem

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[144] Freeberg Direct re: checklist item 13 (Qwest Ex. 18) at 10-11.
[145] SGAT (Qwest Ex. 21) § 7.3.4.2.3.
[146] Freeberg Direct re: checklist item 13 (Qwest Ex. 18) at 12.
[147] 47 C.F.R. § 51.711(a)(3).

switching rate and the tandem transmission rate, as well as the end office call termination rate, if Qwest switches the traffic at both the tandem switch and the separate end office switch.[148] If a CLEC terminates the traffic at a switch that meets the definition of a tandem office switch, the tandem switching rate and the tandem transmission rate, as well as the end office call termination rate apply to all calls that originate and terminate in the same local calling area. All the relevant rates are included in Exhibit A of the SGAT.[149]

b. Qwest reciprocally provides the "termination" component of transport and termination

i. Local telecommunications traffic

The FCC defines "termination" as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises."[150] In the *Local Competition Order*, the FCC clarified that "non-traffic sensitive costs [such as loops] should not be considered" part of reciprocal compensation.[151] The only rate element for call termination is a per minute charge for the use of the end office terminating switch. This rate is reflected in Exhibit A of the SGAT.[152]

ii. Bill and keep

Qwest's interconnection agreement with McLeod USA, Inc. provides for reciprocal compensation through a bill-and-keep arrangement. Qwest's agreements with AT&T and Sprint

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[148] SGAT (Qwest Ex. 21) § 4 (definition of "Tandem Office Switches").
[149] *Id.* § 7.3.4.2.1.
[150] Freeberg Direct re: checklist item 13 (Qwest Ex. 15) at 12-13.
[151] 47 C.F.R. § 51.701(d); *see Local Competition Order* ¶ 1057.
[152] *Local Competition Order* ¶ 1057.
[153] *See* Freeberg Direct re: checklist item 13 (Qwest Ex. 15) at 13.

Hills FiberCom also include forms of a bill-and-keep arrangement that allow for application of standard reciprocal compensation when traffic balance is bypassed.[154]

iii. Internet-bound traffic

Qwest has implemented the FCC's April 2001 order on intercarrier compensation for Internet-bound traffic.[155] Under section 7.3.4.3 of the SGAT, Qwest elects to exchange all Internet-bound traffic at the FCC-ordered rate, and Qwest states that the rate for Internet-bound traffic applies in lieu of end office call termination and tandem switched transport rates.[156] Because Qwest has elected to exchange Internet-bound traffic at the rates ordered in the *FCC ISP Order*, for usage-based intercarrier compensation configurations exchanging traffic pursuant to interconnection agreements as of the adoption of the *FCC ISP Order* on April 18, 2001, Internet-bound traffic compensation is paid at the rates specified in that Order. This compensation is made pursuant to the presumption set forth for identifying ISP-bound traffic, and subject to the Order's growth ceilings for Internet-bound traffic.[157] Based on a CLEC's election, Qwest will exchange EAS/Local traffic at the state-ordered ISP rate or at the ISP rate.[158] Where an interconnection agreement calls for bill-and-keep, Qwest exchanges all section 251(b)(5) and all Internet-bound traffic under the bill-and-keep arrangement. Compensation for interconnection configurations not exchanging traffic pursuant to interconnection agreements prior to April 18,

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[154] *Id.* at 13-14

[155] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 96-98, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) ("*FCC ISP Order*"). Although the Court of Appeals for the District of Columbia Circuit recently remanded this order to the FCC, the court did not vacate the order. *WorldCom, Inc. v. FCC*, 2002 U.S. App. LEXIS 8943 (D.C. Cir. May 3, 2002).

[156] SGAT (Qwest Ex. 21) § 7.3.4.3, *see generally* In re 47 USC § 252(b) Petition of [illegible]

[157] SGAT (Qwest Ex. 21) §§ 7.3.6.1-7.3.6.3.

[158] *Id.* § 7.3.4.4.

CONTINUATION

[5.]

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2001, are on a bill-and-keep basis until further FCC action on inter-carrier compensation. This includes CLEC expansion into markets not previously served.

c. Qwest provides "transit" service to interconnecting carriers

Qwest also offers to switch and transport traffic to allow CLECs to interconnect indirectly with other local carriers using Qwest's facilities. Qwest's transit service allows one CLEC to send traffic to another local carrier's network through Qwest's tandem, thus avoiding the cost of investing in facilities otherwise necessary to interconnect to all other local carriers in a local calling area.[160]

The transit traffic rate element includes tandem switching and tandem transmission charges, and it applies to all usage between CLECs that transit Qwest's tandem switch.[161] On a transit call, the originating carrier is responsible for paying the appropriate rates to both the terminating carrier and the transit carrier. The transit traffic rate element applies when calls do not originate with (or terminate to) a Qwest end user subscriber. The SGAT also provides for Qwest and the CLEC to exchange traffic records to enable the terminating carrier to collect reciprocal compensation from the originating carrier.[162]

d. Qwest properly records, bills, and pays for reciprocal compensation

Qwest has developed detailed processes to support reciprocal compensation billing and payments to CLECs. Qwest's performance with respect to reciprocal compensation is measured, and can be evaluated, using two key PIDs developed collaboratively by Qwest and CLECs in the

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[159] *Id.* § 7.3.6.2.3.4.

[160] Freeberg Direct re: checklist item 13 (Qwest Ex. 150) at 15.

[161] SGAT (Qwest Ex. 21) § 7.3.7.1. Transit traffic may also flow between a CLEC and wireless local carrier or between a CLEC and a non-Qwest ILEC independent company.

[162] *Id.* §§ 7.3.8, 7.6.

ROC process.[163] First, the BI-3 PID evaluates the accuracy with which Qwest bills CLECs, focusing on the percentage of billed revenue adjusted due to errors. BI-3 measures the billed revenue minus amounts adjusted off bills due to errors, as a percentage of total billed revenue. Specifically, BI-3B measures reciprocal compensation minutes of use, but excludes billing adjustments resulting from CLEC-caused errors.[164]

The BI-4B PID measures the completeness with which Qwest bills non-recurring and recurring charges for UNEs and resale associated with completed service orders, as well as the completeness with which Qwest bills the revenue for local minutes of use associated with local interconnection for purposes of reciprocal compensation. Specifically, BI-4B measures the percentage of revenue associated with local minutes of use appearing on the correct bill.[165]

Qwest's average performance for Billing Accuracy from February through July 2001 was 99%, which is well above the 95% benchmark established by the ROC. The average performance for Billing Completeness during this period was 77%. While this measure falls short of the benchmark, it resulted from mis-routed traffic from one party.[166] So that calls were not blocked, Qwest has compensated for the mis-routing. Qwest also advised the party of the need to correct the routing and the billing problem created by the mis-routing. Unfortunately, Qwest was not certain that the ROC would allow that this circumstance to be excluded from collection of this performance data for this performance measure.[167] The party has since agreed

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[163] The affidavit of Michael G. Williams (Qwest Ex. 71) contains a complete description of Qwest's PIDs and their development in ROC proceedings. The PIDs are Exhibit MGW-PERF-6 to Mr. Williams' Affidavit.

[164] Freeberg Direct re: checklist item 13 (Qwest Ex. 18) at 16-17.

[165] The PIDs are attached to the Affidavit of Michael G. Williams (Qwest Ex. 71) as Exhibit MGW-PERF-6.

[166] Tr. 4/23/02 (Freeberg) at 46-48.

[167] Freeberg Direct re: checklist item 13 (Qwest Ex. 18) at 18.

to correct the mis-routing. When the BI-4B results are recalculated to exclude this effect, each month shows a 99 or 100% rating.[168]

A CLEC or Qwest may request an audit of reciprocal compensation billing. Section 18.0 of the SGAT defines the terms and conditions of the audit process. The party requesting the audit may review the non-requesting party's records, books, and documents.

Through the SGAT, Qwest has established a concrete and legal obligation to pay reciprocal compensation *in a timely fashion*. The SGAT states:

> Amounts payable under this Agreement are due and payable within thirty (30) calendar Days after the date of invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later (payment due date).[169]

Qwest has fulfilled its obligation to bill and pay reciprocal compensation to CLECs and other interconnecting carriers. These amounts, based on traffic exchanged with six operating CLECs, reflect the following typical tally of minutes of traffic exchanged between Qwest and CLECs during August 2001 in South Dakota:[170]

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[168] *Id.* at 18.

[169] SGAT (Qwest Ex. 21) § 5.4.1.

[170] Freeberg Direct re: checklist item 13 (Qwest Ex. 18) at 18-19.

	Qwest Originated	CLEC Originated	Total
Local traffic			
End Office	37,388,833	11,757,859	
Tandem	983,680	217,250	
Total	38,372,513	11,985,110	
Transit traffic	1,638,765	1,047,455	
End Office total	38,490,885	12,323,928	
Tandem total	1,520,393	708,636	
Total	40,011,278	13,032,564	53,043,842

The parties have billed and paid each other for the transport and termination of this traffic when the interconnection agreement called for payment. Disputes, when they have arisen, have typically been associated with a CLEC's classification of Internet-bound traffic as local when Qwest classified it as toll or a CLEC's classification of all traffic on a trunk group as toll when, by Qwest's records, some portion was local. Disputes such as these between wholesale carriers are not uncommon in the industry.[171]

3. Disputed issues

a. Excluding Internet Service Provider (ISP) traffic from reciprocal compensation

Dr. Griffing acknowledges that the FCC's *ISP Remand Order* establishes that inter-carrier compensation for Internet or ISP-bound traffic is interstate in nature and, therefore, is not

[171] *Id.*

a proper subject for checklist item 13.[172] He recommends, however, that the SGAT should address this issue, even though not relevant to checklist item 13 approval. Dr. Griffing correctly notes that Qwest and AT&T have agreed on SGAT language relating to intercarrier compensation for ISP traffic, and he recommends that the Commission accept this resolution.

Qwest agrees that the FCC has made clear that this issue is not relevant to checklist approval since ISP-bound traffic does not fall within the reciprocal compensation obligations of section 251(b)(5).[173] Nonetheless, Qwest's SGAT will include the ISP-related provisions that Qwest and AT&T negotiated.

AT&T refers to the Qwest-AT&T language and sets that language forth in exhibits to its testimony.[174] Qwest accepted this language and included it in the South Dakota SGAT. This filing ensures that AT&T's language is readily available to any CLEC that wishes to incorporate it into its interconnection agreement with Qwest.

b. Commingling of interLATA and local traffic on the same trunk group and price ratcheting

As Dr. Griffing notes,[175] Qwest allows CLECs to use spare special access circuits for local interconnection. This practice leads to commingling of local and long-distance traffic. As

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[172] Griffing Direct (Staff Ex. 10) at 44.

[173] *See, e.g.*, Memorandum Opinion and Order, *In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, FCC 01-269, ¶ 119 (rel. Sept. 19, 2001) ("*Pennsylvania 271 Order*").

[174] Affidavit of Kenneth L. Wilson Regarding checklist item 13 – Reciprocal Compensation – filed on March 18, 2002 ("Wilson Direct re: checklist item 13") (AT&T Ex. 11) at 7-8 and Exs. KLW-1 and KLW-2.

[175] Griffing Direct (Staff Ex. 1) at 45.

of traffic are commingled on the same trunk group.[176]

AT&T claims that "Qwest's SGAT improperly requires CLECs to pay private lines rates for interconnection service provided using spare capacity on special access facilities."[177] This statement is not accurate. When a CLEC has arranged a special access facility with some idle portion, and the same CLEC chooses to use the idle portion for transport of local interconnection trunking, Qwest provides that local transport to the CLEC at *no charge*.[178]

AT&T is also mistaken when it says:

> To the extent that special access facilities are used to provide access services or are idle, special access rates should apply. However, to the extent spare capacity on such facilities is devoted to providing local interconnection, only TELRIC prices may be applied.[179]

Again, Qwest does not assess *any charge* when a CLEC uses spare capacity to provide local interconnection service on a special access facility that is otherwise being used to provide access service. Remarkably, AT&T either does not understand that Qwest imposes no charges in this circumstance or it is requesting a reciprocal compensation rate lower than zero.[180]

Section 2.7 of Qwest Tariff F.C.C. No. 1 covers shared use of an interstate special access circuit. When Private Line Transport Service ("PLTS") is shared with local exchange service, this tariff explicitly prohibits proportional pricing:

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[176] Wilson Direct re: checklist item 13 (AT&T Ex. 11) at 13-16.
[177] *Id.* at 13.
[178] Freeberg Rebuttal re: checklist item 13 (Qwest Ex. 19) at 6; Tr. 4/23/02 at 26-27.
[179] Wilson Direct re: checklist item 13 (AT&T Ex. 11) at 13.
[180] Freeberg Rebuttal re: checklist item 13 (Qwest Ex. 19) at 6-7.

2.7.1. PLTS with Local Exchange Service:

> PLTS and Local Exchange Service may be provided on a Shared Use facility. However, individual recurring and nonrecurring charges shall apply for each PLTS and local Exchange Line. *The Shared Use facility is not apportioned.*[181]

This language is very clear. When a jurisdictionally interstate private line is shared with local exchange service, apportionment is not permitted. The proportional pricing sought by AT&T is tantamount to an impermissible attempt to change the rates for this federally-tariffed service.

The FCC has considered and specifically rejected the rate ratcheting sought by AT&T when different types of traffic are commingled on the same trunk group. The FCC confirmed that ratcheting is impermissible in its *Supplemental Order Clarification*[182] and its recent order in *Net2000 Communications*.[183] *Net2000 Communications* expressly prohibits proportional pricing or ratcheting when local and long-distance services are commingled on the same DS3 circuit. The FCC explained:

> There is no provision anywhere in the *Supplemental Order Clarification*, or in prior orders for "ratcheting." The language of Option 3 clearly and specifically requires that "[w]hen a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet [the substantial local exchange service use] criteria." There is no ambiguity in this language. Although Net2000 argues that it would be better if CLECs were permitted to convert only the parts of their DS3s that are used to provide local exchange service and to continue to obtain the remaining parts of the DS3s by tariff, this clearly is not permitted under our rules.[184]

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[181] *See id.* at 4 (emphasis added).

[182] Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 ¶22(3) at 13-14 (rel. June 2, 2000) ("*Supplemental Order Clarification*").

[183] Memorandum Opinion and Order, *In the Matter of Net2000 Communications, Inc. v. Verizon – Washington, D.C., Inc.*, File No. EB-00-018, FCC 01-381 (rel. Jan. 9, 2002) ("*Net2000 Communications*").

[184] *Net2000 Communications* ¶ 28, at 9-10 (citations omitted).

In a related context, the *Supplemental Order Clarification* was very clear that, in affirming the general prohibition against commingling UNEs and incumbent LEC tariffed services, it was not speaking only about enhanced extended links ("EELs")[185]:

> We further reject the suggestion that we eliminate the prohibition on "co-mingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above. We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services.[186]

Thus, both the *Supplemental Order Clarification* and *Net2000 Communications* are clear. They prohibit the proportional pricing scheme advanced by AT&T.

The Multi-state Report noted that special access rates are part of a delicately balanced rate system that supports universal service.[187] To alter that system by allowing TELRIC rates for special access circuits would upset the balance. The Report concludes that CLECs can use special access circuits for interconnection, but should continue to pay the tariff rate for those circuits.

In its *Order on Group 2 Checklist Items* issued December 4, 2001, the Wyoming commission agreed:

> We agree that this is the best resolution of the issue. A pricing-based moratorium on commingling can be put in place through the use of special access pricing because the problem is not so much with the use of the circuits as with the gaming of pricing in a system in transition. We agree also that the potential for damage to universal service should not be ignored. We therefore find and conclude that it serves the public interest best to accept Qwest's proposal that language to this effect should be in the SGAT, i.e.,

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[185] An EEL consists of an unbundled loop and unbundled dedicated transport.
[186] *Supplemental Order Clarification*, ¶ 28 (footnote omitted).
[187] Multi-State 271 Case Workshop One Final Report, Liberty Consulting Group, May 15, 2001 (Qwest Ex. 23) at 13.

> that competitive local exchange carriers may use spare capacity on existing special access circuits for interconnection so long as they pay special access rates for the facilities.

Likewise, the Montana commission reached a similar conclusion on March 6, 2002 in its Final Report on Qwest's Compliance with checklist item 13: Reciprocal Compensation:

> After considering the evidence and arguments, the Commission finds merit in an interim decision that disallows both commingling and ratcheting. As explained below, this interim decision will be revisited in Qwest's wholesale cost/price docket.
>
> The Commission's decision is based on the following. Although there appears no technical impediment to commingling of traffic or ratcheting of rates involving special access and either of UNEs or interconnection facilities costing, pricing, competitive and universal service concerns emerged. There emerged only the barest of evidence on the technical and the costing and pricing implications of commingling and ratcheting. Scanter [*sic*] information exists on the universal service impacts. And, no evidence exists on how either of commingling and, or, ratcheting may advantage Qwest, any affiliate or unaffiliated partner in the bundling of telecommunications (toll, local etc.,) and information services. As the issues here involve costing, pricing, and policy it is premature to address them in the absence of evidence. There is no rush to either permit commingling or ratcheting and an opportunity exists with Qwest's soon-to-be-filed wholesale docket to thoroughly explore these issues. Therefore, the Commission finds necessary an interim decision that disallows commingling and ratcheting. As an aside, the wholesale docket will also provide an opportunity to obtain clarity on the intent of the cited FCC orders and an opportunity for the FCC chooses to clarify its policies on this matter. That this is an interim decision should not, other things being equal, hold up any 271 decision the FCC would otherwise reach."

The New Mexico Public Regulation Commission joined these states when it recently reversed its initial decision and withdrew its order requiring proportional pricing:

> Although addressed to the criteria for converting DS3s for EELs, the FCC's explanation of the *Supplemental Order Clarification's* Option 3, coupled with, among other things, the FCC's observations regarding the FCC's prohibition on commingling as a means of preventing IXCs from using UNEs to bypass special

FCC's pertinent policy statements in *Net2000 Communications*, the Commission is constrained to ask whether, in seeking to promote the policy of fostering local competition through the proportional pricing of entrance facilities, the Commission inadvertently would create an insupportable tension with the FCC's application of its policy against bypassing special access services through TELRIC pricing of mixed-use DS3 facilities, a policy that serves the critical purpose of preserving the universal service revenue stream. Indeed, *Net2000 Communications* causes the Commission to doubt the proportional pricing system AT&T has proposed does not fall within the prohibitions laid down in the *Supplemental Order* and *Supplemental Order Clarification*.

Our doubts are further compounded by our experience with the pricing of interconnection facilities and UNEs under the TELRIC methodology. Our experience indicates that interconnection facilities often are priced at TELRIC levels, the same pricing principle that determines UNE prices. Therefore, it necessarily follows that the differentiation between interconnection and UNEs is a distinction without a difference, at least insofar as the policy considerations driving the *Supplemental Order* and *Supplemental Order Clarification* are concerned. As a consequence, given the manner in which interconnection facilities tend to be priced under the TELRIC methodology, the concerns about regulatory arbitrage between special access and UNEs must apply equally to interconnection facilities.

Accordingly, the Commission concludes consistent with the foregoing that Qwest's Motion is well taken and should be granted and, therefore, the proportional pricing system requirement contained in the *Group 2 Rehearing Order* should be rescinded.[188]

Dr. Griffing recommends that this Commission accept Mr. Antonuk's recommendation.[189] Qwest concurs with Dr. Griffing on this and the other reciprocal

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[188] Order on Rehearing Concerning Proportional Pricing System for Entrance Facilities, *In the Matter of Qwest Corporation's section 271 Application and Motion for Alternative Procedure to Manage the section 271 Process*, at 5-6 (NM PRC May 7, 2002) (footnotes deleted).
[189] Griffing Direct (Staff Ex. 1) at 46.

compensation matters that he accurately reports have been raised and resolved in other states' 271 workshops.

c. Issues relating to long transport links between networks

AT&T expresses concern relating to SGAT section 7.2.2.1.5, which addresses transport in excess of 50 miles.[190] Qwest addressed this concern in the checklist item 1 section of this brief.[191]

d. Compensation associated with interconnection at Qwest tandems

AT&T identified concerns related to SGAT section 7.2.2.9.6.[192] Qwest inadvertently included two conflicting sections 7.2.2.9.6 in the SGAT version it filed in October 2001. Dr. Griffing also pointed out that Qwest did not make the changes at 7.2.2.9.6 recommended by Mr. Antonuk.[193]

In order to resolve this matter, Qwest agreed to accept the verbatim language drafted by Mr. Antonuk and recommended by Dr. Griffing. Qwest has deleted the two sections numbered 7.2.2.9.6 in the October 2001 SGAT. The new section reads:

> 7.2.2.9.6 The Parties shall terminate Exchange Service (EAS/Local) traffic on Tandem or End Office Switches. When there is a DS1 level of traffic (512 BHCCS) between CLEC's switch and a Qwest End Office Switch, Qwest may request CLEC to order a direct trunk group to the Qwest End Office Switch. CLEC shall comply with that request unless it can demonstrate that such compliance will impose upon it a material adverse economic or operations impact. Furthermore, Qwest may propose to provide Interconnection facilities to the Local Tandems or End Offices served by the Access Tandem at the same cost to CLEC as Interconnection at the Access Tandem. If CLEC provides a written statement of its objections to a Qwest cost-equivalency proposal,

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[190] Wilson Direct re: checklist item 13 (AT&T Ex. 11) at 8.
[191] *See supra* section A(3).
[192] Wilson Direct re: checklist item 13 (AT&T Ex. 11) at 8-13.
[193] Griffing Direct (Staff Ex. 1) at 30.

> Qwest may require it only: (a) upon demonstrating that a failure to do so will have a material adverse affect on the operation of its network and (b) upon a finding that doing so will have no material adverse impact on the operation of CLEC, as compared with Interconnection at such Access Tandem.

Qwest's agreement to include this language should close this matter. Qwest apologizes for the inadvertent confusion caused by the October 2001 SGAT relating to this section.

e. Other AT&T concerns

AT&T claims:

> . . . [A] CLEC may interconnect at any technically feasible point, including a single point of interconnection ("POI"). Qwest refuses to accept that where the CLEC establishes a single POI, Qwest must carry traffic to that POI at its own expense, based on properly apportioned reciprocal compensation for such traffic.[194]

While the first sentence is true, the second is not. Qwest offers single point per LATA interconnection. Qwest is legally bound, for example, at section 7.1.2 of the SGAT and the KMC agreement, to provide single point per LATA interconnection.[195] Prior to September 2000, Qwest understood that a CLEC needed to establish one point of interface in each local calling area where it had retail customers. A single LATA has many local calling areas. The words "local calling area" now appear in very few places within the SGAT and Qwest's interconnection agreements.[196] Thus, section 7.1.2 of the SGAT and the KMC agreement reads:

> 7.1.2 Methods of Interconnection The Parties will negotiate the facilities arrangement used to interconnect their respective networks. CLEC shall establish *at least one Physical Point of Interconnection in Qwest territory in each LATA the CLEC has local Customers*. The Parties shall establish, through negotiations, at least one of the following Interconnection arrangements: (1) a DS1 or DS3 Qwest provided facility; (2) Collocation; (3)

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[194] Wilson Direct re: checklist item 13 (AT&T Ex. 11) at 9.
[195] The KMC agreement is exhibit LBB – GTC – 1 to Larry Brotherson's affidavit (Qwest Ex. 56).
[196] Tr. 4/23/02 (Freeberg) at 50.

Feasible methods of Interconnection.

The italicized language ensures that a CLEC can have as few as one point of interface in a LATA.[197] The words, "in each LATA" once said, "in each local calling area." Qwest changed this language more than a year ago. Contrary to AT&T's claims, Qwest is providing transport LATA-wide at TELRIC rates from a single point that is selected by the CLEC and not Qwest. Also, contrary to AT&T's claims, Qwest provides transport to that CLEC-selected single POI from Qwest retail customers across the LATA at no cost to the CLEC. This arrangement properly assumes that the originating and terminating telephone numbers of the call are associated with the same local calling area. This is very similar to the approach that other incumbent LECs have used in states where section 271 applications have been approved.[198]

AT&T asserts that the FCC intervened as *amicus curiae* and urged a court to reject a U S WEST argument that the Act requires competing carriers to "interconnect in the same local exchange in which it intends to provide local service."[199] That was more than three years ago and is now irrelevant given Qwest's changed approach to this issue. The "interLCA proposal" that AT&T mentions[200] is not in the SGAT or, for that matter, in the interconnection agreement with KMC. Qwest long ago abandoned a point-of-interface-per-local-calling-area approach to local interconnection. A CLEC may now freely choose the point of interconnection, even to the extent the CLEC chooses to ask Qwest to provide facilities on the CLEC's side of the POI.

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[197] A POI is not a trunk group, and there is not necessarily a one-to-one relationship between POIs and trunk groups.
[198] Freeberg Rebuttal re: Checklist 13 (Qwest Ex. 19) at 12.
[199] Wilson Direct re: checklist item 13(AT&T Ex. 11) at 10, *citing* Memorandum of the Federal Communications Commission as Amicus Curiae, at 20-21, *U S WEST Communications Inc., v. AT&T Communications of the Pacific Northwest, Inc., et al.* (D.Or. 1998) (No. CV 97-1575-JE).
[200] Wilson Direct re: checklist item 13 (AT&T Ex. 11) at 12.

more generous than they need to be[201] and certainly they are no less efficient than those which Qwest provides to itself.[202]

f. Midcontinent Communications' concern

Midcontinent addressed an issue related to intraLATA toll carrier access billing.[203] Although intraLATA toll exchange access billing is not truly a checklist item 13 reciprocal compensation matter, Qwest addressed this concern in the rebuttal affidavit of Thomas R. Freeberg[204] and at the hearing.[205]

Midcontinent states: "We must pay Qwest for toll access terminated on their network, and we are not being paid for toll access terminated on our network."[206] To be clear, Midcontinent has *not billed* Qwest, which is why Qwest has not made a payment. Midcontinent presumably would agree, since on the same page of its testimony it claims, "...we have been unsuccessful in obtaining the data flow making billing possible."[207]

Assuming Midcontinent is concerned primarily with records of intraLATA toll calls terminated by Midcontinent and originated by a Qwest retail customer who is using Qwest as a (presubscribed) intraLATA toll carrier, Qwest has provided records of these types of calls to interconnected carriers. If this is the call type that Midcontinent is describing as "suppressed" in its testimony, this has only come to Qwest's attention quite recently. Again, not all carriers seek

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[201] Qwest could take the position that each carrier must own and operate the transmission and switching equipment on its side of the point of interconnection.
[202] Freeberg Rebuttal re: Checklist 13 (Qwest Ex. 19) at 13.
[203] Midcontinent Testimony (Midcontinent Ex. 38) at 21.
[204] Freeberg Rebuttal re: checklist item 13 (Qwest Ex. 19) at 13-15.
[205] Tr. 4/23/02 (Freeberg) at 19-20.
[206] Midcontinent Testimony (Midcontinent Ex. 38)at 21.
[207] *Id.*

these records from Qwest, and access to Qwest-provided records is not necessary for a party to produce a bill to Qwest.[208]

When Qwest has provided these records to interconnected carriers, it has not done so through the Carrier Access Billing System (CABS). This system contains the records of intraLATA calls carried by interexchange carriers, but Qwest is not an interexchange carrier. This may explain why Midcontinent describes these records as "suppressed."[209]

When Qwest has provided these records to interconnected carriers, it has done so by transfer of a paper record, an emailed electronic file or by an electronic bond with a system called Clearinghouse and Access Revenue Distribution System (CARDS). This system collects records of intraLATA toll calls carried by Qwest when the call was originated by a Qwest retail subscriber. Qwest is certainly willing to provide Midcontinent access to this system so that Midcontinent may bill Qwest for these calls.[210]

Finally, Midcontinent imagines that a "significant amount of intraLATA toll termination revenue" has been foregone here. Qwest estimates that recent monthly traffic volumes have been approximately 15,000 minutes; at $.05/minute, this issue involves only several hundred dollars of revenue.[211]

Qwest has provided many alternatives to Midcontinent and has pro-actively proposed solutions to problems. Midcontinent's relative inexperience and indecision have contributed to the delays that Midcontinent identifies. Qwest has paid when it was billed. Qwest will provide

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[208] Freeberg Rebuttal re: checklist item 13 (Qwest Ex. 19) at 14.
[209] *Id.*
[210] *Id.* at 14-15.
[211] *Id.* at 15.

the records that Qwest now understands that Midcontinent apparently seeks.[212] This billing matter should be kept in perspective, and Qwest should not be faulted here under either checklist item 2 or 13.

4. Conclusion

Qwest provides competitors with reciprocal compensation agreements that satisfy the requirements of section 271(c)(2)(B)(xiii) of the Act; the Communications Act of 1934, as amended; and the FCC's rules and orders thereunder. Qwest has a concrete and specific legal obligation to provide reciprocal compensation for the transport and termination of local exchange traffic under its Commission-approved interconnection agreements and SGAT. Qwest is currently exchanging traffic and subject to reciprocal compensation obligations with six South Dakota CLECs. It is providing reciprocal compensation in compliance with the negotiated PIDs developed by the ROC. The Commission should find that Qwest has satisfied the reciprocal compensation requirements of checklist item 13.

D. Checklist Item 14 – Resale

1. Legal Standard

Section 271(c)(2)(B)(xiv) of the Act requires a Bell Operating Company ("BOC") to make "telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[213]

Section 251(c)(4) established the resale obligations of local exchange carriers:

> RESALE – The duty – (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers . . .

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[212] *Id.*; Tr. 4/23/02 (Freeberg) at 19-20.
[213] 47 U.S.C. § 271(c)(2)(B)(xiv).

a. Qwest satisfies the requirements of checklist item 14 – Resale in South Dakota

The term "resale" means the sale, by a CLEC, of Qwest's finished retail telecommunications services to an end user. Qwest actually delivers the service to the CLEC's end user, but Qwest's customer of record is the CLEC, and all Qwest contacts and interactions regarding the service take place between Qwest and the CLEC. The CLEC's end user interacts only with the CLEC, not with Qwest.

In accordance with the requirements of section 271(c)(2)(B)(xiv) and the specific obligations imposed by section 251(c)(4)(A) and 252(d)(3), Qwest has undertaken a legally binding obligation to offer for resale at wholesale rates any telecommunications service that it provides at retail to subscribers who are not telecommunications carriers.

b. Qwest's provision of resale products is nondiscriminatory

Qwest provides its retail telecommunications products and services to CLECs for resale to end users on terms and conditions that are reasonable and nondiscriminatory. Qwest's South Dakota SGAT and its Commission-approved resale agreements demonstrate that Qwest has undertaken a legally binding obligation to offer for resale by CLECs telecommunications services that are equal in quality to, and provided in substantially the same time and manner as, the telecommunications services that Qwest provides to itself and its retail end users. The only limitations Qwest places on the resale of its products and services by CLECs are those permitted by the South Dakota Public Utilities Commission and the FCC.

As of August 31, 2001, Qwest provides 13,987 resold local access lines to eight South Dakota reseller CLECs.[214] Of these, 8,650 are business lines, 5,282 are residence lines, and 55

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[214] Affidavit of Lori Simpson re checklist item 14, filed October 24, 2001 ("Simpson Direct re checklist

are Centrex lines. As of the same date, Qwest provides 687 resold private lines, including 613 analog, 35 DS0 and 39 DS1 lines to reseller CLECs.[215]

2. Performance

a. Qwest's performance indicators demonstrate Qwest's compliance with its resale obligations

On September 25, 2001, the Liberty Consulting Group, an independent third party retained as part of the ROC OSS Test, completed its audit of Qwest's performance indicators and performance indicator definitions (PIDs) and issued its "Final Report on the Audit of Qwest's Performance Measures." Liberty reported that resale provisioning and maintenance performance indicators passed the audit. Liberty concluded that "the audited performance measures accurately and reliably report actual Qwest performance."[216] Qwest has offered to have Liberty verify its audit by conducting data reconciliation with any CLEC that believes Qwest's performance data is inaccurate.

The performance indicators for resale measure Qwest's performance for twelve products ranging from residential lines to high speed services such as DS3s. Qwest's resale performance measures demonstrate that Qwest provides telecommunications services for resale in a timely manner, consistently delivering them to requesting CLECs within the intervals they request. Resale performance measures also show that Qwest provisions, and maintains and repairs resold telecommunications services in a manner that is in parity with the provisioning, and maintenance and repair of the equivalent services Qwest provides to retail end users.

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item 14") (Qwest Ex. 53) at 7.

[215] *Id.*

[216] Simpson Direct re checklist item 14 at 7; *see also* "Final Report on the Audit of Qwest's Performance Measures," dated September 29, 2001, at 58-103.

b. There is no legal obligation under checklist item 14 for Qwest to provide CLECs with broad indemnification

AT&T complains in the Affidavit of Ken Wilson that ". . Qwest would like to essentially insulate itself from any responsibility for the harm its poor service causes to its wholesale reseller customer and the wholesale reseller's end-user customers."[217] Qwest respectfully disagrees. There is no legal obligation under section 271(c)(2)(B)(xiv) or the specific obligations imposed by section 251(c)(4)(A) and 252(d)(3) that mandate that Qwest provide CLECs with broad indemnification. In fact, not only has the South Dakota Staff consultant, Dr. Griffing, recommended against such indemnification, but no other state in Qwest's territory has provided for such an indemnity. During the multi-state proceeding, Mr. Antonuk did not find the provision of such indemnity necessary or appropriate.

c. AT&T has raised and lost the expanded indemnity issue in 11 other Qwest states

AT&T has tried and failed in 11 other Qwest states to create expanded remedies that are not justified by the relationship between Qwest, reseller CLECs, and end users; nor are such remedies necessary for purposes of determining compliance with section 271 of the Telecom Act.[218] In an effort to reach a compromise, Qwest agreed to reimburse reseller CLECs for certain service quality failures attributable to Qwest, but AT&T refused to accept the compromise. In his multistate report on resale, Mr. Antonuk concluded that Qwest's proposal was acceptable if Qwest agreed to modify certain provisions. Qwest agreed to make these SGAT changes, and the South Dakota SGAT and Qwest's interconnection agreement with KMC reflect the changes

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[217] Affidavit of Kenneth Wilson re checklist items 1 & 14, filed March 18, 2002 ("Wilson Affidavit re checklist items 1 & 14") at 39.

[218] Affidavit of Lori Simpson re checklist item 14, filed April 2, 2002 ("Simpson Rebuttal re checklist item 14") (Qwest Ex. 54) at 7.

required by Mr. Antonuk's order on resale. Furthermore, the South Dakota Staff's consultant, Dr. Griffing, recommends: "[t]he Commission should accept this recommendation," referring to Mr. Antonuk's resale order on 6.2.3 and this issue.[219]

AT&T has not provided any factual or legal support for its contention that CLECs be provided with broader indemnification. As AT&T's witness admitted during cross-examination, indemnifying CLECs for quality of service problems has never been a real issue.

> By Mr. Cattanach:
>
> You talked initially about indemnity issues, Mr. Wilson. Have there ever been instances in South Dakota where this actually has come up?
>
> Answer by Mr. Wilson:
>
> I don't know of any in South Dakota.[220]

AT&T's concerns regarding indemnification are not based upon any real-life experiences; they have never arisen, and are not likely to arise, in South Dakota.

d. AT&T's contention regarding misdirected service calls has been resolved

Mr. Wilson, in his affidavit and in his testimony asks Qwest to redirect the calls to the appropriate CLEC and does not want Qwest to market to those customers. To further AT&T's objective, AT&T proposes adding the words "seeking such information" at the end of the SGAT section 6.4.1. Qwest has done exactly that. The October 24, 2001, South Dakota SGAT, and the interconnection agreement with KMC, at section 9.23.3.17, provide:

> 6.4.1 CLEC, or CLEC's agent, shall act as the single point of contact for its end users' service needs, including without limitation, sales, service design, order taking, Provisioning, change

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[219] Affidavit of Marlon Griffing, filed March 18, 2001 ("Griffing Affidavit") (Staff Ex. 1) at 47-48.
[220] Tr. 4/29/02 (Wilson) at 143.

> orders, training, maintenance, trouble reports, repair, post-sale servicing, Billing, collection and inquiry. CLEC shall inform its end users that they are end users of CLEC for resold services. CLEC's end users contacting Qwest in error will be instructed to contact CLEC; and Qwest's end users contacting CLEC in error will be instructed to contact Qwest. In responding to calls, neither Party shall make disparaging remarks about each other. To the extent the correct provider can be determined, misdirected calls received by either Party will be referred to the proper provider of Local Exchange Service; however, nothing in this Agreement shall be deemed to prohibit Qwest or CLEC from discussing its products and services with CLEC's or Qwest's end users who call the other Party, *seeking such information.* [Emphasis added.]

Qwest's agreement with KMC includes the identical provision. Qwest believes this settles any issue raised by AT&T.

e. Midcontinent's issues regarding Qwest's resold products and services have also been resolved

W. Thomas Simmons of Midcontinent comments that it has a concern with the definition of "SmartPak" service, which it resells.[221] Specifically, Midcontinent indicates it has experienced difficulties ordering SmartPak for some telephone number prefixes (NXXs) in South Dakota, and with toll charges and feature charges having been billed that should have been suppressed based on the SmartPak service description. As Ms. Simpson noted in her testimony and in her rebuttal affidavit Qwest's account team assigned to and supporting Midcontinent has been meeting monthly with Midcontinent to identify and resolve issues such as these.[222]

In addition, Midcontinent raises the question of when the SmartPak service became available to CLECs. Ms. Simpson in her rebuttal testimony provides the answer by noting that Qwest provides notice to reseller CLECs advising them of new products and services. Specifically, Qwest provided written notice of the SmartPak offering to two Midcontinent

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[221] Tr. 4/30/02 (Simmons) at 17.

employees, Ms. Karen Viste and Ms. Mary Lohnes, on September 13, 2000. Qwest provides appropriate written notice to reseller CLECs in South Dakota advising of new Qwest retail products and services. This allows CLECs to be aware of and to offer new Qwest services for resale.

Mr. Simmons' affidavit also raises other details regarding SmartPak. Qwest agreed during a monthly meeting with Midcontinent in late 2001 to implement a process whereby Qwest pulls a random 10% sample of Midcontinent's resale orders after they are released into Qwest's service order processor. Ms. Simpson noted that Qwest audits these orders for accuracy against Midcontinent's local service request (LSR). Any errors are corrected, and more importantly, the personnel responsible for causing the error are re-trained on the correct process. Moreover, when Midcontinent has raised the billing issues with Qwest's account team, Qwest has corrected Midcontinent's bills. Ms. Simpson noted in her rebuttal affidavit as well as in her testimony that Qwest has taken aggressive actions to ensure that Midcontinent's resale orders are billed correctly. Midcontinent's representative at the monthly meeting with Qwest on March 7, 2002, stated that Midcontinent had seen process improvement and fewer billing errors. Moreover, as Ms. Simpson noted in her testimony, such mistakes are not systemic problems and that Qwest has taken actions to ensure that such mistakes do not happen again:

> Ms. Simpson:
>
> We have agreed through our change management process to send a notice to the CLEC and the CLEC will have an opportunity to say to Qwest "I don't agree with that change you're implementing." And there's a whole procedure outlined in the change management process for how that would be handled where a CLEC would notify

[222] *See* Simpson Rebuttal re checklist item 14 at 3.

us it doesn't agree to a change we're about to implement to its bill.[223]

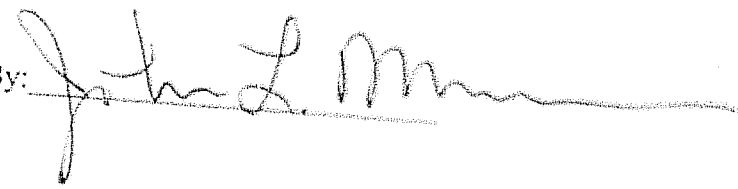
In sum, Qwest's compliance with the FCC's requirements for resale, its legal obligations to provide services for resale by CLECs, and its resale performance for CLECs in South Dakota demonstrate its commitment to satisfying the requirements of checklist item 14.

III. CONCLUSION

Qwest has demonstrated that it meets the requirements in the Act and FCC orders for compliance with checklist items 1, 11, 13 and 14 in the direct and rebuttal testimony of Margaret S. Bumgarner, Thomas R. Freeberg, and Lori A. Simpson. The CLECs who commented on the checklist items cannot rebut Qwest's *prima facie* showing of compliance. Accordingly, Qwest requests that the Commission verify Qwest's compliance with section 271(c)(2)(B)(i), (xi), (xiii) and (xiv) of the Act.

Respectfully submitted this 21st day of May, 2002.

Qwest Corporation

By: 

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[223] Tr. 4/24/02 (Simpson) at 58.

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Its Attorneys

Purpose:
Evaluates the quality of Qwest completing LNP telephone number porting, focusing on the degree to which porting occurs without implementing associated disconnects before the scheduled time/date.

Description:

OP-17A

- Measures the percentage of all LNP telephone numbers (TNs), both stand alone and associated with loops, that are ported without the incidence of disconnects being made by Qwest before the scheduled time/date, as identified by associated qualifying trouble reports.
  - Focuses on disconnects associated with timely CLEC requests for delaying the disconnects or no requests for delays.
  - The scheduled time/date is defined as 11:59 p.m. on (1) the due date of the LNP order recorded by Qwest or (2) the delayed disconnect date requested by the CLEC, where the CLEC submits a timely request for delay of disconnection.
  - A CLEC request for delay of disconnection is considered timely if received by Qwest before 8:00 p.m. MT on the current due date of the LNP order recorded by Qwest.

OP-17B

- Measures the percentage of all LNP telephone numbers (TNs), both stand alone and associated with loops, that are ported without the incidence of disconnects being made by Qwest before the scheduled time/date, as identified by associated qualifying trouble reports.
  - Includes only disconnects associated with untimely CLEC requests for delaying the disconnects.
  - A CLEC request for delay of disconnection is considered "untimely" if received by Qwest after 8:00 p.m. MT on the current due date of the LNP order recorded by Qwest and before 12:00 p.m. MT (noon) on the day after the current due date.

- Disconnects are defined as the removal of switch translations, including the 10-digit trigger.
- Disconnects that are implemented early, and thus counted as a "miss" under this measurement, are those that the CLEC identifies as such to Qwest via trouble reports, within four calendar days of the actual disconnect date, that are confirmed to be caused by disconnects being made before the scheduled time.
- Includes all CLEC orders for LNP TNs completed in the reporting period, subject to exclusions specified below.

Reporting Period: One month	**Unit of Measure:** Percent
Reporting Comparisons: CLEC Aggregate and Individual CLEC	**Disaggregation Reporting:** Statewide

Formula:

[(Total number of LNP TNs ported pursuant to orders completed in the reporting period – Number of TNs with qualifying trouble reports notifying Qwest that disconnection before the scheduled time has occurred) ÷ Total Number of LNP TNs ported pursuant to orders completed in the reporting period] x 100

OP-17 Timeliness of Disconnects associated with LNP Orders (continued)

Exclusions:

OP-17A only

- Trouble reports notifying Qwest of early disconnects associated with situations for which the CLEC has failed to submit timely requests to have disconnects held for later implementation.

OP-17A & B

- Trouble reports not related to valid requests (LSRs) for LNP and associated disconnects.
- LNP requests that do not involve automatic triggers (e.g., DID lines without separate, unique TNs, and Centrex 21).
- Records with invalid trouble receipt dates.
- Records with invalid cleared, closed or due dates.
- Records with invalid product codes.
- Records missing data essential to the calculation of the measurement per the PID.

OP-17B only

- Trouble reports notifying Qwest of early disconnects associated with situations for which the CLEC did not submit its untimely requests by 12:00 p.m. MT (noon) on the day after the LNP due date to have disconnects held for later implementation.

Product Reporting: LNP	**Standard:** OP-17A – 98.25% OP-17B – Diagnostic only, in light of its measuring only requests for delay of disconnect that are defined as untimely.
Availability: Available: • OP-17A (formerly reported as OP-17, through Mar 02 results in the Apr 02 report) Under Development: • OP-17B -Beginning with Apr 02 data on the May 02 report	**Notes:**

OP-17 Revision Log (since ROC PID version 4.0 dated October 22, 2001)

Description	Status	Date
• Created OP-17B as diagnostic to measure untimely requests to have disconnects held for later implementation.	Approved	09 May 02

Purpose:
Evaluates timeliness of clearing LNP trouble reports, focusing on the degree to which residence and business, disconnect-related, out-of-service trouble reports are cleared within four business hours and all LNP-related trouble reports are cleared within 48 hours.

Description:

MR-11A: Measures the percentage of specified LNP-only (i.e., not unbundled-loop), residence and business, out-of-service trouble reports that are cleared within four business hours of Qwest receiving these trouble reports from CLECs.

- Includes only trouble reports that are received on or before the currently-scheduled due date of the actual LNP-related disconnect time/date, or the next business day, that are confirmed to be caused by disconnects being made before the scheduled time, and that are closed during the reporting period, subject to exclusions specified below.

MR-11B: Measures the percentage of specified LNP-only trouble reports that are cleared within 48 hours of Qwest receiving these trouble reports from CLECs.

- Includes only LNP-only trouble reports that are received within four calendar days of the actual LNP-related disconnect date and closed in the reporting period.

- The "currently-scheduled due date/time" is the original due date/time established by Qwest in response to CLEC/customer request for disconnection of service ported via LNP or, if CLEC submits to Qwest a timely or untimely request for delay of disconnection, it is the CLEC/customer-requested later date/time.
- A request for delay of disconnection is considered timely if received by Qwest before 8:00 p.m. MT on the due date that Qwest has on record at the time of the request.
- A request for delay of disconnection is considered untimely if received by Qwest after 8:00 p.m. MT on the due date and before 12:00 p.m. MT (noon) on the day after the due date.
- Time measured is from the date and time Qwest receives the trouble report to the date and time trouble is cleared.

Reporting Period: One month	**Unit of Measure:** Percent
Reporting Comparisons: CLEC Aggregate and Individual CLEC	**Disaggregation Reporting:** Statewide level (all are "non-dispatched").

Formula:

MR-11A = [(Number of specified out-of-service LNP-only Trouble Reports, for LNP-related troubles confirmed to be caused by disconnects, that Qwest executed before the currently-scheduled due date/time, that were closed in the reporting period and cleared within four business hours) ÷ (Total Number of specified out of service LNP-only Trouble Reports for LNP-related troubles confirmed to be caused by disconnects that Qwest executed before the currently-scheduled due date/time, that were closed in the reporting period)] x 100

MR-11B = [(Number of specified LNP-only Trouble Reports closed in the reporting period that were cleared within 48 hours) ÷ (Total Number of specified LNP-only Trouble Reports closed in the reporting period)] x 100

Exclusions:

- Trouble reports attributed to customer or non-Qwest reasons.
- Trouble reports not related to valid requests (LSRs) for LNP and associated disconnects.
- Subsequent reports of LNP trouble before the original trouble report is closed.
- For MR-11B only: Trouble reports involving a "no access" delay.
- Information tickets generated for internal Qwest system/network monitoring purposes.
- Records involving official company services.
- Records with invalid trouble receipt dates.
- Records with invalid cleared or closed dates.

- Records with invalid product codes.
- Records missing data essential to the calculation of the measurement per the PID.

Product Reporting: LNP	**Standards:** MR-11A: • If OP-17 result meets its standard, the MR-11A standard is Diagnostic. • If OP-17 result does not meet its standard, the MR-11A standard is as follows: – For 0-20 trouble reports*: No more than 1 ticket cleared in > four business hours – For > 20 trouble reports*: The lesser of 95% or Parity with MR-3C results for Retail Residence and Business MR-11B: • For 0-20 trouble reports**: No more than 1 ticket cleared > 48 hours • For > 20 trouble reports**: The lesser of 95% or Parity with MR-4C results for Retail Residence and Business * Based on MR-11A denominator. ** Based on MR-11B denominator.

Availability:	**Notes:**
Available, except as noted below. Under Development: • MR-11A including business LNP trouble tickets – Beginning with Apr 02 results on the May 02 report. • MR-11B including service-affecting, as will as out-of-service, trouble tickets – Beginning with Apr 02 results on the May 02 report.	

MR-11 Revision Log (since ROC PID version 4.0 dated October 22, 2001)

Description	Status	Date
• Create MR-11A to measure out-of-service troubles for LNP disconnect before the scheduled due date cleared within 4 business hours. • Create MR-11B to measure all out-of-service LNP troubles cleared within 24 hours	Approved by AZ TAG	30 Apr 02
• Revised MR-11A proposal to remove residence limitation and revise MR-11B to cover both out-of-service and service-affecting troubles cleared within 48 hours.	Approved	09 May 02

Measurement dropped from PID:

Proposed for ROC TAG approval on May 9, 2002
Approved May 9, 2002

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Utilities Commission

BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C)- OF THE TELECOMMUNICATIONS ACT OF 1996	))))	**DOCKET TC 01-165**

QWEST CORPORATION'S OPENING POST- HEARING BRIEF ON EMERGING SERVICES
(Line Sharing, Subloop Unbundling, Packet Switching , and Dark Fiber)

Qwest Corporation ("Qwest") submits this brief regarding impasse issues relating to Emerging Services: specifically, line sharing, packet switching, dark fiber, and subloop unbundling. There are two disputed packet switching issues, two disputed line sharing issues, three disputed dark fiber issues, and four subloop unbundling issues. Several additional issues were briefed in the multistate workshop and discussed in Qwest's testimony; however, at this point no party has seen fit to challenge them. Thus, Qwest will not discuss them in its opening brief. All of the disputed issues should be resolved in Qwest's favor as a matter of law and fact.

Although disputes remain, the Commission should note that many of these issues relate to the CLECs' desire to impose new obligations on Qwest rather than on Qwest's compliance with its present obligations under Section 271 of the Act. Because Section 271 proceedings are not

the proper forum for the creation of new requirements under the Act, the Commission should approve the Emerging Services language in Qwest's SGAT.

I. PACKET SWITCHING

A. Whether Qwest has Fully Implemented the FCC's Rule Regarding the Availability of Spare Copper Loops. [SGAT Section 9.20.2.1.2]

In its *UNE Remand Order*, the FCC modified Rule 319 to require unbundling of packet switching in very limited circumstances.[1] As the FCC has recently confirmed, Rule 319(c)(3)(B) requires an incumbent to unbundle packet switching only if each of the following preconditions are met: (1) the ILEC has deployed a digital loop carrier system ("DLC"), (2) there are no spare copper loops capable of supporting the xDSL services that a CLEC seeks to offer, (3) it has not permitted the requesting CLEC to collocate its DSLAM at the remote terminal, and (4) the ILEC has deployed packet switching capability for its own use.[2]

The parties reached impasse regarding the second of these requirements: "there are no spare copper loops capable of supporting the xDSL services that a CLEC seeks to offer." In order to implement this condition, Qwest literally copied the FCC rule word-for-word into the SGAT at section 9.20.2.1.2. Nonetheless, AT&T complains that additional language regarding available copper loops must be included in order to ensure that CLECs can offer the xDSL service they desire. Specifically, AT&T requests that the word "no" be replaced with "insufficient" and that the word "adequately" be added before "supporting," so that the

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[1] Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) ("*UNE Remand Order*") ¶ 313.

[2] Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 & 96-98, FCC 01-26 (Rel. January 19, 2001) ("*Line Sharing Reconsideration Order*") ¶ 56, citing 47 C.F.R. § 51.319(c)(3)(B).

requirement would be revised to read: "there are *insufficient* spare copper loops capable of *adequately* supporting the xDSL services that the requesting carrier seeks to offer."[3]

These arguments fail as a matter of law and fact. First, AT&T is admittedly seeking to add to the existing legal obligations under the Rule and FCC orders. In multiple proceedings, AT&T has clearly conceded that it was arguing for a new legal obligation in this proceeding by seeking to "go beyond that which the FCC currently requires,"[4] "advocat[ing] in this case that Qwest should unbundle packet switching in certain circumstances that are . . . outside of the boundaries of what the FCC has laid out,"[5] and taking the position that Qwest must "unbundle [packet switching] all the time . . . irrespective of the fact that the FCC says [Qwest] only [has] to unbundle it in these certain circumstances."[6] Such issues are beyond the scope of this proceeding because section 271 proceedings are narrowly focused proceeding to assess whether ILECs are complying with the existing state of the law.[7] The FCC clearly stated in both the *SBC Texas Order* and the *Kansas/Oklahoma Order* that these proceedings are not appropriate fora in which

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[3] Workshop II 1/18/01 Tr. 227:16-278:1.

[4] Multistate Workshop II 1/18/01 Tr. 253:10-12 (Qwest Q: "Are you asking us to go beyond that which the FCC currently requires?" AT&T A: "Yes").

[5] Workshop II 1/18/01 Tr. 254:17-21 ("AT&T intends to advocate in this case that Qwest should unbundle packet switching in certain circumstances that are . . . outside of the boundaries of what the FCC has laid out").

[6] Workshop II 1/18/01 Tr. 256:1-7 (Qwest Q: "[AT&T] want[s] to unbundle [packet switching] all the time . . . irrespective of the fact that the FCC says [Qwest] only [has] to unbundle it in these certain circumstances?" AT&T A: "I believe that is AT&T's position. And I believe that's what we're saying here, yes").

[7] The relevant inquiry is whether a BOC complies with the law in effect at the time its section 271 application is filed. Memorandum Opinion and Order, *Application of SBC Communications, Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, FCC 01-29 (January 22, 2001) ("*Kansas/Oklahoma Order*") ¶ 18; Memorandum Opinion and Order, *Application of SBC Communications, Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 (June 30, 2000) ("*SBC Texas Order*") ¶ 27.

to impose new obligations.[8] Thus, Section 271 proceedings are not the proper fora for adding new legal obligations.

Further, the SGAT language tracks the FCC rule's requirements exactly, yet the CLECs seek to revise the SGAT to include more onerous requirements than the Rule. The FCC has already rejected this argument. The identical dispute arose in SWBT's Kansas/Oklahoma proceeding. The FCC held that SWBT had satisfactorily established a sufficient legal obligation because the SGATs at issue "incorporate verbatim the criteria adopted in our *UNE Remand Order* to establish when packet switching will be made available."[9] Thus, the CLECs' arguments fail as a matter of law. Moreover, the FCC recently sought comment regarding whether this limited obligation to unbundle packet switching should be expanded.[10] To the extent the CLECs seek to impose additional obligations on Qwest with regard to unbundled packet switching, those arguments are appropriately made in response to the FCC's further notice of proposed rulemaking, not in this narrowly focused section 271 proceeding.

These arguments also fail on the facts. First, inserting "adequately" to modify the requirement that available loops must be "capable of supporting the xDSL services the requesting carrier seeks to offer" adds nothing but vagueness and the potential for conflict.[11] The CLECs' revision would introduce a layer of uncertainty by requiring a factual inquiry regarding the "adequacy" of loop capabilities. The language in the SGAT (and the Rule) unambiguously

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[8] *Kansas/Oklahoma Order* ¶ 18 (section 271 proceeding is fast-track, narrowly focused adjudication that is inappropriate for consideration of industry-wide local competition questions of general applicability); *SBC Texas Order* ¶ 23 (a section 271 proceeding is not an appropriate forum for resolution of new and unresolved interpretive disputes regarding an ILEC's obligations to competitors).

[9] *Kansas/Oklahoma Order* ¶243 (emphasis added).

[10] *Line Sharing Reconsideration Order* ¶ 63.

states the condition: available loops are either capable of supporting the xDSL service the CLEC chooses to offer or they are not. Mr. Antonuk also found AT&T's proposed language vague and unconvincing.[12] Thus, AT&T's proposed insertion of "adequately" should be rejected.

AT&T's contention that "no" should be replaced by "insufficient" is similarly flawed. Under the Rule, packet switching must be unbundled if there are no spare copper loops capable of supporting the xDSL service the CLEC seeks to offer. This analysis applies on a customer-by-customer basis.[13] If there is an available loop capable of providing the particular customer with the service the CLEC desires to offer, then the condition is not met. If there is no such loop available to support the xDSL service a CLEC seeks to offer to its customer, the condition is met. The concept of insufficiency simply does not apply. Again, AT&T's proposal would only introduce an additional layer of uncertainty by requiring a factual inquiry regarding the "sufficiency" of available loops. Thus, AT&T's proposal to replace "no" with "insufficient" should be rejected.

AT&T's argument that the availability of copper loops will pose an impediment to its ability to obtain unbundled packet switching is also moot as a practical matter. In order for packet switching to be unbundled, Qwest must have remotely deployed a DSLAM. Generally, Qwest will only remotely deploy a DSLAM if the existing loops are too long to support xDSL;[14] thus, as a practical matter, where the fourth condition for unbundling -- Qwest has remotely

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[11] The facilitator in the Colorado proceeding also agreed: "If you add "adequately" under that circumstance then you have to state what it is you're trying to provide service for. I think you're introducing an ambiguity that would cause problems later." Colorado 12/12/00 Tr. 52:10-13, a copy of which is attached as Exhibit 1.

[12] *Antonuk Emerging Services Decision* at p. 43 (June 11, 2001).

[13] Workshop II 1/18/01 Tr. 303:24-25.

[14] Workshop II 1/18/01 Tr. 290:24-291:1.

deployed a DSLAM -- is met, the second condition -- no xDSL capable copper loops -- will also be met.

As Mr. Antonuk found, "[t]he FCC has made it clear that where copper loops are available and sufficient, providing them constitutes full satisfaction of Qwest's requirements."[15] AT&T has now argued this issue in 13 different jurisdictions. All 12 jurisdictions to finally consider this issue to date have agreed with Qwest and found AT&T's position wanting. Commission Staff witness, Dr. Buster Griffing, agrees with Qwest on this issue.[16] The Commission should adopt Qwest's SGAT language on this issue.

B. Whether Qwest must Unbundle Packet Switching Beyond Situations Required by the FCC. [SGAT Section 9.20.2.1.3]

This issue revolves around whether Qwest must unbundle packet switching each and every time Qwest deploys a DSLAM in a remote terminal. AT&T suggests, without presentation of any financial evidence, that economics preclude it from deploying its own DSLAM when Qwest has already done so for its own use. The language of section 9.20.2.1.3 states that one of the conditions for unbundling packet switching is that "Qwest has placed a DSLAM for its own use in a remote Qwest Premises *but has not permitted CLEC to collocate its own DSLAM at the same remote Qwest Premises or collocating a CLEC's DSLAM at the same Qwest Premises will not be capable of supporting xDSL services at parity with the services that can be offered through Qwest's Unbundled Packet Switching*." (emphasis added). This language tracks the FCC's third condition in Rule 319(c)(3)(B)(iii), and therefore is a necessary prerequisite to unbundling packet switching.

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[15] *Antonuk Emerging Services Decision* at p. 43 (June 11, 2001).

[16] Staff Exhibit 1 at 63.

Many of the arguments raised in the first packet switching issue apply here as well. AT&T is clearly trying to expand the FCC rule on the subject. On this point, AT&T left no room for doubt: it is actually arguing for a new legal obligation to unbundle packet switching in all circumstances, and not arguing that the SGAT did not comply with the current law.[17] The CLEC's request flatly contradicts the FCC rule. The CLECs admit as much. AT&T objects to section 9.20.2.1.3, stating that it is "highly unlikely" that it will ever be economically feasible to remotely collocate a DSLAM.[18] AT&T, however, did not submit any evidence to support this allegation. Moreover, this contention is clearly beyond the scope of the FCC's rule, which is based solely on the ILEC's refusal to permit remote DSLAM collocation. These issues are beyond the scope of this narrowly focused proceeding. As noted above, a Section 271 proceeding is not the proper forum for adding new legal obligations. Instead, such arguments are appropriately made in response to the FCC's further notice of proposed rulemaking seeking comment regarding whether the limited obligation to unbundle packet switching should be expanded.[19]

Moreover, the United States Supreme Court rejected a virtually identical argument posited by the FCC when striking down the FCC's unbundling standard.[20] There, the FCC argued that the impairment prong of the test for unbundling was met if

> the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network.

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[17] Workshop II 1/18/01 Tr. 253:10-12, 254:17-21, 256:1-7.

[18] AT&T's Comments for the Multistate Workshop II ("AT&T Comments") at 50, 52-53.

[19] *Line Sharing Reconsideration Order* ¶ 63.

[20] *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

Iowa Utilities Board, 119 S.Ct. 721, 735. This is the exact argument raised by CLECs here. The Supreme Court rejected that standard because it provided a windfall to competitors:

> [T]he Commission's assumption that any increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element "necessary," and causes the failure to provide that element to "impair" the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms. An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been "impaired" in its ability to amass earnings, but has not ipso facto been "impaired . . . in its ability to provide the services it seeks to offer.[21]

The CLEC argument against section 9.20.2.1.3 is as misguided as contrary to the FCC's erstwhile impairment test and should be rejected for the same reasons.

Moreover, as stated above, CLECs have not even attempted to place any evidence other than bald allegations regarding how they will be purportedly impaired. Section 9.20.2.1.3 fully implements the law regarding the third condition for unbundling packet switching. Accordingly, AT&T's arguments must be rejected.

Mr. Antonuk soundly rejected this request for additional unbundling of packet switching:

> As an initial matter, AT&T's language solution substantially overreaches even its own definition of the problem. It does so by making a CLEC's own and not unbiased perspective on economics the basis for deciding whether the FCC's established conditions for the unbundling of packet switching should be overridden. However, even language that left the decision to an objective standard or decision maker would still depend upon an assumption that there is a substantial difference in the economics of DLSAM deployment between CLECs and Qwest. Apart from broad claims that were not supported by any specific analysis or quantification, there is nothing in the record to support this assumption. The failure to support those claims with evidence is particularly compelling in a case where, as here, a number of CLECs want to add an entirely new requirement to those already deemed appropriate by the FCC. In fact, much more than an addition to the FCC requirements is anticipated; the request is to replace an operational condition with an economic one, which would serve to redefine the applicable FCC standard entirely.

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[21] *Id.*

> It is difficult to imagine that the FCC has utterly failed to consider any relevant economic considerations. Certainly, we should not here consider them without at least a substantial showing that there are significant economic differences in CLEC versus Qwest deployment. Nothing prevented the participants from discovery and testimony that would specifically address such economic differences. The failure to provide any level of quantification of that difference is material, given the *Iowa Utilities Board* standard for economic impairment.
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> There is simply no sound basis for deciding that the FCC conditions regarding DSLAM collocation should be supplemented by the addition of an economic feasibility test.[22]

AT&T has now argued this issue in 13 different jurisdictions. All 12 jurisdictions to finally consider this issue to date have agreed with Qwest and found AT&T's position wanting. Commission Staff witness, Dr. Buster Griffing, agrees with Qwest on this issue.[23] The Commission should adopt Qwest's SGAT language on this issue.

II. LINE SHARING

A. Whether Qwest Must Provide Line Splitters on a Line at a Time Basis. [SGAT Section 9.4.2.1.1]

This issue is addressed fully in Qwest's line splitting brief. As mentioned there, the FCC has repeatedly held that ILECs have no obligation to provide their POTS splitters to CLECs. The FCC first addressed this issue in the *Line Sharing Order*. There, the FCC held that ILECs have the option of providing line splitters themselves or, in the alternative, allowing CLECs to place their splitters in the incumbent LEC's central offices.[24] Interestingly, the FCC believes that

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[22] *Antonuk Emerging Services Decision* at p. 45 (June 11, 2001).

[23] Staff Exhibit 1 at 64.

[24] Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, 14 FCC Rcd 20912 ¶ 146 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

providing CLECs with the option to own line splitters is to the CLEC's advantage, because it ensures the ILEC cannot limit the CLEC's ability to deploy competitive services.[25]

In the *SBC Texas Order*, the FCC reiterated its holding where AT&T argued

> that it has a right to line splitting capability over the UNE-P with [Southwestern Bell Telephone ("SWBT")] furnishing the line splitter. AT&T alleges that this is "the only way to allow the addition of xDSL service onto UNE-P loops in a manner that is efficient, timely, and minimally disruptive." Furthermore, AT&T contends that competing carriers have an obligation to provide access to all the functionalities and capabilities of the loop, including electronics attached to the loop. AT&T contends that the splitter is an example of such electronics and that it is included within the loop element.[26]

The FCC expressly rejected AT&T's argument:

> 327. We reject AT&T's argument that SWBT has a present obligation to furnish the splitter when AT&T engages in line splitting over the UNE-P. The Commission has never exercised its legislative rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the splitter, and incumbent LECs therefore have no current obligation to make the splitter available. As we stated in the UNE Remand Order, "with the exception of Digital Subscriber Line Access Multiplexers (DSLAMs), the loop includes attached electronics, including multiplexing equipment used to derive the loop transmission capacity." We separately determined that the DSLAM is a component of the packet switching unbundled network element. We observed that "DSLAM equipment sometimes includes a splitter" and that, "[i]f not, a separate splitter device separates voice and data traffic." We did not identify any circumstances in which the splitter would be treated as part of the loop, as distinguished from being part of the packet switching element. That distinction is critical, because we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element, and our decision on that point is not disputed in this proceeding.

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[25] *Id.* ¶ 76.

[26] Memorandum Opinion and Order, *Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, 15 FCC Rcd 18354 ¶ 326 (June 30, 2000) (*"SWBT Texas Order"*) (footnotes omitted).

328. The *UNE Remand Order* cannot fairly be read to impose on incumbent LECs an obligation to provide access to their splitters.[27]

There are just two of the FCC's repeated decisions that have upheld Qwest's position. For a full discussion of the issue as well as Mr. Antonuk's sound rejection of AT&T's view, see Qwest's brief on line splitting. This Commission should affirm FCC precedent and Mr. Antonuk's decision and reject AT&T's request.

B. Whether Qwest is Obligated to Provide Line Sharing Over Fiber. [SGAT Section 9.4.1][28]

Qwest was the first ILEC in the country to offer line sharing to CLECs. "Line sharing" requires two carriers to provide services to one customer over a single loop facility; Qwest provides voice service over the lower frequency portion of the loop and the CLEC provides DSL over the high frequently portion of the loop. At this point, the only technically feasible way to "line-share" is when the loop is made of clean copper. When a loop is Digital Loop Carrier (DLC) or fiber, sharing the loop would garble the signals. There does not appear to be any dispute on this point. Nonetheless, AT&T seek to require Qwest to "line share" over fiber based on a hyper-technical (and illogical) reading of a FCC decision.

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[27] *SWBT Texas Order* ¶¶ 327-328 (footnotes omitted; emphasis added).

[28] Qwest must make one clarification to its pre-filed testimony as it relates to line sharing. Ms. Karen Stewart's direct testimony stated that "Qwest provides CLECs with line and station transfers" (LST) in certain circumstances to provision shared loops provisioned over digital loop carrier (DLC). Exhibit 62 at p. 10. Qwest has recently become aware that its original direct testimony may be misleading to some CLECs. When DLC is involved, the standard process is to reject orders to provision line sharing over loops served in whole or in part by DLC. Should a CLEC want to have Qwest search for a spare copper loop and to perform a LST, the CLEC must complete and process a Special Request Process (SRP) order. When Qwest has received the SRP form, it will respond in a timely manner with information regarding the availability of a spare copper loop. If such a loop is available, Qwest will also provide the CLEC the time frame to perform the LST. This time frame may not be the standard 3 day line sharing interval, but an interval more in line with the requirement to do an outside technician dispatch and truck roll. Moreover, Qwest will provide the CLEC with an estimate of the time and materials cost associated with the truck roll, based on the per hour rate listed in Exhibit A of the SGAT for South Dakota. Upon receiving the CLEC acknowledgment of its agreement to pay the actual time and materials for the dispatch of the technician, Qwest will perform the LST and properly bill the CLEC for the actual time involved to compete the outside plant work. This option is only available when an existing copper loop is available to use in performing the LST. Under no circumstances will Qwest do any construction work associated with building a loop to make the LST possible.

In the *Line Sharing Reconsideration Order*, the FCC clarified that ILECs such as Qwest must allow CLECs to "line share" the ***distribution portion of the loop*** where the signal is then split, and allow the CLEC's data to be carried over fiber to some different location. Specifically:

> [W]here a competitive LEC has collocated a DSLAM at the remote terminal, an incumbent LEC must enable the competitive LEC to transmit its data traffic from the remote terminal to the central office. The incumbent LEC can do this, at a minimum, by leasing access to the dark fiber element or by leasing access to the subloop element."[29]

The CLECs do not dispute that Qwest complies with this obligation. Qwest provides CLECs with the network elements that can transport data from Qwest remote terminals; these include dark fiber,[30] DS-1/DS-3 Capable Loops,[31] and OCN Loops.[32] Qwest also provides CLECs with the ability to commingle their data with Qwest's data over the same facility when certain conditions are satisfied.[33]

The FCC then acknowledged that there may be additional ways to implement line sharing where there is fiber in the loop, which would turn on the inherent capabilities of the equipment ILECs have deployed.[34] Accordingly, the FCC initiated two further notices of proposed rulemaking seeking comments on the technical feasibility of "line sharing" over fiber fed loops.[35]

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[29] *Line Sharing Reconsideration Order* ¶ 12.

[30] *See* SGAT section 9.7.

[31] *See* SGAT section 9.2.

[32] *See* SGAT section 9.2.2.3.1. Qwest also offered to add the following sentence at the end of section 9.2.2.3.1: "Qwest shall allow CLECs to access high capacity loops at accessible terminals including DSX, FDPs or equivalent in the Central Office, customer premises or at Qwest owned outside plant structure (e.g., CEV, RT or hut)."

[33] *See* SGAT section 9.20 (unbundled packet switching).

[34] *Line Sharing Reconsideration Order* ¶ 12.

[35] *Line Sharing Reconsideration Order* ¶ 12 ("For these reasons, we are initiating a Third Further Notice of Proposed Rulemaking today in the Advanced Services docket and a Sixth Further Notice of Proposed Rulemaking in the Local Competition docket that requests comment on the feasibility of different methods of providing line sharing where an incumbent LEC has deployed fiber in the loop.").

Clearly, the FCC has not imposed any additional obligations. It has merely begun the process for considering whether to impose any such additional obligations. Nonetheless, the CLECs demand that the Commission impose additional line sharing obligations of the very kind the FCC intends to study through the comments it has requested.

Specifically, the CLECs demand that Qwest delete a reference to copper loops in SGAT section 9.4.1, which describes Qwest's line sharing offering, and broaden the reference to include other loops.[36] These revisions would expand Qwest's line sharing obligations and would create a false impression that it is technically feasible for CLECs to "line share" over any type of facility. Moreover, the line sharing methodology described in Section 9.4 requires use of a Central Office Splitter. This technically will not facilitate line sharing over fiber. Thus, removing references to copper simply does not work. As Qwest's witness explained, the CLEC proposal would render the SGAT's description misleading because it is not technically feasible for Qwest to offer line sharing over anything other than a copper loop.

Nonetheless, Qwest has offered to add the following language as a new section 9.4.1.1. to the SGAT:

> 9.4.1.1 Line Sharing occurs on the copper portion of the Loop (i.e., copper Loop or shared copper distribution). Qwest provides CLECs with the Network Elements to transport data from Qwest Remote Terminals including unbundled Dark Fiber, DS1 capable Loop, and OCN. Qwest also provides CLECs with the ability to commingle its data with Qwest's pursuant to Section 9.20 with Unbundled Packet Switching. To the extent additional Line Sharing technologies and transport mechanisms are identified, and Qwest has deployed such technology for its own use, and Qwest is obligated by law to provide access to such technology. Qwest will allow CLECs to line share in that same manner, provided, however, that the rates, terms and conditions for Line Sharing may need to be amended in order to provide such access.

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[36] Workshop II 2/27/01 Tr. 94:6-15.

Qwest is and has been proactively offering line sharing to CLECs throughout its region for over two years. To date, throughout Qwest's region, CLECs are offering service to customers over a substantial number of shared loops. Qwest has been proactive in industry forums to create best practices and methods for line sharing deployment. On this issue, however, Qwest simply does not have a technical solution that will allow "line sharing" over fiber. The FCC's recent NPRM supports this view as it seeks comments on whether line sharing over fiber is technically feasible. It is illogical to assume that the FCC ordered ILECs to offer line sharing over fiber when the FCC is not even sure it can be done. Qwest is meeting its obligations.

Mr. Antonuk agreed with Qwest on this issue as well. Specifically:

> There is no evidence of record that would support a conclusion that Qwest fails to provide any technically feasible form of line sharing over fiber. There were CLEC arguments about whether the SGAT acknowledged the need to address line sharing over fiber loops. The language of Section 9.4.1.1 does so. . . . A decision on [line sharing over fiber] should therefore come from the FCC and, when it does, the language of SGAT Section 9.4.1.1 is already expansive enough to address the option, should it prove a feasible and effective one.[37]

AT&T has now argued this issue in 13 different jurisdictions. All 12 jurisdictions to finally consider this issue to date have agreed with Qwest and found AT&T's position wanting. Commission Staff witness, Dr. Buster Griffing, agrees with Qwest on this issue.[38] The Commission should adopt Qwest's SGAT language on this issue.

III. DARK FIBER

A. Whether the unbundling requirement extends beyond the RBOC, Qwest Corporation. [SGAT Section 9.7.1]

AT&T contends that Qwest needs to clarify the availability of "classic Qwest" facilities in the 14-state region for lease as unbundled dark fiber. In other jurisdictions, AT&T has

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[37] *Antonuk Emerging Services Decision* at p. 19 (June 11, 2001).

claimed that the unbundling requirements of section 251(c)(3) pertain to entities beyond Qwest Corporation. AT&T has offered no rationale, legal or factual, for its position in this or any other workshops. Indeed, there is no justifiable rationale for AT&T's position.[39]

The unbundling obligations of section 251(c)(3) apply only to ILECs.[40] Qwest Corporation is the only ILEC in the Qwest family of corporations. As part of the Qwest/U S WEST merger, U S WEST Communications, Inc. became Qwest Corporation. Prior to the merger, Qwest had no ILEC operations, and U S WEST Communications, Inc. was the only ILEC within the U S WEST family of entities.[41] Thus, Qwest Corporation is the only ILEC within the Qwest family.[42] Consequently, the unbundling requirements of section 251(c)(3) apply only to Qwest Corporation.

1. **Background**

Qwest Communications International (QCI) is a holding company that owns a variety of subsidiaries. These subsidiaries are separate corporations with defined assets and operations. Two of these corporations own and control significant telecommunications networks that provide telecommunications services pursuant to state or federal authority. Qwest Corporation ("QC"), the successor to the old U S WEST Communications, Inc. ("USWC"), is the only Qwest entity that provides (or has ever provided) local exchange services in the seven states. Qwest

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[38] Staff Exhibit 1 at 56.

[39] To the extent that AT&T argues for a new obligation, the FCC has made it crystal clear that this section 271 proceeding is not the appropriate venue. *Kansas/Oklahoma Order* ¶19.

[40] Section 251 (c) (3) is a subsection of section 251(c) which begins with the following preamble:

ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. – In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

47 U.S.C. §251(c) (emphasis added).

[41] Workshop III 3/27/01 Tr. 62:6-63:2.

[42] Section 251(h)(1) defines ILEC, and there is no evidence that any Qwest entity other than Qwest Corporation satisfies this definition, nor could there be.

change." The only Qwest entity that has done these things (and, hence, the only one that is an ILEC "successor" for purposes of section 251(h)) is QC.[46]

Other provisions of the Act confirm that the regulatory status of a multi-part company such as Qwest must be determined separately for each of the company's corporate entities. For example, section 272 prescribes certain requirements for any Bell Operating Company affiliate "which is a local exchange carrier that is subject to the requirements of section 251(c)" — clearly indicating that there can be BOC affiliates that are *not* local exchange carriers and *not* subject to 251(c).[47] Similarly, 47 U.S.C. § 153(4) defines a "Bell Operating Company" as one of twenty listed companies (the original BOCs) together with *some* (but not all) successors and assigns and *some* (but not all) corporate affiliates, depending on whether they provide wireline telephone service.[48] Contrary to AT&T's suggestion, Congress did not intend the various regulatory categories in the Act to sweep in entire corporate families without any regard to the particular services each entity in that family is actually providing.

QC has not sought to avoid section 251(c) obligations by moving local network facilities or elements from QC to its affiliates and having the affiliates lease them back to QC or provide the services themselves.[49] There is no evidence in the record — and certainly nothing provided by AT&T — suggesting that any of QC's affiliates have pursued the same lines of business as QC in an effort to siphon off its customers.

3. None of QC's Affiliates are LECs, Let Alone ILECs, in South Dakota.

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[46] Workshop III 3/27/01 Tr. 62:14-19.

[47] 47 U.S.C. § 272(a)(1).

[48] The term "(B) includes any successor or assign of any such [listed] company that provides wireline telephone exchange service; but (C) does not include an affiliate of any such company, other than an affiliate described in subparagraph . . . (B)." 47 U.S.C. § 153(4).

[49] Workshop III 3/27/01 Tr. 63:3-7.

By the terms of the Act, the only entities that are subject to section 251(c) are "incumbent local exchange carriers."[50] Congress defined "incumbent local exchange carriers" as a subcategory of "local exchange carriers:" the ILEC in a given area is "the local exchange carrier that — (A) on [February 8, 1996], provided telephone exchange service in such area; and (B)(i) on such date . . . was deemed to be a member of [NECA] . . . ; or (ii) is a person or entity that, on or after such date . . . , became a successor or assign of a member [of NECA]."[51] A "local exchange carrier," in turn, is defined in terms of its specific activities: a LEC is any carrier "that *is engaged in* the provision of telephone exchange service or exchange access."[52]

None of QC's affiliates is "engaged in the provision of" *any* local exchange service in the seven states.[53] None therefore is a "local exchange carrier" within the meaning of the Act. QC's affiliates thus cannot be "incumbent local exchange carriers" as defined in section 251(h): they are not "*the local exchange carrier* that . . . provided telephone exchange service" in the seven states on February 8, 1996, nor are any a "*local exchange carrier* that . . . is a person or entity that, on or after such date . . . , became a successor or assign" of such a LEC.[54] Put simply, since QC's affiliates are not "local exchange carriers" *at all*, they cannot be "incumbent local exchange carriers" for purposes of section 251(c).

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[50] 47 U.S.C. § 251(c).

[51] 47 U.S.C. § 251(h)(1) (emphasis added).

[52] 47 U.S.C. § 153(26) (emphasis added). The Act defines "telephone exchange service" as "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service . . . by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47). "Exchange access" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

[53] Workshop III 3/27/01 Tr. 62:11-14, 23-25.

Even if a QC affiliate were to provide local exchange services in the future in the sev states, it still would not be an *incumbent* LEC within the meaning of section 251(h) unless became USWC's successor or assign by acquiring "key local exchange and exchange acce services and facilities" from USWC – specifically, "network elements that must be provided o an unbundled basis pursuant to section 251(c)(3)."[55] None of QC's affiliates have ever acquire such network elements from USWC or QC.[56] As the FCC has held, "a BOC affiliate should no be deemed an incumbent LEC subject to the requirements of section 251(c) solely because i offers local exchange service; rather, section 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h)," in particular, that section's "successor or assign" test.[57]

4. Section 251(C) does not Extend to an Incumbent LEC's Long Distance Operations or Network.

The FCC has specifically considered how the unbundling obligations of section 251(c)(3) apply to carriers (such as Sprint and the former GTE) that provide both incumbent local exchange and long distance services, and it rejected the argument AT&T makes here. In the *Advanced Services Remand Order*,[58] the FCC found "no merit" to the suggestion that "section 251 would inevitably require GTE and Sprint, acting in their capacity as incumbent LECs, to

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[54] 47 U.S.C. §§ 251(h)(1)(A), (B) (emphases added).

[55] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 11 FCC Rcd 21905, 22054 ¶ 309 (1996). *See also* 47 C.F.R. §53.207 (FCC definition of a BOC "successor or assign").

[56] Workshop III 3/27/01 Tr. 62:14-19.

[57] *Id.* at 22055 ¶ 310.

[58] Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385 (1999), *appeal pending sub nom. WorldCom v. FCC*, No. 09-1002 (D.C. Cir.).

unbundle all their facilities, including their long distance facilities."[59] These ILECs' long distance facilities would not meet the "limitations Congress has established in section 251(d)(2)" on unbundling; access to them is not "necessary" to provide competitive local service, nor would the failure to unbundle such facilities "impair" a CLEC's ability to compete.[60] These limitations ensure "that the unbundling obligations under section 251(c) are consistent with section 251's underlying goal of opening the *local* market to competition."[61]

In a later appeal (which is still pending), the FCC explained its ruling on the basis that the unbundling of ILECs' affiliated long distance networks would not serve the "'underlying goal' of sections 251 and 252: to bring competition to those telecommunications markets that are subject to the continuing *market power* of incumbent LECs."[62] As the FCC told the D.C. Circuit, ILECs have no market power and control no bottleneck facilities in long distance:

> As a general matter, incumbent LECs have traditionally held market power not with respect to "long distance" networks as such, but with respect to the local bottleneck facilities (such as the loop) needed for "access" to those networks (and thus to the telecommunications and information services carried over those networks).[63]

The rationale for unbundling is absent in this context, as the FCC acknowledged.

Indeed, AT&T itself filed a brief *supporting* the FCC in that appeal. AT&T agreed with the FCC that the obligations of sections 251 and 252 are specifically directed to incumbents' *local* service networks:

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[59] 15 FCC Rcd at 390 ¶ 13.

[60] *Id.* at 390-91 ¶¶ 13-14.

[61] *Id.* at 391 ¶ 14 (emphasis added).

[62] Brief for Respondents at 30, *WorldCom, Inc. v. FCC*, No. 00-1002 (D.C. Cir. filed Dec. 22, 2000) (emphasis in original).

> Congress recognized that by virtue of having been the providers of local exchange services in an area prior to the adoption of the 1996 Act, ILECs possess monopoly control over local network facilities. Because new entrants cannot in the foreseeable future possibly replicate the ILECs' infrastructure, particularly their loops, Congress realized that the ILECs' status as incumbent providers of exchange service gave them insurmountable advantages over new entrants in the provision of all telecommunications services that utilize those networks . . . .[64]

AT&T's current suggestion that 251(c) applies without regard to whether the ILEC's *local* network is even at issue is an about-face from its earlier position.

As a result of the foregoing, it would make no difference even if QC affiliates *were* deemed to be ILECs because none provide local exchange service. The only telecommunications services they provide are operator services and long distance. Thus, any dark fiber held by them would be part of a long distance facility, and therefore be exempt from unbundling.[65]

Mr. Antonuk agreed with Qwest's position on this issue *in toto*. At the same time, he recommended adding additional SGAT language to ensure that Qwest (QC) has an obligation to unbundled all dark fiber to which it owns or has a right to access.[66] AT&T has now argued this issue in 13 different jurisdictions. All 12 jurisdictions to finally consider this issue to date have agreed with Qwest and found AT&T's position wanting. Commission Staff witness, Dr. Buster Griffing, agrees with Qwest on this issue.[67] The Commission should adopt Qwest's SGAT language on this issue.

B. Whether Qwest Must Unbundle Dark Fiber It Does Not Own in Joint Build Arrangements. [SGAT Section 9.7.1]

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[63] *Id.*

[64] Joint Brief of Intervenors in Support of Respondents in Opposition to the Qwest Petitioners at 6, *WorldCom, Inc. v. FCC*, No. 00-1002 (D.C. Cir. filed Dec. 22, 2000).

[65] Workshop II 01/18/01 Tr. 28:13-18; Workshop III 3/27-01 Tr. 62:19-22.

[66] *Antonuk Emerging Services Decision* at pp. 53-55 (June 11, 2001).

[67] Staff Exhibit 1 at 67.

In a meet point arrangement, two entities combine to make a fiber route between two points. As part of the arrangement, the route is divided into two parts that come together at the meet point, and each entity owns one of the parts.[68] Usually, each entity has some rights to send traffic over the fiber owned by the other party.[69]

As Qwest made clear, it will unbundle dark fiber that it owns as part of a meet-point arrangement. For this purpose, Qwest added the following language to the SGAT as required by Mr. Antonuk:

> 9.7.1 . . . Deployed Dark Fiber facilities shall not be limited to facilities owned by Qwest, but will include in place and easily called into service facilities to which Qwest has otherwise obtained a right of access, including but not limited to capitalized Indefeasible Right to Use (IRUs) or capitalized leases. Qwest shall not be required to extend access in a manner that is inconsistent with the restrictions and other terms and conditions that apply to Qwest's access; however, in the case of access obtained from an affiliate: (a) the actual practice and custom as between Qwest and the affiliate shall apply in the event that it provides broader access than does any documented agreement that may exist, and (b) any terms restricting access by CLECs that are imposed by the agreement with the affiliate (excluding good-faith restrictions imposed by any agreement with a third party from whom the affiliate has gained rights of access) shall not be applied to restrict CLEC access.

AT&T, however, wants Qwest to go further and unbundle dark fiber it does not own in such joint build arrangements. Qwest cannot and will not unbundle such dark fiber belonging to other entities.[70] Again, AT&T failed to provide any legal justification for how Qwest could unbundle such an asset of a third party or how it could be required to do so.[71]

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[68] Workshop II 2/27/01 Tr. 232:4-19.

[69] Workshop II 2/27/01 Tr. 232:15-19.

[70] Workshop II 1/19/01 Tr. 349:22-350:2; Workshop II Tr. 2/27/01 Tr. 231:4-9.

[71] As noted above, such arguments for novel duties are misplaced in a 271 docket. *Kansas/Oklahoma Order* ¶ 97.

Mr. Antonuk resolved the issue by requiring Qwest to add the SGAT language noted above.[72] All 12 jurisdictions to finally consider this issue to date have agreed that the addition of the language proposed by Mr. Antonuk resolves the issue. Commission Staff witness, Dr. Buster Griffing, agrees with Qwest on this issue.[73] The Commission should adopt Qwest's SGAT language on this issue.

C. Whether Qwest May Impose a Requirement of a Significant Amount of Local Exchange Traffic on Dark Fiber Combinations. [SGAT Section 9.7.2.9]

AT&T has challenged the following provision in the SGAT as unlawful:

> 9.7.2.9 CLEC shall not use UDF as a substitute for special or switched access services, except to the extent CLEC provides "a significant amount of local exchange traffic" to its end users over the UDF as set forth by the FCC (See 9.23.3.7.2).

AT&T claims that the FCC authorized such a restriction only for enhanced extended links (EELs) and not dark fiber per the FCC's *Supplemental Order Clarification* regarding the *UNE Remand Order*.[74] AT&T's argument does not withstand scrutiny.

EELs are combinations of loop and transport.[75] Dark fiber is not a UNE unto itself, but rather a flavor of transport and loop.[76] The local exchange traffic restriction pertains to combinations of loop and transport.[77] Thus, the local exchange traffic restriction does properly pertain to EELs comprised in whole or in part of dark fiber. Moreover, the FCC's rationale for the local exchange restriction pertains to dark fiber combinations of loop and transport just as it

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[72] *Antonuk Emerging Services Decision* at pp. 54-56 (June 11, 2001).

[73] Staff Exhibit 1 at 68.

[74] Workshop II 1/18/01 Tr. 116:19-22.

[75] Workshop II 1/18/01 Tr. 119:1-3; *UNE Remand Order* ¶¶477, 480.

[76] *UNE Remand Order* ¶¶174, 325.

does to EELs. The FCC imposed the restriction so as to prevent unbundling requirements from interfering with access charge and universal service reform.[78] In other words, an unfettered unbundling obligation would have erased substantial amounts of access charge revenues. In addition, access revenues have historically provided implicit subsidies that are necessary to maintain the goals of universal service. Without the local service restriction, dark fiber loop and transport unbundling could present a similar threat to access revenues and universal service. Consequently, section 9.7.2.9 is just and proper under the FCC's *Supplemental Order Clarification*.

The purpose of unbundled network elements is to allow competitors to lease portions of Qwest's network to carry ***local*** traffic on behalf of its customers. Without the local use restriction, Qwest expects that CLECs will begin to order all new special access circuits (which are designed to carry non-local traffic) as EELs. This is exactly what the FCC sought to prevent in its Supplemental Order through creation of the local use restriction. In a Supplemental Order Clarification to the UNE Remand Order, the FCC unequivocally held that a requesting carrier must provide a "significant amount of local exchange service" over a particular facility in order "to obtain unbundled loop-transport combinations."[79] The FCC clarified that a carrier would be determined to meet the "significant amount of local exchange service" requirement if it met one of three options identified in the Order.[80] The FCC imposed the local use restriction to ensure that unbundling does not interfere with access charge and universal service reform,[81] recognizing

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[77] *Supplemental Order Clarification*, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 00-183 (rel. June 2, 2000) ¶8.

[78] *Id.*

[79] Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183, 15 FCC Rcd 9587 ¶ 21 (June 2, 2000)("Supplemental Order Clarification")

[80] Supplemental Order Clarification, ¶¶21-22.

[81] *UNE Remand Order* ¶ 489.

that an unfettered unbundling obligation of loop/transport would erase substantial access charge revenue. In addition, access revenues have historically provided implicit subsidies that are necessary to maintain the goals of universal service. To the extent a CLEC obtains a loop-transport combination comprised in whole or in part of dark fiber, the local use restriction should apply to that UNE Combination as well.

A close review of the FCC's Supplemental Order on Remand make Qwest's position clear. The United States Supreme Court has held that a Commission cannot order a party to unbundle a UNE unless the requisite necessary and impair analysis is completed.[82] This Commission has not performed a necessary and impair analysis with respect to EELs carrying exchange access under Rule 317. The FCC acknowledged it did not perform such an analysis. Thus, this Commission is essentially precluded based on the evidence in the record from eviscerating the FCC's local use restriction as it applies to EELS comprised in whole or in part of dark fiber.

Mr. Antonuk agreed with Qwest on this issue:

> ***There is no doubt that a loop-transport combination that includes dark fiber remains a loop-transport combination.*** The logic behind the FCC's concern about access charges is in no way diminished because the facilities providing the combination were unlit before a CLEC gained access to them. The fact that access charges associated with many users might be avoided (instead of the one contemplated in the preceding quote) hardly serves to lessen the concern. Increased measurement difficulty (which, moreover, was an issue first raised in AT&T's brief, and not supported by any evidence) does not call for elimination of the rule in those cases where the harm it seeks to avoid is the greatest. Therefore, AT&T's argument is without foundation.[83]

Although the Washington Commission originally found for AT&T on this issue, on reconsideration the Washington Commission realized that the FCC had never applied a "necessary and impair" analysis on EELs carrying special access and, as a result, reversed course and sided with Qwest. All remaining eleven jurisdictions have formally agreed with Qwest in

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[82] *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999).

[83] *Antonuk Emerging Services Decision* at pp. 57 (June 11, 2001) (emphasis supplied).

final decisions – Arizona, Colorado, Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, Oregon, Utah and Wyoming. Commission Staff witness, Dr. Buster Griffing, agrees with Qwest on this issue.[84] The Commission should adopt Qwest's SGAT language on this issue.

IV. SUBLOOP UNBUNDLING

The FCC's UNE Remand Order requires ILECs to allow subloop access at any "accessible terminal" in Qwest's outside plant. This requires Qwest to unbundle distribution subloops, feeder subloops in Feeder Distribution interfaces – the primary point at which feeder and distribution are connected to create the complete loop. Qwest is also required to unbundle subloops in accessible terminals in Multiple Tenant Environments (MTEs).

There is no dispute about how Qwest must unbundle subloops outside of MTEs – what the SGAT describes as detached terminals (accessible terminals on their own concrete pads). In these circumstances, the CLEC provides Qwest with a request for "cross connect collocation;" Qwest has 90 days to provision such collocation; the cross-connect collocation includes a facility inventory and a cross-connect field dedicated to the CLEC; once the collocation is complete, the CLEC submits an LSR for each individual subloop order; and Qwest has five (5) days to run the jumper to provision the individual subloop.

The unanimity in the non-MTE environment is contrasted with substantial disagreement as to how Qwest must provision subloops in an MTE environment. AT&T and Qwest have several points of disagreement, each of which will be described below. Nonetheless, Qwest has made substantial concessions regarding subloop access in MTEs. For example, in the collocation workshops, AT&T demanded and Qwest conceded that it must be willing to provide

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[84] Staff Exhibit 1 at 69.

collocation in any Qwest premises, no matter how small (space permitting). In the subloop context, however, AT&T claimed it had the unfettered right to access MTE terminals without collocation. Similarly, Qwest originally demanded that a cross-connect field dedicated to the CLEC be created to ensure there was no confusion about ownership of facilities when a technician accessed the terminal. As described above, both of these demands were uncontested outside of the MTE context. Not true with MTEs. Qwest conceded both of these substantial points. These concessions moved the parties substantially closer together; nonetheless, several impasse issues remain. As set forth below, each of these issues should be decided in Qwest's favor as a matter of fact and law.

A. Whether the SGAT's Provisions for Access to Subloop Elements at MTE Terminals is Consistent with the Act and the Rules Thereunder.

1. Whether the SGAT's Provisions for Access to Subloop Elements at MTE Terminals is Consistent with the FCC's Definition of, and Rules Regarding Access to, the Unbundled NID.

Qwest and AT&T have reached impasse regarding whether the SGAT section on subloop access is consistent with the FCC's definition of the unbundled network interface device ("NID"). Qwest is confused about this issue, as it appears to be an unnecessary hold-over from the time when Qwest demanded collocation in MTE Terminals. The SGAT allows CLECs to access NIDs (demarcation points) and MTE Terminals (when subloop is sought) in exactly the same way. Despite this, AT&T contends that any accessible terminal containing a protector in an MTE is a NID and subject to the FCC's rules on access to the unbundled NID. As a matter of law, AT&T is incorrect.

Before discussing the merits of the argument, Qwest would like to make a practical point. This is simply a terminology issue, nothing more. There is no difference in what CLECs will obtain from Qwest. The only issue is what do we call these terminals when they are demarcation

points and what do we call these terminals when they are not. Qwest asserts that the terminals should have different names to leave absolutely no confusion about whether a subloop is involved or not. When an MTE Terminal is involved, subloop is necessarily there. When a NID is ordered, it is necessarily the demarcation point. At the end of day, it is not going to be lawyers implementing the terms of the contract language. Instead it will be engineers and technicians. We do not need to add a level of confusion to implementation of the contract.

The crux of the disagreement between AT&T and Qwest turns on the FCC's description of these two UNEs – subloop and NID. What AT&T seeks is the ability to gain access to Qwest subloop elements without utilizing the processes set forth in SGAT §9.3. In most instances, these are detailed provisions that AT&T agreed to. AT&T is unabashed in its attempt to end run around the subloop requirements. The Multi-State Facilitator put it best:

> While both Qwest and AT&T expounded on this subject at great length, the discussion appears to raise no issues other than that considered in the first unresolved *Subloop Unbundling* issue (*Subloop Access at MTE Terminals*) from the June 11, 2001 *Third Report – Emerging Services* from these workshops. ***In essence, AT&T is still seeking to argue that MTE terminals are NIDs, because it believes that winning the definition issue will give it essentially unmediated access to such terminals.***[85]

An understanding of how the SGAT is intended to work is instructive. Every time a CLEC orders an unbundled loop, the CLEC obtains the functionality of the NID as well. This is also true of subloop unbundling. In the *UNE Remand Order* the FCC held that "competitors purchasing a subloop at the NID . . . will acquire the functionality of the NID for the subloop portion they purchase."[86] Thus, the FCC determined that there is no need to include the NID as

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[85] *Antonuk UNE Report* at p.76 (Aug. 20, 2001) (emphasis supplied).

[86] *UNE Remand Order* ¶ 235.

part of any other subloop element.[87] A NID/subloop combination is really, therefore, just a subloop. CLECs can, therefore, order one of three items from Qwest: (1) unbundled loops (includes the NID); (2) subloop elements (includes the NID); or (3) unbundled stand alone NIDs. To obtain unbundled loops, SGAT § 9.2 governs; to obtain subloops, SGAT § 9.3 governs; and to obtain stand-alone NIDs, SGAT § 9.5 governs. AT&T is hoping that the SGAT language will become so confused that it can utilize SGAT § 9.5 – the NID section – to access subloops. The Commission should not permit this confusion.

AT&T has now argued this issue in 13 different jurisdictions. All 12 jurisdictions to finally consider this issue to date have agreed with Qwest and found AT&T's position wanting. Commission Staff witness, Dr. Buster Griffing, agrees with Qwest on this issue.[88] The Commission should adopt Qwest's SGAT language on this issue.

2. Whether CLECs Must Submit LSRs to order Subloops. [SGAT 9.3 generally]

AT&T claims that it should not be required to order intrabuilding cable subloops by submitting a local service request ("LSR") to Qwest.[89] This contention is wholly unreasonable especially given that AT&T acknowledges that use of an LSR is appropriate for almost all aspects of subloop unbundling. AT&T acknowledges it is appropriate for all subloop elements accessed at FDIs ("detached terminals).[90] AT&T also acknowledges that in an MTE

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[87] *UNE Remand Order* ¶ 235.

[88] Staff Exhibit 1 at 58.

[89] Workshop II 2/28/01 Tr. 187:12-25.

[90] See SGAT §9.3.5.2.1.

environment, an LSR must be submitted when AT&T seeks a subloop with number portability. According to AT&T, this constitutes approximately 70-80% of all such orders.[91]

Submission of an LSR is the industry standard for wholesale orders. The Ordering and Billing Forum ("OBF") is the national industry forum that creates and maintains LSR ordering guidelines.[92] These guidelines are the de facto standard for ordering.[93] The OBF has considered how subloop unbundling should be ordered and is nearing closure on its draft solution.[94] The process the OBF has defined for ordering subloops is based on submission of an LSR for all subloop elements, including feeder, distribution, and specifically including intrabuilding cable.[95] Whenever a CLEC is interconnecting with Qwest's network, the LSR requires the CLEC to provide CFA information to identify the tie-down information that identifies the interconnection point.[96] The CFA or equivalent information is standard information that is widely used in the industry.[97] Qwest's LSR form for subloop orders requires substantially the same information that CLECs currently provide on LSRs to order unbundled loops.[98]

The industry standard requires submission of an LSR for ordering for good reason. The LSR contains information regarding the interconnection point between the CLEC network and

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[91] Washington July 13, 2001 Workshop Transcript Vol. 32 at 4706:13-20.

[92] Workshop II 2/28/01 Tr. 153:15-154:9.

[93] Workshop II 2/28/01 Tr. 154:1-3.

[94] Workshop II 2/28/01 Tr. 154:9-21.

[95] Workshop II 2/28/01 Tr. 154:22-155:6.

[96] Workshop II 2/28/01 Tr. 167:1-13.

[97] Workshop II 2/28/01 Tr. 166:23-167:5; 168:12-23.

[98] Workshop II 2/28/01 Tr. 179:18-180:2.

the Qwest network.[99] It also allows the CLEC customer care representative who creates the LSR to validate that interconnection point information against Qwest's systems to ensure that it is valid and will be accepted.[100] The LSR contains information Qwest requires for billing, tracking inventory, and identifying the circuit for maintenance and repair purposes.[101] Timely submission of the LSR is required so that Qwest can satisfy its obligations to manage and maintain its network and to bill and recover the payment to which it is entitled for the element.[102] More importantly, both CLEC and Qwest customers will be adversely affected by the lack of a timely LSR due to the resultant inaccuracies in Qwest's systems, which will impede Qwest's repair efforts.

AT&T's sole basis for refusing to submit an LSR to order subloops is the cost it claims is associated with submitting an LSR.[103] Instead, AT&T believes it would be more efficient to send minimal information to Qwest as infrequently as every six months in some instances.[104] AT&T's demand is wholly unreasonable in several respects. First, the absence of an LSR would dramatically increase Qwest's costs. Without LSR information, Qwest would have to build manual processes into its billing flow in order to ensure accurate billing out of the usual monthly flow.[105] In addition, AT&T's position would require that Qwest manually create and track the quarterly or semi-annual AT&T payment notices in a spreadsheet, rather that through Qwest's

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[99] Workshop II 2/28/01 Tr. 166:17-167:16.

[100] Workshop II 2/28/01 Tr. 166:17-167:16.

[101] Workshop II 2/28/01 Tr. 169:16-170:23.

[102] Workshop II 2/28/01 Tr. 171:6-14.

[103] Workshop II 2/28/01 Tr. 149:2-12.

[104] Workshop II 2/28/01 Tr. 148:8-13; 150:4-13.

[105] Workshop II 2/28/01 Tr. 173:2-7

existing automated billing systems.[106] As Mr. Antonuk acknowledged at the workshop, "There's a lot of beauty to the LSR when it comes to billing."[107]

Further, the absence of an LSR will impede Qwest's ability to service its own retail customers. If a customer subscribes to AT&T's service, then decides to return to Qwest, Qwest will have difficulty providing service because it will not know that AT&T has taken the subloop.[108] When that customer called Qwest to order service, Qwest may have committed to a shorter installation interval and be unable to meet it because it was not aware that a portion of the subloop had been taken by AT&T.[109] Qwest would be similarly unable to turn up service if an AT&T customer moved out of an apartment and the new customer orders Qwest service.[110] If AT&T removed the wrong customer's jumper and replaced it with an AT&T jumper, Qwest would be unable to determine the proper placement of the wires.[111] Without knowledge regarding the activity that has taken place at the terminal, a Qwest technician is faced with either pulling AT&T's jumper off, believing that it should be serving a Qwest customer, or not turning up the Qwest service.[112] Neither option is acceptable because both result in the unnecessary disruption of a customer's service. If AT&T had notified Qwest of these activities by submitting

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[106] Workshop II 2/28/01 Tr. 174:4-10.

[107] Workshop II 2/28/01 Tr. 204:5-6.

[108] Workshop II 2/28/01 Tr. 194:13-19.

[109] Workshop II 2/28/01 Tr. 194:20-25.

[110] Workshop II 2/28/01 Tr. 194:13-19.

[111] Workshop II 2/28/01 Tr. 195:6-12.

[112] Workshop II 2/28/01 Tr. 195:6-12.

an LSR, Qwest would be able to contact AT&T to resolve the situation much more quickly and efficiently.[113]

Moreover, AT&T admits that it will have to complete an LSR in approximately 70%-80% of MTE orders because those orders will include local number portability, which must be ordered by LSR. Thus, this dispute will touch only a minority of AT&T's orders. The substantial majority will require an LSR regardless of the outcome of this issue. If AT&T is not prejudiced by issuing LSRs in these instances, surely they will not be in the circumstances without number portability.

AT&T has offered no good faith alternative to submitting LSRs to order subloops. LSRs are the industry norm and specifically endorsed by the OBF for subloops. LSRs ensure proper repair, billing and tracking of facilities improving the transition between carriers. Therefore, AT&T should be required to comply with the industry standard.

Mr. Antonuk agreed with Qwest on this issue.[114] Although the Washington ALJ's recommended decision originally found for AT&T on this issue, the Washington Commission disagreed and found that a uniform process should apply to all states. Ten different jurisdictions have formally agreed with Qwest in final decisions – Arizona, Colorado, Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, Utah and Wyoming. Only the Oregon Commission disagrees and its decision was based on the now vacated Washington ALJ recommended decision. Commission Staff witness, Dr. Buster Griffing, also agrees with Qwest on this issue.[115] The Commission should adopt Qwest's SGAT language on this issue.

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[113] Workshop II 2/28/01 Tr. 195 22-196 10.

[114] *Antonuk Emerging Services Decision* at pp. 31-33 (June 11, 2001).

[115] Staff Exhibit 1 at 59.

3. Whether an Inventory of CLEC Facilities Must be Created Before CLECs may Obtain Access to Subloop Elements in an "MTE Terminal".

AT&T also contends that Qwest should inventory CLEC facilities after, rather than before, the CLEC has completed its installation process. The inventory is an integral step to entering required information into Qwest's systems. The function of the inventory is to create a record in Qwest's systems of the CLEC's termination points for the purpose of submitting the LSR for the subloop element.[116] This information is entered into Qwest's systems so that the addressing information for the termination of the subloop can be identified and recognized when the CLEC issues an LSR to order a subloop.[117] Thus, the inventory is a necessary prerequisite to the CLEC's ability to submit an LSR. Because, as set forth above, CLECs must submit LSRs to order subloops, the inventory must be performed before the CLEC orders or installs any subloops.

AT&T's arguments here concern timing and cost. Both arguments are without merit. AT&T's entire premise is based on the false assumption that it, not Qwest, completes the inventory. Although AT&T informs Qwest of the number of lines it plans to be drawn in the terminal, Qwest, not the CLEC, creates the inventory of these facilities. As to timing, AT&T's concerns are curious. First, inventory creation takes five days and only applies to the first subloop order in a MTE. More importantly, Qwest has created a process to allow CLECs to submit the LSR and process the order before the inventory is completed. Thus, AT&T's timing argument should be rejected out of hand.

Given that Qwest, not the CLEC, creates the inventory, it is appropriate for Qwest to obtain cost recovery for this work. The Act is clear that Qwest is entitled to cost recovery from

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[116] Workshop II 2/28/01 Tr. 112:18-22

the cost causer for all work associated with UNEs.[117] The question of how much cost is ... owner for the cost docket.

Mr. Antonuk agreed with Qwest on this issue.[118] The state commissions participating in the 7-state process and Nebraska have formally agreed with Qwest in final decisions on this issue. Commission Staff witness, Dr. Buster Griffing, also agrees with Qwest on this issue.[119] The Commission should adopt Qwest's SGAT language on this issue.

4. Whether Qwest Must Create a Website to Identify MTE Locations Where it has made an Ownership Determination. [No SGAT Cite]

AT&T has requested that Qwest create a web site to identify every MTE location where it has made an ownership determination, in the same way that Qwest tracks collocation space. Contrary to AT&T's suggestion, there is a crucial distinction between the collocation web site and AT&T's proposed intrabuilding cable ownership web site: unlike collocation space, there are literally tens of thousands of MTE locations in Qwest's fourteen state region. Maintaining ownership determination regarding each location on a web site would entail a staggering number of entries. The creation and maintenance of such a web site would impose an extreme burden on Qwest.

In addition to being overly burdensome, such a web site would have little practical utility. Theoretically, a CLEC could use the site to locate a prior determination of ownership relating to an MTE location instead of waiting for Qwest to provide that information. The SGAT provides that Qwest has only two business days to notify CLECs regarding its determination of ownership

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[117] Workshop II 2/28/01 Tr. 117:18-25

[118] 47 U.S.C. §252(d).

[119] *Antonuk Emerging Services Decision* at pp. 34 (June 11, 2001).

of intrabuilding cable in those MTE locations where there has already been a determination of ownership.[121] Having this knowledge two days earlier would not be of much practical value to a CLEC because the CLEC would require far more than two days to bring its facilities on. CLECs know which locations it may seek to serve weeks, even months, before they are prepared to deliver the service. Qwest's two day interval will not delay any CLEC using a reasonable business planning process.

Given Qwest's eminently reasonable two day interval for notifying CLECs of prior ownership determinations, the Commission should reject AT&T's request to provide and maintain that same information on a web site.

IV. CONCLUSION

For the reasons stated above, Qwest should prevail on all impasse issues regarding packet switching, line sharing, dark fiber, and subloop unbundling. In addition, Qwest should be found to be in compliance with section 271 on all aspects of Emerging Services.

RESPECTFULLY SUBMITTED this 21st day of May, 2002.

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[120] Staff Exhibit 1 at 60.

[121] SGAT section 9.3.5.4.1.

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	DOCKET TC 01-165

QWEST CORPORATION'S OPENING POST- HEARING BRIEF ON WORKSHOP THREE, GROUP 4 ISSUES – UNBUNDLED NETWORK ELEMENTS REPORT

(Checklist Items 2, 4, 5 AND 6)

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I. INTRODUCTION

This brief addresses Qwest's compliance with four of the 14 checklist items in section 271(c)(2)(B). Specifically, this brief addresses compliance with the checklist items addressed the Multi-State Facilitator's Group 4 Report, issued on August 20, 2001:[1] Checklist Item 2 (access to unbundled network elements), Checklist Item 4 (access to unbundled loops), Check Item 5 (access to unbundled local transport), and Checklist Item 6 (access to unbundled local switching). In addition, although not the subject of the Group 4 Report, this brief also addres two other aspects of Qwest's compliance with Checklist Item 2: access to operations support systems and Qwest's Change Management Process.

As set forth below, Qwest has demonstrated that it meets the requirements of section 2 of the Telecommunications Act of 1996 ("the Act") relating to these checklist items. Accordingly, the South Dakota Public Utilities Commission ("Commission") should make a favorable recommendation to the Federal Communications Commission ("FCC") on Qwest's behalf relative to these checklist items.

II. DISCUSSION

A. Qwest Complies with the Requirements of Checklist Item 2, Access to Unbundle Network Elements

Section 271(c)(2)(B)(ii) of the Act requires Qwest to provide nondiscriminatory acces network elements pursuant to section 251(c) and at prices in accordance with the requirement section 252(d).[2] Section 251(d) of the Act requires the FCC, when determining what networ

[1] Multi-state Group 4 Report (August 20, 2001) ("Group 4 Report") (Qwest Ex. 25).

[2] 47 U.S.C. § 271(c)(2)(B)(ii).

elements should be made available, to consider, at a minimum, whether "access to such netw elements as are proprietary in nature is necessary," and whether "the failure to provide acces such network elements would impair the ability of the telecommunications carrier seeking a to provide the services that it seeks to offer."[3]

In the *UNE Remand Order*, the FCC applied the "necessary and impair" standard, identifying a minimum list of unbundled network elements ("UNEs") that incumbent LECs provide to requesting telecommunications carriers on an unbundled basis.[4] The new list, set forth in Rule 51.319, includes local loops, subloops, network interface devices ("NIDs"), loc switching capability, local tandem switching capability, dedicated and shared transport, dark fiber, signaling and call-related databases, and operational support systems ("OSS") function

1. Qwest Complies with The FCC's Access to Unbundled Network Element Requirements in South Dakota

As set forth in the direct and rebuttal testimony of Karen A. Stewart Checklist Item 2 Access to Unbundled Network Elements, Qwest provides nondiscriminatory access to UNEs any technically feasible point to any requesting telecommunications carrier for the provision telecommunications service, in accordance with the Telecommunications Act of 1996, federa rules, and South Dakota law and regulations. Qwest has a concrete and specific legal obligat to provide these unbundled network elements through its interconnection agreements with

---

[3] 47 U.S.C. § 251(d)(2).

[4] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Dkt. No. 96-98, FCC 238, 15 FCC Rcd 3696, ¶ 15 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

[5] *UNE Remand Order*, ¶¶ 44-47 and ¶¶ 51-61.

CONTINUATION

[6.]

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CLECs and its South Dakota SGAT.[6] Qwest provides CLECs with access to all the features functions, and capabilities of the network elements in a manner that allows CLECs to provide any telecommunications service that the network element is capable of providing. Qwest does not impose limitations, restrictions or requirements on requests for the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner desired by the requesting telecommunications carrier other than those expressly permitted under existing FCC rules.[7]

Qwest combines UNEs for competitive local exchange carriers ("CLECs") or provides such UNEs in a manner that allows CLECs to combine such elements in order to provide telecommunications services. When ordered in combination, UNEs that are currently combined and ordered together will not be physically disconnected or separated in any fashion except for technical reasons or if requested by the ordering CLEC. Two standard UNE combinations are available: UNE platform, or "UNE-P," and the Enhanced Extended Loop ("EEL").[8]

Qwest provides access to UNEs in substantially the same time and manner as it provides to itself, or, if Qwest does not provide access to itself, in a manner that provides the CLEC with meaningful opportunity to compete. Qwest has demonstrated in other states that it is provisioning EELs in a non-discriminatory manner.[9] Although Qwest has not had a request for

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[6] *See* Affidavit of Karen A. Stewart re: Checklist Item 2, filed on October 24, 2001 ("Stewart Direct re: Checklist Item 2") (Qwest Ex. 62).

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

[8] *Id.* at 11.

[9] *Id.* at 10-20.

provision an EEL in South Dakota until very recently, Qwest has now provisioned an EEL in South Dakota.

2. No Changes Are Required To The SGAT Relating To Checklist Item 2 – Access To Unbundled Network Elements

Three parties commented on issues associated with Checklist Item 2: Dr. Marlon Griffing representing South Dakota Commission Staff,[10] Ken Wilson on behalf of AT&T,[11] and Michelle Merchen representing Black Hills FiberCom ("FiberCom").[12] For the reasons set forth below, Qwest satisfies the obligations of section 271 of the Act and the FCC's rules as they relate to access to UNEs. Accordingly, the Commission should find that no changes are required to the SGAT.

a. Qwest Does Not Have an Obligation to Carry Out Construction and Build New UNEs at the Request of CLECs.

AT&T is simply wrong in its assertion that Qwest is required to build new UNEs. The Telecommunications Act created UNEs for the purpose of giving CLECs access to the incumbent LEC's existing network. The Act was not designed to force ILECs to build networks

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[10] Direct Testimony of Marlon Griffing, Ph.D., filed on March 18, 2002 ("Griffing Direct") (Staff Ex. 1).

[11] AT&T did not submit any testimony or evidence of record addressing Checklist Item 2. Qwest submits that having foregone the opportunity to submit evidence concerning Checklist Item 2 (and to submit that evidence to cross-examination), AT&T is precluded from submitting such evidence, if any, now. To the extent AT&T makes or suggests legal arguments in AT&T's Verified Comments on Checklist Items 2, 5 and 6, filed on March 18, 2002 ("AT&T's Comments on 2, 5 and 6"), Qwest addresses those legal arguments here.

[12] FiberCom did not submit any testimony or evidence of record addressing Checklist Item 2. Qwest submits that having foregone the opportunity to submit evidence concerning Checklist Item 2 (and to submit that evidence to cross-examination), FiberCom is precluded from submitting such evidence, if any, now. To the extent FiberCom makes or suggests legal arguments in the prefiled Direct Testimony of Michelle Merchen, filed on March 18, 2002 ("Prefiled Testimony of Michelle Merchen"), Qwest addresses those legal arguments here.

for CLECs. The Eighth Circuit, in *Iowa Utilities Bd. v. FCC*, held that CLECs are entitled to unbundled access to only Qwest's *existing* network:

> We also agree with petitioners view that subsection 251(c)(3) implicitly *requires unbundled access only to an incumbent LEC's existing network* -- not to a yet unbuilt superior one. [13]

It is clear that the Act requires "access to *only* an incumbent LEC's *existing* network." Therefore, the obligation to provide access to UNEs in section 251(c)(3) of the Act does not require Qwest to build or construct facilities for CLECs.

There is no issue of bottleneck facilities when facilities do not exist. As set forth at length in the Rebuttal Affidavit of Karen A. Stewart, and as noted by Staff, Qwest has agreed to build loops and switch ports when necessary to meet its provider-of-last-resort and Eligible Telecommunications Carrier obligations.[14] Qwest also agrees in the SGAT to perform incremental facility work which includes the following: conditioning, placing a drop, adding a network interface device, adding a card to existing equipment at the central office or remote locations, adding central office tie pairs, and adding field cross jumpers.[15] Furthermore, CLEC's still have options if Qwest is not required to build. A CLEC can submit a request to build under section 9.19 of the SGAT, a CLEC can self-provision, and a CLEC can obtain the facility from a

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[13] *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part, rev'd on other grounds, sub nom, AT&T Corp v. Iowa Utilities Board*, 525 U.S. 366 (1999) (emphasis added).

[14] Rebuttal Affidavit of Karen A. Stewart re: Checklist Items 2 and 5, filed on April 2, 2002 ("Stewart Rebuttal re: Checklist Items 2 and 5") (Qwest Ex. 64) at 5-7; Griffing Direct (Staff Ex. 1) at 71-73.

[15] Stewart Rebuttal re: Checklist Items 2 and 5 (Qwest Ex. 64) at 6-7.

third party.[16] The line must be drawn somewhere, and Qwest has made a good faith, reasonable effort to clarify when it will construct UNEs.

Commission Staff and the Multi-state Facilitator agree that Qwest does not have an obligation to carry out construction and build new UNEs at the request of CLECs.[17] As the Multi-state Facilitator sets forth, requiring Qwest to be a construction company for CLECs at TELRIC rates inappropriately shifts all investment risk to Qwest while CLECs are only on a month-to-month obligation to pay for the unbundled network elements that they have requested to be constructed:

> First, there is a substantial risk that Qwest will not recover actual costs in the event that AT&T's proposal is accepted. AT&T is not correct in arguing that UNE rates are compensatory for the installation of new or enhanced electronics on dark fiber. UNE rates are monthly in nature and generally without minimum term commitments. They can be said to compensate Qwest for investments that it has already made for its own purposes; at least that is a conceptual underpinning of the FCC's pricing approach for UNEs. However, a CLEC that requires a new investment altogether should have more than an obligation to pay month-to-month. Absent a term commitment, Qwest could be significantly under-compensated in cases where CLECs abandon UNEs before new investment is recovered.
>
> In essence, asking that Qwest be required to provide new construction is tantamount to requiring Qwest to take investment risk in new facilities. Nothing in the Act or in the rulings of the FCC suggests that promoting competition requires altering the risks of new investments. Moreover, AT&T has proposed no language that would mitigate this risk to Qwest. Instead, AT&T proposes merely to move the obligation to Qwest, which actually would encourage AT&T to require Qwest to make investments in situations where neither AT&T nor any other rational competitor would risk its own resources on the chance that customer use would continue for

[16] *Id.*

[17] Group 4 Report (Qwest Ex. 25) at 25; Griffing Direct (Staff Ex. 1) at 70-74.

> long enough to provide investment recovery. It is wholly inconsistent with the promotion of effective competition to sever connections between risk/reward by transferring all of the former to a competitor.[18]

Further, the Multi-state Facilitator properly underscores the importance of facilities based competition and the distinction between existing and new facilities:

> A key premise of the Act and of the FCC's implementing actions with respect to it is the development of facilities-based competition. For existing facilities, it is correct to place the burden on Qwest to show why access to them is not appropriate. For new facilities, the burden should be on Qwest's competitors to show why access to them is appropriate.
>
> There is no evidence of record to support any claim that Qwest has a monopoly position with respect to new facilities. In fact, circumstances would suggest that all carriers competent enough to have a future in the business have the capability either to construct new facilities themselves, or to contract with third party construction experts (much as incumbents do themselves on occasion) who do.[19]

In this docket, as in the Multi-state proceedings, there is no evidence to support any claim that Qwest has any advantage over CLECs with respect to new facilities. Requiring Qwest to become the construction company for CLECs would be contrary to the public policy goals of the Act and the State of South Dakota because it would discourage facilities-based competition by eliminating any incentive that CLECs construct their own competing networks.

(1) The FCC Does Not Require the Installation of Electronics in CLEC Wire Centers.

A sub-issue of the obligation to build issue is whether Qwest is required to add or upgrade electronics for the purpose of providing dedicated transport. For unbundled dedicated interoffice transport ("UDIT"), if electronics are currently available, Qwest includes the existing

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[18] Group 4 Report (Qwest Ex. 25) at 24.

[19] *Id.* at 25.

electronics as part of the overall facility request. Qwest does not agree, however, to add electronics or upgrade electronics for UDIT or EUDIT.[20] This position is consistent with the FCC's unwillingness to impose on ILECs an obligation to construct new facilities for the provision of unbundled transport.[21] As set forth above, Qwest agrees to perform incremental facility work and identifies what falls under the heading of incremental facility work.[22] However, adding electronics at a CLEC's request does not constitute incremental facility work.[23]

The FCC does not require ILECs to add or upgrade electronics for dedicated transport facilities. In fact, the FCC has indicated the opposite: "[W]e do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use."[24] The addition of electronics to existing, unlit fiber constitutes the provision of new transport facilities, so Qwest is under no obligation to do so.

The FCC has, of course, imposed on ILECs an obligation to unbundle dark fiber.[25] But neither the UNE Remand Order nor any subsequent FCC decision requires the ILEC to also

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[20] Stewart Rebuttal re: Checklist Items 2 and 5 (Qwest Ex. 64) at 9.

[21] *See, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499, ¶ 451 (rel. Aug. 8, 1996) (*"Local Competition Order"*) ("[W]e expressly limit the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities.") (emphasis in original).

[22] Stewart Rebuttal re: Checklist Items 2 and 5 (Qwest Ex. 64) at 5-7, 9-10. SGAT § 9.1.2.1.2 expressly clarifies that incremental facility work does not include the upgrade of electronics.

[23] *Id.*

[24] *UNE Remand Order* ¶ 324.

[25] *Id.* ¶¶ 325-26.

provide the electronics at the CLEC end of the fiber or add or to upgrade electronics.[26] Such a requirement would be contrary to the FCC's explicit refusal to impose an obligation to build in the transport context.

(2) The Addition or Upgrade of Electronics Constitutes the Construction of New Facilities.

In keeping with the FCC's requirements for unbundled network element access, Qwest has agreed in its SGAT that it will perform incremental facility work as needed to provide UNEs.[27] However, AT&T is claiming that Qwest does not go far enough and should agree to add or upgrade electronics in order to augment capacity. But adding and upgrading electronics cannot be categorized as incremental facility work: the cost and logistics of electronics installation set it apart from incremental facility work.[28]

The addition of "electronics" can mean anything from a multiplexing unit to a digital cross connect device. In the case of placing an FLM-150 multiplexer, the actual material and placing costs are $36,880 per node. This assumes that all supporting framework and power are in place in the central office. A digital cross connect device can cost in excess of $1 million

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[26] *Cf. id.* at n.292 ("The [carrier] leasing the fiber is expected to put its own electronics and signals on the fiber.") (quoting definition of dark fiber in Newton's Telecom Dictionary, 14th ed.). The FCC has mentioned the provision of electronics in the transport context. *See UNE Remand Order* ¶ 323; *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297, 15 FCC Rcd 17806 at ¶ 120 (rel. Aug. 10, 2000). However, the FCC has never stated or required that an ILEC must provide electronics *at a CLEC wire center.*

[27] *See* SGAT § 9.1.2.1.2 (Qwest Ex. 21).

[28] Stewart Rebuttal re: Checklist Items 2 and 5 (Qwest 64) at 9-10.

dollars to install. In installations such as this, floor space must be acquired, infrastructure evaluated, and power needs assessed. The process can take four to five months to complete.[29] These are clearly construction jobs to build network capacity that are not required by the FCC.

AT&T is also asking that Qwest "upgrade" existing electronics to add capacity to the network.[30] Again, the implication is that an upgrade in electronics is a simple and inexpensive method of adding capacity, when in fact an upgrade of interoffice transport facilities can be an expensive operation. For example, if an existing OC-12 is at exhaust, upgrading to an OC-48 would indeed add capacity, but at a cost of $98,806 per node, with a node needed at each end.[31]

In the provision of interoffice transport, Qwest makes every effort to respond to CLECs' wishes and to comply with the FCC's requirements. But installing or upgrading electronics within a CLEC's wire center clearly constitutes the construction of new transport facilities and is therefore not required by the FCC. Qwest should not be expected to bear the significant expense of adding or upgrading electronics on a CLEC's premises when it is not legally obligated to do so.

In summary, there is no statute, rule or case that imposes upon Qwest the obligation to construct all UNEs. As stated above, the Act requires "access to *only* an incumbent LEC's *existing* network." Therefore, the obligation to provide access to UNEs in 251(c)(3) of the Act does not require Qwest to build or construct facilities for CLECs.

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[29] *Id.*

[30] *Id.* at 10.

[31] *Id.*

(3) Qwest Has No Obligation to Light Dark Fiber to Make Transport UNEs Available.

AT&T asks that Qwest add electronics to turn dark fiber into dedicated transport. This is an obligation to build issue and is specifically addressed above, as the argument and authorities cited above apply to this issue as well.

The FCC defines dark fiber as "fiber that has not been activated through connection to the electronics that 'light' it."[32] By definition, dark fiber does not have electronics attached to it and electronics would have to be added to light the dark fiber to make dedicated transport. This AT&T proposal is clearly an attempt to circumvent the direct FCC order that ILECs are not required to build dedicated transport facilities.[33] Qwest will make dark fiber available to CLECs. CLECs can light that dark fiber and create dedicated transport at virtually the same cost as Qwest would incur. The Commission should reject this attempt by AT&T to force Qwest to incur significant up-front investments to finance or "bank roll" its expansion. Moreover, there is no assurance that AT&T would not disconnect the dedicated transport circuits the day after installation, leaving Qwest and its ratepayers responsible for recovering the cost of the CLEC abandoned facilities investment.[34] This is an obligation to build issue. To the extent a CLEC would like to request that Qwest add electronics to light dark fiber, the CLEC can utilize section 9.19 to make such a request. Qwest can then evaluate the CLEC request, and make an informed decision about any network expansion plans. Again, this Commission should reject any attempt

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[32] *UNE Remand Order* ¶ 174; *see also id.* ¶ 325.

[33] *Id.* ¶ 324.

[34] Stewart Rebuttal re: Checklist Items 2 and 5 (Qwest Ex. 64) at 11.

by CLECs to erode the clear FCC direction that Qwest is not obligated to build UNEs for CLECs.[35]

b. The Prohibition on Commingling UNEs and Tariffed Services on the Same Facilities Is Appropriate Pending the FCC's Resolution of The Issue.

This issue arose in the Multi-state workshops when CLECs asked that the SGAT be amended to permit them to use the same network facility to carry entrance facilities, Local Interconnection Trunks, UNEs and tariffed services, such as dedicated special access circuits (i.e., to commingle different types of services).[36]

The Multi-state Facilitator determined that the FCC has a specific temporary ban on bringing together the different network services on a single network facility due to the significant impacts to access charges.[37] Indeed, the FCC has specifically ruled:

> *We further reject the suggestion that we eliminate the prohibition on "co-mingling" (i.e. combining loops or loop-transport combinations with tariffed special access services)* in the local usage options discussed above. We are not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services. We emphasize that the co-mingling determinations we make in this order do not prejudge any final resolution on *whether unbundled network elements may be combined with tariffed services*. We will seek further information on this issue in the Public Notice that we will issue in early 2001.[38]

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[35] *Id.*

[36] *Id.* at 12.

[37] Group 4 Report (Qwest Ex. 25) at 28.

[38] Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC-00-183, ¶ 28 (rel. June 2, 2000) ("*Supplemental Order Clarification*") (emphasis added).

The issue of commingling, and specifically the issue of whether UNEs can be connected to access service circuits is currently being reconsidered by the FCC, which describes the question as "whether unbundled network elements may be combined with tariffed services."[39] At this time, the FCC has upheld the prohibition on "commingling" pending the resolution of the issue in the further notice of proposed rulemaking. This Commission should allow the FCC to rule on this pending issue rather than to attempt to decide it in the context of Qwest's 271 Petition. To the extent that an interpretative issue, such as this issue has not yet been resolved, the FCC has indicated that it will not deny a 271 application based upon such a dispute:

> [D]espite the comprehensiveness of our local competition rules, there will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors - disputes that our rules have not yet addressed and that do not involve *per se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.[40]

In its *BellSouth Louisiana II Order*,[41] the FCC held that commingled traffic is not a 271 requirement:

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[39] *Id.*

[40] Memorandum Opinion and Order, *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, FCC 01-29, ¶ 19 (released January 22, 2001) ("*SBC Kansas/Oklahoma Order*").

[41] Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, FCC No. 98-271, 13 FCC Rcd 20599, ¶ 54 (rel. Oct. 13, 1998) ("*BellSouth Louisiana II Order*").

> BellSouth also states that it offers, as a standard arrangement, local tandem interconnection for carrying traffic destined for BellSouth end offices that subtend a local tandem. BellSouth offers routing of local and intraLATA traffic over a single trunk group. Access traffic, as well as other traffic utilizing BellSouth's intermediary tandem switching function, is routed via a separate trunk group. BellSouth states that competitive LECs may order two-way trunks for the exchange of combined local and intraLATA toll traffic at BellSouth end offices or access tandems. BellSouth, therefore, establishes that it has a legal obligation to provide interconnection consistent with our rules.[42]

Moreover, a more recent FCC decision supports the Facilitator's and Staff's position on this issue. In the Net2000 order,[43] issued January 9, 2002, the FCC ruled on a similar commingling issue resulting from Option 3 of its *Supplemental Order Clarification*.[44] The FCC held that Verizon did not violate the Communications Act of 1934 or FCC rules by denying Net2000's requests to convert special access circuits to enhanced extended links ("EELs") that would be on the same network facility as other special access circuits. As the FCC explained:

> Net2000 argues that whether circuits are used for "a significant amount of local exchange service" and therefore qualify for conversion to EEL should be judged on an "end-user-by-end-user basis." It should not matter, Net2000 contends, whether a dedicated DS1 between the CLEC's office and the customer's premises that is used to provide local exchange service is carried on a multiplexed DS3 transport channel that includes other DS1s used for other services. It proposes that DS3 circuits derived from both EEL-eligible and non-EEL-eligible DS1 circuits be priced utilizing "ratcheting," similar to mixed use DS3 circuits carrying both special access and switched assess DS1s, so that proportionate unbundled network element rates would apply to the converted DS1s and proportionate special access rates would apply to the non-converted DS1s. The arguments made by Net2000, however, ignore the specific language

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[42] *Id.* ¶ 75 (emphasis added; footnote omitted).

[43] Memorandum Opinion and Order, *In the Matter of Net2000 Communications, Inc. v. Verizon Washington, D.C., Inc.*, File No. EB-00-018, FCC 01-381 (rel. Jan. 9, 2002).

[44] *Supplemental Order Clarification* ¶ 22(3).

> of Option 3. There is no provision anywhere in the *Supplemental Order Clarification*, or in prior orders for "ratcheting." The language of Option 3 clearly and specifically requires that "[w]hen a loop-transport combination includes multiplexing (*e.g.*, DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet [the substantial local exchange service use] criteria." There is no ambiguity in this language. Although Net2000 argues that it would be better if CLECs were permitted to convert only the parts of their DS3s that are used to provide local exchange service and to continue to obtain the remaining parts of the DS3s by tariff, this clearly is not permitted under our rules.[45]

In summary, while the final resolution of this complex issue is awaiting resolution by the FCC, Qwest's SGAT language, approved by the Multi-state Facilitator and Staff, is appropriate.

(1) The FCC-Approved Limits on Commingling Do Not Impede Market Entry

AT&T argues that Qwest's limits on commingling (approved by the FCC) allow Qwest to control CLEC market entry by delaying the provisioning of facilities or making UNE capacity unavailable.[46] Qwest does not agree with this assertion, nor does AT&T provide any evidence or even clarification to support this assertion.

AT&T admits, however, that the FCC has identified situations where UNEs cannot be connected to tariffed services.[47] AT&T requests that SGAT sections 9.1.5, 9.6.2.1 and 9.23.1.2.2 state that UNEs can be connected to finished services, such as special access circuits, except where specifically prohibited by the FCC.[48]

Qwest's SGAT in sections 9.1.5 and 9.23.1.2.2 already contain this commitment:

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[45] *Id.* ¶ 28 (citations omitted).

[46] AT&T Comments on 2, 5 and 6 at 10-11.

[47] *Id.* at 11.

[48] *Id.* at 12.

> 9.1.5 CLEC may connect Network Elements in any Technically Feasible manner. Qwest will provide CLEC with the same features, functions and capabilities of a particular element or combinations of elements that Qwest provides to itself. Qwest will provide CLEC with all of the features and functionalities of a particular element or combination of elements (regardless of whether such combination of elements is ordered from Qwest in combination or as elements to be combined by CLEC), so that CLEC can provide any Telecommunications Services that can be offered by means of such element or combination of elements. Qwest will provide Unbundled Network Elements to CLEC in a manner that allows CLEC to combine such elements to provide any Telecommunications Services. *Qwest shall not in any way restrict CLECs use of any element or combination of elements (regardless of whether such combination of elements is ordered from Qwest in combination or as elements to be combined by CLEC) except as Qwest may be expressly permitted or required by Existing Rules.* (emphasis added)
>
> 9.23.1.2.2 In addition to the UNE Combinations provided by Qwest to CLEC hereunder, Qwest shall permit CLEC to combine any UNE provided by Qwest with another UNE provided by Qwest or with compatible network components provided by CLEC or provided by third parties to CLEC in order to provide Telecommunications Services. *Where specifically prohibited by applicable federal or state requirements, UNE Combinations will not be directly connected to a Qwest Finished Service, whether found in a Tariff or otherwise, without going through a Collocation, unless otherwise agreed to by the Parties.* Notwithstanding the foregoing, CLEC can connect its UNE Combination to Qwest's Directory Assistance and Operator Services platforms. (emphasis added).

The Multi-state Facilitator recommended the SGAT language emphasized above to address this AT&T concern. Staff agrees that this language, which Qwest has included in the SGAT, properly addresses the issue.[49]

In summary, if future FCC decisions require changes to the SGAT on the issue of commingling, Qwest will make appropriate changes to conform its SGAT to FCC requirements. No FCC decisions, however, have been released that would require a change to the Qwest

[49] Griffing Direct (Staff Ex. 1) at 76.

SGAT. Accordingly, Qwest submits that the Commission should adopt the recommendation of the Multi-state Facilitator and Staff that no changes to the SGAT are appropriate on the issue of commingling.

B. Qwest Complies With The FCC's Unbundled Network Elements – Platform Combinations Requirements in South Dakota

As set forth above, section 271(c)(2)(B)(ii) of the Act requires Qwest to provide nondiscriminatory access to unbundled network elements pursuant to section 251(c) and at prices in accordance with the requirements of section 252(d).[50] The FCC's rules also prohibit an ILEC from imposing limitations, restrictions, or requirements on requests for the use of unbundled network elements (other than those expressly permitted by the FCC's rules) that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner desired by the requesting telecommunications carrier.[51]

Section 251(c)(3) of the Act further requires incumbent LECs to provide unbundled network elements on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of its interconnection agreements and with the requirements of sections 251 and 252 of the Act.[52] Section 252(d) requires the rates for network elements to be nondiscriminatory and based on the cost of providing the network element.[53]

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[50] *See* 47 U.S.C. § 271(c)(2)(B)(ii).

[51] *See* 47 C.F.R. § 51.309(a).

[52] *See* 47 U.S.C. § 251(c)(3).

[53] *See* 47 U.S.C. § 252(d).

As set forth in the direct testimony of Lori A. Simpson on this item, Qwest provides access to UNEs, as well as the quality of the UNEs, on a nondiscriminatory basis as between CLECs. Qwest also provides access to UNEs in substantially the same time and manner in which Qwest provides to itself or its affiliates, or where Qwest does not provide UNEs to itself or its affiliates, Qwest will provide access to UNEs in a manner that allows CLECs a meaningful opportunity to compete.[54]

No party submitted any comments challenging Qwest's compliance with Checklist Item 2 – Unbundled Network Elements – Platform. At the close of the Multi-state workshops on UNE-P combinations, no issues remained unresolved. The Multi-state Facilitator who oversaw the Multi-state workshops issued a report recommending no SGAT modifications relating to UNE-P and confirming that all UNE-P issues had been satisfactorily resolved during the workshops subject to satisfactory performance as verified by the Regional Oversight Committee ("ROC") process.[55] Thus far, all state commissions that have considered Qwest's compliance with Checklist Item 2 as it relates to UNE-P combinations have found that Qwest satisfies the requirements subject to satisfactory performance in the ROC OSS test.[56]

1. Access to UNE-P Combinations

Under the terms of its South Dakota SGAT, Qwest combines network elements that are ordinarily combined on Qwest's network on the CLEC's behalf when requested to do so and

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[54] *See* Affidavit of Lori A. Simpson re: Checklist Item 2, filed on October 24, 2001 ("Simpson Direct re: Checklist Item 2") (Qwest Ex. 55) at 3-13.

[55] *See* Group 4 Report (Qwest Ex. 25) at 6.

[56] *See* Simpson Direct re: Checklist Item 2 (Qwest Ex. 55) at 14.

provided facilities are available.[57] CLECs can request access to UNE combinations not provided as standard combinations through the Special Request Process which is described in the South Dakota SGAT, Exhibit F.[58]

Network elements to be provisioned together shall be identified and ordered by CLECs as such. When CLECs order UNE combinations, such as UNE-P services, that are currently interconnected and functional, the UNEs will remain interconnected and functional without any disconnection or disruption of functionality.[59]

The South Dakota SGAT provides a definition for UNE-P combinations as follows:

> 4.61 "Unbundled Network Element Platform (UNE-P)" – is a combination of unbundled network elements, including Unbundled Loop, Unbundled Local Switching and Shared Transport. There are several forms of UNE-P, including but not limited to single line residence, single line business, and PBX Trunks.

UNE-P combinations include a loop, a switch port, switch use, shared transport use, and optional vertical switch features. UNE-P combinations also include access to interLATA and intraLATA toll service, access to 911 emergency services; access to operator services and directory assistance service, and directory listings.[60]

UNE-P combination service is offered in the following forms, as described in the South Dakota SGAT: (1) UNE-P-POTS (plain old telephone service) combination for residential or business customers; (2) UNE-P-ISDN-BRI and UNE-P-ISDN-BRI combinations; (3) UNE-P-

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[57] *Id.* at 5.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 6.

DSS (digital switched service) combination; (4) UNE-P-PBX combination; and, (5) UNE-P-Centrex combinations.[61] As of April 24, 2002, Qwest provides more than 17,000 UNE-P combinations to three CLECs in South Dakota.[62]

All the vertical switch features that are technically feasible for use with the UNE-P combinations are available. If a feature is available with the comparable Qwest retail service, it is available with the UNE-P combination service.[63]

If the CLEC chooses to have Qwest provide operator services and directory assistance services with the CLECs' UNE-P combinations, those services are offered with standard Qwest branding. At the request of the CLEC and where technically feasible, Qwest will brand operator services and directory assistance services in the CLEC's name, CLEC's choice of name, or in no name.[64] A CLEC can order customized routing in conjunction with UNE-P in order to provide access to its own or a third party's operator services and/or directory assistance platforms.[65]

Qwest provides directory listings with UNE-P combinations. The same listings options that are available to Qwest retail end users are available with UNE-P combination services.[66]

Qwest routes the E911/911 calls of CLEC's UNE-P end user customers to the appropriate Public Safety Answering Point ("PSAP") in the same manner that it routes its retail end users'

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[61] *Id.*

[62] Tr. 4/24/02 (Simpson) at 27.

[63] Simpson Direct re: Checklist Item 2 (Qwest Ex. 55) at 7.

[64] *Id.*; *see also* Tr. 4/24/02 (Simpson) at 26.

[65] *Id.*

[66] *Id.*

calls to the appropriate PSAP. Qwest uses its standard processes, that are also used for Qwest retail end user information, to update and maintain CLECs' UNE-P end user information in the databases known as the Automatic Location Identification/Database Management System that support E911/911 services.[67]

a. Installation and Provisioning of UNE-P Combinations

CLECs may obtain UNE-P combinations by ordering the conversion of existing services, such as Qwest retail or CLEC resold services, to UNE-P combinations, or by ordering new UNE-P combination services.[68]

Qwest provides the same quality of and access to UNE-P combinations to all CLECs requesting access. Where Qwest provides UNEs to itself, such as is the case with UNE-P combinations given their similarity to comparable Qwest retail services, UNE-P combinations provided to CLECs are provided in "substantially the same time and manner" to that which Qwest provides to itself.[69]

Standard service intervals for UNE-P combinations are set forth in Exhibit C of the SGAT, and they are the same as service intervals for comparable Qwest retail services. Due dates for UNE-P service requests are firm when Qwest receives a complete and accurate LSR via the IMA-GUI or IMA-EDI interface, or by facsimile.[70]

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[67] *Id.* at 8.

[68] *Id.*

[69] *Id.*

[70] *Id.*

As part of the ordering process, CLECs provide Qwest with complete and accurate end user customer listing information for directory assistance, directory listings, and 911 emergency services for all end user customers served by UNE-P combinations. Optional vertical switch features, as well as choice of interLATA and intraLATA primary interexchange carrier ("PIC"), are also provided.[71]

Qwest and each CLEC provide each other with points of contact for order entry, problem resolution, repair, and in the event special attention is required on service requests.[72]

b. Billing

As set forth in Ms. Simpson's testimony, Qwest provides monthly summary billing information to CLECs for their UNE-P services within seven to ten calendar days of the last day of the CLEC's most recent billing period. The billing information, which is in a standard electronic billing format, includes: (1) a summary bill, and (2) individual end user subaccount information, including charges for switch ports, charges for and number of local originating switch and shared transport minutes of use, and charges for and list of intrastate toll (if applicable).[73]

Qwest provides switched access records which may be used by the CLEC to bill interexchange carriers for use of the CLEC's unbundled switching element portion of its UNE-P combinations for purposes of providing interLATA toll calls.[74]

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[71] *Id.* at 9.

[72] *Id.*

[73] *Id.*

[74] *Id.*

Qwest provides CLECs local originating usage information. Qwest does not provide CLECs the billing records for terminating local calls completed to the CLECs' UNE-P combinations. Qwest does not have the technical capability to capture such terminating local usage. When CLECs purchase unbundled local switching, Qwest does not charge those CLECs for any terminating local calls that are completed to their end user customers using the local switching element provided by Qwest. Because Qwest does not charge CLECs for these calls, CLECs do not incur any costs to terminate such calls, and, therefore, are not entitled to charge reciprocal compensation and have no need for billing records.[75]

c. Maintenance and Repair of UNE-P Combinations

Qwest will maintain facilities and equipment that are owned by Qwest and used to provide UNE-P services to CLECs. Qwest provides maintenance for UNE-P combinations provided to CLECs in the same manner as it provides maintenance to itself for providing comparable retail services.[76]

2. Performance Indicators and Performance Results for CLEC Access to UNE-P Combinations

As set forth in Ms. Simpson's testimony, for UNE-P-POTS, Qwest has implemented performance indicator definitions ("PIDs") that were developed under the auspices of the ROC Third Party Operational Support System ("OSS") tests. These performance measurements and the results have been audited successfully in the ROC OSS tests. The audited results

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[75] *Id.* at 10.

[76] *Id.*

demonstrate that Qwest is providing UNE-P service to competing carriers in substantially the same time and manner as Qwest provides to itself.[77]

Given the overwhelmingly positive performance results for UNE-P service in South Dakota, the Commission should find that Qwest satisfies this aspect of Checklist Item 2.

C. Qwest Complies with the Checklist Item 2 Requirement to Provide Non-discriminatory Access to Operations Support Systems

Though not addressed in the Multi-state Facilitator's Group 4 Report, Operations Support Systems ("OSS") and the Change Management Process ("CMP") are properly part of Checklist Item 2.

The FCC uses the term OSS to refer to a variety of systems, databases, and personnel used by a BOC to provide services to customers.[78] As described by the FCC, nondiscriminatory access to OSS means a BOC must provide access that sufficiently supports each of the three modes of competitive entry into local exchange markets: 1) facilities-based competition, 2) competition using unbundled network elements, and 3) resale.[79]

There are two nondiscrimination standards for OSS. The first standard is for OSS functions analogous to functions provided by a BOC to itself, its customers, or its affiliates. This standard requires a BOC to offer requesting carriers access that is equivalent to the services it provides to itself in terms of quality, accuracy, and timeliness. The FCC has indicated that

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[77] *Id.* at 10-13; *see also* Tr. 4/24/02 (Simpson) at 27.

[78] Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, FCC 01-269, ¶¶ 25 (rel. Sept. 19, 2001) ("*Verizon Pennsylvania Order*")

[79] *Verizon Pennsylvania Order, Appendix C* ¶ 27.

"equivalent access" means a BOC must provide access that permits competing carriers to perform OSS functions in substantially the same time and manner as the BOC.[80]

The second standard is for OSS functions with no retail analogue. This standard requires the BOC to offer access sufficient to allow an efficient competitor a meaningful opportunity to compete. In assessing whether this standard is met, the FCC examines whether specific performance standards exist for those functions and, if such performance standards exist, whether the BOC's performance is sufficient to allow an efficient competitor a meaningful opportunity to compete.

The FCC uses a two-step approach to determine if a BOC meets these nondiscrimination standards. First, the FCC evaluates whether the BOC has deployed the necessary systems, databases, and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them. This part of the FCC's inquiry includes determining whether the BOC has developed sufficient electronic and manual interfaces, and whether the BOC has provided internal business rules and other formatting information necessary to ensure that a carrier's requests are processed efficiently.

Second, the FCC determines if the deployed OSS functions are operationally ready as a practical matter. This part of the FCC's inquiry involves an examination of performance measures and other evidence of commercial readiness to determine whether a BOC's OSS is handling current demand and will be able to handle reasonably foreseeable future volumes.

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[80] *BellSouth Louisiana II Order* ¶ 87.

According to the FCC, the most probative evidence that OSS functions are operationally ready i actual commercial usage. Absent sufficient and reliable commercial usage data r assessing the operational readiness of a BOC's OSS, the FCC considers the results of carrier-to-carrier testing independent third party testing, and internal testing.[81]

The evidence presented by Qwest in its pre-filed testimony and at the hearing, most of which was unrebutted, demonstrates that Qwest meets each of these criteria. The results of the ROC OSS Test, which the Commission will consider in the near future, will provide further evidence that Qwest provides nondiscriminatory access to OSS.

1. Qwest has Deployed Systems, Databases, and Personnel to Provide Non-discriminatory Access to OSS Functions, and Qwest Helps CLECs Implement and Use all of the OSS Functions Available to Them.

The Affidavit of Lynn Notarianni, which was adopted by Barb Brohl, demonstrates that Qwest has developed electronic interfaces to its OSS and has significantly enhanced its internal systems in order to facilitate CLEC access to OSS functions. Further, Qwest's testimony demonstrates that it has deployed extensive processes, personnel, and service centers to support the Qwest-CLEC business relationship.[82] Qwest has developed interfaces which provide electronic access to the five FCC defined OSS functions: pre-ordering, ordering, provisioning, maintenance and repair, and billing. Qwest developed Interconnect Mediated Access-Electroni Data Interchang ("IMA-EDI"), which is a real-time, computer-to-computer, electronic interface

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[81] Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 2 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michiga* CC Docket No. 97-137, 12 FCC Rcd 20543 ¶ 138 (rel. Aug. 19, 1997) *("Ameritech Michigan Order")*. *See also, Verizon Pennsylvania Order*, Appendix C, ¶ 31.

that allows CLECs to access pre-ordering, ordering, and provisioning OSS functions. IMA-EDI enables CLECs to integrate their own OSS with the Qwest electronic interface. CLEC pre-ordering, ordering, and provisioning transactions submitted through the IMA-EDI interface have access to the same information and are processed by the same internal systems that process Qwest retail transactions.[83]

Qwest also provides Interconnect Mediated Access-Graphical User Interface ("IMA-GUI"), which is a real-time, human-to-computer, electronic interface that provides CLECs access to pre-ordering, ordering, and provisioning OSS functions. CLEC pre-ordering, ordering and provisioning transactions submitted through the IMA-GUI interface have access to the same information and are processed by the same internal systems that process Qwest retail transactions.[84]

Qwest also provides CLECs with two repair interfaces, Electronic Bonding-Trouble Administration ("EB-TA") and Customer Electronic Maintenance and Repair ("CEMR"). EB-TA is a real-time, computer-to-computer interface that allows CLECs to submit trouble reports, make inquiries, and receive status notifications for trouble reports. CLEC trouble reports entered through EB-TA are processed by the same Qwest systems that process Qwest retail trouble

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(...continued)

[82] Affidavit of Lynn M.V. Notarianni re: Checklist Item 2-Operations Support Systems, filed October 24, 2001 ("Notarianni Direct re: Checklist Item 2-OSS") (Qwest Ex. 8) at 7-17.

[83] *Id.* at 11.

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

reports.[85] CEMR is a real-time, human-to-computer interface that allows CLECs to submit trouble reports, make inquiries, and receive status notifications for trouble reports. CLEC trouble reports entered through CEMR are processed by the same Qwest systems that process Qwest retail trouble reports.[86] The Notarianni Affidavit also sets forth the extensive support that Qwest provides to CLECs, including web sites, account teams and provisioning centers.[87] The evidence produced by Qwest has not been effectively challenged or rebutted. Therefore, Qwest will not restate here the evidence set forth in its affidavits.

2. Qwest has Demonstrated that its OSS are Operationally Ready.

The second part of the FCC's two-step approach is to evaluate the operational readiness of the OSS functions deployed by the BOC. The Notarianni Affidavit sets forth in detail the operationally ready OSS functions Qwest provides for the five OSS elements identified by the FCC – preordering, ordering, provisioning, maintenance & repair, and billing.

The evidence produced by Qwest has not been effectively challenged or rebutted. Therefore, Qwest will not restate here the evidence set forth in its affidavits.[88]

3. Qwest has Addressed the Issues Raised by Fibercom.

Fibercom raised two specific concerns with OSS. With regard to the first issue, establishing Billing Account Numbers ("BANs"), Ms. Brohl acknowledged that Qwest took

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[85] *Id.* at 13.

[86] *Id.*

[87] *Id.* at 15-25.

[88] *Id.* at 25-34.

longer in establishing Fibercom's BAN than it would have liked. Ms. Brohl also explained that Qwest has implemented new processes to improve its performance in establishing BANs.[89]

Ms. Brohl explained that the second issue raised by Fibercom, LSR ordering, was caused by problems on both sides. The CLEC used the wrong ordering form and filled out some data fields incorrectly. Ms. Brohl admitted that Qwest had problems with its help desk, but that it has instituted new procedures to prevent similar problems from recurring. Qwest has installed random sampling of tickets so that as problems are identified by CLECs, a manager looks at them on a random basis and makes sure that CLECs are being taken care of appropriately. Qwest has also instituted a new process for low-volume new products. Qwest has created a group of service delivery coordinators (SDS), who are dedicated to low volume products. In addition, Qwest has implemented a status update procedure, pursuant to which Qwest calls CLECs whenever they issue the tickets to our help desk and let them know the status of the help tickets.[90] Qwest has established training among the help desk professionals so the escalation tier process is a lot smoother. Qwest has also installed the random-sample tickets to ensure the tickets are not getting closed prematurely. Qwest also has its managers on-site to look at these on a weekly basis and review them with the help desk professionals to ensure that they're managing their work appropriately.[91]

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[89] Tr. 4/22/02 (Brohl) at 159.

[90] *Id.* at 160.

[91] *Id.* at 175.

Because Qwest has addressed the issues raised by Black Hills Fibercom, those issues do not overcome the compelling evidence that Qwest has produced to demonstrate that it provides nondiscriminatory access to OSS.

4. Qwest's Change Management Process Meets FCC Section 271 Criteria

As defined by the FCC, "change management" refers to the "methods and procedures that the BOC employs to communicate with competing carriers regarding the performance of, and changes in the BOC's OSS system."[92]

Qwest's Change Management Process satisfies the factors identified by the FCC in the change management section of Appendix D of the *SBC Arkansas/Missouri Order*: (1) information relating to CMP is clearly organized and readily accessible to competing carriers; (2) competing carriers have had substantial input in the design and continued operation of CMP; (3) CMP defines a procedure for the timely resolution of change management disputes; (4) Qwest provides adequate technical assistance to CLECs; (5) Qwest's stand-alone testing environment ("SATE") is a stable testing environment that mirrors production; (6) Qwest provides adequate documentation for building an EDI interface; and (7) Qwest has demonstrated a pattern of compliance with CMP."[93]

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[92] Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, FCC 01-338 ¶ 41 (rel. Nov. 16, 2001) ("*SBC Arkansas/Missouri Order*").

[93] *Id.* App. D. ¶¶ 40-42.

a. Accessibility and Organization of Information Relating to the Change Management Process

Qwest provides easily accessible and well-organized information regarding CMP. Qwest maintains a website that sets forth the current change management process, including, in part, the method for proposing and processing CLEC-originated and Qwest-originated OSS interface change requests and CLEC-originated product and process change requests.

The Qwest change management website can be found at the following URL: http://www.qwest.com/wholesale/cmp/redesign.html.[94] The governing CMP document contains agreements reached through extensive negotiations between the CLEC community and Qwest regarding the redesign of Qwest's change management process. The CLECs had substantial input, during the redesign process, into the organization and clarification of change management related materials on the website.[95]

The website also serves as a repository of information that is useful to CLEC participation in the change request process. For example, change requests that are to be presented to the CLEC community for discussion and refinement at monthly CMP meetings will be posted on the website. (CLECs participating in the CMP also are notified of new change requests by e-mail.) CLEC-originated and Qwest-originated change requests are posted to the website. The change management website includes a link to a form that allows CLECs and

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[94] Affidavit of Judith M. Schultz re: Change Management, filed April 2, 2002 ("Schultz Direct re: Change Management") (Qwest Ex. 10) at 33, fn 51.

[95] *Id.* at 33.

Qwest to submit change requests to Qwest electronically.[96] Qwest updates and maintains a database that tracks the progress of each change request, reports changes systematically using change request numbers, and uses these same numbers in communications with CLECs to identify specific changes.[97] The Qwest Wholesale Website also includes other information about the change management process, the redesign process, pending change requests and change management issues. For example, the website (1) contains a listing of the change requests, their status, and a complete history of the action taken on each request, including minutes of meetings between the CLEC originator and Qwest; (2) sets forth the schedule for systems and product/process change management meetings; (3) provides a link to OSS documentation and a list of releases notifications that are related to that documentation; and (4) provides a link to the SATE Data Documents which contain SATE test case scenarios. It also includes the minutes from CMP meetings, past and future meeting schedules, the Release Calendar, release notifications, change requests, CMP contact information, information about how to make a change request, and more.[98]

b. Competing Carrier Input into the Design and Continued Operation of the Change Management Process

CLECs have had and continue to have substantial input and opportunities for input into the design and continued operation of the change management process.

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[96] *See* Product/Process and Systems links listed under "Change Requests" link at the following URL: http://www.qwest.com/wholesale/cmp/index.html.

[97] Schultz Direct on Change Management (Qwest Ex.10) at 32-33.

[98] *Id.*at 33.

In June of last year, Qwest undertook a collaborative redesign effort with the CLECs to modify and improve CMP. Qwest sent out a notification on July 2 informing all of the CLECs and resellers that we were about to undertake this redesign process, and then the first meeting was actually held on July 11. Qwest sent out a notification, a letter to the CLECs. In fact, Midcontinent Communications ("Midco") participated in some of the redesign meetings.[99]

Participants in the redesign effort include a team consisting of Qwest representatives, representatives from the CLEC community, third-party testers there, and members of the Colorado Commission staff. The redesign members started with the OBF, ordering and billing forum, issue 2233 proposal for an industry guideline for change management. The redesign members have reached agreement on all of the substantive issues, including the change request initiation process, changes to existing systems as well as new or retired systems, prioritization, interface testing, production support and then the escalation and dispute resolution process.[100]

Ms. Schultz testified that Qwest and the CLECs have reached agreement on all of the substantive issues and have actually implemented the processes.[101]

Qwest and the CLECs have met regularly, generally four days per month, since July 2001, to collaboratively redesign Qwest's change management procedures. The redesigned CMP has already been implemented. In sum, Qwest's current change management process provides for substantial CLEC input into both the design and the continued operation of the

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[99] Tr. 4/22/02 (Gerdes) at 208.

[100] Tr. 4/22/02 (Schultz) at 189.

[101] *Id.* at 196

process. The redesign effort has provided an opportunity for CLECs and Qwest jointly to redesign the CMP by expanding its scope, developing and documenting more detailed processes, improving notification intervals, and establishing meeting standards.[102] The parties have reached agreement on a process for Qwest-initiated product and process changes, which Qwest has implemented.[103]

Significantly, the parties to the redesign process have already agreed that even after negotiations are completed, there will be provisions under the CMP to manage changes to the CMP. The parties understand that the CMP is a dynamic process that will be subject to ongoing improvements. Now and in the future, procedures are in place to ensure that CLECs will have substantial input into the design and operation of the CMP.[104]

c. Procedures for the Timely Resolution of Change Management Disputes

The parties to the redesign process agreed upon escalation and dispute resolution procedures, and Qwest has implemented them. The procedures are set forth in the CMP governing document. As of March 14, 2002 the escalation procedures have been invoked on one occasion with regard to systems changes, and on four occasions with regard to product and process changes. The dispute resolution procedures have not yet been invoked as of March 14, 2002.[105]

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[102] Schultz Direct on Change Management (Qwest Ex.10) at 34.

[103] Tr. 4/22/02 (Schultz) at 186-87.

[104] Schultz Direct on Change Management (Qwest Ex. 10) at 34-35.

[105] *Id.* at 36-37.

The change management escalation and dispute resolution procedures were developed jointly by Qwest and the CLECs in the redesign process. The escalation procedures apply to all issues that are the within the scope of the CMP, as well as to issues surrounding the CMP itself and its administration. The escalation procedures contain specific instructions for communicating to Qwest the escalated issue, including a statement of the CLEC's desired resolution and a request for interim action, if applicable. At the CLECs' request, the escalation process has been streamlined, and now offers CLECs a single point of contact for a given issue. The Qwest single point of contact is responsible for providing a final binding position regarding the escalated issue within seven days for a disputed change request and within 14 days for other escalations. Escalation requests and Qwest and CLEC responses are posted to the website.[106]

d. Availability of a Stable Testing Environment that Mirrors Production

Effective August 1, 2001, Qwest began offering CLECs a stand-alone test environment as part of certification that CLEC systems will interface with Qwest's IMA-EDI systems and for subsequent testing of new releases of IMA-EDI software. SATE provides CLECs with the ability to learn how Qwest's IMA-EDI functions work and the ability to test their skills in a test environment that returns test responses to pre-defined test scenarios that mimic production responses. By providing CLECs with a self-contained, production-like environment for sending transactions, CLECs have the opportunity to experience an environment that acts as production IMA – the gateway to Qwest's OSS – would without interfacing with the actual production environment. SATE uses test account data and requests that are subjected to the same IMA-EDI

[106] *Id.* at 37.

edits as those used in production.[107] Qwest built SATE to provide products and transactions that are currently being ordered by CLECs through IMA-EDI. Qwest continues to monitor the products that CLECs express interest in and has proactively added products or created CMP change requests ("CRs") to add products to SATE. For example, Qwest agreed to add Unbundled Distribution Loop and Unbundled Distribution Loop with Number Portability to SATE for HP's new product evaluation, as Qwest anticipated future EDI implementation of these products. Qwest created a CR to add Facility Based Directory Listings to SATE, a product that was added to IMA-EDI in January 2002.[108] In addition, to ensure that CLECs have the functionality available in SATE that they require, CLECs may request through the CMP that Qwest include additional products and functionality in its suite of SATE transactions.[109]

e. Efficacy of the Documentation for the Purpose of Building an Electronic Gateway

One factor that the FCC examines in evaluating a BOC's compliance with section 271 is the efficacy of the BOC's EDI documentation in helping CLECs build an electronic gateway.[110] Qwest provides sufficiently detailed interface design specifications to enable competing carriers to modify or design their systems in a manner that will enable them to communicate with Qwest's systems and any relevant interfaces. The fact that twenty CLECs are certified to use EDI and that Hewlett-Packard successfully utilized Qwest's documentation to build its own EDI

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[107] Rebuttal Affidavit of Lynn M.V. Notarianni re: Checklist Item 2-Operations Support Systems, filed April 2, 2002 ("Notarianni Rebuttal re: Checklist Item 2-OSS") (Qwest Ex. 9) at 34.

[108] *Id.* at 35-36.

[109] *Id.* at 36.

[illegible] as part of third party OSS testing are both strong indicators of the efficacy of Qwest's [illegible].[111]

f. Demonstrated Pattern of Compliance with Qwest's Change Management Process

Qwest has demonstrated a pattern of compliance with the change management process. Qwest has complied with the agreed-upon scope of the CMP. As of March 14, 2002, Qwest has only rejected one CR on the grounds that it was not within the scope of the CMP.[112]

In Qwest's processing of change requests, it has met its obligations with regard to the following agreed-upon process milestones: 1) sending acknowledgements to the CR originator; 2) posting CRs to Qwest's CMP website; 3) contacting customers to schedule clarification meetings; 4) conducting meetings to clarify CLEC CRs; 5) providing initial responses to CLEC CRs; 6) posting initial responses to Qwest's CMP website; 7) presenting CRs; 8) providing final responses to CLEC CRs (if applicable); and 9) posting final responses to Qwest's CMP website (if applicable.) Between November 1, 2001 and February 2002, Qwest processed 58 new OSS Interface CRs. Of a possible 347 milestones, Qwest was responsible for missing two milestones. This equates to a 99.42% compliance rate with the CLEC/Qwest Initiated OSS Interface CR Process. During this same time, Qwest processed 32 new CLEC initiated Product and Process CRs. Of a possible 126 milestones, Qwest was responsible for missing seven milestones. This

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(...continued)

[111] *Arkansas/Missouri Order* App. D ¶ 42.

[112] *Id.* at 37.

[113] Schultz Direct on Change Management (Qwest Ex. 10) at 39.

equates to a 94.44% compliance rate with the CLEC Initiated Product and Process CR Process. Significantly, the compliance rate for this process in January and February 2002 was 100%.[113]

Qwest tracks nine milestones for the CR initiation process. And Qwest has established a strong pattern of compliance with the process. Out of a potential 599 milestones for the CRs that Qwest processed since implementing the new processes through March 26, Qwest has only missed five milestones for a compliance rate better than 99 percent.[114]

In Qwest's processing of escalations, it has met its obligations with regard to the following agreed-upon process milestones: 1) acknowledging receipt of escalation; 2) posting escalation on Qwest's CMP website; 3) issuing notice to CLECs; and 4) providing Qwest's binding response. As of February 2002, Qwest processed one OSS Interface escalation and four Product/Process escalations. Of a possible 16 milestones, Qwest was responsible for missing one milestone. This equates to a 93.75% compliance rate with the Escalation Process. Qwest also met its obligations regarding the development and implementation of a web-based tool for escalation requests.[115] .

Since July of last year, CLECs have submitted only five escalations, and no issues have gone to dispute resolution. Of the ones that have gone to escalation, Qwest has met its obligation to provide its binding response on those escalations.[116] As of February 2002, for the escalation

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[113] *Id.*

[114] Tr. 4/22/02 (Schultz) 190-91.

[115] Schultz Direct on Change Management (Qwest Ex. 10) at 40.

[116] Tr. 4/22/02 Schultz) at 194.

process, of a possible 16 milestones, Qwest was responsible for missing one milestone. The milestone missed is the commitment to send a response to the CLECs who are participating in an escalation and then post it to the website. Qwest posted one response one day late to the website.[117]

Qwest made a commitment to provide green highlighting of all changes published in the PCAT and to red-line all changes published in the TechPubs beginning January 2, 2002. Since then, Qwest has published 102 PCAT and ten TechPub changes. All of these documents contained the agreed-upon highlighting/red-lining web notification forms, history logs, and customer notification forms.[118] Qwest has demonstrated compliance with the Prioritization Process. In August 2001, and again in October/November 2001, CLECs and Qwest jointly prioritized CLEC-Originated CRs and Qwest-Originated CRs for the IMA 10.0 Release. In February 2002, CLECs and Qwest jointly prioritized CLEC-Originated CRs, Qwest-Originated CRs, and Industry Guideline CRs for the IMA 11.0 Release. At that time, there were only nine outstanding CLEC-initiated CRs.[119] In addition to demonstrating a pattern of compliance with its change management procedures, Qwest also established a pattern of quickly implementing agreements reached in the redesign process.[120]

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[117] *Id.* at 197.

[118] Schultz Direct on Change Management (Qwest Ex.. 10) at 40.

[119] *Id.* at 40-41.

[120] *Id.*at 41 & Exhibit B.

For the foregoing reasons, Qwest has satisfied the requirements of Checklist Item 2 relating to OSS and CMP. Qwest has also satisfied the section 271(c)(2)(B)(ii) for the Act regarding unbundled network elements and unbundled network element combinations. The Commission, therefore, should conclude that Qwest has satisfied Checklist Item 2.

D. Qwest Complies with the Requirements of Checklist Item 4, Access to Unbundled Loops, NIDs, and Line Splitting.

Section 271(c)(2)(B)(iv) requires Bell operating companies ("BOCs"), such as Qwest, to provide "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." The FCC defines the local loop as:

> a transmission facility between a distribution frame (or its equivalent) in the incumbent LEC central office and the loop demarcation point at an end-user customer premises, including inside wire owned by the incumbent LEC. The local loop network element includes . . . dark fiber, attached electronics (except those electronics used for the provision of advanced services, such as Digital Subscriber Line Access Multiplexers), and line conditioning.[121]

Qwest demonstrated its compliance with the requirements of checklist item 4 in the direct and rebuttal affidavit of Jean M. Liston, portions of which were adopted by Barbara Brohl, Dennis Pappas, and Karen A. Stewart.[122] Pursuant to section 9.2 of its SGAT and the KMC

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[121] 47 C.F.R. § 51.319(a)(1).

[122] Jean M. Liston filed direct and rebuttal testimony regarding Qwest's compliance with Checklist Item 4. *See* Direct Testimony of Jean M. Liston re: Checklist Item 4, filed on October 24, 2001 ("Liston Direct re: Checklist Item 4") (Qwest Ex. 12); Rebuttal Affidavit of Jean M. Liston re: Checklist Item 4, filed April 2, 2002 ("Liston Rebuttal re: Checklist Item 4: Pre-Order Loop Qualification") (Qwest Ex. 13). Dennis Pappas, Barbara Brohl and Karen A. Stewart adopted portions of Ms. Liston's testimony. *See* Affidavit of Dennis L. Pappas re: Checklist Item 4- Unbundled Loops, dated April 19, 2002 (Qwest Ex. 44) (adopting those portions of Ms. Liston's testimony relating to unbundled loops); Affidavit of Barbara Brohl re: Checklist Item 4-Pre-Order Loop Qualification, dated April 19, 2002 (Qwest Ex. 11) (adopting those portions of Ms. Liston's testimony relating to pre-order loop qualification); Supplemental (continued...)

agreement, Qwest has a concrete and specific legal obligation to provide CLECs with access to unbundled loops capable of transmitting analog voice service, digital subscriber line service (xDSL), and high-capacity services. For example, Qwest's SGAT and KMC agreement obligate Qwest to provide CLECs unbundled loops, such as 2 and 4-wire analog loops, 2 and 4-wire non-loaded loops that have been conditioned to transmit digital signals, xDSL-I loops, ISDN-capable loops, and DS-1, DS-3, fiber, and OCn high capacity loops.[123] The SGAT and KMC agreements also sets forth terms and conditions for conditioning of loops,[124] access to loops provisioned using Integrated Digital Loop Carrier ("IDLC"), and access to loop make-up information. Qwest's SGAT and KMC agreement offer CLECs six installation options for unbundled loops, each of which is available for both existing customer lines and new customer lines: (1) basic installation; (2) basic installation with performance testing; (3) basic installation with cooperative testing; (4) coordinated installation; (5) coordinated installation with cooperative testing; and (6) project coordinated installation.[125]

(...continued)
Affidavit of Karen A. Stewart re: Checklist Item 4-NIDs and Line Splitting, dated April 19, 2002 (Qwest Ex. 67) (adopting those portions of Ms. Liston's testimony relating to NIDs and line splitting).

[123] SGAT § 9.2 (Qwest Ex. 21); KMC Agreement, § 9.2 (Ex. LBB-GTC-1 to Rebuttal Affidavit of Larry B. Brotherson re: General Terms and Conditions, filed April 2, 2002 (Qwest Ex. 56)).

[124] Loop conditioning is the term used to describe the process of removing load coils, bridged tap, and any other devices from existing copper loops that would negatively affect the transmission of a digital signal. In many cases, the data portion of the loop will not work correctly if there are load coils or certain amounts of bridged tap on the loop. Qwest provides CLEC's with loop conditioning for xDSL compatible loops upon request, consistent with 47 C.F.R. § 51.319(a)(3)(i) & (h)(5). SGAT §§ 9.2.2.4 and 9.2.4.9 (Qwest Ex. 21); *see also* 47 C.F.R. § 51.319(a)(3)(i) (defining line conditioning as "the removal from the loop of any devices that may diminish the capability of the loop to deliver high-speed switched wireline telecommunications capability, including xDSL service").

[125] SGAT §§ 9.2.2.9.1 to 9.2.2.9.7 (Qwest Ex. 21). [126] *See id.*, SGAT § 9.2.2.1.

Qwest is obligated to provide loops to CLECs in a nondiscriminatory manner and to provide loops of substantially the same quality as the loop that Qwest uses to provide service to its own end users.[126] For those loops with retail analogues, Qwest commits to provide the loops in substantially the same time and manner as Qwest provides such loops to itself. For those loops for which the ROC has established performance benchmarks, Qwest commits to provide such loops in accordance with the PIDs established in the ROC and the installation intervals set forth in Exhibit C to the SGAT and KMC agreement.

Qwest, CLECs, and the staffs of the 13 state commissions participating in the ROC process, including the South Dakota Commission staff, have developed extensive performance measurements to measure Qwest's performance in providing unbundled loops to CLECs and in maintaining and repairing unbundled loops for CLECs. Qwest, CLECs, and the state commission staffs established these measures in a collaborative process with the full input of interested CLECs. The PIDs include a definition of the measure, the actual formula used to calculate the measure, and any exclusions.[127] The performance measures for loops primarily fall into the provisioning and maintenance and repair categories. Qwest's posted performance results show that Qwest's performance in providing unbundled loops in South Dakota has been strong.

In addition, Qwest provides access to Network Interface Devices ("NIDs"). Where a CLEC requests an unbundled loop under section 9.2 of the SGAT or KMC agreement, it obtains the NID along with the loop. If the CLEC wishes to purchase a distribution subloop element

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[127] The Affidavit and Rebuttal Affidavit of Michael G. Williams (Qwest Exs. 71 and 72) discuss and describe the ROC's performance measures in detail. Exhibit-JML-LOOP-13 to Liston Direct re: Checklist Item 4 (Qwest Ex. 12) contains the ROC-PID definitions that pertain to provisioning and maintenance of unbundled loops.

under section 9.3 of the SGAT and KMC agreement, it may do so, and the NID is provided with the distribution subloop element. If the CLEC wishes to obtain the NID only on a stand-alone basis, Qwest provides that option as well under section 9.5 of the SGAT and KMC agreement. Thus, Qwest meets its obligation to provide CLECs with access to NIDs.

Finally, Qwest complies with, and exceeds, all of the FCC's requirements for line splitting. As discussed in Qwest's testimony, line splitting is an arrangement whereby the CLEC provides voice service over a UNE-P arrangement and the CLEC or a partnering data provider provides data service over the high frequency portion of the loop in a UNE-P arrangement. Qwest offers line splitting under sections 9.21 of the SGAT and KMC agreement and developed the processes for line splitting in collaboration with interested CLECs. Although no FCC order requires it and no other BOC appears to provide it, Qwest also offers "loop splitting." Loop splitting is an arrangement whereby the CLEC offers voice service over the low frequency portion of an unbundled loop and the CLEC or a partnering data provider provides data service over the high frequency portion of the unbundled loop. This option is included in section 9.24 of the SGAT and KMC agreement. Again, Qwest worked with CLECs to develop loop splitting scenarios. In addition, Qwest has added an additional option to section 9.25 of the SGAT referred to in the industry as "line partitioning."[128] Under this arrangement, which the FCC has not ordered, the CLEC resells Qwest voice service and the CLEC or a partnering data provider

[128] Line partitioning arose from a Customer Request in the Change Management Process in which a CLEC requested the ability to provide Qwest resold voice service with CLEC-provided data service. Although the FCC has not ordered this type of arrangement, Qwest investigated the feasibility of the request and agreed to implement it. This is a prime example of Qwest's willingness to work with the CLECs and facilitate competition. A CLEC had a real request, that could be implemented with minimal

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provides data service over the high frequency portion of the resold line. Finally, in addition to all of these options, Qwest has agreed to provide "EEL splitting" on a special request basis. These options go farther than the FCC requires, and provide CLECs more options than any other BOC appears to provide.

For these reasons, and those set forth in Qwest's testimony and exhibits, the Commission should recommend that Qwest meets the requirements of checklist item 4 in South Dakota.

1. The Claims of MidCo and Black Hills FiberCom Do Not Affect Qwest's Compliance with Checklist Item 4.

Midco and FiberCom presented testimony regarding Qwest's compliance with Checklist Item 4. Midco raised two issues relating to Qwest's compliance with Checklist Item 4: (1) an isolated performance issue that Qwest has addressed with additional training; and (2) opposition to paying for testing for trouble isolation. Neither of these issues affects Qwest's compliance with Checklist Item 4.

With respect to performance, Midco asserted that it had experienced some isolated problems relating to the coordination of provisioning unbundled loops with number portability. As Mr. Pappas testified, Qwest believes this incident is, indeed, an isolated one. Nevertheless, Qwest has taken affirmative actions to prevent a reoccurrence of the problem Midco experienced. As Mr. Pappas testified, Qwest has conducted additional, intensive training in the central office where Midco purchases unbundled loops from Qwest.[129] In addition, Qwest's

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impact and Qwest agreed to add the functionality. Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 59-60.

[129] Tr. 4/23/02 (Pappas) at 172, 187.

CLEC Coordination Center ("QCCC") has tested processes and procedures in place to ensure that coordinated installations run smoothly.[130] Indeed, Mr. Pappas testified that Qwest's coordinated installation performance results under the OP-13 measurement had been excellent.[131] Thus, this isolated event, which Qwest has addressed, does not affect Qwest's compliance with this checklist item.

Regarding the costs for testing for trouble isolation, the issue is very straightforward. Testing for trouble is the responsibility of the carrier serving the end user customer. If the CLEC wishes to perform that testing itself, that is always an option. However, if the CLEC does not want to assume the cost or "burden" of testing, it may request that Qwest perform the trouble isolation testing on its behalf. When it does so, however, Qwest incurs a cost for the test activity, and should be permitted to recover that cost, just as the Act permits it to recover other costs in providing loops to CLECs. Importantly, Qwest is not contending that the CLEC should be required to pay for the repair if the testing shows that the trouble lies on Qwest's network.[132] Under section 9.2.5 of the SGAT and KMC agreement, Qwest would assume those costs. The only question, therefore, is who should pay for the trouble isolation test itself when the CLEC elects to forego performing trouble isolation testing.

Qwest believes its position requiring the CLEC to pay for the trouble isolation test, if the CLEC chooses not to perform the test itself, is reasonable. In South Dakota, for the last quarter

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[130] *Id.* at 168.

[131] *Id.* at 196.

[132] *Id.* at 211.

of 2001, no troubles were found on approximately one third of the CLEC trouble tickets submitted to Qwest. Qwest expended time and resources to test these troubles, which it would not have incurred had the CLEC performed its own trouble isolation testing. To the extent a CLEC wants Qwest to perform the trouble isolation, then Qwest should be compensated for this activity.[133] CLECs always have the option of performing trouble isolation testing themselves.[134]

FiberCom raised only one issue relating to Qwest's compliance with this checklist item: an issue relating to the availability and pricing of DS-1 loops. However, it appears that FiberCom is no longer pressing this claim. FiberCom neither introduced its prefiled testimony on this issue nor presented a witness at the hearing. Nevertheless, Qwest responded to FiberCom's allegations in Ms. Liston's rebuttal affidavit and at the hearing, and that testimony is unrefuted. As Qwest explained, FiberCom's current interconnection agreement does not include DS-1 capable loops.[135] FiberCom's claim that the current contract includes a DS-1 capable loop for $39.34 is, therefore, incorrect. The product to which FiberCom refers is actually a 4-wire analog loop.[136] These facilities, however, are not equivalent. For example, the DS-1 loop has different technical parameters from the 4-wire analog loop.[137] As Qwest explained, the DS-1 price is higher than the 4-wire analog loop price because the DS-1 loop includes all the necessary electronics and guarantees that the facility will perform at a nominal transmission level of 1.544

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[133] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 12-13; Tr. 4/23/02 (Pappas) at 211-12.

[134] *Id.*

[135] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 41.

[136] *Id.* at 42.

[137] *Id.*; Tr. 4/23/02 (Pappas) at 171.

Mbps.[138] Qwest sent FiberCom a new contract amendment that includes the DS-1 capable loop, but FiberCom had not signed that amendment as of the time of the hearing. If FiberCom were to execute that amendment, it would save approximately $45 per month over the price of the special access circuits it currently purchases from Qwest.[139] Qwest offers DS-1 loops under its SGAT, KMC agreement, and its proposed amendment to FiberCom. FiberCom can obtain those facilities from Qwest should it choose to do so.

2. None of AT&T's Issues Affects Qwest's Compliance with Checklist Item 4.

AT&T raises several speculative issues regarding Qwest's compliance with checklist item 4.[140] These concerns are hypothetical because AT&T has no real experience offering service over Qwest unbundled loops in South Dakota.

a. Qwest Has No Obligation to Construct Loops on behalf of CLECs.

In section 9.1.2 of the SGAT and KMC agreement, Qwest commits that it will construct facilities if it would be legally required to do so to meet its provider of last resort ("POLR") or Eligible Telecommunications Carrier ("ETC") obligations.[141] In addition, during the normal

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[138] *Id.*

[139] Tr. 4/23/02 (Pappas) at 171-72.

[140] Two issues raised by AT&T – concerns regarding provisioning loops over IDLC and AT&T's demand that Qwest redesignate interoffice facilities – should be closed. On the first issue, AT&T does not raise any concerns or issues with Qwest's provisioning of loops over IDLC. It simply notes that Qwest should continue to offer loops even if the loops are served by IDLC, which Qwest does. *See* Affidavit of Kenneth L. Wilson re: Checklist Items 4-Unbundled Loops and Checklist Item 11-Local Number Portability, filed Mar. 18, 2002 ("Wilson Affidavit re: Checklist Items 4 and 11") (AT&T Ex. 12) at 44-45. On the second issue, Qwest agreed to insert language in its South Dakota SGAT to accommodate this request. *See* Qwest Ex. 45 (proposed SGAT § 9.1.14); Liston Rebuttal Affidavit re: Checklist Item 4 (Qwest Ex. 13) at 52.

[141] SGAT § 9.1.2.1 (Qwest Ex. 21).

assignment process, if no available facilities are identified for the UNE requested, Qwest will look for existing engineering job orders that could fill the request in the future. If an engineering job currently exists, Qwest will add CLEC's request to that engineering job, as described in section 9.1.2.1.3 of the SGAT, apportioning the facilities in the job on a first-come, first-served basis.[142] As discussed above, Qwest also agrees to undertake incremental facility work to provide CLECs access to UNEs. Additionally, in response to CLEC requests, Qwest has agreed to share with CLECs its plans for construction of outside plant facilities and to post its pending outside plant construction jobs of $100,000 or more on its ICONN website.[143] Of course, if facilities are not available, the CLEC can request that Qwest construct those facilities under the terms of section 9.19 of the SGAT. These commitments go at least as far as Verizon's commitments, which the FCC found satisfied section 271 in its *Verizon Pennsylvania Order*.[144] Nevertheless, AT&T demands that Qwest go beyond these commitments and construct new UNEs and loop facilities at TELRIC rates on demand. AT&T makes this demand without any legal or factual basis.

First, AT&T suggests that the costs Qwest incurs to build new facilities for CLECs may already be included in the prices for UNEs. AT&T's suggestion is based on a basic misunderstanding of the investment that is included in UNE cost studies and the role of fill factors in those studies. The UNE prices that are produced by cost studies are directly dependent

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[142] *Id.*, SGAT § 9.1.2.1.3 (describing treatment of orders when engineering job is pending).

[143] SGAT § 9.1.2.1.4 (Qwest Ex. 21).

[144] *Verizon Pennsylvania Order* ¶¶ 91-92.

upon the amount of investment that the studies include. The TELRIC cost studies that both Qwest and CLECs have presented in cost dockets estimate the costs of building a network to replace the existing network using least-cost, forward-looking technology. Because the studies build a *replacement* of the current network, they do not include investment for *new* facilities that CLECs may request.[145] If TELRIC cost studies had been designed to estimate the costs of a new network that includes new CLEC facilities, the investment in the studies would have been substantially higher and the UNE prices that the studies produced would be higher as well. Accordingly, UNE cost studies do *not* include investment for new CLEC facilities.

AT&T also claims that Qwest's construction position is discriminatory because Qwest is not "holding" CLEC orders. As Mr. Pappas explained at the hearing, AT&T mischaracterizes Qwest's build policy and the manner in which it "holds" CLEC orders when facilities are not available. As Mr. Pappas explained, Qwest does not automatically reject a CLEC's order if facilities are not available. For example, if a CLEC order fell within Qwest's POLR or ETC obligations, Qwest would hold the CLEC order. Qwest also will examine alternatives such as incremental facility work and pending engineering jobs, as described above. If facilities are still at exhaust, Qwest sends the order to a center in Cheyenne, Wyoming that holds the order for 30 business days in the event that churn in Qwest's network leads to compatible facilities. If within that 30 business days a compatible facility becomes available, Qwest will assign the facility to the pending order.[146]

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[145] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 46-47.

[146] Tr. 4/23/02 (Pappas) at 208.

As discussed above in connection with Checklist Item 2, the Act does not require an incumbent LEC to build new facilities to provide an unbundled loop for CLECs if no facilities currently exist. All of the relevant FCC pronouncements are consistent with Qwest's interpretation of its unbundling obligations. For example, when the FCC issued its *Local Competition Order* it made clear that an incumbent's obligation to unbundle facilities applies only to the incumbent's *existing* and deployed network:

> [W]e conclude that an incumbent LEC must provide unbundled access to interoffice facilities between its end offices, and between any of its switching offices and a new entrant's switching office, *where such interoffice facilities exist.*
>
> * * * *
>
> [The] Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, *we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities.*[147]

In the *UNE Remand Order*, the FCC made this point again, even more emphatically:

> Notwithstanding the fact that we require incumbents to unbundle high-capacity transmission facilities, we reject Sprint's proposal to require incumbent LECs to provide unbundled access to SONET rings. In the Local Competition First Report and Order, *the Commission limited an incumbent LEC's transport unbundling obligation to existing facilities, and did not require incumbent LECs to construct facilities to meet a requesting carrier's requirements where the incumbent LEC has not deployed transport facilities for its own use.* Although we conclude that an incumbent LEC's unbundling obligation extends throughout its ubiquitous transport network, including ring transport architectures, *we do not require incumbent LECs to construct new transport facilities to meet*

[147] *Local Competition Order* ¶¶ 443, 451.

specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use.[148]

The FCC has never mandated that an incumbent LEC build new facilities to provide an unbundled loop to a CLEC if the incumbent has no facilities in place. This is because, where Qwest has no facilities, Qwest is not "denying access" to existing facilities. Where copper or high capacity loop facilities do not exist in Qwest's network, all carriers, including Qwest, are equally disadvantaged and Qwest enjoys no competitive advantage. *Any* carrier can build the requisite loop or UNE facilities. Indeed, the two CLECs who participated in the hearing and actually offer service in South Dakota do so through a variety of facility options, including their own facilities.

AT&T has claimed that the FCC's statements in these orders created an "exception" to the supposed rule that incumbent LECs must construct UNEs on demand for CLECs. The FCC, however, did not describe this ruling as an "exception." Moreover, AT&T has never cited the supposed "rule" that requires construction in the first instance. The simple reason for its failure is that the Act does not impose any such obligation on incumbents. Where facilities are not already in place, CLECs are in just as good a position as Qwest to construct the new facilities.

The FCC's statements in the *Local Competition* and *UNE Remand Orders* are consistent with other FCC orders. For example, in the *BellSouth Louisiana II Order*, the FCC held that BellSouth was not required to provide vertical features that were not loaded into the switch software because to do so would require BellSouth to build a superior network for CLECs.[149]

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[148] *UNE Remand Order* ¶ 324 (emphasis added).

[149] *BellSouth Louisiana II Order* ¶ 218.

The FCC reasoned that for those switches loaded into the software, but not activated, BellSouth is required to provide access because those features are part of BellSouth's existing network that it has chosen not to use. However, it drew the line at requiring BellSouth to install new vertical features: "we agree with BellSouth's claim that it is not obligated to provide vertical features that are not loaded into the switch software, because this would require BellSouth to build a network of superior quality."[150]

Likewise, with regard to loop qualification information that must be provided as a part of OSS access, the FCC has held that incumbent LECs are not required to construct a loop qualification database for CLECs if they have not created a loop qualification database for themselves.

> We disagree . . .with Covad's unqualified request that the Commission require incumbent LECs to catalogue, inventory, and make available to competitors loop qualification information through automated OSS even when it has no such information available to itself. *If an incumbent LEC has not compiled such information for itself, we do not require the incumbent to conduct a plant inventory and construct a database on behalf of requesting carriers.*[151]

Although this holding is in a different context, it is further evidence that where an incumbent LEC has not provided a network element for itself, it is not required to create or construct that element for a CLEC. In short, the FCC has been consistent with its rulings on an incumbent's unbundling obligations under the Act: Section 251(c)(3) requires only unbundling of Qwest's existing network, not a network that has yet to be built.

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[150] *Id.*

[151] *UNE Remand Order* ¶ 429 (footnotes omitted; emphasis added).

Requiring Qwest to construct UNEs for CLECs is not only unlawful under the Act, it is contrary to the public policy goals of the Act. The FCC has increasingly emphasized the importance of facilities-based competition by CLECs as an important means of bringing competition to the local telecommunications market. In its August 8, 2001 *Collocation Remand Order*, the FCC stated that "[t]hrough its experience over the last five years in implementing the 1996 Act, the [FCC] has learned that only by encouraging competitive LECs to build their own facilities or migrate toward facilities-based entry will real and long-lasting competition take root in the local market."[152] According to the FCC, "the greatest long-term benefits to consumers will arise out of competition by entities *using their own facilities.*"[153] In addition, the FCC states that "[b]ecause facilities-based competitors are less dependent than other new entrants on the incumbents' networks, they have the greatest ability and incentive to offer innovative technologies and service options to the consumers."[154] Thus, whereas the Act and the FCC *encourage* CLECs to construct their own networks, an order requiring Qwest to construct loops would *discourage* facilities-based competition by eliminating any incentive that CLECs have to construct their own competing networks.

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[152] Fourth Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 01-204 ¶ 4 (Aug. 8, 2001) ("*Collocation Remand Order*").

[153] First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, FCC 00-366, ¶ 4 (rel. Oct. 25, 2000) ("*MTE Order*").

[154] *Id.*

Midco and FiberCom are carriers providing service in South Dakota in large part over their own facilities. Neither of them join in AT&T's demand that the Commission order Qwest to construct UNEs for CLECs. The Commission should avoid rendering a decision that will discourage CLECs from investing in their own competing networks, as Midco and FiberCom have done.

b. The Intervals in Exhibit C Are Reasonable And Afford CLECs A Meaningful Opportunity To Compete.

AT&T challenges two of the intervals in Exhibit C to the SGAT and KMC agreement: (i) the installation interval for DS-1 loops and; (ii) the repair interval for two-wire analog loops.

On June 5, 2001, Denise Anderson of Maxum Telecommunications Group Consulting ("MTG"), the ROC Project Manager for the third party OSS test, testified at the Multi-state workshop regarding the review of Qwest's standard intervals during the ROC performance measure collaboratives. For the benefit of the South Dakota Commission, Qwest has presented that discussion as Ex. JML-LOOP-1 to the Rebuttal Affidavit of Ms. Jean M. Liston (Qwest Ex. 13).

In the early stages of the ROC process, one of the principles established was that CLECs would have a role in developing the performance measures that would apply to determining whether Qwest provides checklist items at an acceptable level of quality.[155] As a result, from the beginning of the development of performance measures, CLECs provided comments, participated in the Technical Advisory Group ("TAG") and were involved in developing the

[155] Ex. JML-Loop-1 to Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13), June 5, 2001 Multi-state Tr. at 152.

PID.[156] The proceeding was informal, and any participant could request that an issue be raised in the TAG.

With respect to Average Installation Interval PID, OP-4, the intervals in Qwest's Standard Installation Guide ("SIG"), the same intervals that appear in Exhibit C, were the foundation for the PID.[157] The initial goal in establishing the PID was to achieve retail parity.[158] There was extensive discussion regarding appropriate retail analogues and, through the collaborative process, some loops were compared to retail analogues with a standard of retail parity but for others, the parties agreed upon a six-day benchmark for "high density" areas and a seven-day benchmark for "low density" areas. Qwest eventually agreed to eliminate the distinction between density zones and, as a result, for the loops with benchmarks, a uniform six-day benchmark applies to the PIDs.[159] Exhibit JML-LOOP-4, attached to Lision Direct re: Checklist Item 4 (Qwest Ex. 12) shows the evolution of the PIDs and demonstrates that for several unbundled loops, the performance benchmark changed from "retail parity," at the insistence of CLECs, to specific benchmarks that were based on Qwest's service intervals. Although the ROC TAG may not have worked through the SIG item-by-item, there is no

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[156] *Id.*, June 5, 2001 Multi-state Tr. at 153-54.

[157] *Id.*, June 5, 2001 Multi-state Tr. at 159 ("Now, OP-4 actually measures the actual interval. And so, you know, the way the intervals are established, to my understanding of OP-4, is the Standard Interval Guide is utilized, or if there are interconnection contracts or terms in a contract that supersede those, those are used for specific CLECs, if that applies. And so the original due date is established using those either contract terms or the Standard Interval Guide.")

[158] *Id.*

[159] June 5, 2001 Multi-state Tr. at 158-61. Loop intervals vary by the quantity of loops ordered. Six days was chosen because it is the mid-point in the interval for these loops.

question that the SIG intervals are integrally related to the benchmarks *and* the retail parity measures in OP-4.[160] Indeed, the term "standard interval" as used in the PIDs is defined as the interval provided in Qwest's SIG.[161]

Although the parties certainly had to compromise to achieve negotiated performance measures, the goal of the ROC participants was to establish benchmarks as well as comparisons with retail analogues that gave CLECs a meaningful opportunity to compete.[162] The process was collaborative, and covered months of negotiations, all issues were fully discussed, and give-and-take occurred on both sides. Indeed, the discussion was so comprehensive that the parties never reached impasse on the OP-3 and OP-4 measures.[163] Where benchmarks are established in the course of collaborative proceedings that permit all interested carriers to weigh in, the FCC presumes that the measures provide carriers a meaningful opportunity to compete.[164]

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[160] *Id.*, June 5, 2001 Multi-state Tr. at 170 (PIDs and standard intervals are "symbiotic"); *id.* at 188, 188-189 (stating that there was a lot of "back and forth" on the intervals).

[161] *Id.*, June 5, 2001 Multi-state Tr. at 178 (Mr. Antonuk reading from the PID definitions).

[162] *Id.*, June 5, 2001 Multi-state Tr. at 187-88, 189-90.

[163] *Id.*, June 5, 2001 Multi-state Tr. at 190.

[164] Memorandum Opinion and Order, *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, FCC 01-130 ¶ 13 (rel. Apr. 16, 2001) ("*Verizon Massachusetts Order*"); Memorandum Opinion and Order, *Application of Bell Atlantic New York, Inc. for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of New York*, CC Docket No. 99-295, 15 FCC Rcd 3953 ¶ 55 (rel. Dec. 22, 1999) ("*Bell Atlantic New York Order*") ("At the same time, for functions for which there are no retail analogues, and for which performance benchmarks have been developed with the ongoing participation of affected competitors and the BOC, those standards may well reflect what competitors in the marketplace feel they need in order to have a meaningful opportunity to compete").

Based upon the extensive discussions of OP-3 and OP-4, the inextricable link between the intervals in Exhibit C and the PIDs, and the consensus reached on these measures, the Commission should recognize that this issue was fully negotiated in the ROC process. The ROC CLEC participants, AT&T included, determined that the benchmarks and retail parity measures in OP-3 and OP-4, which rely upon the SIG, provide them a meaningful opportunity to compete. The Multi-state Facilitator heard this evidence and agreed:

> The evidence demonstrates *conclusively* that the ROC established its loop installation interval related performance measures (OP-3 and OP-4) *through an open and collaborative process that benefited from full, open, and substantial participation by the CLEC community*. The evidence also established that the discussion of those intervals (which measure percent of intervals on time and average durations) centered upon and were ultimately related to the intervals of *Qwest's Service Interval Guide*, which form the basis of the installation intervals set forth in SGAT Exhibit C.[165]

Although the Facilitator found that AT&T could still challenge the Exhibit C intervals, the intervals were entitled to "very substantial weight."[166] AT&T has presented no evidence whatsoever to defeat the negotiated intervals.

DS-1 Installation Interval. AT&T's sole argument in support of reducing the interval for DS-1 loop installation is that the retail interval used to be shorter. The performance comparison for DS-1 loops in OP-3 and OP-4 that ROC participants agreed upon is parity with Qwest retail DS-1. The interval for DS-1 loops in Exhibit C to the SGAT and KMC agreement is the same interval Qwest provides for its retail customers.[167] Because ROC participants collaboratively

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[165] Group 4 Report (Qwest Ex. 25) at 49 (emphasis added).

[166] *Id.*

[167] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 5-7.

agreed that the benchmark for DS-1 should be retail parity, the interval in Exhibit C, which is the retail DS-1 interval, is appropriate and provides CLECs a meaningful opportunity to compete. Indeed, AT&T presents no evidence that suggests that Qwest enjoys a competitive advantage.

Repair Interval for Analog Loops: AT&T argues that the repair interval for analog loops should be reduced from 24 to 18 hours. In establishing the PIDs for MR-3 (Out of Service Cleared within 24 hours) and MR-4 (All Troubles Cleared within 48 hours), the ROC unambiguously established 24- and 48-hour repair intervals based upon Qwest's identical retail repair intervals. Thus, there is no question that for this interval, the ROC collaborative supports the intervals Qwest offers.

AT&T claims, nonetheless, that if it is required to provide repair services within 24 hours, it needs Qwest to perform its repair functions before the expiration of those 24 hours so that AT&T can complete its own repair obligations. AT&T's argument, however, misses the mark: if Qwest is providing repair services for AT&T, there is no "additional" work AT&T must do to address the trouble. AT&T also has not identified how long it would take it to perform any of its alleged repair responsibilities. Regardless, there is no additional work AT&T must perform after Qwest clears a CLEC trouble: once Qwest performs the repair work, the Qwest maintenance and repair processes provide that the trouble ticket is closed *after* the CLEC signs off that the trouble is repaired. Before doing so, it is common sense that the CLEC would

verify that service is repaired with its own customer.[168] Thus, once Qwest completes the repair, and the CLEC signs off on the repair, there is nothing more for the CLEC to do.[169]

The FCC has stated that maintenance and repair functions have a retail analog.[170] The repair intervals are based on the FCC rulings that require parity with retail and the agreements reached during the establishment of the PIDs that establish repair intervals based on parity with retail. Consistent with FCC standards, the intervals in Exhibit C mirror Qwest's retail repair intervals. Again, this mirroring of industry consensus benchmarks demonstrates that CLECs receive a meaningful opportunity to compete.

c. Qwest Has Implemented the Facilitator's Recommended Loop Conditioning Refund Language.

AT&T claims that Qwest should refund conditioning charges if "Qwest's performance causes an end user to abandon the CLEC/DLEC."[171] In the Multi-state proceedings, AT&T recommended SGAT language that would require Qwest to refund conditioning charges under a variety of circumstances, including the loss of the customer. However, the issue of determining fault and what constitutes poor performance from an end user's perspective could prove problematic. To resolve this issue, the Facilitator recommended a compromise position providing that Qwest would refund the conditioning charge to the CLEC if Qwest failed to meet

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[168] Tr. 4/23/02 (Pappas) at 174-75; Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 8-9.

[169] Even if AT&T could identify some menial task it must perform, Qwest's repair performance for analog loops has been, on average, shorter than for Qwest retail, affording AT&T more than ample time to perform whatever "task" it claims it must perform. Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 9.

[170] *Ameritech Michigan Order* ¶ 140.

[171] Wilson Affidavit re: Checklist Items 4 and 11 (AT&T Ex. 12) at 14.

a committed due date and the CLEC customer did not receive service within three months.[172] Additionally, the Facilitator recommended that Qwest should provide one-half credits for conditioning under various circumstances described in the Group 4 Report at 62. Although Qwest did not fully agree with this recommendation, Qwest did make the requested language changes, and these changes are now found in section 9.2.2.4.1 of the SGAT and KMC agreement.[173]

AT&T raises this issue again and offers the same troublesome SGAT language that is impossible to implement on a stand-alone basis. For example, AT&T proposes SGAT language that would afford the CLEC a refund if the end user experiences an "unreasonable delay" in provisioning or "poor quality of service." Determination of fault in these circumstances is neither easily nor readily done. The "unreasonable delay" may be due to the CLEC or the end user customer. Likewise, whether the customer actually experiences "poor quality of service" and which carrier (if any) is responsible for such "poor quality" is not easy to determine without some sort of dispute resolution mechanism. The Facilitator's compromise is reasonable and, unlike AT&T's proposal, can be implemented. Dr. Griffing also recommends the adoption of this recommendation.[174] The Commission should as well.

d. Qwest Complies with FCC Requirements on Loop Qualification Data.

The obligation to provide loop make up information began with the *UNE Remand Order*. The FCC stated in paragraph 426 of the *UNE Remand Order* that as a pre-order function of

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[172] Group 4 Report (Qwest Ex. 25) at 62.

[173] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 16.

access to OSS, incumbent LECs must provide "*access to* loop qualification information." "Loop qualification information identifies the physical attributes of the loop plant (such as loop length, the presence of analog load coils and bridge taps, and the presence and type of Digital Loop Carrier) that enable carriers to determine whether the loop is capable of supporting xDSL and other advanced technologies."[175] The FCC stated that incumbent LECs must provide requesting carriers with nondiscriminatory access to the same detailed loop make up information that is available to the incumbent so that requesting carriers can make their own determination about whether a loop is capable of supporting xDSL services.[176]

AT&T has made much of the FCC's statement that in providing loop make up information, incumbent LECs may not "filter" or "digest" the loop make up information. AT&T has taken the FCC's straightforward statement that incumbent LECs may not "filter" loop make up information to provide information relating only to the type of xDSL service the incumbent provides and twisted it into a requirement that incumbent LECs provide "direct" unmediated access to all of their back office databases. This is *not* what the FCC determined. Instead, the FCC stated that incumbent LECs may not filter and digest loop information "to provide only that information that is useful in the provision of a particular type of xDSL that the incumbent LEC chooses to offer."[177] For example, the FCC disapproved of tools that would provide the CLEC

(...continued)

[174] Griffing Direct (Staff Ex. 1) at 85.

[175] *UNE Remand Order* ¶ 426 (footnote omitted).

[176] *Id.* ¶ 427.

[177] *Id.* ¶ 428.

only with a "red, yellow, green" or "yes/no" qualification response based on the type of DSL service the incumbent LEC provides without any underlying information on the facility. Rather, incumbent LECs must provide CLECs the underlying loop make up information "so that requesting carriers can make their own judgments about whether those loops are suitable for the services the requesting carriers seek to offer."[178] Finally, the FCC did not order "direct" access to incumbent LEC back office databases. Instead, it stated that to the extent incumbent LECs created loop qualification databases for their own use, incumbent's must provide access to those databases "*via an electronic interface.*"[179] This is exactly what Qwest has provided with the Raw Loop Data tool. Qwest has made the underlying loop make up information in the Loop Qualification Database available to CLECs through the Raw Loop Data tool.

Although AT&T appears to have no xDSL loops in service from Qwest in South Dakota,[180] and has ordered only a paltry number of such loops regionwide, it spends the bulk of its pre-filed testimony complaining about the tools Qwest offers to enable CLECs to qualify loops for advanced services. No other CLEC in South Dakota shares its concerns,[181] nor does Staff or the Multi-state Facilitator. Both Staff and the Facilitator found that with changes to section 9.2.2.2.1 of the SGAT, which Qwest has made, Qwest meets the requirements of

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[178] *Id.*

[179] *Id.* (emphasis added).

[180] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 38.

[181] FiberCom's witness stated that he has no knowledge of any issues FiberCom may have with Qwest's loop qualification tools or whether FiberCom would ever need access to the LFACS database. Tr. 4/30/02 (White) at 82, 97.

checklist item 4 relating to loop qualification.[182] As described below, Qwest has gone even further. It has enhanced its loop qualification tools and offers CLECs a manual loop make up search in the unlikely event Qwest's tools do not return complete or clear loop make up information. The Commission should find that Qwest meets all of its requirements to provide loop make up information.

Qwest offers CLECs a host of tools that provide loop make up information to enable CLECs to determine whether a loop can transmit advanced services. The principal tools are the Raw Loop Data tool available through the Interconnection Mediated Access ("IMA") interfaces, the Wire Center Raw Loop Data tool that returns loop make up information for an entire wire center, and the IMA 9.0 Loop Qualification tool.[183] The source database for all of these tools is the Loop Qualification Database, which is also the source database for the Qwest retail DSL tool that Qwest uses to determine if an end user qualifies for Qwest DSL service. Qwest's back office loop database, the Loop Facilities and Assignment Control System ("LFACS"), is the database that feeds the Loop Qualification Database. Thus, although AT&T claims it needs "direct" access to the LFACS database, CLECs already receive loop make up information from

[182] Griffing Direct (Staff Ex. 1) at 87; Tr. 4/30/02 (Griffing) at 138-39. Group 4 Report (Qwest Ex. 33) at 66.

[183] Ms. Notarianni and Ms. Liston addressed Qwest's loop qualification tools in their pre-filed testimony. Ms. Brohl adopted Ms. Notarianni's prefiled testimony on Checklist Item 2- Operations Support Systems and, as noted previously, adopted those portions of Ms. Liston's testimony addressing pre-order loop qualification. *See* Notarianni Rebuttal re: Checklist Item 2-OSS (Qwest Ex. 9); Affidavit of Barbara Brohl re: Checklist Item 2-Operations Support Systems, dated April 19, 2002 (Qwest Ex. 7).

the LFACS database through the Raw Loop Data tool and the IMA 9.0 Loop Qualification tool.[264]

The Raw Loop Data tool provides the following detailed information about the composition of the loop: (i) telephone number, (ii) address, (iii) Common Language Location Identification (CLLI), (iv) MLT distance, (v) terminal ID, (vi) cable name, (vii) pair gain type, (viii) pair number, (ix) load type, (x) number of load coils per segment, (xi) bridged tap offset by segment, and (xii) cable gauge and length by segment. In its August 2001 IMA Release 8.0, Qwest enhanced the Raw Loop Data tool to include spare or unassigned facilities and partially connected facilities. The "Unassigned Address" query in the Raw Loop Data tool returns the spare facilities, and the Loop Status is indicated as "CT," which means the facility is connected through to the central office, or "PCF," which means it is partially connected through (i.e., a segment).[265] Although AT&T claims that Qwest does not provide this spare facility information to CLECs,[266] the testimony and transcripts its witness cites all pre-date IMA Release 8.0, the release that added this information to the Raw Loop Data tool.

The IMA 9.0 Loop Qualification tool provides detailed loop make up information in a format that complies with the Local Service Ordering Guidelines, version 5 ("LSOG 5"). This newly enhanced tool provides all of the detailed loop make up information displayed in the chart on pages 33-35 of the Rebuttal Affidavit of Jean M. Liston, which Ms. Brohl adopted. The

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[264] Tr. 4/22/02 (Brohl) at 231.

[265] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 24.

[266] Wilson Affidavit re: Checklist Items 4 and 11 (AT&T Ex. 12) at 22.

information Qwest provides in its tools compares favorably with the information Verizon provides in its tools, except that Qwest has far more loop information in its tools than Verizon did at the time the FCC approved Verizon's Massachusetts application.[187]

AT&T asserts that Qwest's Raw Loop Data tool does not provide information on loop fragments.[188] AT&T's witness does not define loop fragments, but if he refers to loop segments, such as distribution and feed, then AT&T's claims are not correct. CLECs do receive data regarding feeder (F1) and distribution (F2-Fn) segments in a loop. A loop status field indicates whether loops are working or non-working.[189] The Raw Loop Data tool also provides information on *each segment* regarding load coil number, load coil type, bridge taps, cable gauges and the length of each gauge,[190] all of which Mr. Wilson identified as data that AT&T requires.[191]

AT&T states that Qwest's recent enhancements to the Raw Loop Data tool are insufficient because the tool does not include spare facilities that are not connected to the CLEC switch.[192] The FCC, however, does not even require incumbent LECs to provide spare facility information. As described in the *SBC Kansas/Oklahoma Order*, Southwestern Bell only returns

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[187] See Ex. JML-LOOP-4 attached to Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13); Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 36.

[188] Wilson Affidavit re: Checklist Items 4 and 11 (AT&T Ex. 12) at 22.

[189] Moorhead Rebuttal re: Checklist Item 2-OSS (Qwest Ex. 9) at 7.

[190] *Id.*

[191] Wilson Affidavit re: Checklist Items 4 and 11 (AT&T Ex. 12) at 28.

[192] *Id.* at 23.

loop make up information for a single loop in response to a loop make up query.[193] The FCC stated that "it is not self-evident from the *UNE Remand Order* that a BOC must provide loop make-up information on all loops that serve a particular address."[194] Thus, Qwest is not even required to provide the spare facility information it voluntarily agreed to add to the Raw Loop Data tool. Moreover, Qwest testified that the "PCF" field returns information on segments that are connected to the customer drop, *but not to the switch*.[195] Thus, the tool returns information on the spare segments that AT&T seeks.

AT&T further claimed that it needs direct access to Qwest's LFACS database to obtain more accurate loop make up information.[196] However, the LFACS database is the source of the information in the Loop Qualification Database.[197] As discussed above, the Loop Qualification Database feeds the Raw Loop Data and the IMA 9.0 Loop Qualification tools, as well as the Qwest DSL tool used by Qwest retail. Thus, the information in LFACS is no more accurate than the information in the tools. Furthermore, Qwest has enhanced its tools to include a "recent changes" query. When a CLEC initiates a query in the Raw Loop Data tool or IMA 9.0 Loop Qualification tool, the Loop Qualification Database will search LFACS for a "recent change" relating to that query. If there has been such a change, the Loop Qualification Database returns

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[193] *SBC Kansas/Oklahoma Order* ¶ 128.

[194] *Id.*

[195] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 24-25.

[196] Tr. 4/29/02 (Wilson) at 165.

[197] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 25-26.

the updated LFACS information through the CLEC tools. Thus, CLECs have access to updated LFACS information through the Raw Loop Data tool and IMA 9.0 Loop Qualification tool.[198]

AT&T claims that Southwestern Bell and Verizon provide "direct access" to LFACS.[199] This is not correct.[200] The FCC states that "SWBT provides competitors access to actual loop make-up information contained in SWBT's back-end system Loop Facilities Assignment and Control System (LFACS) *through the preordering interfaces Verigate, Datagate and EDI/CORBA.*"[201] As this statement confirms, Southwestern Bell provides mediated access to LFACS information through interfaces, as does Qwest through Facility Check, the Raw Loop Data tool, and the IMA 9.0 Loop Qualification tool.

Contrary to AT&T's testimony, Verizon also provides mediated access to the data in its LFACS database. Verizon's LiveWire database contains data used for qualification of loops for Verizon's ADSL Product.[202] Verizon gives CLECs mediated access to this data with GUI and EDI interfaces.[203] Qwest's Resale DSL Loop Qualification tool provides the same function for CLECs who, for example, wish to resell Qwest's DSL product. The FCC further noted that Verizon also provides LFACS information via an interim pre-order process that has a 24-hour

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[198] *Id.*

[199] Wilson Affidavit re: Checklist Items 4 and 11 (AT&T Ex. 12) at 26.

[200] Tr. 4/22/02 (Brohl) at 231.

[201] *SBC Kansas/Oklahoma Order* ¶ 122.

[202] *Verizon Massachusetts Order* ¶ 56.

[203] *Id.*

turnaround.[204] Again, this is not direct access. On the contrary, it is a request for data that Verizon personnel processed. The FCC noted that Verizon was in the process of automating this pre-order function through its electronic interfaces.[205] Qwest has already automated these functions in the loop qualification tools described above.

AT&T incorrectly claims that Qwest has "pre-qualified" the loops on which it wants to provide service by performing a "bulk deload" project and MLT tests.[206] AT&T mixes apples and oranges in an attempt to confuse the Commission. The bulk deload project was intended to remove load coils and bridged tap from loops in select wire centers, in which (although AT&T does not mention it) CLECs participated and provided input, to enable all carriers (Qwest and CLECs alike) to encounter fewer loops that require conditioning. Certainly, when load coils or bridged tap were removed from loops, this information was input into LFACS so that all carriers (Qwest and CLECs) would receive accurate information. However, the purpose of this project was not to "update" or "correct" LFACS. Rather, it was to remove the bridged taps and load coils that inhibit data service.

AT&T also misrepresents Qwest's performance of MLTs. When Qwest first created the Loop Qualification Database, there was a limited amount of loop make-up information available

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[204] *Id.* ¶ 57.

[205] *Id.* As described in the *Verizon Rhode Island Order*, Verizon provides access to LFACS information via electronic interfaces, just as Qwest does. *See* Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, FCC 02-63 ¶ 62 & n. 171 (Feb. 22, 2002) ("*Verizon Rhode Island Order*").

[206] Wilson Affidavit re: Checklist Items 2 and 4 (AT&T Ex. 12) at 23.

to qualify facilities for xDSL services. Due to the lack of loop length information, Qwe , on a bulk basis, obtained loop length based on MLTs. Qwest subsequently embarked on an aggressive undertaking to load the feeder and distribution loop make-up information into the LFACS database. This information is presented in the make up descriptions of each loop segment in the Raw Loop Data tool. Thus, the MLT run was not a "plot" to provide Qwest with "more accurate" information; rather, it was a substitute for the more detailed information Qwest now provides in its tools.[207]

In arguing for direct access to Qwest's back office databases, principally LFACS, AT&T claims that the FCC requires Qwest to provide "any loop plant information that any Qwest employee has access to."[208] This is an overstatement. The obligation of incumbent LECs to provide access to loop make up information falls under the umbrella of information necessary to qualify a loop for xDSL services. The FCC clarified "that pursuant to our existing rules, an incumbent LEC must provide the requesting carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent, *so that the requesting carrier can make an independent judgment about whether the loop is capable of supporting the advanced services equipment the requesting carrier intends to install.*"[209] That loop make up information is the information Qwest provides through its loop qualification tools.

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[207] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 36-37; Tr. 4/22/02 (Brohl) at 229-31.

[208] Wilson Rebuttal re: Checklist Items 4 and 11 (AT&T Ex. 12) at 20.

[209] *UNE Remand Order* ¶ 427.

The Multi-state Facilitator agreed that Qwest need not provide direct, unmediated access to LFACS or other back office systems.[210] The Facilitator stated: "We can first conclude that the evidence shows that LFACS does not have the capability to provide the information that AT&T seeks, but that it does contain a very broad range of information that is both very sensitive and hard to exclude from unmediated access."[211] The Facilitator also found that "Qwest has cited a number of other available tools that appear better suited to AT&T's needs. Given that potential, the preferable course at this time is to assure AT&T has access to them . . . ."[212] Staff's witness, Dr. Griffing, agrees with the Multi-state Facilitator's recommendation, noting "the report finds that it is not unreasonable for Qwest to want to mediate the access to allow for proprietary or confidential concerns."[213] Staff concludes that the Commission should ensure that Facility Check is available to CLECs and should adopt the findings of the Multi-state facilitator.[214] As Qwest testified, Facility Check and numerous other tools for obtaining loop make up information are available to AT&T and all other CLECs.

Since the Multi-state workshop, Qwest has gone farther and added the spare facility information AT&T sought and introduced the IMA 9.0 Loop Qualification tool. Furthermore, Qwest has agreed to implement a manual process whereby a CLEC can request that Qwest search its back office records and systems in the event the loop qualification tools do not return

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[210] *See* Group 4 Report (Qwest Ex. 25) at 64-66.

[211] *Id.* at 66.

[212] *Id.*

[213] *See* Griffing Direct (Staff Ex. 1) at 86.

[214] *Id.* at 87; South Dakota Checklist Items/Public Interest Summary (Staff Ex. 4) at 3.

loop make up information or return unclear or incomplete loop make up information. This commitment was discussed in Qwest's testimony and is included in Qwest's updated SGAT, filed with this brief, in section 9.2.2.8. With this commitment, Qwest goes even further in meeting CLEC demands than the Multi-state Facilitator and Staff found sufficient to satisfy Qwest's obligations under Checklist Item 4. The ROC OSS test report also includes an evaluation of Qwest's loop qualification tools and will further confirm that Qwest provides access to loop qualification information at parity.

AT&T has never identified any specific loop make up information that it requires that Qwest does not provide. If, however, AT&T were ever to identify data that it needs in addition to that which Qwest already provides, there is a more appropriate forum in which to raise its request. Qwest's CMP is the forum where CLECs bring their requests for additional operation support system functionality. If AT&T would like to define its additional data needs in the form of a CLEC-initiated change request, it can be placed before the CLEC membership for discussion and prioritization according to CMP procedures. This is far more productive than demanding that Qwest undertake costly modifications to its systems so that AT&T can conduct a fishing expedition.

e. The Commission Should Not Require Qwest to Create The Functionality for CLECs to Perform Mechanized Loop Tests on a Pre-Order Basis.

AT&T is the lone CLEC demanding that Qwest create the functionality for CLECs to perform mechanized loop tests ("MLTs") on a pre-order basis.[215] An MLT is primarily a repair

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[215] During the hearing, a question was raised whether any state commission had ordered Qwest to provide the functionality for CLECs to perform MLTs on a pre-order basis. In fact, only two state (continued...)

tool that identifies faults on a line from a centralized testing point. AT&T, however, demands that Qwest create the functionality for CLECs to perform MLTs as a means of qualifying a loop for xDSL service. There are several problems with AT&T's position.

First, to perform a MLT, the loop must be connected to the Qwest switch and have a telephone number. The repair system, CEMR, enables CLECs to test any loop (service) via a MLT that the CLEC "owns." If the service has not yet been provisioned (i.e., it is not connected to the switch or does not have a telephone number), performance of a MLT is not possible.[216]

Second, while a MLT does provide an estimated loop length for copper loops without faults, it will not provide loop length for loops *with* faults.[217] The loop length information the MLT provides is also misleading. An MLT provides an estimated loop length based upon the resistance on the line.[218] To the extent the customer has multiple telephones connected to the network, the MLT will show the loop length to be longer than it actually is. In fact, a MLT may overestimate loop length by as much as 20 percent.[219] Accordingly, the MLT does not provide more accurate or reliable information regarding loop length. The loop length information in the IMA 9.0 Loop Qualification tool and the information on loop segments in the Raw Loop Data

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(...continued)
Commissions – New Mexico and Utah – have ordered this. They did so, however, before Qwest offered its manual process. Qwest has requested both Commissions to either reconsider their decision or find Qwest in compliance based on its offer to perform a manual search if the tools return incomplete or unclear loop make up information.

[216] Notarianni Rebuttal re: Checklist Item 2-OSS (Qwest Ex. 9) at 13.

[217] *Id.*

[218] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 18.

[219] *Id.*

tool provide a more accurate picture of the actual loop length. As discussed above, the existing tools provide CLECs with loop length information by segment and by gauge type, which is critical to determining if the loop can support DSL service.[220]

Third, AT&T asserts that more information can be derived from a MLT than loop distance, and that a MLT can determine whether there are electronics or equipment on the loop that would interfere with DSL service.[221] Again, Mr. Wilson has misunderstood the capabilities of the version of MLT that Qwest is using. Qwest's version of MLT does not identify bridged taps or load coils, which are necessary to identify what services the loop can support.[222] Thus, if the CLEC relies on a MLT as its loop qualification tool, this critical information for the provision of xDSL service will be missing. Furthermore, if the CLEC is provisioning any xDSL services, it is critical to know if the loop is loaded. A MLT does not provide how much bridged tap is included in the total loop length.

Fourth, AT&T claims it needs MLT to determine if the loop is served by digital loop carrier.[223] As discussed above, the Raw Loop Data tool and the IMA 9.0 tool already report on

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[220] In the IMA 9.0 Loop Qualification tool under the Loop Data tab, there is field called ELL or Equivalent Loop Length. The Equivalent Loop Length is based on the loop length of each segment and the type of wire gauge. Thus, the IMA 9.0 Loop Qualification tool provides loop length information in a user-friendly format. The Raw Loop Data tool also provides CLECs with the actual loop length by segment and the wire gauge by segment, so CLECs can calculate the equivalent loop length for itself. Thus, CLECs have the option of obtaining loop length in a "raw" uncalculated form in the Raw Loop Data tool or calculated according to the wire gauge in the IMA Loop Qualification tool. *Id.* at 37-38.

[221] Wilson Affidavit re: Checklist Items 4 and 11 (AT&T Ex. 12) at 31.

[222] Notarianni Rebuttal re: Checklist Item 2-OSS (Qwest Ex. 9) at 13.

[223] Wilson Affidavit re: Checklist Items 4 and 11 (AT&T Ex. 12) at 29.

the presence of digital carrier on the loop.[224] Moreover, the Raw Loop Data tool identifies the *type* of digital loop carrier on the loop.[225] A MLT does not. MLT tests, in short, suffer from several deficiencies as a loop qualification tool.

Fifth, the retail Qwest DSL pre-qualification process does not include live MLT testing. Up front employees are neither trained on nor do they have access to perform MLTs on a line-by-line basis.[226] Thus, AT&T is demanding that Qwest create a functionality beyond what Qwest performs for itself. CLECs and Qwest retail use the same underlying information, including the MLT distance already populated in the Loop Qualification Database that feeds Raw Loop Data tool, to qualify a loop. To the extent the database is updated, it is updated for both Qwest and CLECs alike in the same manner and timeframe.

Sixth, AT&T misstates the nature of the MLT "sweep" Qwest conducted to populate the Loop Qualification Database.[227] AT&T does not acknowledge that *all* MLT information Qwest obtained was loaded into the Loop Qualification Database that serves *both* the wholesale Raw Loop Data tool and the Qwest DSL tool.[228] The Multi-state Facilitator found this compelling evidence that CLECs are provided MLT length information at parity to Qwest.[229] Qwest

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[224] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 19.

[225] *See* Ex. JML-LOOP-2 at 3 and Ex. JML-LOOP-2d, attached to Liston Direct re: Checklist Item 4 (Qwest Ex. 12).

[226] Notarianni Rebuttal re: Checklist Item 2-OSS (Qwest Ex. 9) at 15.

[227] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 36-37.

[228] *Id.* at 36.

[229] Group 4 Report (Qwest Ex. 25) at 64.

provides parity with respect to MLT distance: the only MLT information available on a pre-order basis to any carrier (including Qwest) is what is in the Loop Qualification Database that feeds the Raw Loop Data tool and the Qwest DSL tool. Qwest enjoys no competitive advantage over CLECs.[230]

Seventh, each central office can only accommodate a limited number of MLTs simultaneously.[231] Additional load on the MLT system would raise system capacity issues, and may entail not only purchasing MLT equipment but could require a switch expansion. However, due to engineering limitations, expansion may be limited or cost-prohibitive for some switch types. Additional load on the MLT system also would likely create response time problems or time out issues for both the CLECs and Qwest repair operations. If numerous pre-order MLT tests are being run, it could cause contention with and actually preclude Qwest repair technicians from performing MLTs for repair purposes. This could result in a degradation of repair quality for both Qwest and CLECs.[232]

Finally, although MLTs are routinely used for repair purposes by other BOCs, Qwest knows of no BOC that has received section 271 approval that is providing CLECs with the ability to perform their *own* MLTs on a *pre-order* basis. In the *Verizon Massachusetts Order*, Verizon did commit to perform MLTs on behalf of requesting carriers; however, this was part of

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[230] In addition, there is no requirement that individual CLECs provide one another (or Qwest for that matter) with loop data. Thus, if CLECs perform pre-order MLTs on Qwest loops without restriction, multiple CLEC may perform the same MLT to derive the same information with no accrued benefit to other carriers or long-term benefit to the Raw Loop Data tool that all CLECs share.

[231] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 18, 20.

[232] Notarianni Rebuttal re: Checklist Item 2-OSS (Qwest Ex. 9) at 14.

Verizon's *manual* loop qualification process.[233] The order does not state that Verizon performs MLTs as a routine *replacement* to its loop qualification tools, which is what AT&T appears to be requesting here. In addition, as described in the *Verizon Massachusetts Order*, the only information Verizon returns by the MLT is loop length. As discussed above, MLT length information is not always accurate, and Qwest provides CLECs other, more accurate loop length information in its current tools. Furthermore, Verizon engineers performed this function, not the CLEC itself,[234] because Verizon had not yet implemented a permanent electronic means for CLECs to obtain loop make up information. Because it is manual, this process takes three days.[235] Qwest, in contrast, has developed a mechanized loop qualification database that returns loop make up information on a real-time basis. Finally, as described in the *Verizon Massachusetts Order*, Verizon had loop make up information in LFACS for only 10 percent of its terminal locations.[236] Thus, Verizon performed MLTs to "fill the gaps" in its tools, not as an alternative to them.

The existing Qwest loop qualification tools and Raw Loop Data tool provide CLECs with detailed information needed to prequalify a loop for DSL service. Notably, however, Qwest does not require CLECs to perform a loop pre-qualification prior to submitting an order for an unbundled loop for DSL purposes. The existing Qwest ordering process does not reject orders if the CLEC does not perform a pre-qualification or if the information returned suggests the loop

[233] *Verizon Massachusetts Order* ¶ 58.

[234] *Id.*

[235] *Id.*

[236] *Id.* ¶ 57, n. 162.

would not support xDSL service. In fact, the CLEC can submit a request for a 2-wire non-loaded loop, even if the tools do not indicate the existence of a copper loop. Qwest will accept the order, and if a copper loop is identified during the 11-step assignment process, the CLEC will receive the standard 5-day installation interval. This is in stark contrast to the process for Qwest DSL. The Qwest sales representatives are required to perform a loop qualification, and if the existing loop does not qualify, Qwest processes provide that the sales representative cannot place the DSL order. The existing process, therefore, provides CLECs with a distinct advantage.

f. NIDs—The NID Definition in the SGAT is Appropriate.

The primary issue relating to Network Interface Devices in the Multi-state workshop was how to determine if Multi-tenant Terminal Equipment ("MTE") is a NID, or a subloop access point. The Facilitator agreed that the Qwest position better comports with the intent of the FCC rules and did not recommend any changes to the SGAT language relating to NID access.[237] Mr. Gabbey, in analyzing this issue, agreed with the Facilitator's resolution.[238]

Nonetheless, AT&T asserts that Qwest should create a standardized process for all forms of NID access. This is unreasonable and unnecessary. Qwest has jointly developed a MTE Access Protocol that spells out how CLECs should access many such terminals and a procedure for how to work with Qwest to gain access to unusual terminals.

[237] Section 9.5 of the SGAT (Qwest Ex. 21) addresses NIDs.

[238] Gabbey Direct (Staff Ex. 1) at 89.

AT&T also argues that Qwest must make stand-alone access to NIDs of all typ available. Qwest already does so pursuant to section 9.5.1 of the SGAT and KMC agreement.[239] Thus, even if Qwest owns facilities on either side of the NID and a CLEC only wants access to the NID itself (a highly unlikely scenario, but one that AT&T purportedly claims could occur), the CLEC can obtain such access through section 9.5. The only access that CLECs cannot get through section 9.5 is access to a NID that also includes access to a loop or subloop distribution element. The FCC has made plain that accessing subloops and loops authorize the CLEC to gain access to the NID as well. Thus, CLECs gain access to loops through section 9.2 (and the NID comes with the loop), to subloop distribution elements through section 9.3 (and the NID comes with the subloop distribution element), and to stand-alone NIDs through section 9.5. The access Qwest provides is more than adequate.

g. NIDs-The Commission Should Reject AT&T's Demand That Qwest Remove Connections from the Protector Side of the NID.

AT&T claims that the Commission should require Qwest to remove wires from a protector if there is no space available on the protector for AT&T's connection. The only evidence AT&T puts forth to support this strange recommendation is a 1969 Bell System practice. That Bell System Practice concerned situations when the NID is removed from the house altogether, thereby removing the protector field.[240] Thus, this policy addresses only what a technician should do when there is no protector field in which to ground the wire. However,

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[239] SGAT § 9.5.1 (Qwest Ex. 21) ("...If CLEC seeks to access only a NID (i.e., CLEC does not wish to access a Subloop connected to that NID), it may only do so pursuant to this Section 9.5...").

[240] Liston Rebuttal re: Checklist Item 4 (Qwest Ex. 13) at 63.

where the NID ground is place – as would be the case in the situation AT&T addresses – AT&T's own Bell System Practice states "do not disconnect the outside drop at the customer building."[243] The Multi-state Facilitator used this very point to deny AT&T's request on this issue.[244]

AT&T nevertheless demands that Qwest remove Qwest's equipment from the protector if there is not enough space available. FCC guidelines contain no such requirement. Qwest does not have any legal obligation to remove its wires and equipment from NIDs. Moreover, the NID provides protection against voltage surges caused by lightning and inadvertent contact between commercial power cable and telephone cable.[245] Removing Qwest's distribution facilities from the protector field of the NID would violate electrical safety codes, which require surge protection or over voltage protectors on communications conductors.[244] It would also create risks to the network and to employees working on the terminal.[245] The removal of the ground protection creates a potential fire hazard that could impact the network, the building and individuals in the building. Staff agrees with the Facilitator that CLECs should not be permitted to remove Qwest's wires from the protector field of the NID.[246] The Commission should follow the Multi-state Facilitator's recommendation on this issue.

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[243] Id.

[244] Group 4 Report (Qwest Ex. 251) at 74.

[245] Lucas Deposition w/ Exhibit Item 4 (Qwest Ex. 13) at 64.

[246] Id.

[247] Id.

[248] Staffing Panel (Staff Ex. 11) at 90.

b. Line Splitting Qwest Offers More Line Splitting and Loop Splitting Options Than Other BOC's.

As discussed above, Qwest offers three varieties of "splitting": line splitting (addressed in section 9.23 of the SGAT and KMC agreement), loop splitting (SGAT and KMC agreement § 9.23), and line partitioning (see SGAT § 9.25). These are in full compliance with the representations made by Mr. Antonuk in the Multi-state workshops and actually go beyond FCC requirements.

AT&T, however, appears to demand more. During the Multi-state proceedings, the Facilitator found, and Qwest agreed, that Qwest should make "EEL splitting" available on a "special request basis" as there was inadequate demand to warrant development of an EEL splitting product. Although AT&T has not identified any need for EEL splitting in the real world, it continues to demand Qwest spend time and money to develop such a standardized product.[40] As the Multi-state Facilitator noted, there are only a limited number of requests for EELs in Qwest's 14-state region, and no CLEC has placed an order for a "split" EEL. Thus, CLEC demand for this option at this time is nonexistent. Moreover, Qwest expects that demand for this product will stay at zero. Line splitting, and therefore EEL splitting, is distance sensitive. EEL are only typically a loop of about 18,000 feet. An EEL is, by definition, serving an end-user customer in a different wire center. Thus, to provide DSL service the end user and the two end offices all must be within approximately a 3-mile radius. This configuration is highly unlikely. Based on these restrictions, the limited number of EELs in service, and the absence of any real

[40] Wilson Affidavit re: Checklist Items 4 and 11 (AT&T Ex. 12) at 56.

could demand for DSL splitting, it is fully appropriate for Qwest to continue to offer [illegible] splitting on a special request basis.

Dr. Doherty concurred with Mr. Antonuk's recommendations with the caveat that Qwest have adequate terms and conditions for loop splitting.[248] Qwest has done so and would again refer to AQAT and KMC's sections 9.21 and 9.24. With this addition, Qwest is in full compliance with the FCC's mandates for both line and loop splitting.

6. Line Splitting-The FCC has Repeatedly Held That Incumbent LECs Are Not Required To Provide Access To Their POTS Splitters.

Despite clear and repeated FCC rulings that incumbent LECs are not required to provide CLECs access to their POTS splitters, and the rejection of its arguments by every single state commission in Qwest's territory to consider AT&T's arguments, AT&T demands that Qwest provide CLECs with access to Qwest's POTS splitter. The Multi-state Facilitator rejected this position in both his Emerging Services Report[249] and his Report on Checklist Items 2, 4, 5, and 6.[250]

The FCC has repeatedly held that incumbent LECs have no obligation to provide their POTS splitters to CLECs. The FCC first addressed this issue in the *Line Sharing Order*, which is the basis for the line sharing and line splitting requirement. There, the FCC held that incumbent LECs have the option of providing line splitters themselves or, in the alternative,

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[248] Doherty Direct (Staff Ex. 1) at 88.

[249] Third Report - Emerging Services, dated June 11, 2001 (Qwest Ex. 24) at 15.

[250] Group 4 Report (Qwest Ex. 25) at 67.

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allowing CLECs to place their splitters in the incumbent LEC's central offices.[251] Interestingly, the FCC believes that providing CLECs with the option to own line splitters is to the CLEC's advantage, since it ensures that the incumbent cannot limit the CLEC's ability to deploy competitive services.[252]

In the *SWBT Texas Order*, the FCC reiterated its holding. AT&T argued in that proceeding

> that it has a right to line splitting capability over the UNE-P with [Southwestern Bell Telephone ("SWBT")] furnishing the line splitter. AT&T alleges that this is "the only way to allow the addition of xDSL service onto UNE-P loops in a manner that is efficient, timely, and minimally disruptive." Furthermore, AT&T contends that competing carriers have an obligation to provide access to all the functionalities and capabilities of the loop, including electronics attached to the loop. AT&T contends that the splitter is an example of such electronics and that it is included within the loop element.[253]

The FCC expressly rejected AT&T's argument:

> 327. We reject AT&T's argument that SWBT has a present obligation to furnish the splitter when AT&T engages in line splitting over the UNE-P. The Commission has never exercised its legislative rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the splitter, and incumbent LECs therefore have no current obligation to make the splitter available. As we stated in the UNE Remand Order, "with the exception of Digital Subscriber Line Access Multiplexers

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[251] Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, 14 FCC Rcd 20912 ¶ 146 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

[252] *Id.* ¶ 76.

[253] Memorandum Opinion and Order, *Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, 15 FCC Rcd 18354 ¶ 326 (June 30, 2000) ("*SWBT Texas Order*") (footnotes omitted).

(DSLAMs), the loop includes attached electronics, including multiplexing equipment used to derive the loop transmission capacity." We separately determined that the DSLAM is a component of the packet switching unbundled network element. We observed that "DSLAM equipment sometimes includes a splitter" and that, "[i]f not, a separate splitter device separates voice and data traffic." We did not identify any circumstances in which the splitter would be treated as part of the loop, as distinguished from being part of the packet switching element. That distinction is critical, because we declined to exercise our rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element, and our decision on that point is not disputed in this proceeding.

13. The *UNE Remand Order* cannot fairly be read to impose on incumbent LECs an obligation to provide access to their splitters.[254]

In the January 2001 *Line Sharing Reconsideration Order*, the FCC clarified that incumbent LECs must permit CLECs to engage in line splitting, as opposed to line sharing, using the UNE platform "where the competing carrier purchase the entire loop and *provides its own splitter*."[255]

In November 2001, the FCC issued its order on SBC's application to provide interLATA services in Arkansas and Missouri and confirmed that incumbent LECs are not required to provide access to their splitters under the Act.[256] Specifically, McLeod contended that to receive FCC approval, SBC must provide splitters to CLECs that seek to engage in line splitting.[257] The FCC rejected this contention, holding: "As we concluded in the *Line Sharing Reconsideration*

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[254] *SBC Texas Order* ¶¶ 327-28 (footnotes omitted; emphasis added).

[255] *Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, 16 FCC Rcd 2101 ¶ 19 (Jan. 19, 2001) ("*Line Sharing Reconsideration Order*").

[256] *SBC Arkansas-Missouri Order*".

[257] *Id.* ¶ 186.

Under, incumbent LECs have *no obligation* to provide splitters to competitive LECs that obtain voice service on the same line from a competing carrier."[258]

Now, in its May 15, 2002 order on BellSouth's application to provide long distance service in Georgia and Louisiana, the FCC has once again rejected AT&T's claim that a BOC must provide access to its POTS splitter as a condition of section 271 relief. In that order, the FCC reiterated that it rejected AT&T's claim in the *SWBT Texas Order*.[259] The FCC could not be more clear. Qwest has no obligation under either the FCC's rules or its section 271 orders to provide CLECs with access to its POTS splitter.

Contrary to AT&T's testimony, Qwest does not use "outboard" splitters like some other BOCs. The splitters used in Qwest's central offices are integrated into the Qwest DSLAM unit.[260] Within both the Cisco and Lucent platforms Qwest uses, there is a separate shelf for the splitters. However, the DSLAM shelves are hardwired directly to the back of the data ports of the splitters.[261] These hardwired connections are made with amphenol connectors. Qwest's current architecture for DSLAM and splitter deployment does not call for circuit board segregation because of the critical need to maintain voice service if a DSLAM card fails or is

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[258] *Id.* (emphasis added).

[259] Memorandum Opinion and Order, *Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147, ¶ 242 (rel. May 15, 2002).

[260] Rebuttal Affidavit of Karen A. Stewart re: Emerging Services, filed April 2, 2002 ("Stewart Rebuttal re: Emerging Services") (Qwest Ex. 66) at 6.

[261] *Id.*

removed for maintenance purposes.[262] However, integration of DSLAMs and splitters is not defined exclusively by circuit board integration.

Furthermore, from a design and provisioning perspective, Qwest's DSLAM modems and POTS splitters are considered as one unit.[263] This translates into only one point of demarcation between the line shared loop and the Splitter/DSLAM port combinations. Also, the interface to the ATM switch is seen as one demarcation point. Furthermore, the equipment bays that house the POTS splitter and DSLAM units are ordered from the manufacturer as one EF&I (Engineered, Furnished, and Installed) unit.[264] Finally, Qwest's technicians do not have access to the cable between the Splitter and the DSLAM for testing. Testing is performed at the Main Distribution Frame ("MDF") in the serving wire center.[265] Thus, the Qwest splitter is not an outboard splitter, as AT&T contends.

AT&T's position has been roundly rejected by the state commissions that have considered it. This Commission should reject it as well.

E. Qwest Complies with the Requirements of Checklist Item 5, Access to Unbundled Local Transport.

1. Qwest Provides Unbundled Local Transport in Compliance with the Act and the FCC's Rules

Section 271(c)(2)(B)(v) of the Act requires a BOC to provide "local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other

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[262] *Id.*

[263] *Id.*

[264] *Id.* at 6-7.

[265] *Id.* at 7.

services.[266] BOCs are required to provide all technically feasible capacity-related services, as well as higher capacities as they evolve over time.[267] The FCC requires that BOCs provide both dedicated and shared transport to requesting carriers.[268] Shared transport need only be offered to CLECs that also request unbundled local switching,[269] because it is not technically feasible to use shared transport in conjunction with self-provisioned switching.[270]

Qwest has completed 271 workshops for transport in the states of Arizona, Colorado, Nebraska, Oregon, and Washington, and in the Multi-state proceeding. The workshop process spanned more than one year and involved detailed and rigorous negotiations in which the parties reached consensus on all possible issues related to unbundled transport. The South Dakota SGAT attached to Qwest's Petition (Qwest Ex. 29) has been updated to incorporate changes to the SGAT agreed to in these other 271 unbundled transport workshops. In addition, the Direct and Rebuttal Affidavits of Karen A. Stewart, Qwest Exhibits 63 and 64 demonstrate Qwest's compliance with the requirements of Checklist Item 5, respectively.

The term "local transport" encompasses two categories: dedicated transport and shared transport. Dedicated transport refers to transmission facilities dedicated to a particular customer

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[266] 47 U.S.C. § 271(c)(2)(B)(v); *see also* 47 C.F.R. § 51.319(d) ("An incumbent LEC shall provide nondiscriminatory access . . . to interoffice transmission facilities on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service.").

[267] *UNE Remand Order* ¶ 323.

[268] *BellSouth Louisiana II Order* ¶ 201; *see also SBC Kansas/Oklahoma Order* ¶ 331.

[269] *UNE Remand Order*, fn. 127.

[270] *Id.*, ¶ 372.

or carrier. Shared transport refers to transmission facilities shared by more than one carrier, including the incumbent local exchange carrier.

Qwest provides access to unbundled local transport in a nondiscriminatory manner. The only limitations Qwest imposes are those authorized by the FCC and this Commission.

In its SGAT, Qwest has undertaken a concrete and specific legal obligation to provide CLECs with access to unbundled transport in substantially the same time and manner as Qwest provides these network elements to itself, and in a manner that offers CLECs a meaningful opportunity to compete.[271] Qwest has already installed unbundled local transport facilities for CLECs in South Dakota.

a. Dedicated Transport

Qwest has a legal obligation to provide, and is currently providing, unbundled dedicated transport to CLECs in South Dakota.[272] Qwest's dedicated transport offerings provide CLECs with a single transmission path between Qwest end offices, serving wire centers, or tandem switches in the same LATA and state; they also include a bandwidth-specific transmission path between the Qwest serving wire center and the CLEC's wire center or an interexchange carrier's point of presence located within the same Qwest serving wire center area.[273] Qwest offers

[271] SGAT § 9.1.2 (Qwest Ex. 21).

[272] Affidavit of Karen A. Stewart re: Checklist Item 5, filed on October 24, 2001 ("Stewart Direct re: Checklist Item 5") (Qwest Ex. 63) at 5.

[273] *Id., see also* SGAT § 9.6.1.1 (Qwest Ex. 21).

dedicated transport in DS0 through OC-192 bandwidths, as well as such higher capacities that evolve over time.[274]

As of August 31, 2001, Qwest had provided three unbundled dedicated transport facilities for two CLECs in South Dakota.[275]

In the Qwest SGAT and interconnection agreements, the unbundled transport rate element for transport between Qwest Wire Centers is called Unbundled Dedicated Interoffice Transport ("UDIT"). UDIT is a distance-sensitive, flat-rated bandwidth-specific interoffice transmission path designed to a digital cross-connect system in each Qwest wire center[276]. For unbundled transport between a Qwest wire center and CLEC wire center the rate element is called Extended Unbundled Dedicated Interoffice Transport ("E-UDIT").[277] Exhibit KAS-TR-2 to Ms. Stewart's Direct Affidavit, Qwest Ex. 63, provides a diagram of UDIT and E-UDIT. UDIT's two components are priced differently to reflect the way costs are incurred.

b. Shared Transport.

Qwest provides shared transport transmission facilities between end office switches, between end office and tandem switches, and between tandem switches in its network, as

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[274] *Id.*

[275] Stewart Direct re: Checklist Item 5 (Qwest Ex. 63) at 6, *citing* Official Qwest Wholesale Volumes Report, August 31, 2001.

[276] *Id.* at 6.

[277] *Id.*

required by the FCC.[278] Qwest provides shared transport in a way that enables the traffic of a CLEC to be carried on the same transport facilities that Qwest uses for its own traffic.[279]

ILECs are required to provide unbundled shared transport only where they also provide unbundled switching[280] (as the FCC noted, it is not technically feasible for a competitor to use shared transport with self-provisioned switching[281]). In compliance with this requirement, Qwest offers unbundled shared transport in conjunction with unbundled local switch ports and as part of its Unbundled Network Element-Platform ("UNE-P") offering.[282] Shared transport is automatically provisioned when a CLEC orders switching unless the CLEC requests otherwise.

Qwest permits CLECs to use shared transport as an unbundled element to carry originating access traffic from, and terminating to, customers to whom the CLECs provide local exchange service.[283]

c. **Performance Measurements for Unbundled Transport**

Currently, the parties in the ROC proceeding have agreed that Qwest should track ten different performance measurements for dedicated unbundled transport. These measurements concern either the installation/provisioning of DS1 and above DS1 UDITs or the

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[278] *Id.* at 8; *see also* SGAT § 9.8.2.1 (Qwest Ex. 21); *UNE Remand Order* ¶ 370; *BellSouth Louisiana II Order*, ¶ 204.

[279] *Id.*, *see also* SGAT § 9.8.2.3(a) (Qwest Ex. 21).

[280] *UNE Remand Order* ¶ 369.

[281] *Id.* ¶ 372.

[282] Stewart Direct re: Checklist Item 5(Qwest Ex. 63) at 9, *see also*, SGAT § 9.8.2.1.

[283] SGAT § 9.8.2.3(d) (Qwest Ex. 21).

repair/maintenance of these facilities. The agreed-upon measurements for unbundled transport are listed in the table below. The definitions for these performance indicators can be found in the affidavit of Mr. Michael Williams.

Indicator Number	*Checklist Item 5 Performance Indicator*
OP-3	Installation Commitments Met
OP-4	Installation Interval
OP-5	New Service Installation Without Trouble Reports for 30 Days After Installation
OP-6	Delayed Days
OP-15	Interval for Pending Orders Delayed past Due Date
MR-5	Out of Service Cleared within 4 Hours (designed repair process)
MR-6	Mean Time to Restore
MR-7	Repair Repeat Report Rate
MR-8	Trouble Rate
MR-10	Customer Related Trouble Reports

On September 25, 2001, the Liberty Consulting Group, an independent third party retained as part of the ROC OSS Test, completed its audit of Qwest's performance measures (PIDs) and concluded that "the audited performance measures accurately and reliably report actual Qwest performance."[284] Qwest has offered to have Liberty verify its audit by conducting data reconciliation with any CLEC that believes Qwest's performance data is inaccurate. No

[284] *See* Liberty Consulting Final Performance Measures Audit Report at 2-3, attached as Ex. MGW-PERF-2 to the Affidavit of Michael G. Williams re: Performance Measures, filed on October 24, 2001 (Qwest Ex. 71).

party has questioned the authenticity or accuracy of the performance data specific to unbundled transport.

As of August 31, 2001, Qwest had provisioned three UDIT orders in South Dakota. This minimal volume does not allow for statistically significant performance result comparisons. While the regional numbers of UDITs are not large, they are statistically significant. Qwest's regional performance record over the past four months in provisioning and maintaining these facilities has been excellent. For example, for DS1 transport, Qwest met 100 percent of its CLEC installation commitments in its region from November 2001 through January 2002.[285] Although volumes increased in February 2002, Qwest's performance was still very good. In February, Qwest met 94.44 percent of its commitments.[286] In all cases during the past four months for which data is available, Qwest's wholesale results were better than retail results, thus demonstrating that Qwest is providing dedicated transport to CLECs in full compliance with its obligations.

d. Checklist Item 5 Issues Raised in Prefiled Testimony or in Other States.

AT&T is the only party to raise issues concerning Qwest's compliance with Checklist Item 5. In each instance, however, Qwest's position on the disputed issues is consistent with the recommendations of the Multi-state Facilitator and of Dr. Griffing, testifying on behalf of the Commission Staff.

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[285] Qwest Performance Results (Qwest Ex. 75) at 188 (OP-3D).

[286] *Id.*

(1) UDIT/ EUDIT Distinction

In other jurisdictions, AT&T has made the claim that Qwest's distinction between UDIT and EUDIT conflicts with the FCC's requirements for dedicated transport. In the record in South Dakota, however, AT&T did not choose to submit any argument or evidence on this point.[287] AT&T's decision not to press this argument perhaps reflects the understanding that the distinction Qwest has drawn between UDIT and EUDIT is largely a question of rate design. As such, the UDIT/ EUDIT distinction discussion is more properly raised in another context.

Dr. Griffing, testifying on this issue in his Direct Testimony[288], recommended this Commission adopt the resolution offered by the Multi-state Facilitator in the Group 4 Report.[289] Mr. Antonuk recommended that issue be resolved in a cost docket. Qwest agrees with Dr. Griffing's recommendation, and agrees that it will address cost and rate structure issues associated with the EUDIT portion of unbundled transport in its cost docket.

2. Other AT&T issues.

Ms. Stewart's Rebuttal Affidavit, Qwest Ex. 64, responds[290] to a number of other issues raised by AT&T in its prefiled submissions but not offered in evidence in the hearing. In each instance, Ms. Stewart demonstrates that Qwest's SGAT and Commission approved interconnection agreements in South Dakota meet the requirements of Checklist Item 5. Thus,

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[287] *See, e.g.*, Tr. 4/29/02) at 111-12. As noted above, AT&T did not offer its prefiled comments on Checklist Items 2, 5 and 6.

[288] Griffing Direct (Staff Ex.1) at 92.

[289] Group 4 Report (Qwest Ex. 25) at 78-79.

[290] *See* Rebuttal Affidavit of Karen A. Stewart re: Checklist Item 5, filed on April 2, 2002 ("Stewart Rebuttal re: Checklist Item 5") (Qwest Ex. 64) at 17-24.

although AT&T raised some issues in prefiled testimony, it never pushed those issues in the hearing. Ms. Stewart's testimony demonstrates that these issues were resolved in the Multi-state workshops and the consensus language developed from those agreements were filed in the South Dakota SGAT.

For the foregoing reasons, Qwest has satisfied the requirements of section 271(c)(2)(B)(v) of the Act for unbundled local transport. The South Dakota Public Utilities Commission should conclude that Qwest has satisfied this Checklist Item 5.

F. Qwest Complies with the Requirements of Checklist Item 6, Access to Unbundled Local Switching.

Section 271(c)(2)(B)(vi) of the 1996 Act requires a BOC to provide "local switching unbundled from transport, local loop transmission, or other services."[291] Qwest provides CLECs unbundled access to the following types of local switching in compliance with the Act and the FCC's rules: (1) local circuit switching unbundled from transport, local loops and other services; and (2) local tandem switching facilities.[292]

In previous orders concerning section 271 applications of other BOCs, the FCC outlined eight individual items that a BOC must demonstrate it provides in order to comply with Checklist Item 6: (1) line-side and trunk-side facilities; (2) basic switching functions; (3) vertical features; (4) customized routing; (5) shared trunk ports; (6) unbundled tandem switching; (7)

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[291] *See* 47 U.S.C. § 271(c)(2)(B)(vi).

[292] *See* 47 C.F.R. §§ 51.319(c)(1), (3) & (4).

usage information for billing exchange access; and (8) usage information for billing for reciprocal compensation.[293]

The Direct and Rebuttal Affidavits of Lori A. Simpson[294], detail Qwest's provision of these items to requesting CLECs. As required by the FCC's rules, the switching element is unbundled from transport, local loops and other services.[295] Qwest also provides access to line-side and trunk-side facilities, basic switching functions, vertical features, and customized routing.[296]

The features, functions, and capabilities of the local switch available to CLECs include, but are not limited to, the basic switching function of connecting lines to lines, lines to trunks, trunks to lines and trunks to trunks.[297] It also includes the same basic capabilities available to Qwest retail end users, on a line-by-line basis, such as telephone number; directory listing; dial tone; signaling; on/off hook detection; audible and power ringing; automatic message recording; blocking options; access to 911, Qwest's operator services, and Qwest's directory assistance service.[298]

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[293] *Bell Atlantic New York Order* ¶ 346; *SBC Kansas/Oklahoma Order* ¶ 242.

[294] *See* Affidavit of Lori A. Simpson regarding Checklist Item 6, filed October 24, 2001 ("Simpson Direct re: Checklist Item 6) (Qwest Ex. 47) and Rebuttal Affidavit of Lori A. Simpson regarding Checklist Item 6, filed April 2, 2002 ("Simpson Rebuttal re: Checklist Item 6) (Qwest Ex. 48).

[295] Simpson Direct re: Checklist Item 6 (Qwest Ex. 47) at 3; *see also*, 47 U.S.C. § 251(c)(3) and 47 C.F.R. § 51.319(c)(1).

[296] Simpson Direct re: Checklist Item 6 (Qwest Ex. 47) at 3.

[297] *Id.* at 4; *see also* SGAT § 9.11.1.1 (Qwest Ex. 21).

[298] Simpson Direct re: Checklist Item 6 (Qwest Ex. 47) at 4; *see also* SGAT §§ 9.11.1.1 and 9.11.1.6 (Qwest Ex. 21).

Intervals for provisioning unbundled local switching elements and activating vertical switch features are provided in Exhibit C to the South Dakota SGAT. A CLEC may purchase unbundled local switching on a stand-alone basis or in combination with other unbundled network elements ("UNEs") in order to provide local service to its end user customers.[299]

Qwest provides competitors with access to unbundled switching pursuant to section 9 of its South Dakota SGAT and pursuant to its Commission-approved interconnection agreements with CLECs. Qwest's SGAT was updated as a result of consensus reached in collaborative section 271 workshop processes from twelve other states, conducted on an open basis with full, active, and equal participation by competitors, facilitators, administrative law judges, and state commission staffs. Qwest witnesses were subject to cross-examination throughout the rigorous workshop process. Specifically, Qwest's SGAT was updated with the input of competitors and commission staffs through collaborative section 271 workshops in Arizona, Colorado, Oregon, Washington, and the Multi-state collaborative workshops.[300] Although South Dakota did not participate in the section 271 collaborative workshops, the SGAT filed in South Dakota with its Petition included the consensus language developed through the collaborative workshop processes in other states, so that South Dakota CLECs would also benefit from agreements reached in those workshops.[301] Through these multiple, rigorous workshops, Qwest reached consensus on most issues.

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[299] Simpson Direct re: Checklist Item 6 (Qwest Ex. 47) at 3; *see also* SGAT §§ 9.23 and 9.11 (Qwest Ex. 21).

[300] Additionally, Nebraska conducted formal hearings, but also incorporated the entire record from the multi-state collaborative process.

[301] Simpson Direct re: Checklist Item 6 (Qwest Ex. 47) at 5.

At the close of the Multi-state workshops on unbundled switching, four issues remained unresolved. The Multi-state Facilitator made recommendations concerning the resolution concerning the four unresolved issues, finding in Qwest's favor that no SGAT changes were required.[302] Dr. Griffing, testifying on Checklist Item 6 on behalf of the Commission Staff, recommended that this Commission follow the Multi-state Facilitator's recommendations.[303]

No party to these proceedings submitted evidence that Qwest does not meet the requirements of Checklist Item 6. AT&T, in its prefiled submissions, raised certain questions, all of which were addressed in Ms. Simpson's Rebuttal Affidavit, Qwest Ex. 48. In all cases, AT&T's concerns were unfounded. Indeed, AT&T appeared to request changes that were already incorporated in the South Dakota SGAT.[304] In another instance, AT&T's complaint was not so much with Qwest as with the FCC whose precedent is inconsistent with a position AT&T advanced in other jurisdictions.[305] In any event, AT&T offered no evidence on Checklist Item 6 and did not seek to have its "comments" on this topic admitted into evidence.[306]

All state commissions that have considered Qwest's compliance with Checklist Item 6 have found that Qwest satisfies the requirements subject to satisfactory performance in the ROC OSS test.[307]

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[302] Group 4 Report (Qwest Ex. 25) at 92-96.

[303] Griffing Direct (Staff Ex. 1) at 97-100.

[304] *See, e.g.*, Simpson Rebuttal re: Checklist Item 6 (Qwest Ex. 48) at 3-4, 11-13.

[305] *Id.* at 5.

[306] Tr. 4/29/02 (Wilson) at 111-12.

[307] Simpson Direct re: Checklist Item 6 (Qwest Ex. 47) at 18.

While no CLECs have requested stand-alone unbundled local switching, Qwest stands ready and able to provide such service[308]. The ROC Third Party OSS Test process did not develop any measurements, or PIDs, for unbundled local switching. Qwest currently provides UNE-P combinations to South Dakota CLECs, and those UNE-P combinations include the unbundled local switching UNE. As described in Ms. Simpson's testimony, Qwest's performance in providing these UNE-P combinations is measured under the PIDs developed by the ROC Third Party OSS Test process[309]. The performance measurements and the measurement results have been successfully audited in the ROC OSS tests. The audited results demonstrate that Qwest is providing UNE-P service (including switching) to competing carriers in substantially the time and manner as Qwest provides to itself.[310]

Given the positive performance results for UNE-P service in South Dakota, Qwest has satisfied the requirements of section 271(c)(2)(B)(vi) of the Act for unbundled local switching and the Commission should conclude that Qwest has satisfied Checklist Item 6.

Qwest has satisfied the requirements of section 271(c)(2)(B)(vi) of the Act for unbundled local switching. The South Dakota Public Utilities Commission should conclude that Qwest has satisfied Checklist Item 6.

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[308] *See, id.*, at 14-16.

[309] *See*, Simpson Direct re: Checklist Item 2 (Qwest Ex. 55) at 10-13.

[310] *Id.*

III. CONCLUSION

For the foregoing reasons, and those set forth in Qwest's testimony and exhibits, the Commission should recommend that Qwest meets the requirements of Checklist Items 2, 4, 5, and 6 in South Dakota.

Dated this 21st day of May, 2002.

RESPECTFULLY SUBMITTED,

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