5/24/02

Exh. 85 thru-

6/19/02

Order for : Notice of Procedural Schedule : 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
SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996	))))	DOCKET TC 01-165

QWEST CORPORATION'S

SUPPLEMENTAL AFFIDAVIT

OF

LORI A. SIMPSON

CHECKLIST ITEM 8 – WHITE PAGES DIRECTORY LISTINGS

MAY 20, 2002

QWEST EXHIBIT 85

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CONTENTS

SUPPLEMENTAL AFFIDAVIT

OF

LORI A. SIMPSON

Checklist Item 8 — White Pages Directory Listings

Lori A. Simpson states as follows:

My name is Lori A. Simpson. My business address is 301 West 65th Street, Minneapolis, Minnesota. I am Director – Legal Issues for Qwest Corporation (Qwest). I submit this Supplemental Affidavit in support of Qwest's application for authority to provide interLATA services originating in South Dakota. In this Supplemental Affidavit, I provide information that Commission Chairman Jim Burg asked during my cross-examination in this proceeding that I provide concerning Qwest's white pages directory listings. In this Supplemental Affidavit, I also supplement my testimony on cross-examination (concerning a Midcontinent Communications (Midco) directory listing) with new information that has come to my attention following my cross-examination.

I. ELECTRONIC WHITE PAGES DIRECTORY LISTINGS

Chairman Jim Burg has asked how often the electronic white pages directory listings provided by Qwest Dex and accessed via the Internet are updated. Tr. 4/24/02 (Simpson) at 85-86. The answer is that Qwest Dex updates the listings contained in its electronic version of the white pages on an

annual basis at approximately the same time as it delivers new, annual phone books.

II. MIDCO'S ORDER TO SWITCH LISTING OF ONE END USER BELONGING TO A RESELLER CLEC TO MIDCO

During the hearing, I testified on cross-examination concerning a Midco order to switch the listing of one end user belonging to a reseller CLEC over to Midco. Tr. 4/25/02 (Simmons) at 35-38.

At the time that I testified, I understood that when Midco wished to transfer a particular end user's existing resale service to itself, using number portability, Midco used the procedure of issuing an order to disconnect the existing resale service and porting the number to itself, and would also issue a stand-alone listing order. However, I learned after I testified that, in fact, Midco followed a different procedure to maintain the particular listing that I was questioned about; that procedure is to include a request to maintain the listing as part of the order to disconnect the existing service and to port the number to Midco. I apologize for any confusion my testimony on cross-examination may have caused.

This supplement to my testimony does not change my testimony that Midco should have reviewed the monthly verification proofs that Qwest submitted to Midco. Had Midco reviewed its monthly verification reports following issuance of the disconnect and number portability order, it would have known shortly after the disconnect/number portability order had been worked that the listing was not

maintained and could have taken steps to re-establish the listing immediately rather than approximately 11 months later.

IV. CONCLUSION

This concludes my supplemental testimony.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996	)	**Docket No. TC01-165**

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

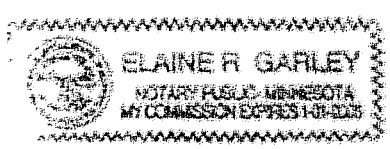
Executed this 20th day of May, 2002.

Lori A. Simpson

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

Subscribed and sworn before me this 20th day of May, 2002.

Notary Public



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May 21, 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 Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan. Please call me if there are any questions.

Sincerely,

Steven H. Weigler /jb

Steven H. Weigler

SHW/jb

Enclosure

cc: Service List

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 ADDITIONAL STATEMENT OF SUPPLEMENTAL AUTHORITY

AT&T Communications of the Midwest, Inc. submits this Additional Statement of Supplemental Authority regarding the Qwest Performance Assurance Plan, stating as follows:

On May 20, 2002, the Washington Utilities and Transportation Commission issued its 33rd Supplemental Order entitled "Order Denying in Part, and Granting in Part, Qwest's Petition for Reconsideration of the 30th Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan (Attachment A). This Order acknowledges the review and rejection of stipulation language between Qwest and Judith Hooper of the Utah Staff and affirms the Washington Utilities and Transportation Commission's position regarding:

1) Rejecting Qwest's argument that a state public utilities commission does not have the authority to create, administer or change a performance assurance plan under the Telecommunications Act of 1996. (p.4-5).
2) Rejects Qwest's argument that there be a one hundred percent cap for interval measures. p. 6
3) Continues to require Tier II payments in any month that Qwest fails to meet Tier II performance standards. p. 7.
4) Requires the measurement of special access circuits in Washington. p.9.

5) Requires that a PO-2b measurement be included in the QPAP for payment purposes. p.10

6) Maintains that the Commission, and not Qwest, maintains ultimate change control authority and specifically rejects the language proffered by Qwest under the stipulation between Qwest and Judith Hooper of the Utah Staff on the issue. p.11-12. (but may consider the issue of a payment collar at the six month review.)

7) Maintains its language on its right to participate, or not participate, in a ROC-led effort to develop a multi-state audit process and specifically rejects the stipulation between Qwest and Judith Hooper of the Utah Staff on the issue. (p.13) Also maintains the Commission's right to require a root cause analysis for any consecutive Tier I miss. *Id.*

8) Maintains that Qwest needs to continue proffering the QPAP even if it exits the long distance market. (p.14)

9) Maintains that "the Qwest Performance Assurance Plan not be the sole remedy available to CLECs for poor performance. Rejects stipulation language between Qwest and Judith Hooper of the Utah Staff on the issue. Maintains language verbatim to the Colorado language on allowing CLECs to seek alternative remedies for contractual damages if the CLEC meets a procedural threshold. (p. 15-16.)

10) Maintains language on offset where offset is only appropriate in the relevant proceeding and the relevant finder of fact determines if offset is appropriate. (p.17).

11) Maintains language that requires payments to be made in cash instead of bill credits. (p.18-19).

12) Requires that Qwest "make the state aggregate performance data available to the public on its website, and will provide a paper copy and an electronic copy of the information to the Commission (and public advocate).

AT&T notes that the Washington Utilities and Transportation Commission is the first Commission that has reviewed (and rejected) the stipulation between Judith Hooper and Qwest, as well as maintained its position on all essential aspects of the Performance Assurance Plan.

Respectfully submitted on May 21, 2002.

AT&T COMMUNICATIONS OF THE MIDWEST, INC.

By: Steven H. Weigler /gs

Mary B. Tribby
Steven H. Weigler
AT&T Law Department
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202
(303) 298-6957

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s [1] Compliance With Section 271 of the Telecommunications Act of 1996	)	DOCKET NO. UT-003022 DOCKET NO. UT-003040 33RD SUPPLEMENTAL ORDER; ORDER DENYING IN PART, AND GRANTING IN PART, QWEST'S PETITION FOR RECONSIDERATION OF THE 30TH SUPPLEMENTAL ORDER, COMMISSION ORDER ADDRESSING QWEST's PERFORMANCE ASSURANCE PLAN
In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	

I. SYNOPSIS

In this Order, the Commission denies Qwest's petition for reconsideration of the Commission's 30th Supplemental Order, except for Qwest's request for reconsideration of modifications to language in the QPAP concerning force majeure events and monthly reports, which the Commission grants in part and denies in part. The Order also directs Qwest to modify language in the QPAP relating to election of remedies.

II. BACKGROUND AND PROCEDURAL HISTORY

1 This is a consolidated proceeding to consider the compliance of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc., with the requirements of section 271 of the Telecommunications Act of 1996 (the Act)[2] and to review and consider approval of Qwest's Statement of Generally Available Terms and Conditions (SGAT) under section 252(f)(2) of the Act. The Commission is conducting its review in this proceeding through a series of workshops, comments by the parties, and the opportunity for oral argument to the Commission on contested issues.

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[1] Since the inception of this proceeding, U S WEST has merged and become known as Qwest Corporation. For consistency and ease of reference we will use the new name Qwest in this Order.

[2] Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 151 *et seq.*

2 The Commission participated with a number of other states in the initial review of Qwest's Performance Assurance Plan (QPAP). Washington and Nebraska joined other states already participating in the Multi-state Proceeding[3] for the purpose of holding hearings, developing an evidentiary record, and issuing an initial order on the QPAP. Hearings in the Multi-state Proceeding were held on August 14-17, and August 27-29, 2001, in Denver, Colorado.

3 Mr. John Antonuk, the facilitator for the Multi-state Proceeding, issued his Report on Qwest's Performance Assurance Plan (QPAP Report or Report) on October 22, 2001. *Ex. 1285.* The Commission had previously explained in the *12th Supplemental Order* that it considered Mr. Antonuk's report to be analogous to an initial order entered by an administrative law judge or hearing examiner, and that all findings and conclusions reached in Mr. Antonuk's report would be subject to review by the Commission.

4 Following written comments on the Report, as well as responses to Bench Requests and other questions by the Commission, and oral argument by the parties, the Commission entered on April 5, 2001, its *30th Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan.*

5 On April 15, 2002, Qwest filed a Petition for Reconsideration of the *30th Supplemental Order*, requesting reconsideration of a number of issues decided in the order. On May 1, 2002, AT&T Communications of the Pacific Northwest, Inc., AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively AT&T), Time Warner Telecom of Washington, Electric Lightwave, Inc., WorldCom Inc. and Covad Communications Company (collectively "CLECs") filed a Joint Answer to Qwest's Petition for Reconsideration. Public Counsel also filed a response to Qwest's petition on the same day.

III. DISCUSSION

1. Standard of Review/FCC Standard

6 The *30th Supplemental Order* identifies the performance assurance plan as an element of the public interest requirement under section 271(d)(3)(C), specifically, whether there is sufficient assurance that markets will remain open after grant of the application" and "whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market." *Order at ¶5 (citing Bell Atlantic*

[3] Seven states--Iowa, Utah, North Dakota, Wyoming, Montana, Idaho, and New Mexico--have held a joint proceeding similar to the proceeding in Dockets No. UT-003022 and UT-003040 to evaluate Qwest's SGAT and Qwest's compliance with section 271 of the Act. This proceeding has become known as the "Multi-state Proceeding."

New York Order).[4] The Order outlines the standard used by the FCC to determine the sufficiency of a performance assurance plan, i.e., the five-prong zone of reasonableness test. *Id. at ¶7.*

7 The Order also rejected certain "considerations" upon which the Facilitator based his decisions that went beyond the FCC's zone of reasonableness test. *Id. at ¶36.* The Order further stated that the Commission would apply the FCC's test, but asserted that the "Commission has authority under state law and the Telecommunications Act to require Qwest to act if its performance results in service that is unfair, unreasonable, or would stifle competition in the state." *Id. at ¶37.*

8 **Qwest:** Qwest states that the Commission correctly recognizes that its recommendations to the FCC must be governed by the FCC's zone of reasonableness test. *Qwest's Petition for Reconsideration at 2 (Petition).* However, Qwest objects to paragraphs 36 and 37 of the Order, asserting that the Commission's decision "begins with an incorrect premise." *Id. at 1-2.* Qwest argues that the Commission "ignore[s] Qwest's two-year effort to model the QPAP upon a framework already repeatedly found by the FCC to satisfy that federal standard." *Id. at 2 (emphasis omitted).* In addition, Qwest asserts that the Commission "appears to dismiss Qwest's further efforts in the ROC PEPP collaborative and multi-state workshop to make substantial improvements on what the FCC has previously required." *Id.*

9 Qwest objects to references to decisions on performance assurance plans from other states, arguing that the references "ignore the different overall structure, record, and negotiating history of those other state proposals." *Id. at 3.* Specifically, Qwest questions why the FCC's prior determinations on performance assurance plans should not control the Commission's decision in Washington. *Id.* Qwest argues that the QPAP filed in Washington following the issuance of the QPAP Report is sufficient to meet the FCC's "zone of reasonableness" without the changes ordered in the *30th Supplemental Order. Id. at 5.*

10 **CLECs:** The CLECs assert that Qwest has demonstrated no "substantial error of fact and law" as the Commission has required for petitions for clarification or reconsideration. *Joint Answer to Qwest Corporation's Petition for Reconsideration at 2 (Joint Answer).* The CLECs argue that the Commission correctly based its decision on the FCC's zone of reasonableness test and the statements of the FCC requiring state authority over performance assurance plans. *Id. (citing to the Bell Atlantic New York Order and the Verizon Pennsylvania Order).*[5] Specifically, the CLECs argue that the

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[4] *In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, (rel. Dec. 22, 1999) *(Bell Atlantic New York Order).*

[5] *In the Matter of the Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization*

FCC has stated that states have authority under the Telecommunications Act as well as state law to adopt performance assurance plans that meet the needs of the particular state, and to determine whether the plan meets the public interest requirement of the Act. *Id. at 2-5.*

11 The CLECs object to Qwest's characterization of compromise and negotiation at the ROC PEPP collaborative, arguing that Qwest failed to negotiate key sections of the QPAP that are now at issue in this proceeding. *Id. at 5.* Further, the CLECs argue that the Commission should reject Qwest's argument that its QPAP should be sufficient because the framework of the QPAP is like that in the plan adopted in Texas and other SBC states approved by the FCC. *Id.* The CLECs assert that the QPAP offered by Qwest for the state of Washington is different from the Texas plan. *Id.*

12 **Discussion and Decision:** We reject Qwest's assertion that the FCC's zone of reasonableness test limits states to approving plans that are identical to those included in applications the FCC has previously approved. The FCC's standard is a zone, which by definition is not an exact point, but parameters within which states may approve varying plans. As we stated in the *30th Supplemental Order*, the FCC has recognized and allowed states to develop plans that vary:

> We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. 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 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 commercial performance in the local marketplace.[6]

13 We also reject Qwest's assertion that the Commission's authority to approve a performance assurance plan is limited to the requirements of section 271, section 272 and the FCC's rules. In its first order approving an application under section 271, the FCC noted that performance monitoring and enforcement mechanisms "are generally administered by state commissions and derive from authority the states have under state law or under the federal act."[7]

14 Finally, we reject Qwest's objection to references in the Order to other state decisions and plans, asserting that these plans' provisions were developed through a different history and process. First, throughout its petition, Qwest appears to contradict itself by requesting that the Commission adopt provisions from a stipulation offered but not

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to Provide In-Region, InterLATA Services in Pennsylvania, Memorandum Opinion and Order, CC Docket No. 01-138, FCC 01-269, (rel. Sept. 19, 2001) (*Verizon Pennsylvania Order*).

[6] *Verizon Pennsylvania Order*, ¶128.

[7] *Bell Atlantic New York Order*, ¶429, n.1316.

adopted in Utah, which was negotiated by the Utah Advocacy Staff and Qwest without involvement of the CLECs (Utah stipulation). Second, given the FCC's expectation that states will "build on the work of other states" in developing plans, it is entirely appropriate for this Commission to consider what other states have ordered. The process of developing a plan for Washington has not occurred in a vacuum, but at a time when each of the 14 states in Qwest's region are determining an appropriate plan for that state. The Commission has looked to the decisions of other states in keeping with the FCC's direction to develop the best plan for Washington state.

2. Duration/Severity Caps

15 The *30th Supplemental Order* directs Qwest to remove the 100 percent cap on the deviation between actual performance and the performance standard in order to encourage Qwest to minimize any disparity in providing services between itself and competitors. *Order at ¶78.*

16 **Qwest:** Qwest asks the Commission to reconsider the decision to remove the 100 percent cap on the interval measures contained in the QPAP. Qwest argues that the *30th Supplemental Order* "addresses neither the reasons for departing from these FCC views nor the basis for rejecting the Facilitator's approach." *Petition at 7.* Qwest provides two mathematical examples that purport to demonstrate that sufficient incentive is provided under the proposed 100 percent cap. *Id. at 7-8.* Qwest argues that "there is no basis for departing from the clear recognition by the FCC and all other state Commissions in Qwest's region that have addressed the matter that the 100% cap satisfies the governing FCC incentive criterion of its zone of reasonableness standard." *Id. at 8-9.*

17 **CLECs:** The CLECs take issue with Qwest's assertion that removing the 100 percent cap is a departure from the FCC's approval of a 100 percent cap. *Joint Answer at 6.* The CLECs assert that the FCC initially endorsed a plan containing no cap on the number of payment occurrences in approving SBC's application for Texas, and then allowed SBC to modify the plan to accommodate a change made during the first six-month review. *Id. at 7-8.* The CLECs also assert that Qwest misrepresents how the Colorado plan treats the severity of misses, noting that the Colorado plan does limit the number of occurrences to 100 percent, but includes a payment multiplier to account for the severity of misses. *Id. at 8-9.* The CLECs assert that the FCC, Colorado and Washington all share the concern that the payment liability should increase with the severity of the performance failures. *Id. at 9.*

18 With respect to Qwest's demonstration that the existing formula provides sufficient incentive, the CLECs note that Qwest used the worst-case scenario, i.e., an $800 per-occurrence payment that only applies to measures in the "High" category, and only after six consecutive months of missing the measure. *Id. at 10.*

19 **Discussion and Decision**: The CLECs' answer demonstrates that the FCC has accepted performance assurance plans that contain a 100 percent cap and has accepted a state plan that contained no limitation. The most reasonable conclusion is that both options are within the FCC's zone of reasonableness. What is relevant here is that there are different ways to address severity of performance failure, not just one correct way. As we stated in the *30th Supplemental Order*, the key to local service competition is Qwest providing services to CLECs at parity with the services it provides to its own retail customers. Removing the 100 percent cap best achieves the proper balance of incentives for Qwest following a grant of section 271 authority. We are not persuaded by Qwest's arguments to retain the 100 percent cap for severity of performance failures and deny Qwest's request for reconsideration of this issue.

3. Tier 2 Payment Trigger

20 Qwest's original QPAP, Exhibit 1200, required Tier 2 payments—payments made to the state—only after 3 consecutive months of non-performance. The Report modified Qwest's proposal to require Tier 2 payments when Qwest failed to meet any Tier 2 performance measure for any two months of any consecutive three months in a rolling 12-month period. *Report at 43.* The *30th Supplemental Order* directs Qwest to modify section 7.3 of the QPAP to require Tier 2 payments in any month that Qwest fails to meet Tier 2 performance standards. *Order at ¶86.*

21 **Qwest**: Qwest asks the Commission to reconsider its decision regarding Tier 2 payments, asserting that "this modification has not been required by the FCC." *Petition at 9.* Qwest argues that Tier 2 payments are designed purely to provide additional incentive to Qwest and have payment levels at least three times higher than Tier 1 base payment levels. *Id.* Qwest suggests that it is only fair for Qwest to have some opportunity to review and address its performance results before being subject to Tier 2 payments. Qwest reiterates the concern it expressed in prior arguments to the Commission that it may not be aware of a problem until the month after the performance results were generated. *Id. at 10.* Noting that the objective of Tier 2 payments is to provide incentive, not punishment, Qwest offers to include Tier 2 payment provisions agreed to in the Utah stipulation. *Id. at 10-11.*

22 **CLECs:** The CLECs disagree with Qwest's assertion that it may not be aware of performance misses until the end of the month following the performance failure. *Joint Answer at 12.* The CLECs assert that Qwest's operational employees rely on performance measurement information that is available on a daily and weekly basis. *Id.* The CLECs also express concerns with the Utah stipulation, arguing that it is quite unlikely that Tier 2 payments would ever be made under the language in the stipulation. *Id. at 14.*

23 **Public Counsel:** Public Counsel objects to Qwest's proposed use of the Tier 2 trigger language in the Utah stipulation arguing that language in the stipulation would allow a significant lag before any payment would occur. *Response of Public Counsel to Qwest's Petition for Reconsideration of the 30th Supplemental Order at 7 (Public Counsel's Response).* Public Counsel argues that this lag in making Tier 2 payments could act as a disincentive for Qwest to take immediate action to address performance issues related to Tier 2 performance measures. *Id.*

24 **Discussion and Decision**: It is not possible from the evidence in this proceeding or the parties' arguments to determine how frequently Qwest monitors its performance results. However, it cannot be denied that Qwest has access to the data and control over how and when to analyze it. The FCC looks to see whether a plan includes "potential liability that provides a meaningful and significant incentive to comply with the designated performance standards."[8] A plan that allows Qwest to miss significant performance measurements one-third of the time without consequence does not create a meaningful and significant incentive to comply. Nor does it provide "a reasonable structure that is designed to "detect and sanction poor performance when it occurs."[9] Qwest's request for reconsideration of this matter is denied.

4. Collocation Payments

25 Washington state rules establish standards and payments for collocation provisioning in Washington state. *WAC 480-120-560.* Qwest's QPAP also includes payments and standards for collocation. *Ex. 1217, §§6.3, 6.4; Table 3.* Paragraph 93 of the *30th Supplemental Order* requires Qwest to modify the QPAP to reflect that certain business rules are applicable only to matters not addressed in WAC 480-120-560. The Order also requires that section 6.3 of the QPAP and section 8.4.1.10 of the SGAT be consistent in applying the Washington rule.

26 **Qwest:** Qwest asserts that no additional changes are necessary to address the Commission's concerns about business rules CP-2 and CP-4. *Petition at 11-12.* Qwest asserts that provisioning intervals of interconnection agreements are incorporated into CP-2 and CP-4. *Id. at 11.* Further, Qwest asserts that the SGAT incorporates the intervals from WAC 480-120-560 to allow CLECs to include the intervals in their interconnection agreements. *Id.*

27 **CLECs:** The CLECs assert that it is not clear whether all of the requirements of the Washington rule are incorporated into the SGAT. *Joint Answer at 15.* Specifically, the CLECs identify certain omissions from SGAT section 8.2.1.9 through 13. *Id.* The CLECs request that the Commission require Qwest to demonstrate how each requirement of the rule is incorporated into the SGAT. *Id.*

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[8] *Bell Atlantic new York Order*, ¶433.
[9] *Id.*

28 **Discussion and Decision:** Upon review of SGAT section 8.2.1 and WAC 480-120-560, we reject Qwest's assertion that no further changes are necessary to the SGAT. The CLECs are correct in noting certain omissions. In addition to those noted by the CLECs, Qwest must modify SGAT section 8.2.1.1 to include the following sentence: "The terms and conditions of this section (8.2.1) shall be in compliance with all requirements specified in the Washington State Collocation Rule, WAC 480-120-560." Further, Qwest must add the following sentences to SGAT section 8.4.1.10: "Recurring charges will not begin to accrue for any element until Qwest delivers that element to the CLEC. To the extent that the CLEC self-provisions any collocation element, Qwest may not impose any charges for provisioning that element."

5. Special Access Circuits

29 The payments in the QPAP are based upon performance measures defined by performance indicator definitions, or PIDs. During the Multi-state Proceeding, WorldCom and the Joint CLECs requested that special access circuits be included in the performance measurements in the QPAP. The Report rejected that request, finding that the FCC has jurisdiction over circuits purchased under federal tariff. *Report at 57.* Paragraph 119 of the *30th Supplemental Order* required Qwest to report its monthly provisioning and repair intervals for special access circuits at the same time it begins special access reporting to the Colorado commission.

30 **Qwest:** Qwest reasserts its argument that state commissions lack jurisdiction to address performance issues relating to special access circuits purchased from the interstate tariff. *Petition at 12.* Qwest notes that the FCC has issued a Notice of Proposed Rulemaking to determine whether to establish federal performance standards for provisioning special access circuits and argues that the Commission should allow the FCC to determine the issue. *Id., n.26.*

31 Qwest also asserts that its systems are not capable of distinguishing between orders purchased for local service and orders for other uses of special access services, or those carriers and its own retail customers who purchase special access. *Id.* Qwest offers to provide monthly special access reports to the Commission on a reasonable schedule, as long as the measurements are not included in the PIDs or the QPAP, as in Colorado. *Id. at 13.*

32 **CLECs:** The CLECs assert that Qwest has agreed to begin reporting special access performance results in Colorado by mid-June, not "upon a reasonable implementation schedule" as Qwest offers to this Commission. *Joint Answer at 17.* The CLECs argue that the Commission should not reconsider or "weaken" the special access reporting requirements adopted in the *30th Supplemental Order. Id. at 18.* The CLECs also assert that Qwest does include measures of special access performance in the PIDs and that Qwest already measures its special access performance in Washington. *Id. at 17.*

The CLECs state that the only issue is whether Qwest can disaggregate its retail and wholesale service measurements. *Id. at 17-18.*

33 **Discussion and Decision**: Qwest's request for reconsideration of this issue is denied. As we discussed in the *30th Supplemental Order*, we assert our jurisdiction over the provision of intrastate services under federal tariff, as the matter does not involve enforcement of rate terms in the federal tariff. *Order at ¶117 (citing to Special Access Order).*[10] Should the FCC determine whether to establish performance measures for provisioning and repair of special access circuits, we will address whether the reporting requirements we order here are consistent with the FCC's standards.

34 Our decision in the *30th Supplemental Order* requires Qwest to report its monthly provisioning and repair intervals for special access circuits at the same time it begins special access reporting to the Colorado commission. We did not require that a PID or PIDs be developed for performance in provisioning and repairing special access circuits, nor that payments be required under the QPAP. Qwest must report on special access measures for Washington using the same measures on which it reports to Colorado. We will defer to the first six-month review whether special access measures should be included in the PIDs or added to the QPAP.

35 Although Qwest has agreed to begin reporting its performance in Colorado in mid-June, Qwest requests a "reasonable implementation schedule" in Washington. Given that Qwest acknowledges that certain measures already exist to measure special access performance, and that it has agreed to provide the reports to Colorado in June, we expect Qwest to provide reports in Washington at the same time it does so for Colorado.

6. Adding New Performance Measures

36 During this proceeding, the CLECs asked that Qwest establish several new performance measures in the QPAP, including PIDs for electronic order flow-through. Paragraph 129 of the *30th Supplemental Order* directed Qwest to add the PID for electronic order flow-through (PO-2b) into the QPAP in the Low Tier 1 and High Tier 2 payment categories, stating that the measure is important to a CLEC's ability to compete with Qwest.

37 **Qwest:** Qwest argues that it is premature to include the PO-2b measurement in the QPAP and asserts that the measure should not be considered for inclusion into the QPAP until the first six-month review. *Petition at 14.* Qwest asserts that the matter was not raised until after the hearing on the QPAP in the Multi-state Proceeding.

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[10] *In re the Complaint of AT&T Communications of the Northwest, Inc. v. U S WEST Communications, Inc., Regarding the Provision of Access Services*, Tenth Supplemental Order, WUTC Docket No. UT-991292 (May 18, 2000) (*Special Access Order*).

Qwest also argues that it is not appropriate to include the measure in the QPAP as the measure is affected by CLEC behavior, i.e., accurate order submission. *Id.* Further, Qwest argues that the industry is still evaluating how to make PO-2b a better measurement. *Id.*

38 **CLECs**: The CLECs request that the Commission reject Qwest's request to defer the matter to the six-month review. *Joint Answer at 20.* The CLECs argue that the PO-2b measurement is not a last minute request, but has been subject to discussion before the ROC Steering Committee since September 2001. *Id. at 18.* Further, the CLECs assert that Qwest has agreed to include the PO-2b measurement in the Colorado performance assurance plan (CPAP), and that it has been included in the CPAP since April 2001. *Id. at 19.* The CLECs also dispute Qwest's claim that the measure is not appropriate for inclusion, asserting that the PO-2b measurement allows Qwest to exclude "rejected LSRs and LSRs with CLEC-caused non-fatal errors." *Id.*

39 **Discussion and Decision**: Given the information and arguments provided by the parties, we are not persuaded to change our decision to require that the PO-2b measurement be included in the QPAP for payment purposes. In particular, Qwest has agreed to include the measure in its plan in Colorado, and should do no less in Washington. The measure is an appropriate measure of Qwest's performance, regardless of the weight that the FCC has assigned to the measurement in looking at overall BOC performance. If, at the time of the six-month review, it appears that it is necessary to make refinements to the PO-2b measurement, the parties can revisit the matter.

7. Six-Month Review Process

40 The *30th Supplemental Order* states that the Commission has authority under state and federal law to amend the QPAP during the six-month review process. *Order at ¶143.* The Order requires Qwest to modify section 16.1 of the QPAP to provide that the Commission, not Qwest, retains control over whether changes will be made to the QPAP, and the scope of those changes. *Id. at ¶146.*

41 **Qwest:** Qwest objects to the Commission's decision to require Commission approval for changes to the QPAP, and to determine the scope of changes that may be made during the six-month review. *Petition at 15.* Qwest also objects to the Commission conducting its own six-month review and not agreeing to participate in a multi-state review process. *Id.*

42 Qwest argues that it based its QPAP upon the Texas plan, which requires mutual agreement for any changes to the plan, and argues that under the Commission's decision, Qwest will face uncertain and substantial financial risk under the QPAP. *Id. at 16.* Qwest argues that state commissions have no authority to order changes to the QPAP and cannot assert such authority in the QPAP. *Id. at 16-17.* While Qwest

acknowledges that the FCC recognizes the role of state commissions in administering plans, Qwest disputes the idea that states have "change control" over the plan. *Id. at 18.* Qwest proposes that the Commission adopt the change control provisions it recently negotiated with the Utah Advocacy Staff. *Id.* The Utah stipulation provides that Commission approved changes would be subject to judicial review, and imposes a "payment collar" on Qwest's total liability by limiting to 10 percent any increase in payment liability for changes occurring in the six-month review. *Id.* Qwest would continue to retain approval authority over changes to the QPAP. *Id.*

43 **CLECs**: The CLECs assert that there is significant statutory and FCC authority that would allow state commissions, and not Qwest, the authority to modify any aspect of the QPAP. *Joint Answer at 20.* In particular, the CLECs point to provisions in plans included in applications for Pennsylvania and Massachusetts, both of which the FCC has approved. *Id.* The CLECs also argue that no Commission in the Qwest region that has issued a final order on the QPAP has allowed Qwest to retain ultimate change control authority. *Id. at 20-23.* The CLECs object to the provisions in the Utah stipulation as worse than the original Qwest language. *Id. at 23.*

44 **Public Counsel**: Public Counsel urges the Commission to deny Qwest's petition for reconsideration on this issue and to reject the language in the Utah stipulation. *Public Counsel's Response at 2, 5.* Public Counsel argues that veto power by Qwest over changes to the QPAP "is inconsistent with the primary goals of the QPAP: to deter anti-competitive conduct and compensate CLECs for inferior service." *Id. at 2.* Public Counsel cites to the final decision of the Montana Public Service Commission in arguing that it is logical for the Commission to oversee the operations of the QPAP, and when necessary, order changes consistent with the public interest. *Id. at 3.*

45 Public Counsel also argues that the Commission's decision in the *30th Supplemental Order* "strikes an appropriate balance regarding the scope of the six-month reviews." *Id. at 4.* Public Counsel notes that no party can foresee what might be appropriate to address during a six-month review, and that the Commission has appropriately limited issues to those that can be demonstrated as "highly exigent." *Id.*

46 **Discussion and Decision**: We are not persuaded to modify our decision on this issue, and deny Qwest's request for reconsideration. As we noted in the *30th Supplemental Order*, the FCC expects states to play a prominent role in modifying and improving the performance metrics in performance assurance plans. *Order at ¶145 (citing to Verizon Pennsylvania Order, ¶¶127-32).* The FCC has approved plans in New York and Massachusetts that allow states control over changes to the plan. *See Joint Answer, Attachments 9 and 10.* As such, state commission control over changes to the plan appears to be within the FCC's zone of reasonableness.

47 Further, Qwest has agreed to a plan in Colorado that allows the state control over changes to the plan. *Joint Answer , Attachment 4.* Every state commission in Qwest's region that has entered a final order on the QPAP has asserted control over changes to the QPAP, denying Qwest the sole right over changes to the QPAP.

48 While we reject Qwest's offer to adopt the language in the Utah stipulation, we find that the issue of including a mechanism such as the payment collar is more appropriately considered during the six-month review.

8. Special Fund & Multi-state Audits/Investigations

49 Following the Multi-state Proceeding, the Facilitator recommended an extensive multi-state process for six-month reviews, as well as audits and investigations, and a special fund for funding the multi-state processes. *Report at 42, 78-79.* In the *30th Supplemental Order*, the Commission declined to adopt the Facilitator's recommendations on these matters. *Order at ¶¶ 160-61, 239-42.* The Commission explained that it was not prepared to adopt the Facilitator's proposed multi-state process, as the ROC Technical Advisory Group was currently developing a post-section 271 long-term PID administration and review process. *Id. at ¶¶149, 241.* In the meantime, the Commission directed Qwest to include alternative language concerning audits and funding mechanisms into the QPAP. *Id. at ¶¶161-162, 241-42.*

50 **Qwest:** Qwest argues that the Commission, Qwest, and CLECs would all benefit from a regional audit and urges the Commission to include language agreed to in the Utah stipulation. *Petition at 21-25.*

51 Qwest also requests that the Commission reconsider its decision to modify section 15.5 of the QPAP to require root cause analyses for any consecutive Tier 1 miss. *Id. at 25.* Qwest argues that root cause analyses are conducted due to "systemic problems exemplified by deficient industry-wide performance." *Id.* Qwest believes such problems would be captured in the original language of section 15.5 concerning consecutive month misses for Tier 2 and aggregate Tier 1 measures. *Id.* Qwest does not oppose the other changes the Commission ordered for section 15.5.

52 **CLECs:** The CLECs object to Qwest's request that the Commission participate in a multi-state audit proceeding, and limit the Commission's ability to conduct an independent audit. *Joint Answer at 25.* The CLECs argue that Qwest provides no compelling reason to modify its decision, or to adopt language from a stipulation that has not been approved or reviewed in any other state, including Utah. *Id. at 26.* The CLECs also argue that Qwest's proposed language is "too much, too late" in the process. *Id. at 26-30.* The CLECs identify problems with the specific language in the Utah stipulation. *Id. at 31-34.*

53 The CLECs request that the Commission deny Qwest's request for reconsideration of the requirement to conduct root cause analyses in the event of consecutive Tier 1 misses. *Id. at 34.* The CLECs argue that without the requirement for a root cause analysis of consecutive Tier 1 misses, Qwest may be able to discriminate against a particular CLEC without triggering a Tier 2 payment. *Id.*

54 **Public Counsel:** Public Counsel objects to Qwest's proposal to return language in the QPAP for a multi-state audit and review process. *Public Counsel's Response at 5.* Public Counsel believes the decision to participate in a multi-state audit and investigation process is best made by the state commission. *Id. at 6.* Further, Public Counsel argues that a multi-state effort would severely limit the ability of Washington-state specific parties to participate and would make the process less open to the public. *Id.*

55 **Discussion and Decision:** We deny Qwest's request for reconsideration of this issue as well as Qwest's proposal to adopt language concerning a multi-state process from the Utah Stipulation. The Commission is currently participating in a ROC-led effort to develop a multi-state process that is intended to be acceptable to all parties. As we stated in the *30th Supplemental Order*, the Commission will await the outcome of that process before deciding whether to participate in a multi-state process, as well as the extent of our participation and funding for the process.

56 We also deny Qwest's request for reconsideration of modifications to QPAP section 15.5 concerning root cause analyses for consecutive Tier 1 misses. Qwest is not required to conduct a root cause analysis every time there is a consecutive Tier 1 miss, but only upon a petition by a party. Qwest will have an opportunity to respond to the petition before the Commission determines if it is appropriate to conduct a root cause analysis. Providing an opportunity for investigation is a means to discourage discrimination against an individual CLEC.

9. Termination of QPAP

57 The *30th Supplemental Order* requires Qwest to modify QPAP section 16.2 to mirror language in section 18.11 of the CPAP approved by the Colorado Hearing Examiner, to allow the QPAP to expire in six years, but to continue payments to individual CLECs subject to a review of their necessity. *Order at ¶180.* Qwest's original QPAP provides that the plan will terminate upon Qwest exiting the long distance market.

58 **Qwest:** Qwest argues that the Commission misconstrues the purpose of a performance assurance plan. *Petition at 26.* Qwest argues that the plan is offered to satisfy the requirement that a BOC's performance not "backslide" after obtaining section 271 approval. *Id.* Qwest insists that it would be unfair to enforce the QPAP if Qwest is no longer in the long distance market. *Id.* Qwest asserts that, upon termination of the QPAP, CLECs would have all non-QPAP remedies that are available to them today.

Id. at 26-27. Finally, Qwest argues that inserting section 18.11 of the CPAP into the QPAP does not work and shows the problems of adopting other state provisions. *Id. at 27.*

59 **CLECs:** The CLECs assert that Qwest has agreed to implement the language in CPAP section 18.11. *Joint Answer at 35.* The CLECs further note that this Commission ordered Qwest to incorporate the concept of CPAP section 18.11 into the QPAP, not to include the exact language. *Id. at 36.* The CLECs assert that "for all practical purposes" there are no other remedies for Qwest's failure to perform other than the QPAP. *Id.* The CLECs argue that the Commission should require Qwest to adopt the same language it has agreed to in Colorado. *Id.*

60 **Discussion and Decision**: The Commission directed Qwest to *mirror* the language in CPAP section 18.11 in the QPAP, not insert the exact language. The CPAP does not allow the plan to terminate upon Qwest exiting the long distance market, but provides that the CPAP will expire after six years, with certain payments, equivalent to Tier 1 payments, continuing subject to Commission review. *Joint Answer, Attachment 4, §18.11.* Such a requirement does not result in the problems Qwest alleges. Qwest has acquiesced in this language in its plan filed in Colorado. Qwest provides no justification for why such a provision is not appropriate in the plan for the state of Washington. Allowing time after the plan terminates for a review of payments to individual CLECs will allow the Commission time to investigate the need for wholesale service quality rules, if the Commission has not already adopted such rules. While Qwest may leave the long distance market, it will likely continue to compete with CLECs in the local market. For the reasons stated above, we deny Qwest's request for reconsideration of this issue.

10. Election of Remedies

61 Section 13.6 of the original QPAP requires CLECs to elect a remedy for poor performance, but includes an exception allowing CLECs to seek remedies for non-contractual causes of action. *Ex. 1200.* The Report recommended modifying section 13.6 to limit any recovery in non-contractual causes of action to harm not compensable under a contractual theory of liability. *Report at 32.* The *30th Supplemental Order* found that the Report's recommendation would severely and inequitably limit the alternative remedies available to CLECs. *Order at ¶193.* The Order required Qwest to include language in part proposed by AT&T and in part from section 16.6 of the CPAP. *Id. at ¶195.*

62 **Qwest**: Qwest argues that the election of remedies language of the QPAP contains language that is consistent with language included in the Texas plan and plans adopted in four other states in SBC's region. *Petition at 28.* Qwest argues that it is "intended to require an election of remedies compensable in contract that are available to the

CLECs for activity covered by the PAP." *Id.* Qwest argues that the Commission disregards the FCC's prior guidance on the issue. *Id. at 29.*

63 Qwest also asserts that borrowing portions of CPAP section 16.6 is problematic as the context of the language is lost when only a portion of the language is adopted. *Id. at 29-30.* Qwest also objects that the CLECs' language does not reflect the language in the CPAP that a CLEC must disgorge any payments made under the QPAP if they are proceeding under an alternative remedy. *Id. at 30.* Finally, Qwest offers to modify the QPAP to include language from the Utah stipulation. *Id. at 31-32.*

64 **CLECs**: The CLECs assert that section 13.6 of the QPAP as offered by Qwest does not contain exactly the same language as contained in the FCC-approved SBC Texas plan. *Joint Answer at 36.* The CLECs assert that the FCC has not required that liability under the QPAP be the only remedy for CLECs. *Id. at 37.* The CLECs note that the states of Montana, Nebraska, and Wyoming have also rejected Qwest's proposal and have adopted the Colorado proposal for election of remedies. *Id. at 37-40.* The CLECs are concerned that Qwest would accept the language in Colorado and not in another state. *Id. at 40.* Finally, the CLECs reject the language in the Utah stipulation arguing that it would foreclose any alternative remedy. *Id. at 40-41.*

65 **Discussion and Decision**: We remain convinced that the QPAP should not be the sole remedy available to CLECs for poor performance. Nor has the FCC required the QPAP to be the sole remedy. We reject Qwest's offer to substitute language from the Utah stipulation, as it appears to limit the alternative remedies for CLECs more so than the language recommended in the Report. Upon review of our decision in the *30th Supplemental Order*, however, we agree that the language ordered in paragraph 195 was not a full and accurate excerpt from the CPAP, especially with regard to disgorging payments made under the PAP.

66 In order to accurately reflect the concepts and limitations set forth in section 16 of the CPAP, Qwest must replace section 13.6 of the QPAP with the following:

> 13.6 This PAP contains a comprehensive set of performance submeasures, 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, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 13.6.1, 13.6.2, and 13.7.
>
> 13.6.1 In electing the PAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by

the PAP. The PAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

13.6.2 Tier 1 payments to CLECs are in the nature of liquidated damages. Before CLEC shall be able to file an action seeking contract damages that flow from an alleged failure to perform in an area specifically measured and regulated by the PAP, CLEC must first seek permission through the Dispute Resolution Process set forth in Section 5.18 of the SGAT. This permission shall be granted only if 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 the competitive harm. If CLEC can make this showing, it shall be permitted to proceed with this action. Any damages awarded through this action shall be offset with payments made under this PAP. If the CLEC cannot make this showing, the action shall be barred. To the extent that CLEC's contract action relates to an area of performance not addressed by the PAP, no such procedural requirement shall apply.

67 These paragraphs are taken directly from CPAP sections 16.3, 16.4, and 16.6. We find this language correctly balances the concerns of Qwest and the CLECs concerning limiting financial exposure and remedying poor performance. Qwest has agreed to this same language concerning election of remedies in Colorado and must adopt the same language in its Washington QPAP.

11. Offsetting Remedies

68 The QPAP originally filed in the Multi-state Proceeding included a provision allowing Qwest itself to offset any award "for the same or analogous wholesale performance covered by this PAP." *Ex. 1200.* While the Report recommended changes to section 13.7 of the QPAP, the Report did not change the language allowing Qwest the right to make an offset. Paragraph 202 of the *30th Supplemental Order* requires Qwest to modify the SGAT to reflect that only a court or finder of fact has the right to require an offset. The Order determined that allowing Qwest the right to offset would only add another level of litigation concerning Qwest's action if it were not ordered by a court or regulatory commission. *Order at ¶202.*

69 **Qwest:** Qwest asserts that nothing in QPAP section 13.7 gives Qwest the sole decision to determine an offset. *Petition at 31.* Qwest argues that the provision gives Qwest the option to choose the forum in which it enforces its right to offset. *Id.* Specifically, Qwest states that its decision to offset is "not unreviewable." *Id.*

70 **CLECs:** The CLECs assert that "offset is a judicial concept for the finder of fact to consider to ensure that a party does not receive double recovery." *Joint Answer at 42.* The CLECs assert that Qwest has the right to argue for an offset, but not the right to make the offset on its own decision. *Id.* The CLECs note that the Texas plan requires that "whether an offset is appropriate will be determined in the relevant proceeding." *Id. at 43.* Further, the CLECs argue that Qwest has agreed in Colorado to include in the plan offset language like that ordered in the *30th Supplemental Order*. *Id.* The CLECs also note that the states of Idaho, Montana, Nebraska, and Wyoming have limited the right to offset to the court or finder of fact. *Id. at 43-45.*

71 **Discussion and Decision**: Qwest has provided no reason to persuade us to modify our decision in the *30th Supplemental Order* on this issue, and we deny Qwest's request for reconsideration. Qwest has agreed to similar language in Colorado, and as we stated above, has not sufficiently explained why the language is inappropriate for Washington. Allowing Qwest the right to offset an award on its own decision would only invite additional litigation, contrary to the FCC's desire for a plan with a "self-executing mechanism that does not leave the door open to unreasonable litigation and appeal."[11]

12. Force Majeure Language

72 The *30th Supplemental Order* addressed two impasse issues concerning force majeure events: First, whether a reference to parity is appropriately included at the end of QPAP section 13.3 because force majeure events should not apply to parity standards; and Second, whether Qwest must file a waiver of payment obligations with the Commission following a force majeure event. *Order at ¶¶208-9.* The Report recommended adopting language proposed by AT&T to the effect that force majeure events did not excuse poor performance with respect to parity measures. *Report at 38.*

73 **Qwest:** Qwest states that, at AT&T's request, it included certain language in QPAP section 13.3 to address the time frame in which force majeure and other excusing events would apply to benchmark and parity measures. *Petition at 32-33.* Qwest argues that the reference to parity measures is necessary because the phrase also includes "other excusing events." *Id. at 33.*

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[11] *Bell Atlantic New York Order*, ¶433.

74 Qwest also objects to the requirement that it seek a waiver from the Commission before its performance is excused for a force majeure event. *Id.* Qwest asserts that the QPAP already provides a process for parties to petition the Commission to determine whether a force majeure event should excuse Qwest's performance, and that the Commission's decision would only add an administrative hurdle. *Id. at 34.*

75 **CLECs**: The CLECs assert that force majeure events should not apply to parity measures. *Joint Answer at 46.* The CLECs suggest, however, adding the words "(excluding Force Majeure events)" after the word "parity" in section 13.3 in order to resolve any ambiguities or inconsistencies. *Id. at 46-47.*

76 The CLECs assert that the Commission should deny Qwest's request to reconsider the decision to modify section 13.3 to add a waiver process. *Id. at 47.* The CLECs argue that the existing processes place the burden on the CLECs and the Commission to petition the Commission to determine if a force majeure event should excuse performance. *Id.* The CLECs argue that the burden should be placed on Qwest, not CLECs, to request that Qwest's performance be excused. *Id.* The CLECs note that the CPAP, which Qwest has now agreed to, includes such a provision. *Id. at 47-48.*

77 **Public Counsel:** Public Counsel argues that the waiver process required in the *30th Supplemental Order* will provide a clearly defined and transparent process to protect against the potential abuse of force majeure claims. *Public Counsel's Response at 7.*

78 **Discussion and Decision**: After reviewing Qwest's petition and the CLEC's response, we grant, in part, Qwest's request for reconsideration and require Qwest to modify the language in section 13.3 to add the words "(excluding Force Majeure events)" after the word "parity" to avoid any confusion or inconsistencies.

79 Qwest's request to reconsider the requirement for a waiver procedure is denied. A review of the provisions in sections 13.3 and 13.3.1 shows that there would not be a duplicative process. As the CLECs point out, the current process does not require Qwest to seek approval before it considers a force majeure event to be an excusing event. The waiver procedures requested by Public Counsel and required by the *30th Supplemental Order* are necessary to avoid any potential abuses, and places the burden more appropriately on Qwest to request that its performance be excused.

13. Payment Method

80 Section 11.2 of Qwest's QPAP provides that payments to CLECs be made in the form of bill credits, rather than by cash or check. Paragraph 220 of the *30th Supplemental Order* requires Qwest to modify the QPAP section to adopt the language in section 12.2 of the CPAP, providing that payments be made in cash, except where a CLEC has non-disputed charges 90 days past due.

81 **Qwest:** Qwest argues that there is nothing in the record to support a requirement that payments be made in cash. *Petition at 35.* Qwest then notes that it provided rebuttal testimony in the Multi-state Proceeding to demonstrate that FCC-approved plans for New York, Connecticut, and Massachusetts all include payment exclusively by bill credits. *Id.* Qwest also argues that payment by cash would be more difficult to administer. *Id.*

82 **CLECs:** The CLECs argue that Qwest has now agreed to the language in the Colorado plan requiring the company to pay CLECs in cash, rather than bill credits, and that Qwest should agree to the same provision in Washington. *Joint Answer at 48-49.* The CLECs argue that Qwest has made no new arguments, nor provided any new evidence that should cause the Commission to change its decision. *Id. at 49.*

83 **Discussion and Decision**: The record in the Multi-state proceeding included testimony, exhibits and argument concerning the issue of the form of payment. The parties provided additional argument on the issue before this Commission. As Qwest has now agreed to language concerning the form of payment in Colorado, we see no reason to modify our decision on the issue in the *30th Supplemental Order*.

14. Monthly Reports to Public Counsel

84 Sections 14.1 and 14.2 of the QPAP require Qwest to provide monthly reports to CLECs and the Commission of its performance under the measures set forth in the QPAP. Paragraph 244 of the *30th Supplemental Order* requires Qwest to also provide copies of the monthly aggregate reports to Public Counsel.

85 **Qwest:** Qwest states that it does not object to providing monthly reports to the Commission, but requests that the Commission allow Qwest to provide the state aggregate information on its public website. *Petition at 36.*

86 **Public Counsel**: Public Counsel requests that the Commission affirm its decision requiring Qwest to provide copies of its monthly reports to relevant parties such as Public Counsel. *Public Counsel's Response at 8.*

87 **Discussion and Decision**: Qwest's request is vague, and implies that Qwest would not provide paper copies to *either* the Commission or Public Counsel. That is not sufficient. Qwest must revise QPAP section 14.1 to provide that it will make the state aggregate performance data available to the public on its website, and will provide a paper copy and electronic copy of the information to the Commission and Public Counsel.

IV. FINDINGS OF FACT

88 Having discussed above in detail the oral and documentary evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues at impasse between the parties and the reasons and bases for those findings and conclusions, the Commission now makes and enters the following summary of those facts. Those portions of the preceding detailed discussion that state findings pertaining to the ultimate findings stated below are incorporated into the ultimate findings by reference.

89 (1) The FCC has accepted state performance assurance plans that contain a 100 percent cap for severity of performance failures, and has also accepted a plan that did not contain such a cap.

90 (2) The evidence in this proceeding does not demonstrate how frequently Qwest monitors its performance results. Qwest has access to its own performance data and has control over how and when to analyze the data.

91 (3) SGAT section 8.2.1, as filed with the Commission on April 5, 2002, omits certain aspects of the Washington collocation rule, WAC 480-120-560.

92 (4) The FCC has approved performance assurance plans in New York and Massachusetts that allow the states control over changes to the plan. In addition, Qwest has agreed to a plan in Colorado that allows the state control over changes to the plan.

93 (5) Under the provisions of QPAP section 15.5, as required by paragraph 242 of the 30th *Supplemental Order*, Qwest is not required to conduct a root cause analysis every time there is a consecutive miss.

94 (6) Qwest has agreed to implement the terms of section 18.11 of the Colorado plan, which allows the plan to expire after six years, but requires payments to individual CLECs to continue after expiration of the QPAP subject to a review of their necessity.

95 (7) Qwest has agreed to include in its Colorado plan a provision that gives the finder of fact, i.e., a court or state commission, the right to determine whether an offset should be made.

96 (8) Qwest has agreed to include in its Colorado plan a provision requiring the company to pay CLECs in cash, rather than bill credits, except where a CLEC has non-disputed charges 90 days past due, similar to the requirement ordered in paragraph 220 of the *30th Supplemental Order*.

V. CONCLUSIONS OF LAW

97 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

98 (1) The FCC's zone of reasonableness test does not limit states to approving plans identical to those included in applications the FCC has previously approved.

99 (2) State commission authority to approve and administer a performance assurance plan derives from state law and the Telecommunications Act, and is not limited to authority under sections 271 and 272 of the Act and FCC rules.

100 (3) The FCC expects that states will look to and build upon the work done in other states on performance measurements and performance assurance plans, and does not prohibit states from doing so.

101 (4) There is room within the FCC's zone of reasonableness for plans to include, or remove, a 100 percent cap on severity of performance failures. We believe that removing the cap best achieves the proper balance of incentives for Qwest following a grant of section 271 authority.

102 (5) A plan that allows Qwest to miss significant performance measurements one-third of the time without consequence does not fall within the FCC's zone of reasonableness, as the plan does not create a "meaningful and significant incentive to comply." Nor would the plan adequately "detect and sanction poor performance when it occurs."[12]

103 (6) Consistent with our decision in the *Special Access Order*, the Commission may assert jurisdiction over the provision of intrastate services under federal tariff where the matter does not involve enforcement of rate terms in the federal tariff.

104 (7) State commission control over changes to performance assurance plans is within the FCC's zone of reasonableness, as the FCC expects states to play a prominent role in modifying and improving the performance metrics in performance assurance plans and has approved plans in New York and Massachusetts that allow states control over changes to the plan.

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[12] *Bell Atlantic New York Order*, ¶433.

105 (8) The QPAP should not be the sole remedy available to CLECs for poor performance, nor has the FCC required the QPAP to be the sole remedy.

106 (9) The waiver process following force majeure events ordered in paragraph 208 of the *30th Supplemental Order* is necessary to avoid any potential abuse concerning force majeure events, and places the burden more appropriately on Qwest to request that its performance be excused.

107 (10) Qwest's offer to provide the Commission and Public Counsel access over its website to monthly aggregate performance reports is not sufficient.

VI. ORDER

THE COMMISSION ORDERS That:

108 (1) The Commission retains jurisdiction to implement the terms of this order.

109 (2) Qwest's Petition for Reconsideration of the *30th Supplemental Order* is denied in part, and granted in part.

110 (3) Qwest must modify SGAT sections 8.2.1.1 and 8.2.1.10 as set forth in paragraph 28 of this order.

111 (4) The Commission defers until the six-month review the question of whether special access performance measures should be included in PIDs or added to the QPAP.

112 (5) Qwest must provide reports on special access performance in Washington at the same time, and upon the same measures, as it does so for Colorado.

113 (6) To ensure that the language in section 13.6 of the QPAP retains the intent of section 16.6 of the Colorado plan, Qwest must modify the QPAP as set forth in paragraph 66 of this order.

114 (7) Qwest must modify the language in QPAP section 13.3 to add the words "(excluding Force Majeure events)" after the word "parity".

115 (8) Qwest must revise QPAP section 14.1 to provide that it will make the aggregate performance data available to the public on its website, and will provide a paper copy and electronic copy of the information to the Commission and Public Counsel.

DATED at Olympia, Washington and effective this 20th day of May, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that on this 21st 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 21, 2002 addressed to:

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MAY 24 2002
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

MARY S. HOBSON
Direct (208) 387-4277
mshobson@stoel.com

May 23, 2002

VIA OVERNIGHT DELIVERY

Debra Elofson, Executive Director
SD Public Utilities Commission
500 East Capitol
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 -Docket No. TC01-165

Dear Ms. Elofson:

Enclosed please find an original and ten copies of Qwest Corporation's Opposition to AT&T's Motion to Reopen Proceedings.

Thank you for your consideration of this matter.

Very truly yours,

Mary S. Hobson

Enclosures

cc: Steven H. Weigler
Gregory J. Bernard
David Gerdes
Karen Cremer
Harlan Best
Warren R. Fisher
Mark Stacy
Marlon Buster Griffing
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May 23, 2002

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Re: Docket No. TC01-165

Dear Counsel:

Enclosed please find Qwest Corporation's Opposition to AT&T's Motion to Reopen Proceedings.

Very truly yours,

Mary S. Hobson

Enclosures

Boise-141584.1 0029164-00073

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE: APPLICATION FOR interLATA RELIEF OF U S WEST COMMUNICATIONS INC. PURSUANT TO SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	))))))	**Docket No. TC01-165** **CERTIFICATE OF SERVICE**

I, Mary S. Hobson, do hereby certify that I am a member of the law firm of Stoel Rives LLP, and on this 23rd day of May, 2002, I caused true and correct copies of Qwest Corporation's Opposition to AT&T's Motion to Reopen Proceedings to be delivered to the following:

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SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

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Attorneys For Qwest Corporation

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 OPPOSITION TO AT&T'S MOTION TO REOPEN PROCEEDINGS

Qwest Corporation ("Qwest") respectfully objects to AT&T Communications of the Midwest, Inc.'s ("AT&T") latest attempt to delay the section 271 proceedings by attempting to inject complex, unrelated and unresolved issues – specifically, whether Qwest fully complied with the undefined filing requirements of section 252 of the Telecommunications Act of 1996 (the "Act") – into this docket. As state commissions, the FCC and reviewing courts have repeatedly emphasized, matters such as these are best addressed in proceedings separate from section 271.

1/ Contrary to AT&T's misunderstanding of the status of the section 271 proceedings in South Dakota, these proceedings have not concluded and thus, it is inappropriate to seek to reopen them. This motion is therefore typical of AT&T's participation in this case: an attempt to muddy the waters with unrelated issues that are not pertinent to South Dakota or AT&T's attempt to do business in this state.

As a preliminary matter, it is deeply ironic, yet entirely predictable, that AT&T is seeking to inject these issues into the section 271 process. As this Commission well knows, AT&T has no serious interest in providing local services in this state through unbundled network elements and other entry vehicles that are the subject of the agreements about which it complains. Thus, whether the agreements should be filed has no impact whatever on AT&T's local entry plans, which do not exist. CLECs that are serious about local entry can and do speak to Qwest outside the hearing room about interconnection and other matters, and may participate in the FCC and other state proceedings that directly address the agreements that are the subject of the Minnesota Complaint. But AT&T's efforts here are merely the latest manifestation of its case of "the vapors" 2/ when it comes to section 271 and Qwest's threat to inject more competition into the long distance market and AT&T's pricing. This Commission should take a dim view of AT&T's attempt to broaden the section 271 inquiry beyond its appropriate boundaries, as both the FCC and D.C. Circuit have in recent years 3/ and as the Colorado commission did just two months ago:

2/ "AT&T is apparently prone to get a case of the vapors at the beginning of § 271-related dockets. It now appears that this affliction has returned near the end of the § 271 dockets. This affliction manifests itself with ill-advised aggressiveness and overwrought pleading. . . . From an invective standpoint, AT&T succeeds, but it is not clear toward what end. Coming rhetorically unhinged is unbecoming, especially when the underlying legal analysis you are attacking is sound." Order Denying Motion to Modify Order on Staff Volume VII, *In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Docket No. 971-198T, Decision No. R02-516-I, Before the Public Utilities Commission of the State of Colorado, May 3, 2002, at 2-3 (citations omitted).

3/ *See* 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 for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶ 19 (2001), *modified, Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) ("*SBC Kansas/Oklahoma Order*") (footnotes omitted, emphasis added); *see also* 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 Texas*, 15 FCC Rcd 18354 ¶¶ 23-27 (2000) ("*SBC Texas Order*"); *AT&T Corp. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000).

> This Commission previously has determined that the public interest test is not a catch-all inquiry. "Public interest" is not the "*et cetera*" at the end of the 14-point checklist. The bad effects of an open-ended public interest inquiry are many. If the "public interest" becomes so protean to encompass anything and everything, then nothing in this record would be dispositive. Moreover, if the relative weight to be given to the various factors of public interest analysis is not known beforehand, then there is no basis for reasoned decision making by the fact-finder, nor for reasoned record-making by the participants to this docket.
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> * * *
>
> Why we adhere to this "welfare maximization" standard as the touchstone for our analysis is vindicated by the number of issues and the scattershot pleading in this portion of the record. As is too often the case when the public interest is involved, the participants have attempted to smuggle within the standard ideas and grievances that either have nothing to do with § 271, or that – even if true – have no remedy in this proceeding. 4/

Indeed, AT&T's Motion is overreaching by its own terms. AT&T cannot deny that Qwest has routinely and regularly filed hundreds of interconnection agreements with CLECs pursuant to section 252. Nor does AT&T assert that each and every contract between an ILEC and a CLEC is subject to the section 252 filing requirements. AT&T itself expects certain of its contractual arrangements with Qwest to be confidential and not subject to filing. At most, then, AT&T is simply disputing Qwest's line drawing in a relative handful of situations where Qwest did not make a filing.

Furthermore, and contrary to AT&T's claims, the legal issue underlying its Motion – the applicable legal standard to determine which voluntarily negotiated agreements are subject to the

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4/ Order on Staff Volume VII Regarding Section 272, The Public Interest and Track A, *In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with Section 271(c) of the Telecommunications Act of 1996*, Docket No. 97-198T, Decision No. R02-316-I, Before the Public Utilities Commission of the State of Colorado, March 15, 2002, at 22, 24 ("Colorado Order") (footnotes omitted, emphasis added).

filing and 90-day pre-approval process of section 252(a) of the Act – has never been defined. The parties asserting claims against Qwest on this basis do not agree on a standard. Because of the lack of clarity on the standard, Qwest has filed a Petition for Declaratory Ruling before the Federal Communications Commission, which the FCC has accepted for review and comment. 5/ And given the lack of a defined legal standard, those issues are particularly inappropriate for consideration in this section 271 docket. Among other things, and as Qwest demonstrated in Minnesota, the agreements at issue in the Minnesota Complaint fall outside of the Act's filing requirements, and thus Qwest never was obliged to file them. The Commission should decline AT&T's invitation to derail and delay this section 271 docket, which already has been pending for more than seven months, with these issues that are best addressed in another docket and at another time.

AT&T's Motion relies heavily upon allegations regarding Qwest's agreements with Eschelon; however, Eschelon does not provide services in South Dakota, and therefore the Eschelon agreements do not serve as the basis for either Qwest's or Eschelon's conduct in South Dakota. As shown below, the Minnesota agreement with Eschelon regarding its non-participation in section 271 proceedings in fact promotes the interests underlying section 271.

ARGUMENT

I. THIS DOCKET IS NEITHER THE TIME NOR THE FORUM TO ADDRESS AND DECIDE THE "UNFILED AGREEMENTS" ALLEGATIONS

A. Section 271 Dockets Are Not A Catchbasin For All ILEC-CLEC Disputes.

Without in any way diminishing the importance of the issues underlying the "unfiled agreements" cases, they nevertheless are not appropriate matters for this Commission to consider as part of the section 271 public interest inquiry. This docket is not a vehicle for resolving this

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5/ *See* Petition for Declaratory Ruling of Qwest Communications International Inc., *In the Matter of Qwest Communications International, Inc., Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, WC Docket No. 02-89 (filed April 23, 2002) (the "FCC Petition").

legal ambiguities concerning Qwest's obligations under section 251 and 252 or other unresolved questions about the interpretation and application of the Act:

> As the Commission stated in the *SWBT Texas Order*, despite 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. . . . [section 271 proceedings] are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability. . . . [F]ew of the substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing; they rely for their content on the Commission's rules. 6/

Indeed, the United States Court of Appeals for the District of Columbia Circuit expressly rejected AT&T's attempt to convert Bell Atlantic's section 271 proceeding in New York into the same sort of global referendum on the ILEC that AT&T seeks to create here. In agreeing with the FCC that CLECs should not be permitted to raise collateral issues, the court held that the sweeping inquiry AT&T sought to foment would cast the section 271 process adrift from its statutory moorings:

> Given the deference we owe the Commission, especially where, as here, it has made a judgment about the most efficient way to proceed in a complex administrative matter, we find its interpretation of the statute reasonable. The Commission's concerns about encumbering the ninety-day administrative process and prolonging litigation, thus delaying BOC entry into long distance markets, seem well-founded. Under AT&T's interpretation of the statute, parties to section 271 proceedings could challenge (before

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6/ *See SBC Kansas/Oklahoma Order*, ¶ 19 (footnotes omitted, emphasis added); *see also SBC Texas Order*, ¶¶ 23-27; Colorado Order, at 22, 24.

> both the Commission and this court) virtually every aspect of the agency's local competition regulations – including TELRIC, as AT&T counsel conceded at oral argument. Such a challenge would further complicate these already enormously complex proceedings, requiring the Commission, in addition to resolving the many other issues before it, to present a comprehensive defense of TELRIC, all within the ninety days prescribed by the statute. We would then have to determine whether TELRIC was the appropriate pricing methodology, and in doing so we would create a holding that would supplant any pending petitions for review of the underlying TELRIC orders, at least in this Circuit. We thus agree with the FCC that allowing collateral challenges could change the nature of section 271 proceedings from an expedited process focused on an individual applicant's performance into a wide-ranging, industry-wide examination of telecommunications law and policy. 7/

Putting aside the obvious questions about whether AT&T's motion has anything really to do with the public interest – why did AT&T wait for three months after the Minnesota "unfiled agreements" complaint was filed, and for more than two months after AT&T intervened in that docket, to raise these purported "public interest" concerns? – this Commission should not address these issues in this docket. The kinds of "unfiled agreements" at issue are hardly novel. ILECs that have been granted section 271 approval in other states no doubt settled disputes with CLECs as well, but no state (or CLEC) to Qwest's knowledge ever expressed any concern in those proceedings, or previously in this one. The novelty and "emergency" arise only because AT&T sees an opportunity to frustrate (through little or no effort of its own) Qwest's application to this Commission.

As discussed in greater detail below, the legal and factual issues underlying the "unfiled agreements" allegations are being fully and fairly resolved in other fora, and rulings will follow soon. There is, therefore, no need for this Commission to expend further resources and time in the section 271 dockets with this ancillary dispute.

7/ *AT&T Corp. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000) (emphasis added).

B. Qwest Understands These Issues, Takes Them Very Seriously, And Has Taken Multiple Steps To Address And Resolve Them.

Qwest understands and takes seriously the concerns raised by the Minnesota Commission, other state commissions and CLECs in the "unfiled agreements" context, and has responded affirmatively to those concerns in a number of ways that address both the underlying legal issues and the overriding policy concerns.

First, Qwest filed its FCC Petition on April 23, 2002, and, in so doing, asked the FCC to define once and for all the scope of ILEC-CLEC agreements subject to section 252(a)(1)'s filing requirements. Qwest's FCC Petition sets forth Qwest's understanding of the Act and its legislative history and purposes in detail and opens Qwest's position for public comment and debate. Opening comments to the FCC Petition are due on May 29, 2002, reply comments by June 13, 2002, and the FCC will consider all of these submissions thereafter. Because these important questions now have been presented formally and squarely to the FCC, this Commission can expect a definitive answer on the threshold standard in the foreseeable future.

Second, until the FCC rules on Qwest's FCC Petition, Qwest has committed voluntarily to file and seek approval of all contracts, agreements, and letters of understanding with CLECs that create forward-looking obligations to meet the requirements of sections 251(b) or (c) – a commitment that goes well beyond the requirements of section 252(a). Qwest also will work with the state commissions and their staffs on the treatment of agreements that may be close to this standard.

Third, Qwest has begun the process of forming a committee of senior managers from its Legal Affairs, Public Policy, Wholesale Business Development, Wholesale Service Delivery, and Network divisions that will review all agreements involving Qwest's in-region wholesale

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8/ *See* Letter dated May 21, 2002 from Mr. R. Steven Davis, Sr. Vice President, Policy and Law, Qwest Corporation, to Mr. Jim Burg, Chairperson, Ms. Pam Nelson, Vice Chairperson, and Mr. Robert Sahr, Commissioner. A copy of this letter is attached hereto as Exhibit 1.

activities and ensure that Qwest complies with both the above commitment and any ruling the FCC issues on Qwest's petition. 9/

Whatever the merits of the arguments criticizing Qwest's filing decisions (and Qwest continues to believe those arguments have no merit), these issues are resolved going forward. Qwest already is filing numerous agreements that it believes fall within section 252(a)'s requirements. As for the relatively few contractual arrangements in dispute, the FCC's ruling on Qwest's Petition either will vindicate Qwest's interpretation of section 252(a) or articulate a new standard for how this section must be applied to everyone's agreements. And in the meantime, Qwest has agreed to file on a going-forward basis the range of agreements its opponents assert should be filed. Even if this Commission were to credit the unproven allegations that AT&T's Motion embodies, because of the preventative measures outlined above there is no public policy concern for the Commission to address in the context of this section 271 docket.

II. THIS PARTICULAR DISPUTE IS ESPECIALLY INAPPROPRIATE FOR A SECTION 271 DOCKET

A. The Issues Underlying The "Unfiled Agreements" Cases Are Complex, Hotly Contested, And The Outcome Far From Clear.

AT&T would have this Commission believe that the law and the factual evidence before the Minnesota Commission leave no doubt that Qwest violated the Act and discriminated against CLECs. Briefs in response to AT&T's Motion are not appropriate vehicles for detailed analyses of the governing law and facts. It is, however, important for this Commission to understand two things. One, there is no ruling by a court, the FCC, or any state commission articulating the scope of ILEC-CLEC agreements that must be filed as "interconnection agreements" for purposes of section 252(a)(1). Second, the reading of section 252 most consistent with the Act's legislative history and overriding procompetitive and deregulatory purposes indicates that Qwest was not required to file the agreements at issue in the Minnesota dockets (and those of the other states).

9/ *Id.*

Some agreements – such as typical interconnection agreements or amendments to interconnection agreements describing basic interconnection services, unbundled network elements, and rates – pose no such interpretive difficulties. The problem arises with respect to agreements covering issues one or more steps removed from the nuts and bolts of interconnection, *e.g.*, agreements settling prior disputes between an ILEC and CLEC, agreements establishing granular details of broad provisioning obligations contained in an interconnection agreement, agreements establishing details of dispute resolution procedures, and the like. These latter types of agreements by all accounts fall into a vast gray area that no tribunal has clarified or resolved to date.

1. The Governing Standard Has Never Been Defined And, Indeed, There Is No Consensus On What The Act Requires

AT&T does not, and cannot, cite any ruling by the FCC, a court, a state commission, or any other body defining the range of agreements or provisions that must be filed under section 252(a)(1) of the Act. There also is no uniform position from Qwest's opponents as to what the standard should be. Two examples make this point:

- A provision should be filed, according to Minnesota Department of Commerce expert, W. Clay Deanhardt, if "a provision created a concrete and specific legal obligation for Qwest to do something or refrain from doing something on a looking-forward basis to meet the requirements of §§ 251(b) and (c)." Mr. Deanhardt characterized his standard as "a permutation of part of the FCC's test for whether an [ILEC] like Qwest can obtain approval under 47 U.S.C. § 271 to provide interLATA long distance services." 10/ However, Mr. Deanhardt admitted that

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10/ Testimony of W. Clay Deanhardt on behalf of the Department of Commerce, *Minnesota "Unfiled Agreements" Docket*, April 22, 2002, at 9:9-10:1. This quote and all others from the Minnesota hearing are taken from the unofficial transcript; the official transcript has not yet been completed.

It should be noted that the Administrative Law Judge presiding over the Minnesota "unfiled agreements" hearing specifically ruled that he would disregard testimony by Mr. Deanhardt and any other witness on legal issues, including the governing standard. Qwest includes this discussion here only to demonstrate the inability of the parties critical of Qwest to articulate a uniform standard among themselves.

the FCC has not to date issued any definitive standard, and that his proposed standard was not expressed in any statute, rule or case. 11/

- After admitting that "[t]he Act does not define 'terms and conditions' or interconnection," AT&T proffered the following comprehensive, five-part standard to the Iowa Public Utilities Board:

> The standard for whether an agreement is subject to the filing requirements of sections 251 and 252 should be based on the following:
>
> 1. The word "agreement" must be interpreted broadly to cover comprehensive interconnection agreements as well as agreements which cover only specific segments, fragments, or parts of the overall interconnection arrangement between carriers.
>
> 2. If the agreement has been negotiated between the incumbent and another carrier, and it relates to "interconnection with the local exchange carrier's network," then the agreement should be subject to commission approval, and filed pursuant to section 252(h).
>
> 3. Guidance on the question of whether a particular agreement relates to interconnection should be obtained initially from other, previously filed agreements. If the subject matter of the agreement in question is similar to that of a previously filed agreement, then the new agreement should be subject to commission approval, and filed pursuant to section 252(h).
>
> 4. Further guidance on the question of whether a particular agreement relates to interconnection should be obtained by asking whether and to what extent the terms and conditions

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11/ *See* Transcript of Hearing, *Minnesota "Unfiled Agreements" Docket*, April 29, 2002, at 131:16-20 ("Q. And you'd agree that the FCC has never defined the term interconnection agreement directly; is that correct? A. Like I said in my testimony, I have not been able to find a definition from the FCC for that term."), and 132:17-25 ("Q. Now, has the test you've articulated been adopted by any state public utilities commission in its literal terms? A. Certainly I have not urged its adoption. I also have not reviewed all 50 states to determine if anyone has adopted a test that is basically it or something similar. Q. So you don't know? A. Yeah, I don't know.").

It is even more difficult to imagine, as AT&T's motion inherently posits, that Congress intended that the Act, which was designed fundamentally to deregulate the telecommunications industry, would require state commissions to review and approve every agreement between ILECs and CLECs. There simply is no way to read the Act itself and its legislative history in a manner consistent with the approach that the Minnesota Department of Commerce and AT&T advocate.

2. Section 252(a)(1) Of The Act Requires ILECs To File Agreements Relating To The Rates And Associated Service Descriptions For Interconnection, Services And Network Elements

In addressing this question, Qwest looks to the language of section 252(a)(1) itself and the underlying purposes of the Act. As Qwest argued before the FCC and the Minnesota Commission, the 90-day prior approval process applies only to the most significant aspects of a negotiated agreement, *i.e.*, the rates and associated service descriptions for interconnection, services and network elements. This approach takes into account the prerequisite explicitly articulated in section 252(a)(1): "a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." The standards articulated by AT&T and others in the Minnesota docket afford no weight or meaning to this express limitation on the scope of agreements that must be filed and approved.

In contrast to AT&T's approach, Qwest's reading of section 252(a)(1) properly balances the competing public interests in the Act, as articulated by Congress. Qwest's line preserves regulatory oversight (notwithstanding the associated costs in terms of delay) in connection with activities covering the most important interconnection matters, but permits – as Congress intended – normal, unregulated business dealings in all other aspects of the ILEC/CLEC business relationship. The Act reflects Congress's preference that ILEC-CLEC agreements be formed to the maximum extent possible through private negotiations between the parties, 14/ and in that

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14/ S. 652, Telecommunications Competition and Deregulation Act of 1995, Report of the Committee on Commerce, Science, and Transportation, S. Rep. No. 104-23, at 19 (March 30, 1995).

respect departs significantly from the tariffing framework of the past, in which regulators stood in the shoes of consumers (or interconnecting carriers) and established a standard set of terms and conditions. Indeed, FCC Commissioner Michael J. Copps expressed this underlying theme of the Act when he commented upon the recent approval of BellSouth's section 271 application: "Our expectation is that BellSouth's performance will continue to improve and that it will work cooperatively with other carriers through their business-to-business relationships to resolve any issues that develop."15/

The Act eschews a system in which regulators, in the first instance, play the most significant role in working through every aspect of the ILEC-CLEC relationship. Instead, the Act establishes a paradigm in which carriers are expected to negotiate matters of mutual interest among themselves. That is a paradigm to which Qwest has sought to adhere in its dealings with CLECs. And, as such, Qwest believes that the Act never contemplated that ILECs would file and seek approval of, subject to a 90-day regulatory review, the type of agreements at issue in the Minnesota docket.

3. AT&T's Discussion Of The "Unfiled Agreements" Allegations Leaves Out Important Facts And Circumstances

Although Qwest will not burden this Commission with a comprehensive discussion of the contested factual issues from the Minnesota "unfiled agreements" docket, Qwest cannot let AT&T's (mis)characterizations of Qwest's agreements and conduct remain unchallenged. AT&T claims that "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." AT&T Motion, at 3-4. But AT&T fails to mention any of the unrebutted evidence Qwest introduced at the hearing on the Minnesota Complaint, an omission all the more remarkable given that AT&T

15/ Statement of Commissioner Michael J. Copps, *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*, Federal Communications Commission, CC Docket No. 02-35 (May 15, 2002).

intervened and participated as a party in that proceeding. Qwest will, in turn, fill in the blanks with respect to each of AT&T's claims:

AT&T Claim 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." AT&T Motion, at 3.

AT&T Omission 1: Qwest demonstrated at the Minnesota hearing that the dedicated on-site provisioning team was set forth in a filed interconnection agreement, and that AT&T's interconnection manager did not request this term from Qwest even though it was publicly filed.

AT&T Claim 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." AT&T Motion, at 3.

AT&T Omission 2: Qwest's unrebutted testimony in Minnesota demonstrated that Qwest received what it considered to be significant value from these consulting services, and that AT&T does not purchase unbundled network elements in Minnesota.

AT&T Claim 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." AT&T Motion, at 3.

AT&T Omission 3: Qwest's unrebutted testimony at the hearing established that the credit, which was actually simply a pro rata adjustment to $13 per line per month, was an interim dispute resolution methodology pending an audit of switched access reporting that validated Qwest's reporting. This resolution only applied to the product known as "UNE-Star," which

required manual processing, versus mechanized processing for the "UNE-P" product, and was purchased by only Eschelon and McLeod.

AT&T Claim 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." AT&T Motion, at 3.

AT&T Omission 4: Qwest's unrebutted evidence established at the hearing that this credit involved intraLATA, interexchange switched access services that Qwest purchased from Eschelon, an issue not within sections 251 and 252.

AT&T Claim 5: "Qwest agreed to provide Covad with more favorable service interval terms than any other carrier, including AT&T." AT&T Motion, at 3.

AT&T Omission 5: Qwest's unrebutted testimony in Minnesota demonstrated that Qwest does not (and, indeed, cannot) provide a different level of service to any CLEC.

AT&T Claim 6: "Qwest offered the so-called 'small CLEC coalition' in Minnesota the ability to adopt the terms of any effective interconnection agreements that 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." AT&T Motion, at 3-4.

AT&T Omission 6: AT&T fails to mention Qwest's unrebutted testimony establishing that this term was not effective until March 17, 2002 and that the agreement was publicly submitted to the Minnesota Commission on March 4, 2002.

Qwest is not asking this Commission to resolve these claims in this docket. AT&T's omissions are worth detailing, however, to demonstrate that the facts are not as clear, nor as clearly unfavorable to Qwest, as AT&T suggests. In fact, as Qwest demonstrated in Minnesota,

it treats its wholesale customers fairly and equitably and in the manner contemplated by the Act. Moreover, Qwest believes that the tribunals addressing these issues ultimately will agree.

B. Contrary To AT&T's Claim, The November 15, 2000 Confidential Agreement Is Entirely Consistent With The Goals And Purposes Of Section 271

AT&T takes serious liberties with Qwest's November 15, 2000 Confidential Agreement with Eschelon Telecom, Inc., among other ways, by accusing Qwest of "silenc[ing] its opponents" with an agreement AT&T characterizes as a "gag order." AT&T Motion, at 6. But, viewed fairly, this agreement actually promotes the objectives of section 271. Indeed, as AT&T's own policy witness testified last week in the state of Washington, [16] there is nothing wrong or inconsistent with Qwest's burden under section 271 for Qwest to agree to satisfy customer concerns and, if it does so, for that customer to agree not to oppose Qwest's section 271 application.

The Confidential Agreement is an unremarkable document. It provides, quite simply, that Qwest and Eschelon will "(1) develop an implementation plan by which to mutually improve the companies' business relations and to develop a multi-state interconnection agreement; (2) arrange quarterly meetings between executives of each company to address unresolved and/or anticipated business issues; and (3) establish and follow escalation procedures designed to facilitate and expedite business-to-business dispute solutions."[17] Furthermore, "if an agreed upon Plan is in place by April 30, 2001, Eschelon agrees to not oppose Qwest's efforts regarding section 271 approval or to file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreements" (emphasis added). As such, Eschelon and Qwest agreed to deal in good faith with each other to create and execute a plan to

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16/ *See* Testimony of Diane F. Roth, *In the Matter of the Investigation into U S West Communication, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Wash. Utilities & Transp. Comm'n Docket No. UT-003022 (May 13, 2002) ("Roth Testimony").

17/ A copy of the Confidential Agreement is attached hereto as Exhibit 2.

address business issues between the companies. If it worked, the parties agreed that this plan also would satisfy any concerns Eschelon might have regarding Qwest's section 271 efforts. If it did not, Eschelon was free to say so, to the state commissions or anyone else. In the same way, Eschelon's agreement to not oppose Qwest's section 271 application was not linked to any payment, but was expressly contingent upon the parties' ability to agree upon and implement a plan that satisfied Eschelon.

There is, of course, nothing sinister or nefarious if Qwest enters into an agreement designed to improve its business relationship with one of its customers without any resort to the regulatory process. Indeed, AT&T's own witness in the Washington State 271 docket testified last week that an agreement of this nature is unobjectionable for section 271 purposes so long as the Act did not require Qwest to file the agreement at issue in the first place:

> Q. [Chairwoman Showalter] Well, okay, I will repeat the question. I understood your testimony to raise two objections. One is these agreements need to be filed, but the other is that these were secret agreements not to oppose each other in a regulatory proceeding. So are you saying that you have no objection to this kind of agreement unless it is also the kind of agreement that must be filed with the Commission?
>
> A. [Diane F. Roth, AT&T] I think in large part that's correct. The reality of business is that there are negotiations, there are settlements on issues, and a lot of times they settle billing disputes as well as regulatory proceeding. But I think what makes these secret interconnection agreements unique is the obligation under the federal law to negotiate them and also to file them publicly. And what I object to is then intertwining that obligation with an agreement not to file complaints or be involved in 271. So it's the intertwining of the two, if you will, that I object to.
>
> Q. So if these other agreements, not this one, but if these other agreements need not be filed with the Commission as an interconnection agreement, then you have no objection to them and feel they don't demonstrate anything one way or the other in the context of 271?

> A. I would agree with that, but I would also have to focus on the if in your statement. If those other agreements aren't interconnection agreements, then I don't have the same kind of an objection as I do if they are. And it's our company's position that they do fall under the federal law in terms of the obligation to negotiate for interconnection and the other elements that are part of the federal law. [18]

Changes to Qwest's processes that result from its responses to concerns Eschelon expressed directly to Qwest about its wholesale service delivery benefit all of Qwest's CLEC customers, just as they would if Eschelon raised its concerns in a regulatory setting. If anything, then, agreements that improve processes and procedures that benefit provisioning of wholesale services to all CLECs, and to develop a multi-state interconnection agreement, promote the interests underlying section 271. AT&T's suggestion to the contrary not only is incorrect, but contradicts the sworn testimony of its own official in another section 271 docket.

CONCLUSION

Qwest respectfully requests that the Commission deny AT&T's Motion. As set forth above, there is no reason to obscure the section 271 process with the "unfiled agreements" issues, particularly when the FCC will resolve the underlying legal issue definitively in the months to come. Any public interest implications that ever arose from these issues – and, again, Qwest continues to believe it acted properly – have been resolved going forward by Qwest's FCC petition and its commitment to file agreements pursuant to the broad standard articulated above. Accordingly, AT&T's Motion to Reopen Proceedings should be denied.

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[18] Roth Testimony, excerpt at 51:11–52:18 (emphasis added). A copy of this excerpt is attached hereto as Exhibit 3.

Dated this 23rd day of May, 2002.

RESPECTFULLY SUBMITTED,

QWEST CORPORATION

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Its Attorneys

EXHIBIT
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Phone 303 896-8000
Facsimile 303 294-8743

May 21, 2002

Mr. Jim Burg, Chairperson
Ms. Pam Nelson, Vice Chairperson
Mr. Robert Sahr, Commissioner

Dear Commissioners:

There has been a lot of publicity over the past few weeks related to certain agreements that Qwest has entered into with competitive local exchange carriers. I am writing to advise you of new policies that Qwest is implementing in this area.

As you may know, ILECs routinely enter into agreements of many kinds with CLECs. Some of them may take effect immediately as in the normal business world. Others must be filed with and pre-approved by state commissions. Qwest itself has filed over 3,200 agreements with CLECs since the passage of the Telecommunications Act, including both initial agreements and amendments. This large number reflects our efforts to work with individual CLECs to meet their specific business needs. However, questions have been raised regarding a relative handful of our arrangements with CLECs. Some parties allege that under Section 252(a) of the Telecommunications Act such agreements also should have first been filed and approved.

Qwest disputes these allegations and is defending the legal line it drew between those agreements that did, and did not, need to be filed. Qwest also has filed a petition with the FCC asking for guidance on where the filing line is drawn.

Meanwhile, however, Qwest is implementing two new policies that will eliminate debate regarding whether Qwest is complying fully with applicable law. First, Qwest will file all contracts, agreements or letters of understanding between Qwest Corporation and CLECs that create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis. We believe that commitment goes well beyond the requirements of Section 252(a). However, we will follow it until we receive a decision from the FCC on the appropriate line drawing in this area. Unless requested by the Commission, Qwest does not intend to file routine day-to-day paperwork, orders for specific services, or settlements of past disputes that do not otherwise meet the above definition.

Second, Qwest has reviewed and is enlarging its internal procedures for evaluating contractual arrangements with CLECs and making all necessary filings. Qwest is forming a committee of senior managers from the corporate organizations involved in wholesale agreements: wholesale business development, wholesale service delivery, network, legal affairs attorneys, policy and law attorneys, and public policy. This committee will review agreements involving in-region wholesale activities to ensure that the standard described above is applied prior to the issuance of an FCC ruling, and that any later FCC decision also is implemented fully and completely.

EXHIBIT
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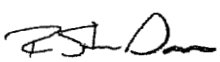
Qwest is implementing these policies to eliminate any question about Qwest' compliance with the requirements of Section 252(a) in this state while Qwest's petition to the FCC is pending. We hope to continue to work with CLECs to meet their individual needs, as we have in the past. This is a practice that we are proud of, and we do not want to see it obscured by controversy over the meaning of Section 252(a), or decisions on line drawing in a small number of situations.

To the extent there are questions or concerns associated with the procedure outlined in this letter, please contact me.

Sincerely,



R. Steven Davis

CC: Rolayne Ailts-Wiest, General Counsel

EXHIBIT
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CONTINUATION

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EXHIBIT
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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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-003022 (Excerpt) Pages 1 to 60
In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	Docket No. UT-003040 (Excerpt) Pages 1 to 60

A hearing in the above matters was held on May 13, 2002, at 10:00 a.m., at 1300 South Evergreen Park Drive Southwest, Room 206, Olympia, Washington, before Administrative Law Judge ANN RENDAHL and CHAIRWOMAN MARILYN SHOWALTER and COMMISSIONER PATRICK J. OSHIE and COMMISSIONER RICHARD HEMSTAD.

Joan E. Kinn, CCR, RPR
Court Reporter

EXHIBIT 3

AFTERNOON SESSION

(1:20 p.m)

JUDGE RENDAHL: We'll be back on the record for our afternoon session on public interest, and our first witness is Ms. Roth from AT&T.

So you were, Ms. Roth, you were previously sworn in in our July and August proceeding, but I think for purposes of today we will have you be sworn in again.

MS. ROTH: Okay.

JUDGE RENDAHL: So would you please state your full name and address for the court reporter.

MS. ROTH: My name is Diane, middle initial F as in Frank, Roth, R-O-T-H. My business address is AT&T, 1875 Lawrence Street, 15th Floor, Denver, Colorado 80202.

JUDGE RENDAHL: Thank you.

Could you raise your right hand, please.

Whereupon,

DIANE F. ROTH,

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE RENDAHL: Thank you.

Let's go ahead, and you have, I understand, a brief overview of your testimony, and then you will be subject to cross-examination by Qwest. Please go ahead.

MS. ROTH: Thank you very much.

Chairwoman Showalter, Commissioners, Judge Rendahl, thank you for having this additional hearing today and for taking more input on the public interest phase. I was here last January, or last January, excuse me, last July for the initial hearing, and we're here today to continue this hearing on whether or not it will be in the public interest or would be in the public interest for Qwest to enter the interLATA long distance market.

I would like to begin my testimony by saying to this Commission that I believe you have broad discretion to identify and weigh all of the factors that you consider relevant to a public interest finding. I believe you're free to consider past and present behavior of Qwest, you're free to consider state regulatory action and cases here in Washington and also at the federal level, as well as you're not just confined to looking at the SGAT, that is the statement of generally available terms, or the performance assurance plan or the OSS test, for example, when as you make your record and make your findings on public

interest.

The theme of my supplemental affidavit and my surrebuttal affidavit really picks up right where my direct affidavit left off, and that is that I believe it shows that Qwest and the pre-merger company, U S West, has previously violated Section 271 and continues to do so. I also show in my affidavits that Qwest has a past and present pattern of anticompetitive behavior and an attitude towards local competition that in many ways can be characterized by sort of a catch me if you can attitude, and this causes competitors to spend valuable time and money doing things like filing complaints and seeking dispute resolution. So the question that I believe this Commission is faced with is how to determine what is relevant to public interest, and I would submit that the track record, the pattern, and the current landscape should all be considered by this Commission when it makes its final public interest finding.

I will discuss very specific examples of anticompetitive behavior and attitude that I believe constitute unusual circumstances that this Commission should consider in a public interest finding. In other words, I recommend that you consider more than just the theory of an open market and instead look to the

reality, what has happened and what is currently happening in the market. My supplemental affidavit contains information and incidences that had -- that occurred since the July 2001 hearing.

The first thing I would like to talk about is the regionwide practice that shows Qwest's unlawful and anticompetitive behavior concerning secret unfiled interconnection agreements. This was uncovered after about a six month investigation in Minnesota when the Minnesota Department of Commerce gathered enough information in order to file a complaint. And they asked the PUC there to investigate these secret unfiled interconnection agreements. And this filing just occurred in February, and the hearing was held in early May of this year. These agreements, and there are 11 of them, I believe, were entered into between Qwest and just certain competitive local exchange carriers or CLECs. These agreements contain preferential treatment for things like access to network elements and service quality, also called direct measures of quality or DMOQs. Another provision in at least one of these agreements was that in return for the preferential treatment, there was an agreement on the part of the CLEC that it would not file complaints or I should say and it would not participate in the 271 proceeding.

Now I have heard Qwest say that these agreements really aren't interconnection agreements, that they're merely implementation terms or that maybe they're just settlement agreements. And we recently -- and we learned this morning that Qwest has a new policy of filing all agreements, and my reaction to that was it really just seems like a promise of not to do it again, and I think that the outstanding issue is it doesn't cure the past discrimination, the fact of filing all new agreements or all agreements heretofore. So my point is that I believe that Qwest should not be tacitly allowed to break a federal law, nor should they be allowed to discriminate, nor should Qwest be allowed to use a secret unfiled interconnection agreement to silence opposition to the 271 case. My recommendation in this instance, I believe the Commission should conduct -- should put the 271 public interest phase of the case on hold or on pause and conduct a formal investigation of these agreements.

Moving to a second area, the second area in my supplemental affidavit, I discuss a case that occurred in Minnesota, and it involves unbundled network element platform or UNE-P testing. And the reason I believe it's relevant to bring this up in the context of this Washington case is that Qwest's systems and many

times interconnection agreements are regionwide or they cover multiple states, and I believe this incident that occurred in Minnesota truly does show some anticompetitive -- an anticompetitive mindset as well as behavior. What occurred is that AT&T wanted to do a test of unbundled network element platform. They wanted to do a UNE-P test of significant volume, and there was interconnection agreement language in place to provide for cooperative testing between Qwest and AT&T. But what happened, Qwest refused to do the test. So AT&T had to file a compliant with the Minnesota Commission in order to get the interconnection agreement language enforced and to get the test done. And that case documents that a Qwest executive issued a directive not to conduct the test, instructed Qwest personnel not to conduct the test. In fact, there are even notes that are part of the case evidence where an employee, or it was actually a contract employee of Qwest, had included the statement in their notes that Qwest is not going to allow AT&T into the residential market.

Well, the ALJ has ruled in Minnesota, and I would like to just give one quote from that ruling, and this is also contained in my pre-filed affidavit, and the quote is:

Qwest failed to act in good faith and

committed knowing, intentional, and material violations of its obligation to act in good faith under the interconnection agreement and under Section 251(c)(1) of the Act.

And that ends the quote. Further, the ALJ found that Qwest refused to conduct the test despite the interconnection agreement language and that Qwest engaged in deceptive negotiations with AT&T for over eight months and then openly refused to conduct the test unless AT&T was able to demonstrate to Qwest's satisfaction that it had business plans to enter the market. This ruling in Minnesota characterized the case as being a continuing pattern of conduct and that Qwest deliberately fabricated evidence. And I bring this to your attention to support the position in my testimony that Qwest is showing, has shown and is showing a pattern of anticompetitive behavior and that this falls again into the category of unusual circumstances.

Now a topic that I covered in my surrebuttal affidavit is directly applicable to cooperative testing between CLECs and Qwest, and that is concerning the SGAT language. I would like to correct an impression that I think is a misimpression that is left in Mr. Teitzel's testimony, and there is a statement in his testimony

that says:

> Qwest has always been willing to adopt SGAT language clarifying when CLECs can obtain individual tests, individualized testing.
>
> The mischaracterization I would like to correct is that the language that Qwest proposed AT&T did not think was fair, and as I explained in my surrebuttal affidavit, the language that Qwest proposed would actually force a competitor to disclose market entry plans just in order to obtain the testing. We think this is wrong, because we don't think that Qwest ought to be in control of a competitor's entry plan, and they shouldn't be in a position of deciding whether or not they believe that entry plan is legitimate. Qwest's role is to provide wholesale services, not to be the gatekeeper of competitive entry through refusing testing. So the other thing that I mention in my testimony, and I actually attach the current SGAT, is that the parties, including Qwest, WorldCom, and AT&T, agreed to eliminate language on cooperative testing because they couldn't agree on the language. But at the same time, I would also point out that additional negotiations on language concerning cooperative testing is still going on in Arizona.

Moving to the third issue, I would like to draw your attention to the complaints filed by Touch America with the FCC, and there are actually two. One of them is about Qwest not complying with the terms of the divestiture agreement, that is the divestiture of the in-region long distance service that it sold to Touch America. And the Touch America complaint says that basically Qwest has reneged on the deal and didn't really divest that long distance business. Now that complaint to me is a bit of a surprise, because the very company that you would expect an extreme amount of cooperation with in terms of Qwest working with Touch America would be Touch America, since it did sell that in-region business, but the complaint is what it is.

And so moving to the second complaint that Touch America has filed, it is more directly applicable to this 271 case, because the second Touch America complaint is about whether or not the IRU capacity is really interLATA service and in violation of 271. In other words, Qwest is selling this capacity, and while Qwest maintains that this capacity is a network facility, Touch America and my company believe that that capacity really constitutes interLATA service, therefore, it's a violation of Section 271. I believe this Commission should be concerned about any violation

of Section 271 and should want to look into these complaints and perhaps even -- and follow these complaints very closely and perhaps even become involved with these complaints at the federal level. My recommendation on this issue is that the Commission not make any final finding on public interest until these complaint proceedings have been resolved.

A fourth area of anticompetitive attitude that I will just briefly mention is in my supplemental affidavit, and it concerns an E-Mail that was sent out when Covad, Covad is a dataLEC and a competitor, a retail competitor of Qwest, when they claimed bankruptcy. And when they filed bankruptcy, there was an E-Mail, and this E-Mail from a Qwest employee said the following:

> Third batter down, end of the national DLEC game.
>
> The E-Mail went on to say:
>
> Covad management was delusional, the result of drinking too much Cool-Aid.

Now that's something that Qwest has dismissed as being, well, this employee wasn't really a high level management employee, and Qwest has apologized for this. And while that all may be true, I think it shows that there is -- there is really a pervasive anticompetitive

attitude from either top to bottom or bottom to top within the corporation, and I think it's very difficult to separate that attitude from actual behavior and to actually track that behavior in all aspects. A strict code of conduct or better yet even a structural separation would go a long way towards solving those inherent conflicts that Qwest has as both a retail provider of service and also a wholesale provider of service.

Fifth and quickly, and I won't spend much time on this one, there is a complaint pending before this Commission filed by AT&T concerning local freezes, and the anticompetitive aspects that trouble me the most about that issue is the fact that customers could not switch their local service from Qwest to AT&T Broadband. So some of them didn't follow through. They didn't persevere, they gave up. Some may have followed through and even chosen to get new numbers, but we really can't -- we really won't be able to totally track how many people just gave up. And also customers didn't know that they had a freeze. So I recognize that this Commission will -- has a -- has this pending and will follow that issue through, but my recommendation in this case again would be a pause in the public interest proceeding until that complaint, since it does deal with

residential local competition, is resolved.

Finally, this Commission has two conflicting or two studies that are at odds in front of it. One is the Qwest study, I will call it the -- it's the Hausman study, and it alleges that consumers would benefit by Qwest being in the long distance business. But Lee Selwyn on behalf of AT&T analyzed that study and found -- he found it to be flawed because he couldn't reproduce the research methods or the techniques, and he found that the methods and the techniques were deficient. His conclusion was that there are really two reasons that long distance rates have declined. First, the market is competitive. And secondly, access charge reductions, notably Interstate as well as intrastate reductions that occurred in the two states that are being focused on in the Hausman study, namely Texas and California, that the intrastate access reductions had been ignored in the study. So in short, it's our position that the Selwyn study discredits the Hausman study and shows that consumers will not benefit from one more long distance competitor in the market. So I think it goes without saying that this case is about local competition, not long distance competition. It's about insuring that local markets are open and will remain so.

So to kind of wrap this up, I would like to

just briefly go through the three factors that Qwest has proffered as being what you should -- what the FCC and what this Commission should consider in terms of a public interest finding. The first is the determination of whether granting the application is consistent with promoting competition. The second is assurances that the market will remain open. The third is consideration of any unusual circumstances.

And turning to the first, whether or not the 271 application is consistent with promoting competition, well, I think this Commission will have to -- has the hard job, to be real honest, of looking at the record and making that determination. But I would also just like to tell you briefly about what happened in Texas. And after SBC entered the interLATA market in the state of Texas, they entered that market with a long distance price of 9 cents a minute and then also a long distance price that was bundled with local services of 6 cents a minute. Those were the two entry prices.

About six months later, SBC was able to raise its prices. The 9 cents a minute long distance rate went up to 10 cents a minute, and the 6 cents a minute rate went up to 8 cents a minute. And while that may not sound like a lot, a penny or two a minute, when you think about it and do the math in terms of billions of

minutes, that is a lot of money. And so this kind of rate increase really highlights the fact that SBC felt like it was in control of the market and could set the price. So in other words, I think this Commission should be concerned about remonopolization of the long distance market and the market power that Qwest may hold if it is granted authority to enter the interLATA long distance market.

Moving to the second item of looking at assurances as to whether or not the market will remain open, performance assurance plans I think are the -- that's the mechanism that Qwest is relying on in its application. And I understand from talking with my colleagues that what is happening here in Washington in the performance assurance plan is very good work and that the plan is a very good plan, but I have worked in a number of states, and I have often heard Qwest say that a performance assurance plan is purely voluntary, so I expect you will have to be vigilant about that plan remaining in effect and being something that can be truly enforced, because it's very important that a performance assurance plan not become just a cost of doing business.

So I believe the performance assurance plan is essential, but it's imperfect as a mechanism, because

the measures or the dollar amounts, the penalties, the fines, whatever you want to call them, they only materialize after inferior quality service occurs. So like all enforcement mechanisms, the performance assurance plan occurs after the fact or after the damage occurs. And it's far better to truly have the market open than it is to rely on punitive kind of measures.

And another mechanism is, of course, the complaint mechanism, but we all know that complaints don't, excuse me, we all know that complaints aren't resolved overnight. In fact, I was looking at a federal complaint, and it was the complaint that occurred pre-merger, and it was on the 1-800-call-USWEST issue, and it's astounding that it took the FCC three and a half years from when that complaint was actually filed to when it actually ruled on that complaint. So again, complaints, like other mechanisms, are -- are not -- are very imperfect when it comes to assurances that the market will stay open.

And finally, most of my testimony is really spent on anticompetitive attitude and behavior, which I would submit to you constitutes unusual circumstances. I believe the track record is there on past 271 violations, it continues, as well as the anticompetitive behavior that is the subject of complaints and other

regulatory proceedings.

So I ask that the Commission consider these items, and I thank you for being here today, and I will be happy to answer your questions.

JUDGE RENDAHL: Thank you, I think we will begin with cross-examination from Qwest, and then if we have any questions, we will address them after that.

MS. ROTH: Okay.

MR. MUNN: Thank you.

C R O S S - E X A M I N A T I O N

BY MR. MUNN:

Q. Good afternoon, Ms. Roth.

A. Good afternoon.

Q. Ms. Roth, would you agree that the Touch America IRU issues that you have just mentioned in your oral summary and the ones that you have discussed in your written testimony here, that they're currently pending before the FCC in separate complaint proceedings?

A. Yes, I agree they're pending at the FCC.

Q. With respect to the Minnesota UNE-P testing complaint that you have mentioned, is it fair to say that AT&T has not requested the UNE-P testing that was the subject of the Minnesota complaint here in

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Washington?

A. That's my understanding.

Q. And would you agree that none of the allegations that AT&T made against Qwest in the Minnesota complaint occurred here in Washington?

A. They may not have occurred in Washington, but I still think it's a useful example, and I also think there's no guarantee that this situation couldn't occur in Washington.

Q. Would you agree that this same UNE-P testing issue, that this is the same issue that AT&T addressed previously in Washington in the checklist 2, 5, and 6 workshops in March and April of 2001?

A. I don't know, I wasn't part of those workshops.

Q. Okay. And so, for example, the April 25th workshop of last year in this state, in Washington, beginning around page 3563 of the transcript, it's your testimony that you're not aware one way or the other whether AT&T brought Michael Hydock into this state to testify specifically regarding this issue?

A. I will have to look at those dates subject to check, but you have refreshed my memory that the issue of cooperative testing started with -- in the UNE -- in the UNE workshop with a proposal made by Michael Hydock.

But then as I explained in my surrebuttal affidavit --

JUDGE RENDAHL: There's somebody joining us on the bridge line.

Who has joined us, please?

Please go ahead.

A. Okay. But as I explained in my surrebuttal affidavit, the issue of and the language regarding cooperative testing all of a sudden transferred over into the general terms and conditions workshop, and that's where -- that's the section now, the Section 12, where the language has been struck by agreement between the parties, including AT&T, WorldCom, and Qwest. Because they couldn't agree on the language, they agreed to take the language out.

BY MR. MUNN:

Q. So subject to check, would you also agree that Mr. Hydock in the March 13th, 2001, workshop for checklist item 2 addressed this issue, and the parties addressed this issue starting around lines or page 3052, subject to check?

A. Subject to check, but with also the qualification that the topic has been continued to Section 12 and into the general terms and conditions section of the SGAT.

Q. And that's an interesting point. So not only

has this been addressed, based on your own testimony, this issue has been addressed in checklist items 2, 5, and 6 workshops, it's also been addressed in the general terms and conditions workshops, correct?

A. It was addressed in the general terms and conditions workshop, and the language was struck through in that workshop for lack of agreement, which to me does not give finality to the issue. It just leaves the issue open, because the SGAT then is devoid of instruction and language about cooperative testing. And if the Arizona negotiations are successful on this topic, then I would be hopeful that that language would then be brought to Washington to see if it would be suitable to include in Washington rather than having the situation that is here today, which is that the SGAT doesn't address the cooperative testing.

Q. And, Ms. Roth, it was my understanding that what we were doing today was to address new issues that hadn't already been hashed out before the Washington Commission, so would you agree this is the same Minnesota UNE-P testing issue raised by AT&T in its June 7th, 2001, public interest testimony that I think it was of Mary Jane Rasher that you adopted here?

A. I will agree in part, but not in full. The part I will agree about, that it was included in the

pre-filed testimony filed by Ms. Rasher that I adopted. But what is different is that the case is in a different point in time. At that point, and correct my recollection here, at that point, the Commission in Minnesota had merely ordered that the test occur. Now the test has occurred since the time that we had the hearing here last July, and there is also now an ALJ's ruling in that case. And again, we didn't have that ruling. And I will also mention that the Commission has upheld that, the ruling of the ALJ, orally, although the written order hasn't been issued yet, so that's the difference.

Q. Is it fair to say, Ms. Roth, that relating to this UNE-P testing issue that reasonable minds can differ on the conclusion to be drawn from that record?

A. I don't think reasonable minds can differ on the quote that I read from the ALJ's order. I think that's fairly straightforward.

Q. Okay. Ms. Roth, you would agree with me -- or strike that.

Isn't it fair to say that the staff of the Minnesota commission disagreed with the Minnesota ALJ's order and submitted written recommendations finding that both Qwest and AT&T acted in good faith, that no penalty should be awarded, and that the complaint should be

dismissed?

A. I will accept that subject to check, but I will also add that the commission itself did uphold the ALJ's ruling. They haven't issued their order, but in an open meeting or in an oral setting, they did uphold the order.

Q. And are you representing -- well, strike that.

So I just need to know one way or the other, do you -- when you say that you don't believe that reasonable minds could differ, clearly the staff recommendation that they submitted to the commission was directly at odds with the ALJ's order on the issue of bad faith or good faith for Qwest and whether penalties should be issued, correct?

A. While that may be correct, I'm also pointing out that the Commission has stuck with the ALJ's ruling.

Q. And so, Ms. Roth, is it your testimony that the Minnesota staff of the Minnesota commission are unreasonable?

A. That's not my testimony.

Q. Okay, so I will ask you the question again. Is it fair to say that reasonable minds can differ as to the conclusions to be drawn from this Minnesota UNE-P testing issue?

A. I think it's fair to say that the staff had a different opinion from the ALJ, but that the Commission agreed with the ALJ. I think that's a fair characterization.

Q. And is it also fair to say that Mr. Antonuk disagreed with the findings of the Minnesota ALJ decision when he addressed this issue in his checklist item 2, 5, and 6 reports and public interest reports?

A. I'm sorry, could you repeat the question?

Q. Sure. That Mr. Antonuk, the multistate facilitator -- let me set a few foundational questions.

AT&T and Mr. Hydock also presented the same Minnesota UNE-P testing that you're bringing to this Commission in the multistate workshops, correct?

A. Yes.

Q. And Mr. Antonuk's orders addressed that testing, correct?

A. That's correct.

Q. And is it fair to say --

MR. WITT: Counsel, excuse me, were they orders or were they simply reports?

MR. MUNN: Reports.

MR. WITT: Thank you.

THE WITNESS: Thanks, that a good clarification.

BY MR. MUNN:

Q. And so the language -- based on that presentation, did Mr. Antonuk order SGAT language to be put into the SGAT or that he recommended in his recommendation that Qwest put into its SGAT to address this UNE-P testing issue?

A. The facilitator, Mr. Antonuk, did recommend some language in his report.

Q. And in that report, didn't he find that AT&T's testing proposal was inflexible and potentially duplicative and that the OSS test would comprehensibly address AT&T's stated concerns with Qwest's OSS?

A. Are you -- if you're reading from his report, I will accept that subject to check.

JUDGE RENDAHL: Can you identify a date and title for that report, Mr. Munn?

MR. MUNN: Yes, this would be the multistate facilitator's report on checklist items 2, 4, 5, and 6, and it was dated August 20th, 2001. I was particularly referencing pages 29 and 30 of that report.

JUDGE RENDAHL: Thank you.

THE WITNESS: What was the date on that again?

MR. MUNN: August 20th, 2001.

BY MR. MUNN:

Q. And subject to check, isn't it also true that Mr. Antonuk addressed this Minnesota UNE-P testing issue again in the public interest report that he issued in October of 2001?

A. I don't think it's fair to say that he addressed the Minnesota UNE-P case directly. I think you can say he addressed the topic, but I don't think you can fairly say or accurately say that he addressed the complaint and the specific instance of -- that then constituted the Minnesota -- the Minnesota complaint and the conduct of the test itself there.

Q. It is true that AT&T brought in Michael Hydock, a specific witness, in the multistate proceeding to address those issues before that tribunal, correct?

A. To address that language but to not address the specific Minnesota complaint.

Q. So it's your testimony Mr. Hydock did not testify about the Minnesota complaint, and his testimony was just related to SGAT language?

A. My testimony is that what Mr. Antonuk issued was specific to the multistate proceeding, not specific to the Minnesota complaint itself, because he's not in a position to adjudicate that complaint.

Q. Ms. Roth, who was AT&T's witness in front of the Minnesota commission on the Minnesota UNE-P testing

complaint?
A. I think it was Mr. Hydock.
Q. Thank you. Is it fair to say that Mr. Antonuk ordered SGAT language regarding the cooperative testing that you have just been discussing?
A. Yes.
Q. And would you agree that Qwest included that language that Mr. Antonuk ordered in the multistate proceeding, that Qwest included that language in its April 2002 SGAT filing here in Washington?
A. I don't have that date and that specific -- that -- I can't correlate that date exactly, because I don't have that documentation with me, but I will take that as subject to check.
Q. So subject to check, the answer would be yes?
A. It's my understanding --
Q. Let me rephrase it.
A. It's my understanding --
JUDGE RENDAHL: Let's not talk over one another. Please wait for each other to finish before you continue.
A. It's my understanding that that may be where the language began in the Washington SGAT, but that's not where it ended, because the parties all agreed that -- they all agreed to strike the language, and I believe

that's primarily because there were additional discussions about the language that went on in the workshops here in Washington after the multistate, so the issue continued to be discussed.

Q. Now you have characterized this language as language that Qwest proposed, but a more accurate depiction of that language would be the language that Mr. Antonuk ordered Qwest to put in the SGAT or recommended that Qwest put in the SGAT in the multistate proceeding; is that correct?

MR. WITT: Counsel, which is it, is it a recommendation or an order? I just ask.

MR. MUNN: I think we have already done that drill, it's a recommendation.

JUDGE RENDAHL: I would ask that your questions be directed through me as opposed to one another.

MR. WITT: Thank you very much, I will.

JUDGE RENDAHL: Thank you.

MR. WITT: In that case, I guess I would put it to the Administrative Law Judge that I would object to the characterization of these as being orders.

JUDGE RENDAHL: I think the documents which have been provided to the Commission will speak for themselves, and we will take counsel's comments on them

with and compare them with what we see in front of us.

MR. WITT: Thank you, Your Honor.

MR. MUNN: Just for expediency, if I refer to something as an order from Mr. Antonuk, everything that he has issued are reports, they're not orders.

JUDGE RENDAHL: Thank you.

MR. MUNN: It's just an inartful use of the phrase order.

JUDGE RENDAHL: Thank you.

BY MR. MUNN:

Q. And -- go ahead.

A. Mr. Antonuk, while his job was to make recommendations to the states as a result of the multistate workshop, in the end, the state has the discretion whether or not to accept that recommendation, and that's -- I guess that's why we have had this discussion about whether it's an order or a recommendation. So I guess my point is that these recommendations were not binding on the state, and the states have the discretion whether or not to accept them in full or in part.

Q. That's an interesting point, but my question was, isn't it fair to characterize the language as what Mr. Antonuk recommended that Qwest put in its SGAT, not something that Qwest itself proposed?

A. Sure, that may be true, but I would also venture to guess that there are probably other aspects of the SGAT that were recommended that Qwest didn't want to put in. I mean this was a -- the workshop process was a collaborative process, and again, nothing that Mr. Antonuk recommended was final or binding on the state.

CHAIRWOMAN SHOWALTER: Ms. Roth, can I suggest that you will -- your counsel has an opportunity to ask questions on redirect, and it would help me anyway if you simply answer the question. If it needs a complete answer, that's all right, but you don't need to give a repartee to every question, because it slows down the progression of the cross-examination, and you do have an opportunity later if there are important points to make.

THE WITNESS: Okay.

CHAIRWOMAN SHOWALTER: We're mostly interested in what your answer to his question is.

BY MR. MUNN:

Q. Would you agree that, subject to check, that on page 9 of the multistate facilitator's public interest report, which is dated October 2001, that Mr. Antonuk said that this very SGAT language that he recommended "should preclude such a dispute in the

future"?

A. I don't have that. I don't recall that specific part of the report. Could you say that -- could you either read it or show it to me so I could be more sure of what you're saying?

Q. Sure. My question is that subject to check, would you agree that in addressing this SGAT language that Mr. Antonuk in that report said that it "should preclude such a dispute in the future"?

A. I will accept that subject to check.

Q. And AT&T requested that Qwest remove that very SGAT language from the Washington SGAT, correct?

A. Not precisely, I can't agree with that in full. It's my understanding that the parties agreed that it would be fine to delete that language, so that you can't just say -- what I object to is the characterization that AT&T just wanted it deleted from the SGAT. I think that's -- I don't think that's a fair characterization.

Q. And maybe that's an interesting point, that AT&T, WorldCom, and other carriers wanted the Antonuk language, which he said is designed to prevent this dispute from happening in the future, that generally all companies that I'm aware of wanted Qwest to remove that language from the SGAT?

A. I think that's true, but I can't stop there, and I apologize that I -- that I have to elaborate about that, because it was language that was further negotiated, was the topic of further discussions because, and the heart of the matter is that, and let me get that language in front of me, AT&T did have a disagreement about being forced to show market entry plans. We felt that was an important enough point to continue the discussion.

Q. Ms. Roth, I would like to change gears for a minute, and you brought up a white paper that someone else, Dr. Selwyn, had written, and you have made reference to that in your oral summary this morning, correct?

A. Correct.

Q. And I think that I heard you say this, but I actually have the wording from his paper here, is it fair to say that Dr. Selwyn acknowledges in that document you're referring to that:

> The single most important source of the enormous drop in long distance prices is the succession of FCC required decreases in access charges.

A. That sounds familiar. Can I just take a brief look?

Q. Sure, I will tell you that that is at page 3.
A. (Reading.)
That's correct.
Q. Is it also fair to say that AT&T's approximately 23 million basic residential customers just recently had their daytime calling rate increased by 17% to 35 cents a minute?
A. AT&T did increase the basic schedule, but many calling plans were not changed. And I also think that AT&T acted very responsibly in that regard by notifying customers.
Q. And I think this is sort of evident from your testimony, I almost hesitate to ask this, but so I don't want to sound like a smart alec when I ask it, I just -- it is fair to say that the local service freeze issue that you have addressed is -- there is a separate docket in front of this Commission to address AT&T's criticisms or issues as it relates to the LSF tariff, correct?
A. There is a separate docket, but it seems to be a topic that to me is directly related to local competition, which is why I brought it up in my testimony, and also the public interest.
MR. MUNN: Your Honor, that concludes my cross-examination. I think Mr. Lundy has a few questions on the discreet issue of the unfiled

agreements. He won't address any topics that I have.
JUDGE RENDAHL: Okay.
MR. LUNDY: Thank you, Your Honor.
BY MR. LUNDY:
Q. Good afternoon. I would like to turn to your supplemental affidavit dated April 19th, Ms. Roth.
JUDGE RENDAHL: That's been admitted as Exhibit 1649.
Q. Do you have it in front of you?
A. I do.
Q. Could you please turn to page 3 where you start talking about what you call secret interconnection agreements?
A. Yes, I'm there.
Q. And for that testimony that starts on page 3 and continues through page 4, you relied upon the allegations contained in the Minnesota Department of Commerce's complaint.
JUDGE RENDAHL: I'm sorry, are we talking about the surrebuttal affidavit or the initial, the responsive affidavit?
MR. LUNDY: I'm talking about the April 19th supplemental affidavit.
JUDGE RENDAHL: I'm sorry, that's 1640. And we're looking at page 3?

MR. LUNDY: Yes, please.
JUDGE RENDAHL: Okay.
BY MR. LUNDY:
Q. Ms. Roth, are we talking about the same document?
A. I'm sorry, would you repeat your question?
Q. Sure. The information that's contained on page 3 and 4 of your testimony there, you're relying upon the allegations that are made in the complaint filed by the Minnesota Department of Commerce; am I correct?
A. Yes, that's a publicly filed complaint.
Q. All right. And you don't in your testimony present any standard under which an ILEC or Qwest must or must not file an agreement as an interconnection agreement under Section 252(a) in your testimony, do you?
A. No, and that wasn't the purpose of my testimony.
Q. Okay.
A. The purpose of my testimony was to --
JUDGE RENDAHL: Ms. Roth, if you could merely answer the question and give your attorney an opportunity to bring issues up on redirect, that would be helpful.

THE WITNESS: Okay.
CHAIRWOMAN SHOWALTER: I'm going to add that the purpose of your testimony is not to challenge the underlying question. The purpose of your testimony is to answer the question, and the question is assumed legitimate unless objected to. So you just need to answer what that question is.
THE WITNESS: Okay, I'm sorry.
BY MR. LUNDY:
Q. And, Ms. Roth, am I correct then that you also did not analyze the agreements that are at issue in Minnesota according to a standard; am I correct?
A. That's correct.
Q. All right. You mentioned in your oral summary an agreement with a CLEC, I don't know if you mentioned that I believe your word was silenced with regard to the 271 process. Do you recall that part --
A. Yes.
Q. -- of your oral summary?
A. Yes.
Q. You did not refer to that agreement in your written testimony, did you?
A. I did not.
Q. Okay. That agreement that you referred to, do you know which CLEC is the other party to that

agreement?
A. Yes, I do.
Q. And that's a letter agreement that contains a provision that -- well, I'm sorry, could you please identify which CLEC that is?
A. The CLEC would be Eschelon.
Q. All right. And the letter agreement that contains the agreement that Eschelon will not participate in 271 proceedings, have you read that letter agreement?
A. I have not.
Q. Okay. So is it fair to say then that you do not know what the quid pro quo was for their decision or agreement not to participate in 271; am I correct?
MR. WITT: At this point, I would like to object. My understanding is that the document is in the record before this Commission at this point, and it does speak for itself.
JUDGE RENDAHL: In terms of what the contents of the agreement are, I think it does speak for itself. But I think the question, maybe he should -- if you could ask your question again, Mr. Lundy.
MR. LUNDY: Sure.
BY MR. LUNDY:
Q. My question was, are you aware of what the

quid pro quo is for Eschelon's agreement not to participate in 271?

A. Well, it's my understanding that there were a number of items that were part of the agreement and that they included some service quality measurements as well as some payment terms, and that the package, if you will, the package of terms also contained that quid pro quo that Eschelon would not file a complaint nor participate in 271.

Q. But you're making those judgments without reading the document; am I correct?

A. That's right, I read a transcript of another proceeding.

MR. LUNDY: All right. It's my understanding that this document is in the record. May I approach to provide a copy of that document to the witness?

JUDGE RENDAHL: Yes, if you could identify the document to the Bench.

MR. LUNDY: Certainly, it is --

JUDGE RENDAHL: Let's be off the record for a moment.

(Discussion off the record.)

JUDGE RENDAHL: Mr. Lundy, you may approach the witness, and we're talking about Exhibit 3 in the first set of responses in Exhibit 1635-C.

BY MR. LUNDY:

Q. Ms. Roth, I have placed before you what in Minnesota was marked as Exhibit 3, and it's a part of a compilation of exhibits in this case marked as 1635-C. I take it from your previous responses you have not seen that agreement before; am I correct?

A. That's correct.

Q. All right. I would like to turn your attention to the last paragraph on that page, on the first page, it starts with during development of the plan.

A. Okay.

Q. Do you see that language?

A. Mm-hm.

Q. Will you please read that sentence into the record.

A. (Reading.)

Q. Aloud please.

A. I'm sorry.

During development of the plan and thereafter, if an agreed upon plan is in place by April 30th, 2001, Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory

body concerning issues arising out of the parties' interconnection agreements.

Q. Thank you. Now could you now move up to the earlier paragraph where I will represent we talk about what the capital P Plan is, could you please read into the record starting with, by no later than December 31.

A. (Reading.)

By no later than December 31, 2000, the parties agree to meet together via telephone, live conference, or otherwise and as necessary thereafter to develop an implementation plan. The purpose of the implementation plan (Plan) will be to establish processes and procedures to mutually improve the company's business relations and to develop a multistate interconnection agreement.

Q. Thank you. Will you agree with me then that the quid pro quo for Eschelon not participating in 271 procedures was (1) to meet to establish processes and procedures to mutually improve the companies' business relations, and (2) to develop a multistate interconnection agreement; will you agree with me on that?

A. Just based on the reading of those two

sentences, but I haven't been able to read the entire agreement.

Q. But based upon that language, would you agree with me on that?

A. Just based on those two sentences, I will agree.

Q. All right. And will you agree with me that meeting together to establish processes and procedures to mutually improve the companies' business relations, that's a pro 271 interest; would you agree with me on that?

A. On its face, I would agree with that, and I also think it should have been extended to every competitor.

Q. Would you agree with me that meeting together to develop multistate interconnection agreements, that that is also an interest that furthers the 271 concept?

A. I think it's an obligation under the federal law to have an interconnection agreement.

Q. But you would agree with me that that's not contrary to 271 interests, to meet together to develop a multistate interconnection agreement, would you?

A. No, it's not contrary to any aspect of that federal law.

Q. All right. Does AT&T participate in every

generic type docket such as a 271 docket or cost dockets; does AT&T participate in all of those?

A. AT&T participates in as many dockets as it can, but it can't -- it doesn't participate in everything.

Q. There are dockets, generic type dockets, that AT&T does not participate in, correct?

A. I think that's correct.

Q. For example, AT&T did not participate in the recent Iowa cost docket; am I correct?

A. I don't know that.

Q. Okay. Assume --

A. I will accept that subject to check.

Q. Thank you, I appreciate that.

Assuming with me that AT&T did not participate in the recent Iowa cost docket, is it your understanding that that taints somehow the orders that were issued and the rates that are finally established in that docket?

A. No.

MR. LUNDY: Thank you, Ms. Roth, I have nothing further.

JUDGE RENDAHL: Okay, thank you.

Are there any questions -- sorry, go ahead, Mr. Cromwell, if you have any cross-examination.

MR. CROMWELL: Thank you, Your Honor. Actually, I just have two points of fact for the record that I would like to make with Ms. Roth, if I may.

JUDGE RENDAHL: Please go ahead.

MR. CROMWELL: Thank you.

C R O S S - E X A M I N A T I O N

BY MR. CROMWELL:

Q. Good afternoon, Ms. Roth. My name is Robert Cromwell with the public counsel section of the Attorney General's Office. You referred a while back to the Covad E-Mail from a Qwest employee to other Qwest employees; is that correct?

A. I did.

Q. And it had a reference there to drinking the Cool-Aid?

A. Too much Cool-Aid.

Q. And do you know what that reference or that somewhat macabre humorous reference is referring to?

A. I think it was in reference to an unfortunate event in Guyana where people drank Cool-Aid following what I would characterize as a cult leader and died.

Q. Thank you. And are you aware of the March 1, 2002, agreement between Qwest and Eschelon?

A. I have to say no.

MR. CROMWELL: Your Honor, for the record, on May 2nd of this year, Qwest produced in response to Public Counsel Data Request 52 its First Supplemental Response. Included therein was a non-confidentially designated agreement between Qwest and Eschelon dated March 1, 2002. It has no Minnesota exhibit number. Because it's not confidential, I'm just going to hold it up.

JUDGE RENDAHL: Which date, what is the date of the agreement?

MR. CROMWELL: The top line of the agreement says March 1, 2002. It's titled settlement agreement. May I approach the witness with this document, Your Honor?

JUDGE RENDAHL: Yes, you may.

Let's be off the record for a moment.

(Discussion off the record.)

JUDGE RENDAHL: Mr. Cromwell, you're going to share with Ms. Roth a settlement agreement between Qwest and Eschelon; is that correct?

MR. CROMWELL: Yes, Your Honor. I have approached the witness, and I have handed her the settlement agreement, which is dated March 1st, 2002.

BY MR. CROMWELL:

Q. I would ask Ms. Roth to turn to the second

page of the agreement, and there's a section numbered 3, actions to be taken, a subjection (e) under 3, the bottom sort of section of that page 2 of the six pages of the agreement, which I believe is titled in parens terminated agreements. Ms. Roth, could you identify for me the first two agreements which this agreement between Qwest and Eschelon terminated?

A. I'm sorry, you lost me on that one.

Q. Oh, okay. Section 3.

A. Okay, I see 3.

Q. Section b.

A. Mm-hm.

Q. And could you just read the introductory sentence for B and then the first two agreements which were terminated. Well, actually, I guess let's go through -- well --

JUDGE RENDAHL: Why don't we just have her read --

Q. Read the first sentence, please.

A. Okay, I'm reading under item number 3, actions to be taken:

The parties shall undertake the following actions.

And then moving down to paragraph B.

For convenience and various reasons, the

parties hereby terminate the following agreements (terminated agreements) as of the effective date.

Number 1 --

Q. I'm sorry, maybe to shorten this, can you tell me, do the first five entries there deal with letters and agreements, confidential and apparently non, between Qwest and Eschelon dated November 15 of 2000?

A. They appear to, and specifically contain the implementation plan letter that Mr. Lundy showed me earlier dated November 15th, 2000.

MR. CROMWELL: Thank you. Nothing further for this witness.

JUDGE RENDAHL: Okay, thank you.

Are there any questions for this witness?

CHAIRWOMAN SHOWALTER: I have questions, but can we take a five minute break.

(Recess taken.)

JUDGE RENDAHL: Let's be back on the record after a brief break, and I think we're going to take questions from the Bench, and then we will have redirect for you, Mr. Witt.

MR. WITT: Thank you.

JUDGE RENDAHL: Are there any questions from the Bench?

CHAIRWOMAN SHOWALTER: Yes.

EXAMINATION

BY CHAIRWOMAN SHOWALTER:

Q. Ms. Roth, this may be in another part of your testimony but I was focused on the supplemental, what is your background, how long have you been working for AT&T?

A. I have been with AT&T for over 20 years. I began pre-divestiture with AT&T Longlines. I worked for a short time for Mountain Bell and then ended up at AT&T Communications in the external affairs department where I have been for the past, oh, 12 years or so, and we're now called government affairs.

Q. And what is your educational background and training?

A. I have an undergraduate degree. I have a Bachelor of Arts in Liberal Arts. I majored in economics as well as music. And I also did some course work toward an MBA at the University of Southern California, but I did not complete it.

Q. And what is the scope of your duties?

A. At the present time, I have multiple duties. I am a policy witness for 271 proceedings, and I have appeared in several states. I'm also the regulatory

advocate for the state of Colorado as well as the legislative lobbyist for the state of Colorado for AT&T.

Q. All right. Can you turn to Exhibit 1635, and specifically it's the hot pink section if your color scheme is the same as mine.

A. Excuse me, but I don't have that.

CHAIRWOMAN SHOWALTER: Can counsel provide it?

MR. CROMWELL: Actually, Your Honor, pursuant to Qwest's request, I believe those are the highly confidential documents that have not been provided to parties other than the Commission and Public Counsel, who originally requested them.

MR. WITT: I was embarrassed to say that I don't have them, but now I'm not embarrassed to say that I don't have them.

JUDGE RENDAHL: Let's be off the record for a moment.

(Discussion off the record.)

JUDGE RENDAHL: Let's be back on the record after a brief break. We determined that the first agreement that was provided in the first supplemental set of responses to Bench Request Number 46 and provided on May 2nd is, in fact, an agreement that has already been made public here in Washington, and so that is no

longer highly confidential or confidential and can be discussed on the record, so there are questions from the Bench to Ms. Roth on this document.

BY CHAIRWOMAN SHOWALTER:

Q. Yeah, I would like to inquire more about your statement earlier. I believe you made the general statement that you objected to Qwest entering into agreements where it gives allegedly preferential treatment to a CLEC in exchange for some kind of agreement by the CLEC not to oppose I think you said 271; is that right?

A. Yes.

Q. Is that the basic objection you have to these agreements? In addition, I understand you think they are terms and conditions that should be filed with the appropriate commission.

A. That's right. I agree with your characterization, and I also agree with the addition that the agreements that we object to are really part of the -- part of the interconnection requirements under 251 whatever, I think it's (c)(1) or something like that. Maybe my attorney can correct me on that.

Q. Well, then looking at the part of Exhibit 1635 that has a page number at the bottom beginning Q110066, and it's labeled at the top, agreement between

AT&T, U S West, and Qwest; do you have that in front of you?

A. I do.

Q. I'm wondering if you could turn to the second page. It's item number 3 of the agreement.

A. Yes.

Q. Picking up on the second line there, it says: AT&T agrees to cease and withdraw its opposition to the U S West and Qwest merger and the related divestiture of Qwest's business activity that would be prohibited by the Telecom Act and not to support intentionally any conditions being applied to the merger or denial modifications or other adverse action with respect to the divestiture. Do you see that sentence?

A. I do.

Q. Then turning to the next page, item number 9, do you see the sentence that says, the parties agree that the specific terms of this agreement are confidential?

A. I do.

Q. And then on paragraph 10, do you see that: The parties agree that if either party

materially breaches any part of this agreement, the breaching party shall pay to the other liquidated damages in the amount of $500,000 per breach.

A. Yes.

Q. I am having a hard time understanding your point of view. This agreement appears to be exactly the kind of agreement you say you're objecting to, that is an agreement between Qwest and a CLEC, in this case your own company, whereupon the parties agreed to refrain from challenging each other in regulatory matters on penalty of half a million dollars penalty payment. Do you agree that from the paragraphs that I have read that that's essentially what this agreement is about?

A. Yes, I do, and I certainly understand your thought in that regard. And when I sit here and think about it just for a couple of minutes, the difference that I see is that the agreements that I am objecting to involve interconnection, a duty under the federal act, whereas this agreement that we're looking at on the hot pink, well, this agreement about the Qwest/U S West merger and AT&T's agreement not to oppose that merger is not part of the interconnection and interconnection obligations under the federal act. But I certainly do understand your initial reaction, but that's the

difference that I see is that there's a federal interconnection obligation that is separate and apart and makes the agreements that I am objecting to different.

Q. So if an agreement need not be filed because it's a term and condition, then you have no objection to these kinds of quid pro quos that one element of which is agreeing not to oppose each other in regulatory matters?

A. Okay, I want to make sure I understand.

Q. Well, okay, I will repeat the question. I understood your testimony to raise two objections. One is these agreements need to be filed, but the other is that these were secret agreements not to oppose each other in a regulatory proceeding. So are you saying that you have no objection to this kind of agreement unless it is also the kind of agreement that must be filed with the Commission?

A. I think in large part that's correct. The reality of business is that there are negotiations, there are settlements on issues, and a lot of times they settle billing disputes as well as regulatory proceeding. But I think what makes these secret interconnection agreements unique is the obligation under the federal law to negotiate them and also to file

them publicly. And what I object to is then intertwining that obligation with an agreement not to file complaints or be involved in 271. So it's the intertwining of the two, if you will, that I object to.

Q. So if these other agreements, not this one, but if these other agreements need not be filed with the Commission as an interconnection agreement, then you have no objection to them and feel they don't demonstrate anything one way or the other in the context of 271?

A. I would agree with that, but I would also have to focus on the if in your statement. If those other agreements aren't interconnection agreements, then I don't have the same kind of an objection as I do if they are. And it's our company's position that they do fall under the federal law in terms of the obligation to negotiate for interconnection and the other elements that are part of the federal law.

Q. In general, what distinguishes as a factual matter those other agreements that you say need to be filed because they are interconnection agreements from this one, what are the sorts of things that cause an agreement to fall over into the category of agreements that need to be filed?

A. Well, I think in short whether or not it's

required for -- if it's required under the federal law as part of the Local Competition Act that envisions the interconnection agreement in either the negotiation or the arbitration of that agreement as forming the basis for local competition occurring on a going forward basis. What I would characterize as a business agreement, which is what I view the Qwest/U S West merger agreement that AT&T made with it, there are business agreements that involve again billing disputes is the first one that comes to mind because I have seen some of those between AT&T and Qwest, and I think that there is a difference between the basic business agreement, if you will, and the obligation for an interconnection agreement under the federal act, and I think that those are two very distinct kinds of agreements. And that is where my position comes into play is that the agreement that's obligated under federal law to facilitate local competition is a very separate -- is a very -- is very special if you will, a special, distinct, and unique kind of agreement separate and apart from the business agreement.

Q. Your testimony, Exhibit 1640, page 2, says that your affidavit contains new information, and your the last sentence on page 2 says:

These latest incidents have all occurred

after the previous hearing last summer.

And I wanted to ask you a little bit about the timing, because it appeared to me that several of these, of the underlying incidents, occurred before last summer. Some facts may or may not have come to light after last summer, but it's not clear to me reading the testimony whether you intend that sentence to mean that you're only focusing on incidents that occurred after last summer.

A. Okay, the purpose --

Q. In the real world.

A. The purpose of that sentence was to focus on information that became known publicly after the July 2001 hearings occurred here in Washington.

Q. All right. Then with respect to the agreements that you cite or that are in our record, what ones actually deal with incidents that occurred prior to last summer as opposed to coming to light after last summer?

A. Unfortunately, I can't answer your question, because I'm not -- I don't have all of those agreements, I believe there's 11 of them, and I apologize for not being able to answer your question, but we only became aware of the existence of the agreements after the department of Minnesota, the department of commerce in

Minnesota filed their complaint in February, so some of the secret agreements may predate, well, they all do predate the filing of the actual complaint.

Q. The filing of what complaint?

A. The department of commerce's complaint in Minnesota, which was filed February of 2002.

Q. All right. I thought another point you made was that there are quid pro quos about not opposing 271 application; am I right on that?

A. Yes, that was part of the letter agreement, what is called the letter agreement dated November 15th, 2000, between Eschelon and Qwest.

Q. And can you point me to that document?

A. I don't know where it is in your order of documents, but it is dated November 15th, 2000, and it's a letter written to Richard Smith.

JUDGE RENDAHL: Does it also have an Exhibit 3 at the top?

THE WITNESS: I'm sorry, it has an Exhibit 3 in upper right-hand corner. Thank you.

CHAIRWOMAN SHOWALTER: That is the one we were just looking at, I think.

JUDGE RENDAHL: Yes.

BY CHAIRWOMAN SHOWALTER:

Q. Because it appeared to me that most of them,

I can't say I have read every word of every agreement, but it appeared to me that most of them if they mentioned some kind of quid pro quo at all it was about the merger or not 271, that many of these were entered into before or around the time of the merger.

A. I will accept that, and the one that we're looking -- that I'm looking at here though, which is your Exhibit 3, is very specific to 271.

Q. Well, just then before I leave that topic, is it your view that only if it's an agreement that ought to have been filed as an interconnection agreement coupled with a quid pro quo that it then demonstrates evidence that Qwest should not receive 271 approval?

A. If I may, it's -- the objection is that any interconnection, first of all, is that any interconnection agreement should be filed, because there should be nondiscriminatory treatment and the ability to pick and choose, so that is -- that's the base line for me. And then secondly, some of those agreements have also implicated, as in the case of the one that I'm looking at that's dated November 15th, have also implicated not appearing in 271. And so the fact that -- and so what's essential for me is first of all the fact that there's an interconnection agreement that wasn't filed. That in and of itself, putting the 271

agreement not to participate in 271 aside for the moment, the fact that an interconnection agreement is executed and not filed, that's the base line of what I think is improper, unlawful behavior, because there's some discrimination going on. Another CLEC might have wanted to pick and choose an aspect of that interconnection agreement that they weren't able to.

Q. All right, but then you are saying the fact that an interconnection agreement was executed, but isn't the fact a question of fact and, in fact, a contested question of fact?

A. Yes, it appears that it is.

Q. And do you propose that we just accept what the Minnesota commission found because it's the Minnesota commission?

A. No, I do not, I propose that you conduct your own investigation and that you have that authority and I would hope that curiosity to know about secret interconnection agreements in Washington. So I wouldn't propose that you just merely accept the department of commerce's complaint and whatever the Minnesota commission rules. I certainly think that this Commission can conduct its own investigation.

Q. But other than bringing us information about what's going on in the Minnesota commission, AT&T itself

did not bring these facts or contested facts before us, did it?

A. With all due respect, I don't think we can. I don't think we have that information. We don't know. AT&T is not in a position to know where Qwest has entered into a secret interconnection agreement or how many there may be or where they may be. So what I wanted to do was bring you an awareness of the issue using Minnesota as an example, and in the end, I believe it's your decision whether or not this is a topic that you are going to -- that it's a topic that you care about. I wanted to bring it to you, to discuss it, but in the end, I think it's something that this Commission can or can not decide they want to do.

Q. Okay. Well, turning to the UNE-P testing in Minnesota that's part of your testimony on pages 4 and 5, what are we supposed to do with this information? You have brought a complaint I gather in Minnesota that resulted in a ruling by them on April 30th, 2001. If the underlying facts are relevant to us in this state, why hasn't AT&T brought it directly in front of us as a contemporaneous event?

A. That's a fair question. We have not requested that same testing here in Washington, so in terms of this actual UNE-P testing case in Minnesota,

did not bring these facts or collected facts before us, did it?

A. With all due respect, I don't think we can. I don't think we have that information. We don't know. AT&T is not in a position to know where every box entered into a secret interconnection agreement or how many there may be or where they may be. So what I wanted to do was bring you an awareness of the issue using Minnesota as an example, and in the end, I believe it's your decision whether or not this be a topic that you are going to -- that it's a topic that you care about. I wanted to bring it to you, to discuss it, but in the end, I think it's something that this Commission can or can not decide they want to do.

Q. Okay. Well, turning to the 271 testing in Minnesota that's part of your testimony on page 6 and 7, what are we supposed to do with this information? You have brought a complaint in Minnesota that resulted in a ruling by them on April 25th, 2001. If the underlying facts are relevant to us in this case, why hasn't AT&T brought in directly in front of us as a contemporaneous event?

A. That's a fair question. We have not requested that some testing here in Washington, as in terms of this actual 271-F testing can or should

there isn't anything that I am asking in the context of that particular case. This was an issue that I wanted to bring to your attention that supported my testimony that there is a multistate pattern of anticompetitive behavior and attitude within the Qwest organization, and that was the purpose of the testimony.

CHAIRWOMAN SHOWALTER: Okay, I have no further questions.

COMMISSIONER HEMSTAD: I don't have any questions.

COMMISSIONER OSHIE: No questions.

JUDGE RENDAHL: Okay.

Any redirect for this witness?

MR. WITT: No, thank you, Your Honor. I would ask that the witness be excused at this time.

JUDGE RENDAHL: Okay, I think since we are done with questioning, you are excused, Ms. Roth, and let's take a ten minute recess while we bring Mr. Teitzel on and be off the record.

MR. WITT: If I may, just to make certain, it's not necessary for me to move the admission of any of the witness's exhibits or her testimony, I understand that they have already been admitted into evidence, am I correct there?

JUDGE RENDAHL: Correct, all of the exhibits

there isn't anything that I am asking in the context of that particular case. This was an issue that I wished to bring to your attention that supported my testimony that there is a multistate pattern of anticompetitive behavior and attitude within the Qwest organization, and that was the purpose of the testimony.

CHAIRWOMAN SHOWALTER: Okay, I have no further questions.

COMMISSIONER HEMSTAD: I don't have any questions.

COMMISSIONER OSHIE: No questions.

JUDGE RENDAHL: Okay.

Any redirect for this witness?

MR. WITT: No, thank you, Your Honor. I would ask that the witness be excused at this time.

JUDGE RENDAHL: Okay, I think since we are done with questioning, you are excused, Ms. Roth, and let's take a ten minute recess while we bring Mr. Teitzel on and be off the record.

MR. WITT: If I may, just to make certain, it's not necessary for me to move the admission of any of the witness's exhibits or her testimony, I understand that they have already been admitted into evidence; am I correct there?

JUDGE RENDAHL: Correct, all of the exhibits

that we marked in the pre-hearing conference and subsequently have been admitted this morning.

MR. WITT: Thank you very much.

JUDGE RENDAHL: Okay. We'll be off the record.

(Recess taken.)

AT&T
[illegible]

May 29, 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 AT&T's Reply to Qwest Corporation's Opposition to AT&T's Motion to Reopen Proceedings. Please call me if there are any questions.

Sincerely,

Janet Browne

JB/gmd

Enclosure

cc: Service List

CONTINUATION

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May 2002, the original and 10 copies of AT&T's Reply to Qwest Corporation's Opposition to 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 29, 2002 addressed to:

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Janet Bowman

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 REPLY TO QWEST CORPORATION's OPPOSITION TO AT&T's MOTION TO REOPEN PROCEEDINGS

AT&T Communications of the Midwest, Inc. ("AT&T") hereby submits this Reply to Qwest Corporation's Opposition to AT&T's Motion to Reopen Proceedings.

A. AT&T and the Local Market in South Dakota.

Qwest Corporation ("Qwest") begins its Opposition with the false, gratuitous, and unsubstantiated assertion that "AT&T has no serious interest in providing local services in this state through unbundled network elements and other entry vehicles that are the subject of the agreements about which it complains." Qwest Opposition at page 3. As AT&T has repeatedly noted, AT&T will enter the local market wherever and whenever it is feasible to do so.[1] That would obviously include South Dakota, provided market entry here is truly feasible. Among the factors that determine feasibility are the availability and pricing of facilities such as UNEs and interconnection, the elimination of anticompetitive conduct by the ILEC, as well as the presence or absence of other barriers to entry.

While Qwest may assert that AT&T's motion is "deeply ironic," the true irony is in the fact that Qwest's own anticompetitive actions—including its establishment of UNE

[1] AT&T has chosen not to share its business plans with Qwest or the other ILEC's. Thus, Qwest's bald assertion that AT&T is not interested in participating in the local market in South Dakota shows prescience at best, and begs the question of why such a statement would be made, and how such a statement might be relevant. The answer is that, in addition to being untrue, Qwest's statement lacks both foundation and relevance.

prices—have until now precluded AT&T from participating in the South Dakota local market. Qwest would now attempt to further exclude AT&T from that market by asserting that AT&T should not be heard here because it has already been excluded. The result is a Catch-22.

In reality, of course, AT&T's motion itself reveals both a high level of interest in entering the South Dakota local market and a desire on AT&T's part to direct the Commission's attention to the fact that the local market in South Dakota is far from open.

Furthermore, the irrefutable fact is that, given an appropriate competitive environment, with an affordable price level for the UNE platform, no other company is more well-positioned to enter the local market throughout the United States—including South Dakota—than AT&T is.

If this Commission is interested in the anticompetitive practices which CLECs have had to endure since passage of the federal Telecommunications Act, then an investigation into those practices is necessary and appropriate. AT&T would urge this Commission to conduct such an investigation, in a thorough and diligent manner, contrary to Qwest's desires here.

B. The Standard for Filing Agreements under 47 U.S.C. 252.

Qwest next argues, alternatively, that the standard for filing agreements under section 252 of the federal Act is unclear, that Qwest has filed a petition for declaratory ruling at the FCC to determine that standard, that these secret agreements are not a proper subject for examination in these section 271 proceedings, and that for a variety of reasons Qwest was never obligated to file these agreements.

AT&T will address each of these separately.

First of all, AT&T believes that the standard for filing, approval, and "pick and choose" of interconnection agreements under section 252 is quite clear. AT&T is fully prepared to submit briefs on that standard at the appropriate time and place, *i.e.*, in the docket created by the initiation of an investigation by the Commission. To argue for the establishment of a standard at this time appears premature. What is important at this stage is that Qwest has an obligation to file certain agreements, there is evidence that it has failed and refused to do so, and competitors have been harmed by that failure and refusal.

Even assuming *arguendo* that Qwest is correct and the standard is unclear, any asserted lack of clarity should not preclude this Commission from investigating whether and to what extent these secret agreements exist, and whether and to what extent these secret agreements may have harmed the development of competition in this state. In fact, this Commission has an obligation under state law to pursue this matter:

> The commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation. The commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies. The commission may exercise powers necessary to properly supervise and control such companies.

SDCL § 49-31-3.

Ultimately, the question presented here is whether or not Qwest has unlawfully discriminated against some CLECs and in favor of others. In other words, in the face of these secret agreements, has Qwest given the same terms and conditions to all CLECs as

a nondiscriminatory basis? Under these circumstances, while the standard for filing these agreements is certainly important, it is secondary to the question of whether discrimination has occurred in violation of federal and state law.

Likewise, the existence of Qwest's petition to the FCC for declaratory ruling on the standard for filing documents should not deter this Commission from proceeding with its own investigation. It has not deterred the Minnesota or New Mexico Commissions. In fact, the New Mexico Public Regulation Commission's Hearing Examiner on May 23, 2002, flatly rejected Qwest's motion to stay its proceedings. Qwest's New Mexico motion was based on the same grounds presented here.[2]

Qwest begins its argument by asserting that the governing standard for filing agreements under section 252 has "never been defined" in the federal Act or by the FCC. Qwest then asserts that there is no "consensus" on what specific agreements the Act requires to be filed.

Qwest's fretfulness over the definition of a governing standard for filing agreements is entirely unnecessary. Over the six or more years in which the Act has been in effect, there have been innumerable agreements negotiated between carriers, and approved by various state commissions including the South Dakota PSC. Most of these agreements were thoroughly and painstakingly negotiated, and in many cases arbitration was necessary in order for them to be concluded and implemented. One result of this process is that the subject matter of interconnection agreements is at the same time fairly broad yet well-defined. A brief glance at the table of contents for the AT&T/Qwest agreement reveals that the subject matter of an interconnection agreement can range from

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[2] Order from the bench, May 23, 2002, *In the Matter of an Investigation into Unified Agreements between Qwest Corporation and Competitive Local Exchange Carriers*, Utility Case No. 3716

the obvious topics of payment, pricing, branding, resale, and the definition of unbundled network elements, to the more indirect (but no less important) subjects of dispute resolution, maintenance, and network security.[3]

From AT&T's perspective, it appears reasonable to insist that any agreement between carriers which addresses the same issues, or deals with the same subject matter as an interconnection agreement should be approved, filed, and made available in the same manner as any other interconnection agreement. This follows directly from the express requirements of sections 252(e), 252(h), and 252(i). Guidance with respect to what subject matter constitutes "interconnection" can be derived from industry practice over the past six years, by examining the contents of previous interconnection agreements approved and filed by this Commission.

In addition, AT&T believes that any agreement which would give one carrier an advantage over another in the area of interconnection must be approved, filed, and made available pursuant to sections 252(e), (h), and (i). This follows directly from the nondiscrimination provisions of the Act, *viz.*, sections 251(c)(2)(C) and (D). So, for example, as noted previously an agreement giving a carrier special privileges or processes for escalating a problem or a trouble ticket should be approved and filed.

Furthermore, Qwest's assertion that a national standard is necessary for determining which agreements should be filed and which need not, is contrary to the letter and spirit of the federal Act. Under 47 U.S.C. §252(e)(3), "[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement...." In other words, the federal Act not only

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[3] *See* Table of Contents to the *Agreement for Local Wireline Network Interconnection and Service Resale*, between AT&T and Qwest, attached here as Exhibit A.

establishes that individual states have the right to review and approve interconnection agreements, but they also have the right to impose and enforce other requirements, consistent with state law, in the review of an agreement. Thus, the plain language of the Act is expansive when it refers to state jurisdiction over interconnection agreements. The federal Act does not anticipate establishing a national standard here, and in fact expressly rejects the need for such a standard.

In short, this Commission has full statutory authority to establish a state-specific standard for filing interconnection agreements. The fact that the Commission has not yet done so should not deter the Commission from proceeding with an investigation and determination on this issue. Furthermore, as noted above, the Commission has a statutory obligation under state law to address and eliminate discriminatory practices by the incumbent monopoly carrier.

Beyond this, however, Qwest's assertion that an examination of these unfiled agreements is not germane to Qwest's section 271 application is entirely wrong. AT&T is asserting here that the failure and refusal by Qwest to file these agreements constitutes a direct violation of Qwest's duty to open the local market to competition, and to do so in a nondiscriminatory manner. The FCC has clearly held that anticompetitive behavior by an ILEC is extremely relevant to that ILEC's application for 271 authority. 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.[4]

As the FCC has noted, the very success of the federal Act depends on BOC compliance; however, that compliance appears to be absent here.

Finally in this regard, Qwest's assertion that it was not obligated to file these agreements presents a question of fact which can only be adequately addressed by a thorough and diligent investigation. It is not appropriate for this Commission to accept an argument that an investigation is unnecessary, based on Qwest's unsubstantiated statement to that effect.

C. Qwest's strained interpretation of section 252(a)(1).

Qwest further attempts to argue that section 252(a)(1) limits the applicability of the filing and approval requirements of section 252. Qwest asserts that the fact that section 252(a)(1) requires inclusion of a detailed schedule of charges for interconnection and each service or network element means that any agreement which does not contain such a detailed schedule is not subject to the filing and approval requirements.[5] Such a strained interpretation would eviscerate the nondiscrimination requirements of the remainder of section 252, and lead to a situation in which an ILEC could discriminate against individual CLECs with impunity, on the terms and conditions of interconnection. Such a result would be clearly contrary to the letter and spirit of the Act.

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[4] *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.

[5] Qwest Opposition, at p. 12.

Interconnection agreements contain much more than prices. Indeed these agreements typically go on for hundreds of pages, and the bulk of these agreements relates not to pricing but to terms and conditions, each of which have been the subject of painstaking negotiations, review, and argument. Allowing only a narrow reading of section 252 will result in a myriad of discriminatory amendments to these agreements, and will license preferential treatment of some CLECs by Qwest, with respect to the terms and conditions of interconnection.

The language of section 252(a)(1) must be read in context, and not in a vacuum as Qwest would prefer. Where interconnection agreements can be arrived at through voluntary negotiations, then certainly the Act prefers that approach. But the Act still imposes the filing and approval requirements on voluntary agreements, just as it does arbitrated agreements.[6] Section 252(e) requires that "any" interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the state commission. Furthermore, the grounds for rejection of an interconnection agreement are clear: such an agreement must be rejected, *inter alia*, if the agreement *or any portion thereof* discriminates against a telecommunications carrier not a party to the agreement. The nondiscrimination requirements of section 252(e) are an integral part of the approval requirements of that same section, as well as the filing requirement of section 252(h). In turn, these nondiscrimination requirements are implemented and enforced by way of the "pick and choose" requirement found in section 252(i) of the Act.

[6] It should be noted that Qwest has forced AT&T to arbitrate each and every one of the interconnection agreements it has with AT&T. In this context, the expectations of Commissioner Copps cited by Qwest may be applicable to BellSouth, and its successful 271 applications in Georgia and Louisiana, but they are not applicable to Qwest, whose cooperation with AT&T and other CLECs has been sadly lacking.

Each of these nondiscrimination protections is as applicable to terms and conditions as it is to price.

The language of the Act, when read in its entirety and unencumbered by Qwest's selective myopia, calls for a broad interpretation of what agreements are subject to state commission approval, filing, and "pick and choose." Not only should "any" interconnection agreement be filed with the state commission, but the commission may reject it if even *a portion* of the agreement is found to be discriminatory. Additionally, when asked about the applicability of the filing, approval, and nondiscrimination requirements of section 252, the FCC clearly chose to use an expansive interpretation of which agreements should be subject to those requirements.[7]

Qwest's strained interpretation of section 252(a)(1) should be summarily rejected.

D. The need for further investigation.

Qwest next argues that the Commission should not proceed with an investigation because "AT&T's discussion of the 'unfiled agreements' allegations leaves out important facts and circumstances." However, this makes little or no sense. AT&T's Motion was not intended to constitute the judge, jury, and executioner on this matter. However, AT&T believes it has presented this Commission with enough evidence to warrant further investigation. In fact, Qwest's assertion that AT&T's discussion is incomplete merely shows that further investigation is necessary and appropriate.

[7] *See for example Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, paras. 165-7 (1996) ("Local Competition Order").

As to the so-called "omissions" which Qwest alleges have occurred here, AT&T would offer the following analysis:

1. Irrespective of whether a dedicated on-site provisioning team was offered by Qwest under a filed agreement, Qwest was actually providing such a team to a CLEC under the terms and conditions of an unfiled agreement. Indeed, Qwest insisted on maintaining that agreement as confidential, rather than open.

2. Payment for "consulting services" under the Eschelon agreement was linked not to the provision of consulting services, but to a discount applicable to the purchase of telecommunications services in general. In other words, in exchange for "consulting" services, Eschelon received a discount on the telecommunications services it purchased from Qwest. There was additional consideration contained in the agreement as well. Moreover, AT&T is informed, and believes, that Eschelon's "consulting services" were never actually provided to, or accepted by, Qwest.

3. Whether or not the $13.00 per line "adjustment" granted to Eschelon and McLeod was "an interim dispute resolution methodology pending an audit of switch access reporting" is irrelevant. Other CLECs were similarly situated to Eschelon and McLeod, and they did not receive the same benefits from this "interim dispute resolution methodology."

4. Similarly, the $2.00 per-line per-month credit represents a benefit conferred on one CLEC and not on others. The question in this case, as stated previously, is whether Qwest has engaged in discriminatory treatment of some CLECs. Qwest here does not deny that such discriminatory treatment occurred.

5. In Minnesota and elsewhere, Qwest has asserted that the Covad agreement is really no agreement. However, by its terms the Covad agreement is extremely detailed and rigorous with respect to direct measurements of quality, including order and installation intervals, which Qwest promised to Covad. In return, Covad agreed to forego its legal right to object to the Qwest/USWest merger. Thus, on its face the Covad agreement appears to be a) fully enforceable, and b) extremely detailed and rigorous in its performance expectations for Qwest. Essentially, Qwest's argument here amounts to an assertion that Qwest's own breach of the Covad agreement (or its inability to perform) makes the agreement evaporate for purposes of section 252. Such is not the case however.

6. And finally in this regard, Qwest asserts that the "small CLEC" agreement was filed before the Minnesota Commission. However, the fact remains that AT&T and other carriers have had continuing difficulty obtaining agreement from Qwest with regard to the adoption of terms and conditions under the "pick and choose" provisions of the federal Act. Qwest's supposed publication of this agreement does not alter the fact that it has treated, and continues to treat CLECs differently

and desperately when it comes to allowing a CLEC to "pick and choose" provisions from other agreements.

AT&T strongly disagrees with assertions that Qwest "treats its wholesale customers fairly and equitably and in the manner contemplated by the Act." Such statements are directly contrary to AT&T's lengthy and considerable experience with Qwest. Two examples are instructive here. First, in Minnesota the ALJ in AT&T's complaint case issued specific findings of bad faith on Qwest's part in its dealings with AT&T over testing issues of interest and concern to AT&T. See Exhibit B, attached here. And secondly, in Utah, Qwest has continually refused to engage AT&T in negotiations relating to its QPAP, despite a specific Commission order there to the contrary. See Exhibit C, attached here.

E. Qwest's promises to address and resolve these problems.

In its Opposition, Qwest represents to this Commission that it "has committed voluntarily to file and seek approval of all contracts, agreements, and letters of understanding with CLECs that create obligations to meet the requirements of sections 251(b) or (c)."[9]

From the outset, AT&T would note that this is merely a commitment to do what is required under the Act—something Qwest should have been doing all along. But in addition, the safeguards proposed by Qwest here are illusory. The creation of an internal committee, irrespective of the seniority or depth of experience of its members, does not provide the kind of oversight which this Commission should condone. Instead, the Commission should pursue an investigation into this matter in order to arrive at its own methods and procedures for preventing discrimination by Qwest against the CLECs.

In short, the creation of this internal committee does not obviate the need for further investigation into the discriminatory business practices of Qwest. The promises by Qwest to alter and improve its internal structure do not change the underlying need for oversight by this Commission.

F. Unfiled agreements and Qwest's application for section 271 authority.

Qwest next argues that the resolution of the unfiled agreements controversy is not a precondition to a grant of section 271 approval. However, this is incorrect. As noted previously, in section B *supra*, the FCC has expressly stated that anticompetitive behavior or discrimination by an ILEC is relevant to the FCC's examination of any 271 application.

Qwest attempts to characterize the unfiled agreements controversy as merely an "interpretive dispute[ ] about the precise content of an incumbent LEC's obligations to its competitors."[9] This is a mischaracterization, however, because Qwest's failure to file these agreements stands as a *per se* violation of the self-executing requirements of the Act. Section 252 is, in short, a vitally important element in the overall statutory scheme to require the opening of the local market. The presence of these unfiled agreements directly calls into question the notion that Qwest has been forthright and diligent in opening its local markets to competition. These unfiled agreements, in short, undermine Qwest's assertions not only that its local exchange markets are open, but that they will remain so. In addition, as noted previously, these agreements also raise the issue of discriminatory treatment under state law. These are all issues which go to the very heart of Qwest's application for 271 authority.

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[9] Qwest Opposition, at p. 7. Footnote omitted.
[10] *Id.*, at pp. 11-12.

G. Qwest's discussion of the November 15, 2000, Eschelon agreement.

AT&T believes that the November 15, 2000, Eschelon agreement speaks for itself, and that Qwest's attempts to analyze that document here merely raise additional factual issues which in turn justify rather than eliminate the need for further investigation.

However, Qwest's argument that this particular Eschelon agreement "actually promotes the objectives of Section 271" is frankly absurd.[10] Essentially, the 271 process which Qwest asked for in the various states was to be a collaborative one. It would entail "workshops" rather than "hearings" and "military style testing" rather than a pass-fail process. Issues were to be discussed openly and among all participants, so that all parties could gain the benefit of that dialogue.

On the other hand, here we have a situation in which Qwest, in the midst of this collaborative process, engineers a separate, private deal for one CLEC. Qwest promises to focus on the needs of this one CLEC, and in exchange the CLEC promises to remain silent during the "collaborative" process.

In other words, while Qwest was collaborating with some CLECs publicly, its was also being *more* collaborative with others privately. Clearly this does not promote the overall collaboration which was supposed to occur, but instead undermines it.

Beyond this, however, Qwest also asserts that AT&T's Washington testimony supports Qwest's arguments when it certainly does not.[11] This is much more than merely a matter of Qwest having taken this testimony out of context; it is also a matter of Qwest having completely mischaracterized that testimony. Quite simply, the conversation cited by Qwest between Ms. Roth and Chairwoman Showalter related to a specific agreement

[10] *Id.*, at p. 13.
[11] *Id.*, at pp. 14-15.

which had nothing to do with interconnection or the 271 process, but still silenced opposition to the Qwest/U S West merger. On the other hand, the Eschelon agreement had everything to do with interconnection and the 271 process, and *also silenced opposition to Qwest's 271 application.* It is this "intertwining" to which Ms. Roth objects, and which is clearly present in the Eschelon agreement. There is, in short, nothing in Ms. Roth's testimony that would indicate that AT&T in any way condones Qwest's actions in negotiating 271 issues behind everyone's back. In fact, AT&T considers those actions reprehensible.

By citing to this brief portion of transcript, and then mischaracterizing the conclusion to be drawn from that testimony, Qwest is not only grasping at straws, but is also attempting to mislead this Commission. The arguments presented by Qwest, and the manner in which Qwest presents them, again support the need for further investigation into this matter.

II. 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 29th day of May, 2002.

AT&T COMMUNICATIONS
OF THE MIDWEST, INC.

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LIST OF EXHIBITS

Exhibit A: Table of Contents to AT&T/Qwest ICA

Exhibit B: ALJ order in MN (AT&T complaint case re: UNE testing)

Exhibit C: Utah order re: participation in QPAP negotiations

Exhibit A

AGREEMENT
FOR LOCAL WIRELINE NETWORK INTERCONNECTION
AND
SERVICE RESALE
Between
AT&T Communications of the Midwest, Inc.
and
U S WEST Communications, Inc.

[NOTE: In this Agreement, *italicized language* corresponds to language agreed to by the Parties; Courier New pt 10 font language corresponds to U S WEST proposed language; Times New Roman pt. 11 font language corresponds to AT&T proposed language; **bold language** corresponds to language included to comply with the Commission's Order; bracketed **[ ]** language corresponds to language proposed to be deleted by a Party]. Issues identified as "Parked" are pending before the United States Supreme Court and will be resolved in accordance with the Court's ruling.

TABLE OF CONTENTS

OAH Docket No. 12-2500-14262-2
MPUC Docket No. P-421/C-01-391

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

Hearings in this matter were conducted on July 9-11 and July 26-27, 2001, by Administrative Law Judge Steve M. Mihalchick in the Small Hearing Room of the Minnesota Public Utilities Commission, 200 Metro Square Building, 121 East 7th Place, St. Paul, Minnesota. The record was closed October 1, 2001, upon receipt of supplemental affidavits from Qwest and AT&T.

Mary B. Tribby, AT&T, 1875 Lawrence Street, 15th Floor, Denver, Colorado 80202 and W. Patrick Judge, Briggs & Morgan, P.A., 332 Minnesota Street, Suite W-2200, St. Paul, Minnesota 55101, appeared on behalf of AT&T Communications of the Midwest, Inc. (AT&T). Jason D. Topp, Qwest Corporation, 200 South Fifth Street, Room 395, Minneapolis, Minnesota 55402 and Robert E. Cattanach, Dorsey & Whitney, 50 South 6th St., Minneapolis, Minnesota 55402, appeared on behalf of Qwest Corporation (Qwest). Steven H. Alpert and Peter R. Marker, Assistant Attorneys General, Minnesota Attorney General's Office, 525 Park Street, Suite 200, St. Paul, Minnesota 55103, appeared for the Department of Commerce (the Department or DOC).

ISSUES

1. Did Qwest's position that AT&T intended to use AT&T's proposed UNE-P testing only for the purpose of opposing Qwest's Section 271 application, and not for market entry evaluation or preparation, relieve Qwest of its legal obligation to cooperate in such testing? The Administrative Law Judge concludes that it did not.

2. Did Qwest knowingly and intentionally violate the Interconnection Agreement and state and federal law in its dealings with AT&T regarding UNE-P testing? The Administrative Law Judge concludes that it did, from mid-September 2000 to mid-May 2001.

3. Did Qwest engage in anti-competitive behavior in its dealings with AT&T and the UNE-P testing? The Administrative Law Judge concludes that it did, from mid-September 2000 to mid-May 2001.

4. Did AT&T knowingly and intentionally violate the Interconnection Agreement and state and federal law in its dealings with Qwest regarding UNE-P testing? The Administrative Law Judge concludes that it did not.

5. Should a penalty be considered by the Commission? The Administrative Law Judge concludes it should and recommends that a penalty of $1,195,000 be imposed upon Qwest.

NOTICE

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

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

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

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

Based upon the record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

The Interconnection Agreement

1. Section 251(c) of the Telecommunications Act of 1996 (the Act) requires incumbent local exchange carriers (ILECs) to provide competitive local exchange carriers (CLECs) with interconnection, access to unbundled network elements (UNEs), and collocation "on rates, terms and conditions that are just, reasonable and nondiscriminatory. . .." Section 251(c)(1) requires ILECs and CLECs to negotiate agreements in good faith regarding these obligations.

2. In 1997, AT&T and Qwest's predecessor, U S WEST Communications (USWC), executed an interconnection agreement (the Interconnection Agreement) that was approved by the Commission. Section 14.1 of the Interconnection Agreement contains several provisions concerning "Cooperative Testing", including the following:

14.1 **Cooperative Testing**

14.1.1 **Definition**

Cooperative Testing means that USWC shall cooperate with AT&T upon request or as needed to: (a) ensure that the Network Elements and Ancillary Functions and additional requirements being provided to AT&T by USWC are in compliance with the requirements of the Agreement; (b) test the overall functionality of various Network Elements and Ancillary Functions provided by USWC to AT&T in combination with each other or in combination with other equipment and facilities provided by AT&T or third parties; and (c) ensure that all operational interfaces and processes are in place and functioning properly and efficiently (I) for the provisioning and maintenance of Network Elements and Ancillary Functions, and (II) so that all appropriate billing data can be provided to AT&T.

14.1.2.1 USWC shall provide AT&T, for testing purposes, access at any interface between a USWC Network Element or Combination and AT&T equipment or facilities. Such test access shall be sufficient to ensure that the applicable requirements can be tested by AT&T. This access shall be available seven (7) days per week, twenty-four (24) hours per day.

14.1.2.2 AT&T may test any interfaces, Network Elements or Ancillary Functions and additional requirements provided by USWC pursuant to this Agreement.

14.1.2.5 USWC shall provide AT&T upon request any applicable test results from USWC testing activities on a Network Element, Ancillary Function, Additional Requirement or the underlying equipment providing AT&T a Network Element, Ancillary Function or Additional Requirement. AT&T may review such testing results and may ask USWC to rectify any deficiencies that are detected.

14.1.2.7 Upon AT&T's request, USWC shall provide technical staff to meet with AT&T representatives to provide required support for Cooperative Testing.

14.1.2.12 USWC shall participate in Cooperative Testing upon AT&T's request to test any operational interface or process used to provide Network Elements, Ancillary Functions or services to AT&T.

14.1.2.13 AT&T and USWC shall endeavor to complete Cooperative Testing expeditiously.

14.1.2.15 USWC shall participate in Cooperative Testing whenever it is deemed necessary by AT&T to ensure service performance, reliability and customer serviceability.[1]

3. The Interconnection Agreement also has a provision relating to good faith of the parties and the obligation to negotiate further when necessary, as follows:

SCOPE OF AGREEMENT

In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including, without limitation, the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement), such action shall not be unreasonably delayed, withheld or conditioned.[2]

4. Summarizing § 14.1, Qwest must cooperate in testing when a test is requested or necessary and when it is for one or more of the purposes specified. AT&T and the Department acknowledge that there is also a requirement that the test be reasonable.

UNE-P and OSS

5. Under the Act, a CLEC may choose to provide local telephone service in an area by leasing all of the network elements needed to provide local telephone service from an ILEC. This is known as the Unbundled Network Element Platform (UNE-P)[3]. It includes all the elements of each loop to every customer of the CLEC, as well as all the switching and support services the ILEC uses to provide service to those customers. Thus, the CLEC is totally dependent upon the ILEC's performance on behalf of the CLEC in delivering the local service to the CLEC's customers. Although it is composed of unbundled network elements, the UNE-P is itself considered an unbundled network element.

6. UNE-P, like all leased network elements, is ordered through the ILEC's Operations Support System (OSS). The CLEC also links to the ILEC's OSS for receiving billing information and to request repair and maintenance activities for the ILEC's customers.

[1] Ex. 1031.
[2] Ex. 1032.
[3] Hearing Transcript (Tr.) 605-06; 734.

7. Qwest provides three OSS interfaces that CLECs may use: IMA GUI (Intermediated Access, Graphical User Interface), IMA EDI (Intermediated Access, Electronic Data Interface), and faxes sent to Qwest's IIS fax imaging system.[4]

8. With the GUI, a CLEC representative first types the order from its customer into the CLEC's own computer system. Then the CLEC representative retypes the same order into Qwest's systems over the GUI, which is similar to a web page.[5] EDI involves less manual data entry. With EDI, the CLEC representative types an order from a customer into the CLEC's system. The CLEC's system then converts it into a format that Qwest's EDI systems can read and transmits it to Qwest's EDI system, perhaps batched with other orders.[6] It is expensive for a CLEC to design and purchase the hardware and software necessary to communicate with Qwest's systems over the EDI,[7] but the order volumes anticipated if AT&T were to enter the market using UNE-P can only be handled with the EDI; using the GUI or fax methods would not be feasible.

9. When GUI and EDI orders are sent to Qwest 's OSS, they either "flow through" electronically or "drop out" for human intervention on Qwest's end. Human intervention creates more errors because service representatives must perform repetitive typing tasks.[8]

10. The Qwest IMA EDI is relatively new and its use, particularly for ordering UNE-P, has not been fully tested under market conditions. Prior to February 2001, Qwest had not received any UNE-P orders through the EDI interface. From February through May 2001, Qwest processed a total of 29 orders via EDI, none of which flowed-through.[9] In May 2001, 3 of 22 orders (approx. 14%) flowed through.[10]

The UNE-P Test, 1-2-3 Test, and ROC Test

11. The UNE-P test at issue in this matter was designed by Edward Gibbs, an AT&T Division Manager in charge of "national friendlies testing," and two other AT&T employees.[11] The test they intended for Minnesota was the same as the UNE-P tests that had been used with other ILECs.[12] Gibbs felt that the test had been validated over time and should not be changed.[13] The UNE-P test uses 1000 residential lines installed at one AT&T location where all the lines can be tested and monitored by an AT&T technician. While 1000 lines is desired to assure validity, AT&T has run the test with fewer lines where necessary.[14]

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[4] Ex. 20.
[5] Tr. 603-05.
[6] Tr. 605.
[7] Tr. 607.
[8] Tr. 602-03.
[9] Ex. 1023, p. 18.
[10] *Id.*; Ex. 1023.
[11] Tr. 709.
[12] Ex. 46 at 142-43.
[13] Ex. 46 at 72.
[14] Ex. 46 at 59, 88, 107.

12. For a CLEC the size of AT&T and potential number of local service customers it would likely have in Minnesota, it was not unreasonable to test 1000 lines to simulate real-world commercial conditions.[15] In New York, where AT&T offers local service using UNE-P, it has experienced ordering volumes of 8,000 UNE-P lines per day.[16] In an internal e-mail written December 18, 2000, Eric Hyde of Qwest's Network Services wrote that he had some concern about the short time given to provision so many retail lines for the UNE-P test, but stated that Qwest must get to the point of being able to accommodate these volumes over time.[17]

13. Because AT&T was contemplating a residential offering of local service, it was important to Gibbs that residential lines be used in the UNE-P test to accurately simulate Qwest's actions in converting residential lines to UNE-P. Again, the need was valid and reasonable. Residential lines carry different USOC codes than business lines, so orders might be handled differently by Qwest systems.[18] Likewise, different Qwest offices provision residential lines and business lines.[19] It was reasonable to require residential test lines to simulate real world order processing.

14. It was also part of Gibbs' design that Qwest be "blind" to the test, that it not know what items would be tested, or at least in what numbers and combinations, so that Qwest systems would respond in a real-world manner using the systems and employees who would respond to similar orders normally.

15. To use the UNE-P test in Minnesota, Gibbs' team would create a database in which each line is given a fictitious name and suite number, along with a telephone number when assigned by Qwest.[20] At some point, the actual lines would be installed.

16. The next preliminary step in the UNE-P test process would be to perform certification testing. For Gibbs, and commonly in the industry, certification testing means the process of determining whether the ILEC and CLEC systems can communicate over the EDI interface, whether the CLEC system can place orders in conformance with the ILEC's business rules, and whether the ILEC system responds appropriately to the orders. Problems are corrected until the certifications are successful.[21] For Gibbs' team, the major tasks in the certification phase are interpreting Qwest's business rules, coding them into the UNE-P test's gateway program, and correcting the code if testing and meetings with Qwest turn up errors.[22]

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[15] Ex. 2088, p. 15.
[16] Tr. 571, 1269-70.
[17] Ex. 1014.
[18] Tr. 668, 674; 802.
[19] Tr. 56, 67, 1159.
[20] Tr. 721.
[21] It is not necessary that either the AT&T or the Qwest computers communicating over the EDI be located in Minnesota.
[22] Tr. 712-725.

17. Under Gibbs' design, only when certification is complete can the operational phase of the UNE-P test be started.[23] This part of the test places orders to Qwest in volumes large enough to simulate market levels adequately, assess Qwest's performance, and detect errors by either of them that only occur at operational levels.[24] This phase tests Qwest's systems and measures customer serviceability and service reliability. AT&T's Consumer Business Unit would then use the information gained as part of assessing market entry viability.[25].

18. Once AT&T understands the Qwest EDI for testing purposes, it can also use it's understanding to develop the systems it will use for actual market entry and for placing orders from real customers over another EDI interface program rather than from its testing gateway program. However, Qwest revises it's EDI every several months, so changes are continual and some of the knowledge gained becomes dated before it can be used.

19. Because AT&T has reasonably deemed the UNE-P test necessary to ensure service performance, reliability, and customer serviceability, the UNE-P test falls squarely within the parameters established by § 14.1.2.15 of the Interconnection Agreement, as well as other sections.

20. Qwest offers an enhanced certification process to CLECs known as IMA EDI Production Readiness Testing. This test is used to assure that the CLEC and ILEC "systems can adequately 'talk' to each other both for normal and error conditions." [26] The test incorporates a three stage approach consisting of 1) connectivity testing, 2) interoperability testing, and 3) controlled production. Thus, it was referred to as the "1-2-3 test" or "normal three-step process" in this proceeding.

21. The "controlled production" stage of the 1-2-3 test carries it somewhat beyond a traditional "certification" test because it involves Qwest's downstream systems in actually processing the requests. Thus, it has the Qwest systems transmit additional information to the CLEC, such as firm order confirmations. It verifies the CLEC's ability to send valid transactions and requests, acknowledge transactions generated by Qwest, and display Qwest responses. Thus, it also verifies the CLEC's supporting business processes.

22. According to Lynn Notarianni, a Director in Qwest Information Technologies, Qwest has and will expand the controlled production phase to accommodate a CLEC's testing needs.[27] However, Qwest is willing to do so only to the extent Qwest feels is necessary, not to the extent the CLEC feels is necessary. Thus, with regard to AT&T's requested UNE-P test, she testified that the controlled production phase of the 1-2-3 test, "provides AT&T with the opportunity to accomplish a live-

[23] Tr. 783-785.
[24] Tr. 739-742.
[25] Tr. 732, 734, 737.
[26] Ex. 20 at 2.
[27] Tr. 302-04.

production environment test on a more limited but sufficient volume than being requested in the AT&T trial proposal."[29]

23. The tests to be run during the 1-2-3 test are selected by the CLEC, which provides a list of "scenarios" of things it desires to have tested to Qwest. Qwest then reviews the list and advises the CLEC of any corrections that must be made to the scenarios.[30]

24. The purpose of the 1-2-3 test, including its controlled production step, is to test CLEC ability to communicate with and react appropriately to information received from the Qwest systems through the IMA EDI. It is not designed to and does not test any communication or production function performed by Qwest.[30] It is not a "blind" test for Qwest. It assumes that the Qwest systems function properly and is designed to assure that the CLEC systems can work with the Qwest systems.

25. Even though Qwest considers it to be "sufficient" as a live-production environment test for AT&T, the 1-2-3 test as designed and offered by Qwest provides only the preliminary "certification" portion of the UNE-P test requested by AT&T. It does not provide any testing of the ability of Qwest to respond to orders and provide services at volumes sufficient to approximate real market conditions that the UNE-P test is designed to test. Completing a scenario once successfully is not sufficient to sufficient to simulate a market—it must be repeated many times to ensure that Qwest's systems are likely to respond correctly substantially every time. The 1-2-3 test does not do that; AT&T's UNE-P test does.

26. The 1-2-3 test fulfills only some of the requirements of cooperative testing available under the Interconnection Agreement. It partially fulfills the requirements of 14.1.1(c) and 14.1.2.12 for testing of interfaces and processes, but not under real market conditions. It does not fulfill the requirements of 14.1.1(a) and (b) and 14.1.2.2 for testing of network elements or the overall functionality of various network elements in combination with each other or in combination with other equipment and facilities provided by AT&T. AT&T's UNE-P test does fulfill these requirements.

27. Under Qwest's procedures, successful completion of the 1-2-3 test is sufficient to demonstrate that the CLEC can communicate properly with the Qwest systems and that the CLEC can then, if it so chooses, enter the market and place orders that Qwest will accept. Several CLECs have done so with certain products. AT&T itself has done so with Local Number Portability and Unbundled Loops.[31] That, however, does not make it unreasonable for a CLEC to request additional testing to obtain reasonable assurance that Qwest can actually deliver the services and functions requested by the CLEC.

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[29] Ex. 20 at 4.
[30] Id. And, see Ex. 21.
[30] Tr. 2012; Ex. 21
[31] Ex. 20.

28. A Regional Oversight Committee (ROC) has been established by 13 of the 14 states in Qwest's service territory, including Minnesota. The ROC has adopted a Master Test Plan to evaluate the operational readiness, performance and capability of Qwest to provide pre-ordering, ordering, provisioning, maintenance and repair, and billing OSS functionality to CLECs. The Master Test Plan, administered by KPMG Consulting, uses Hewlett-Packard to simulate a CLEC and conduct a third party test of the Qwest OSS (the ROC test).[32]

29. The ROC test is now in progress. It executes "numerous" production transactions as test cases to validate that Qwest's systems and processes can support various product offerings, including UNE-P. It examines Qwest's end-to-end business processes and operations, including maintenance and repair, by executing 420 UNE-P test cases.[33] The ROC test is a "military-style" test, which means errors encountered on each run are corrected and the test case is repeated until it is passed.[34]

30. The ROC test and the AT&T UNE-P test are different in structure and purpose. For example, the ROC test does not test AT&T's likely volumes; the use of Hewlett-Packard as a pseudo CLEC does not accurately simulate AT&T's practices; and the ROC test uses "virtual lines" instead of working lines.[35]

31. The results of the ROC test are expected to be used by Qwest in its Section 271 applications to demonstrate successful performance of its OSS.[36] Qwest's 271 initiative is one its top priorities."[37]

AT&T Decision to Test UNE-P

32. AT&T's Consumer Business Unit had developed business plans for UNE-P residential service offerings in a number of states. Thomas Pelto, AT&T's Vice President for Law and Government Affairs, had identified Minnesota to the Consumer Business Unit as a good state for UNE-P. Pelto based his recommendation upon previous Commission actions that he interpreted as the most favorable to UNE-P of all the states in Qwest's territory. After considering this information and other factors, the Consumer Business Unit decided to conduct a UNE-P test in Minnesota.[38]

33. AT&T has done UNE-P testing and has entered the UNE-P market in a number of states not served by Qwest. In New York, AT&T offers local service using UNE-P and has 900,000 customers; in Texas it has 400,000.[39] On the other hand,

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[32] Ex. 24.
[33] Tr. 295-96; Ex. 20 and 24.
[34] Ex. 24 at 11.
[35] Tr. 622, 627-31, 823, 827, 1171, 1318, 1322, 1324; Ex. 2088 at 3-5.
[36] Ex. 24 at 13.
[37] Tr. 259.
[38] Tr. 1218.
[39] Tr. 1269-70.

AT&T has recently announced entry in one market before doing UNE-P testing of the sort proposed in this matter.[40]

34. The information gained and problems corrected in the UNE-P test in Minnesota would be used by AT&T in any evaluating and making a UNE-P offering in Minnesota or other states in Qwest's territory. However, because AT&T had had difficulties in the past working with Qwest to resolve problems with Qwest's services, AT&T also intended to use the UNE-P test as a tool to resolve any problems encountered during the test. AT&T also expected to report the data in Qwest's Section 271 cases, again for the purpose of using the leverage to resolve problems that would inhibit using UNE-P to provide local service.[41]

UNE-P Test Negotiations

35. AT&T's Consumer Business Unit asked Pelto and Gregory Terry to pursue a test agreement with Qwest to engage in a UNE-P test.[42] Terry, an AT&T executive based in Denver, is in charge of relations with ILECs in AT&T's Western and Southern Regions, including Qwest, Bell South, Sprint and others.[43]

36. About September 14, 2000, Pelto called Steve Davis, Qwest's National Vice President for Policy and Law, to inform him that AT&T was going to be making a request for a friendly test in Minnesota. Davis had formerly worked for AT&T. Through discussions Davis and other Qwest managers had had with managers of other RBOCs, Davis was already aware of AT&T's UNE-P testing with other RBOCs and their complaints that AT&T had used the results unfairly in regulatory proceedings. He was already of the opinion that AT&T's only purpose for the UNE-P test was to manufacture evidence to use against Qwest in Qwest's 271 applications and was ready with a response to AT&T's request. The position was that unless Qwest became convinced that AT&T was truly using the test to evaluate market entry and not just compiling data to oppose Qwest's 271 efforts, Qwest would refuse to do AT&T's UNE-P test. Qwest maintained that position from then until May 11, 2001.

37. When Pelto called, Davis asked Pelto if AT&T would commit to enter the UNE-P market in Minnesota if the test was successful. Pelto declined to respond. In Davis' view, Pelto "kind of sheepishly refused to answer." That, for Davis, confirmed his previous conclusion that the UNE-P test had nothing to do with market entry.[44]

38. Pelto's refusal to guarantee market entry to Davis was reasonable and appropriate. There are several variables beyond testing for a CLEC to evaluate when considering market entry (e.g. cost of capital, number of competitors, general state of the market), and the actual test results may impact the business plan in some way that makes the venture unprofitable. Thus a CLEC can not be expected to guarantee market

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[40] Tr. 780-84, 1160-61.
[41] Tr. 1219.
[42] Tr. 500.
[43] Tr. 482.
[44] Tr. 258.

entry in order to conduct a desired test.[45] AT&T told Qwest that it was considering entering the market using UNE-P; which was all it could say. Moreover, Pelto could not legally reveal proprietary competitive information to Qwest, as both he and Davis knew very well.[46]

39. Davis informed Pelto that Qwest would not perform the UNE-P test if the only purpose of the test was to provide data for AT&T to submit in opposition to Qwest's 271 applications. However, he did not inform Pelto that he had, in fact, already concluded that the only purpose of the test was to gather data to use against Qwest in 271 proceedings and had decided that Qwest would not allow the UNE-P test, or any test other than the 1-2-3 test or the ROC test, to proceed. And he did not inform Pelto that it would be up to Qwest to decide whether AT&T had a legitimate purpose for the UNE-P test.[47]

40. Had Davis given an unconditional refusal, AT&T could have attempted to convince Qwest of its error or taken other steps, such as seeking clarification from the Commission. Instead, Davis gave Pelto a vague statement that could be taken as a conditional approval by AT&T, because AT&T knew the UNE-P test was not for 271 purposes only. Moreover, Davis allowed negotiations for the UNE-P test to begin and continue for several months, thereby delaying AT&T in taking any action for those several months.

41. As Pelto had done, on September 14, 2000, Terry called his counterpart at Qwest, Beth Halvorson, Vice President of Wholesale Major Markets, to begin the negotiation process. Halvorson has worldwide accountability for the three major accounts of Qwest: AT&T, WorldCom, and Sprint. She also has responsibility for all wireless and paging companies.[48] Terry told her that AT&T wished to conduct a UNE-P test in Minnesota. Halvorson understood Terry's description of the test as an internal test using AT&T's employees, ordering residential lines.[49]

42. On September 15, 2000, Terry followed up with a letter to Halvorson.[50] The letter stated that AT&T was planning to perform an evaluation of using UNEs to provision local service in the Qwest territory, particularly the use of the UNE-P; that they were planning to perform a trial in the Minneapolis-St. Paul area in early 2001, that it would be "an internal trial, using only AT&T employees as test participants," and that the purpose of the test was "to gain experience in such areas as billing, access, trouble

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[45] Ex. 2048 at 12.
[46] Tr. 1235-36.
[47] The Department and AT&T argue that Davis gave Pelto an unqualified refusal to participate in the UNE-P test. Their claim is based upon Pelto's testimony that during the September call, Davis told him that Qwest was not going to do the test, Tr. 1261. But Pelto also testified that it was possible, although he did not recall it, that Davis had said that if AT&T had what Davis considered a legitimate purpose for the test other that just a 271 test, Qwest would do the test. Tr. 1260-63. Davis and Qwest felt that they could refuse to test if it the test was only for 271 purposes, so it is most likely that he would have told Pelto that.
[48] Tr. 27-28.
[49] Tr. 29-30.
[50] Tr. 987.

reports and fixes, business rules, OSS and other facets of the use of UNE-P to provide local service.[51]

43. The letter went on to state that AT&T had already undertaken similar trials with other RBOCs, that AT&T had used brief operational contracts to cover the trials, requested Halvorson's assistance in setting up a team to negotiate an agreement, and identified Michael Hydock of Terry's staff as the AT&T contact for negotiation of a test agreement.[52]

44. The letter also set out some details of the UNE-P test to provide Qwest "with a global understanding of the trial." First among those was, "Deployment of 1,000 lines at an AT&T location in the Minneapolis area."

45. The letter requested that negotiations begin by September 25, 2000.[53]

46. AT&T wanted a testing agreement that set forth parameters of the test and certain specifics because the Interconnection Agreement was silent as to testing specifics.[54] Every other RBOC that AT&T had worked with had ultimately accepted and implemented AT&T's proposed test, although it sometimes took some threats of seeking regulatory assistance to gain agreement.[55]

47. AT&T District Manager Michael Hydock was put in charge of negotiating the test agreement. Hydock talked to test manager Gibbs concerning the details of the test agreement and consulted with other AT&T employees who had negotiated similar test agreements in the past.[56]

48. Apparently unaware of Davis' position, Halvorson immediately set about complying with AT&T's request. She named an executive team to help her deliver what she understood AT&T had requested and faxed copies of Terry's letter to them. The team included Qwest executives from operations, business development, systems and network provisioning, as well as members of her own account team.[57]

49. Hydock and Christine Schwartz of AT&T met with Mark Miller and Christina Valdez of Qwest on September 18, 2000. Miller is Qwest's Wholesale Account Team Manager for the AT&T account. They discussed the number of lines needed for the test, the duration of the test, and the fact that the test had been requested by AT&T's Consumer Business Unit.[58] Hydock followed up later that day by sending Miller what he called a "plain vanilla" version of an earlier test agreement that AT&T had negotiated with another RBOC for an earlier UNE-P trial. Hydock's e-mail's subject line

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[51] Ex. 1
[52] Id.
[53] Id.
[54] Tr. 963.
[55] Ex. 46 (Gibbs Deposition), 56-59.
[56] Tr. 798.
[57] Ex. 1; Tr. 30-32.
[58] Ex. 2, pp. 1-2.

stated, "MN 'Friendly' test." Hydock's message stated that he hoped the draft provided some guidance; it did not specifically require any response.[59]

50. The September 18 draft agreement had been modified from the other RBOC agreement to identify Qwest and AT&T as the parties and Minnesota as the location. It was a complete and fairly detailed document accurately describing the details needed to understand the UNE-P test as proposed by AT&T. The only significant items left blank were the effective dates and two blanks for building locations for the installation of "approximately 1000 Qwest retail 1MR residential lines."[60]

51. In Halvorson's experience, a "friendlies" or "friendly" test is one done using employee or customer volunteers as guinea pigs to test a new product or service on their own phones.[61] AT&T Senior Policy Witness John Finnegan agreed that was a common meaning of the term in the industry. He pointed out that in the Arizona test, there were actual volunteers involved with lines provisioned to their homes. In this case, Gibbs, Terry, and Hydock all often referred to the UNE-P test as the "Friendlies Test," or "MN Friendly Test," even though the AT&T employees being used were the technicians doing the test, not people whose phones were being used. That could be confusing, which Finnegan admitted.[62]

52. Because of AT&T's use of the term "friendly test" and references to "using AT&T employees as test participants," and despite the fact that AT&T never said the employees would be used "at their homes,"[63] and despite the fact that every document to that point and later referred to "an AT&T location," "business location," or "901 Marquette Ave.," Halvorson believed until January that the test involved installation of residential lines to AT&T employee homes.[64] Miller was aware of the potential conflict between using the word "friendly" and the "business location" language in the draft agreements, but thought it was something that would be corrected or negotiated eventually.[65]

53. AT&T was partially responsible for Halvorson's mistake as to the location of the test lines. AT&T used the term "friendly" in an unusual manner and Halvorson relied upon assumed meanings without reading or without clarifying documents, some of which Qwest wrote, that clearly stated the lines would be installed to an AT&T business location.

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[59] Ex. 2; Tr. 991-992.
[60] Ex. 2.
[61] Tr. 38. Halvorson also believes that a test is not a "friendly trial at all," if the results are used in an unfriendly manner. Tr. 39.
[62] Tr. 632-33.
[63] Halvorson and Miller testified that Terry and Hydock said the test involved lines to employee homes. Tr. 29-30, 1301. Terry and Hydock testified they did not. Tr. 566, 1059. It is most likely that Terry and Hydock did not make such statements because they specifically and expressly said otherwise in their documents and knew all along that employee homes were not involved.
[64] Tr. 29-30, 58, 93-94.
[65] Tr. 1305-06.

54. Miller called Hydock on September 18 or 19 to ask about timelines for completing the agreement. On September 19, Hydock sent Miller an e-mail responding that he would like to finalize the contract by October 13 and wondering whether that was totally out of the question. On October 5, Miller e-mailed back, stating

> I have received some feedback and questions about your UNE P trial request. I understand the 3rd Party Testing scheduled could be a duplication of this request. Please let me know if you disagree.[66]

55. On October 6, Hydock replied. He stated that as a CLEC that could be using UNE-P as a market entry strategy, it would be logical that AT&T would want to test facets of offering UNE-P in Qwest's territory. He stated that the proposed AT&T test was not a duplication of third party testing from AT&T's point of view because AT&T was testing its own systems during the process as well, which a third-party test would not do. He reiterated that AT&T was serious about conducting the proposed test and stated that they had had no problems with performing tests with other RBOCs that were also involved in some type of third party test. He asked whether there were any other issues because AT&T was finalizing the contract and would be submitting it to Qwest the week of October 16.[67]

56. Hydock's statement that AT&T was testing its own systems was accurate. Because AT&T would have to rely entirely upon Qwest systems and personnel to provide the local telephone service on behalf of AT&T, operational or production testing would focus primarily on the Qwest systems. But AT&T will have to be involved in ordering service, reporting problems, and receiving billing information, so AT&T also had to use the UNE-P test to determine that it was accurately interpreting Qwest's business rules and properly applying them, not only in the certification phase, but also in the operational phase. Hydock's statement that AT&T had had no problems with performing tests with other RBOCs stretched the truth. AT&T had had some problems with other RBOCs in reaching agreements and with the RBOCs feeling the results had been used unfairly by AT&T. But Qwest was well aware of the RBOCs' complaints. Hydock's statements were not misleading.

57. Miller did not respond to Hydock's question about other issues and never reported that Qwest felt Hydock's brief explanation of why AT&T did not view the test as duplicative was inadequate.

58. On October 17, 2000, Hydock sent Miller a "more defined version" of the proposed testing agreement that specified that the test lines be located at the AT&T tower at 901 Marquette in Minneapolis. It also proposed the use of ROC PIDs rather than Minnesota-specific performance guidelines and eliminated the requirement of weekly meetings and any reference to the use of test data. Hydock suggested a

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[66] Ex. 1696, October 5, 2000, entry. The source of the "feedback" is not in evidence.
[67] Id., October 6, 2000, entry.

meeting as soon as possible to discuss details and issues.[68] While AT&T's proposals were subject to negotiation, they didn't change significantly after that point.[69]

59. Qwest responded with a letter dated November 3, 2000, from Halvorson to Terry. In that letter, Halvorson stated that despite various reservations, Qwest would work with AT&T on the UNE-P test. She expressed Qwest's concern about the need for 1000 test lines, saying it seemed far in excess of what was necessary and that they would like to discuss the issue. She also expressed Qwest's belief that the test could be completed in four months or less, but expressed willingness to extend the length of the test if necessary. Halvorson attached a redlined version of the AT&T proposed testing agreement re-styled as a "Project Plan."[70]

60. The re-draft sent by Halvorson retained the AT&T proposal for retail residential lines to be installed at 901 Marquette Avenue. But, instead of providing for 1000 lines, it stated that an "agreed to amount" of lines would be installed. Following a provision that the locations and lines would be treated as residential, it added, "However, when the lines are converted to UNE-P they will carry a business USOC." The re-draft also changed the duration of the test from nine to four months and made other changes.[71]

61. On November 7, 2000, Hydock sent an e-mail to Miller saying he wanted to provide some information so Miller would have some time to consider it before Terry responded directly to Halvorson. He expressed concern over the restrictions that Qwest was proposing to place on the test and identified what he determined to be the three big issues remaining (number of test lines, use of performance data, type of performance data reporting), argued AT&T's position on the issues, and proposed alternative language for the use of performance data/confidentiality issue. Hydock further inquired as to whether Qwest's position on these issues was final. He expressed some flexibility on the number of lines for the test, but noted that 1000 lines was far less than the number that would be involved in an actual commercial situation. He stated that AT&T's position had been agreed to by other RBOCs, "albeit with Commission and/or 271 proceeding pressure."[72] Hydock's statements were accurate.

62. Terry wrote to Halvorson on November 10, 2000, stating, "AT&T has successfully engaged other incumbent LECs to perform these trials on substantially the same terms we proposed to Qwest," and expressing AT&T's position that the constraints on the UNE-P test created by Qwest's suggested modifications to the agreement would jeopardize AT&T's ability to conduct a useful UNE-P operational trial. He asked that Qwest, "reconsider the changes to the test agreement proposed in your letter," and urged resolution of the issues so that the test could commence.[73]

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[68] Ex. 4, Tr. 1329-05.
[69] Tr. 1994-05.
[70] Ex. 5, Tr. 41-42, 1005-06.
[71] Ex. 5, Tr. 1009-06.
[72] Ex. 1537, Tr. 1010-12.
[73] Ex. 6.

63. On November 17, 2000, as part of a monthly executive meeting between AT&T and Qwest, during which many issues were discussed, Terry and Halvorson, with other people on the phone conference, briefly discussed the issues that had been raised in the most recent correspondence. Halvorson stated that Qwest would agree to AT&T's demands for 1000 lines and use of ROC PIDs. She also agreed not to demand confidentiality of the results and to resolve the exact language at a later date.[74]

64. On November 22, 2000, Terry wrote Halvorson to confirm the November 17 agreements and enclosed a redrafted "Project Plan for UNE-P Testing" dated November 1, 2000. It called for installation of the lines on January 15, 2000 (sic) and commencement of the UNE-P test on February 27, 2001, to run for up to four months.[75] However, the document had not been finalized by AT&T and contained some errors, so Terry's office promptly called Halvorson, asked that she shred the draft because it was not right, and told her another one would be sent.[76]

65. On November 29, 2000, Hydock sent Miller an e-mail advising him, in case he was not aware, that AT&T had mistakenly sent the revised agreement to Halvorson because it was not final, and that the final version would be sent "this week." He also wanted clarification about the business USOC provision. They had some communications about the issue. Two weeks later, December 13, 2000, Hydock sent Miller another redrafted "Project Plan," dated December 12, 2000. This revision included the USOC numbers Qwest had provided, because they turned out not to present a problem. It also changed the install and test commencement dates to March 1, and April 16, 2001, respectively. That change was made because AT&T needed the additional time because of other testing and because it was attempting to run the UNE-P test concurrently with the ROC test. In his cover message, Hydock did not reveal that, but said that the change gave both parties additional time to prepare for the trial. He asked that Qwest review the draft over the next few days and get back with any issues so that the parties could finalize the agreement.[77]

66. Meetings between technical teams for Qwest and AT&T began in December, 2000. The purpose of the meetings was to prepare for and run the 1-2-3 test to certify AT&T's test system, but not to address the additional tests AT&T desired to perform with its UNE-P test.[78] In fact, the Qwest EDI certification people were largely unaware of the additional testing AT&T desired.[79]

67. On December 21, 2000, Timothy Boykin, an AT&T District Manager, wrote to Halvorson noting that AT&T was building its gateway program for the UNE-P test to interface with IMA EDI, Version 6.0, which had just become available in November. However, AT&T had now been informed that Version 6.0 would only be available until October, 2001, because it would be replaced by later versions. The letter stated that

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[74] Tr. 48-49, 841-42, 1019-20, 1027.
[75] Ex. 7
[76] Ex. 8; Tr. 50, 1021.
[77] Exs. 11 and 1039; Tr. 1025-26.
[78] Tr. 412.
[79] Tr. 295, 844.

because of the delays in getting the agreement signed by Qwest, and delays in certification because Qwest did not provide a test bed environment, and delays because of the time AT&T needed to build its gateway program, AT&T had put off the test commencement date to April 16, 2001. Thus, because AT&T desired that the UNE-P run for nine months, AT&T was requesting that Qwest agree to keep Version 6.0 available for the duration of the test.[80]

68. Qwest considered the letter to be posturing by accusing Qwest of delaying while AT&T had just taken a month to get back to Qwest with a revised agreement. So Halvorson did not respond to the letter. However, at the hearing, on July 9, 2001, Halvorson testified that Boykin had been informed that Qwest would keep Version 6.0 available until the test was completed and that, at any rate, she was stating that on behalf of Qwest at that point.[81]

69. During the first week of January, 2001, Miller told Hydock that Qwest would have a response back to AT&T early the next week. On Wednesday, January 10, 2001, Hydock inquired about the status. Miller responded that it might be the next week because a couple more internal people needed to comment.[82]

70. Sometime in December 2000 or early January 2001, Halvorson realized that AT&T was serious about using lines to 901 Marquette and further realized that Qwest could not, under its existing tariff, provide residential service to a business location. In early or mid-January, Halvorson sought guidance from the policy and regulatory group at Qwest on how to resolve this tariff issue.[83] She spoke to Charles Ward, Qwest's Regional Vice President for Policy and Law, about that concern.[84] Ward spoke to his supervisor, Davis, and they talked about the nature of the test proposal, not the tariff issue.[85] Davis continued to conclude that the test looked duplicative of the RBOC test and that AT&T was proposing the test only to provide additional data to oppose Qwest's 271 initiative, not as a market entry test.[86]

71. Davis' conclusion was still based on reports received in conversations with other RBOC's of AT&T using the data from UNE-P tests in regulatory proceedings against those RBOC's and on his view that the UNE-P could stress Qwest's ordering and provisioning systems to the breakdown level, thereby creating negative results to report. And he still based his conclusion on Pelto's refusal to guaranty market entry if the test proved successful.[87]

72. Davis or Ward provided instructions to the Qwest account team at the time to reform the agreement into a document that was more consistent with Davis' view of

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[80] Ex. 10.
[81] Tr. 101-04.
[82] Ex. 1041.
[83] Tr. 199-98.
[84] Tr. 221, 264. Ward, like Davis, had also been with AT&T. Pelto had been his supervisor.
[85] Tr. 221.
[86] Tr. 221-22, 264.
[87] Tr. 226, 239-40, 252-53, 281-82.

the sort of testing Qwest would allow. However, they did not provide any advice to Halvorson or her account team about resolving the tariff issue with AT&T.[88] Prior to this point, Qwest had proceeded with the UNE-P test negotiations with AT&T at a slow, but fairly reasonable pace. Beginning about January 12, 2001, Qwest took deliberate steps to put unnecessary hurdles and delays into the negotiation process.

73. On January 12, 2001, Miller sent Hydock a significantly revised agreement with changes that were returns to old positions in some cases and wholly new issues in others. Qwest changed the title to "Initial Provisioning Plan for UNE-P."[89] Qwest delayed the start date to June 4, 2001. Qwest rewrote the agreement to delete all references to "testing," which it replaced with references to a "plan" for "addressing" methods, processes and systems for ordering, provisioning, maintenance and repair, and billing associated with UNE-P in Minnesota. Qwest added a provision that it was entering into the Plan, "to assist AT&T with its initiation of UNE-P services." The "Plan" eliminated the use of the ROC PIDs, provided that "Plan results" must remain confidential, and required the installation of business lines instead of residential lines.[90] Other than these last three items, AT&T never objected to the wholesale language changes that reformed the document from a test agreement into a plan for market entry.

74. Prior to receiving the January 12 draft, Hydock had believed that the differences between the companies had narrowed to virtually nothing, so he found the changes regarding ROC PIDs, confidentiality, and business lines shocking and appalling.[91] In an e-mail dated January 14, 2001, Hydock expressed to Miller "severe concerns" with Qwest's changes and proposed a meeting to discuss the issues. He stated that AT&T would have to evaluate its options, meaning that he was starting to think he would have to pursue options beyond informal negotiations. He felt so because it now seemed to him that just as they came close to agreement, Qwest was going back on resolved issues and injecting new issues. He became worried that the test would not be ready to go as proposed in the April, May time frame.[92]

75. When Miller received Hydock's e-mail, and in subsequent discussions, he learned that Halvorson had made agreements with AT&T on November 17 that he had not been aware of when he sent out the January 12 draft.[93] There were more discussions between AT&T and Qwest, including the regular monthly meeting on January 17, 2001. On January 18, 2001, Hydock sent Halvorson and others an e-mail regarding the time frames for installing the lines and starting the test. It adopted Qwest's last proposed start date of June 4, 2001.[94]

76. On January 25, 2001, Miller sent Hydock what he hoped would be the final version of the UNE-P agreement and asked that Hydock let him know if there was

[88] Tr. 288.
[89] Ex. 1042.
[90] Ex. 1042; Tr. 1032-33.
[91] Tr. 1002.
[92] Ex. 1043; Tr. 1034-35.
[93] Tr. 1002-03.
[94] Ex. 1046.

anything that they had discussed that had not been changed. Qwest had revised its proposal to reflect the agreements reached on November 17, except that Qwest continued to propose the use of business retail lines in place of residential retail lines. That appeared to Hydock to be the only remaining issue.[95] Halvorson felt the same.[96]

77. On January 26, 2001, Hydock wrote an e-mail to Miller and others stating that AT&T had moved up the desired start date to mid-May, desired to have a meeting on the billing process, and wanted to set up a site visit for a Qwest technician for February 15.[97]

78. Hydock understood Qwest's concern with the tariff issue and indicated to Qwest that AT&T would look at it. He checked with the AT&T testing group and was told that they really wanted to do the test with residential lines.[98]

79. On January 29, 2001, Hydock sent a message to the Qwest team stating that provisioning the lines as business lines pursuant to the tariff requirements was an issue for the AT&T test group and offering a brief explanation why. He also stated, "...other LECs have reached this agreement and have alerted the respective regulatory bodies that this provisioning of the residential lines in a business location is merely done to facilitate a test of LEC interfaces and AT&T OSS on residential lines." Hydock offered to work with Qwest in describing the situation to the Commission, and asked when Qwest's state managers could pursue such a meeting.[99]

80. About January 31, 2001, Miller advised AT&T that Qwest "couldn't confirm" the availability of 1000 lines at 901 Marquette Avenue.[100] On February 2, 2001, Miller sent Hydock another revision of the UNE-P agreement. In the cover message, he stated that Scott Schipper (his supervisor) was "still working with our regulatory folks on the residential and business issue," and that he had "confirmed that we do not have the full spare capacity for the 1000 lines at the Minneapolis location." The only substantive change in the agreement was in the provision on reporting results.[101] Miller did not respond to AT&T's invitation to approach the Commission jointly about the tariff issue because that issue was still in the hands of Davis and Ward.[102]

81. Qwest had the option of filing an amended tariff and it knew that there was a good possibility that the tariff could be waived. Waivers of tariffs for testing purposes are a normal occurrence.

82. Because Qwest did not respond to the invitation, in early February 2001, Hydock and Sandy Holstetter of AT&T met with Commissioner Edward Garvey and Commission staff without Qwest to discuss the tariff lines problem. Commissioner

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[95] Ex. 12, Tr. 1049.
[96] Tr. 69.
[97] Ex. 1046.
[98] Tr. 1046-47.
[99] Ex. 13, Tr. 1048.
[100] Ex. 1047.
[101] Ex. 14.
[102] Tr. 200-03.

Garvey and staff advised them that the use of residential lines for the test should not be a major issue and offered to work with Qwest and AT&T to resolve it.[103] On February 12, 2001, Hydock sent Miller an e-mail referring to Commissioner Garvey's statements and attaching a new draft of the testing agreement that had been revised to provide for the installation of residential lines, an installation date of April 15, 2001, and a commencement date of "on or after May 1, 2001."[104]

83. On or about February 12, 2001, Pelto contacted Ward by telephone and left a voice mail message inquiring as to why the test negotiations were being held up. Pelto received a return voice mail message from Ward the next day, stating that a response would be forthcoming in writing.[105] Hydock sent an e-mail on February 13, also inquiring about the agreement.

84. On February 14, 2001, John Stanoch, a Qwest policy and regulatory official in Minnesota, attended a "Jackson Forum" conducted by Commission Chair Gregory Scott where AT&T complained about Qwest's actions in the negotiations. He reported that to Ward, concluding that it was part of the on-going strategy to make Qwest look bad.[106]

85. The scheduled site visit to 901 Marquette was conducted on February 15, 2001, by the AT&T test manager and a Qwest engineer. They determined that 1000 spare pairs (lines) were currently available there for AT&T's use.[107]

86. On February 15, 2001, Carla Dickinson, an AT&T manager, sent Tim Bessey, a Qwest account manager, an e-mail with a spreadsheet file laying out the number of lines AT&T needed for certification (about 30), as well as the scenarios they would be using for certification. Bessey promptly sent them on to Halvorson, Miller, and Schlapper.[108]

87. In mid-February, AT&T was advised that Qwest's account team would no longer be involved in the negotiations. Communications between AT&T and Qwest's negotiating teams then ceased.[109] On or about February 19, after not having seen anything in writing for a week, Pelto again called Ward. This time, he asked simply how long it was going to take Qwest to say "no" to AT&T's test request. Ward responded with a vagueness indicating that Qwest would not be doing the test, but said they'd respond in writing.

88. On or about February 20, 2001, Stanoch and JoAnn Hanson, another Qwest policy and regulatory official in Minnesota, met with Chair Scott. They told him

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[103] Tr. 1053-1054.
[104] Ex. 15; Tr. 1054.
[105] Tr. 1057.
[106] Ex. 1018.
[107] Ex. 1048-1051; Tr. 1049-52, 1054-55. Qwest later attempted to explain its earlier contrary statement as a matter of confusion on AT&T's part over the meaning of "capacity." Ex. 1049; *see also* Ex. 46 (Gibbs Dep.) at 154-155.
[108] Ex. 1048.
[109] Tr. 1058-59.

that Qwest desired to handle the negotiations with AT&T on a "business-to-business" basis.[110]

89. On February 21, 2001, Halvorson sent a letter to Pelto and Terry that she had composed under the direction of Davis, with input from Ward, Stanoch, and Hanson.[111] In the letter, Halvorson stated that she was responding to Hydock and Ward's inquiries as to whether Qwest planned to proceed with the "UNE-P initial implementation plan" in Minnesota. The letter started by claiming that AT&T's initial request "included utilizing UNE-P service at AT&T employees' residential locations." It then said that option had always been available to AT&T under the Interconnection Agreement.

90. The letter went on, "Qwest did not agree with AT&T's written UNE-P trial proposal and instead, has opted to fully engage with AT&T and other CLECs in the ROC OSS trial." Just when Qwest had not agreed was not stated.

91. The February 21 letter said that in the past Qwest and AT&T worked together on large projects without written agreements, and they could do so in this matter as well. Instead, AT&T could simply order UNE-P under the Interconnection Agreement, even large numbers of lines. The letter then stated that AT&T "now" wants the residential lines to be provisioned at 901 Marquette or 200 South 5th Street in Minneapolis.[112] Since both of those were "clearly business locations," the letter said that Qwest could not agree to provide residential lines to a business location in violation of its tariff, but would be happy to provide business lines.

92. Qwest's suggestion that AT&T simply order 1,000 UNE-P lines under the Interconnection Agreement was not a legitimate resolution to the situation because it did not allow for the testing of conversion of residential lines to UNE-P lines, which was a legitimate and primary component of the test for AT&T. The tariff issue was easily resolvable at the Commission and Qwest's contention that it could not agree to provide residential lines was not made in good faith. The tariff issue was never an issue for Davis and not the reason that Qwest refused to conduct the test as requested by AT&T. It was merely a bogus justification added to the February 21 letter by Halvorson. Qwest should have offered to go to the Commission with AT&T to resolve the issue or at least said that it would rely on AT&T to obtain a waiver from the Commission. Not doing so was simply another reflection of Qwest's refusal to perform the UNE-P test and to allow AT&T to do only testing that Davis found acceptable.

93. Despite his increasing impression that Qwest was not going to conduct the test proposed by AT&T,[113] Pelto wrote Ward and Halvorson on February 22, 2001, asking that further delay on AT&T's test request cease. He expressed confidence that

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[110] Ex. 1002.

[111] Ex. 10; Tr. 205, 267.

[112] This statement is evidence that Halvorson is not above distorting the facts. Even by her own testimony, Halvorson had known by early January that the lines were going to 901 Marquette; that's when and why she talked to Ward about the tariff issue.

[113] Tr. 1223, 1271

the Commission would very likely grant Qwest a waiver from it's tariff so that residential lines could be provisioned. Pelto again proposed that Qwest join AT&T in a meeting with the Commission, this time with Commission Chair Scott, and further requested that Qwest commit to working in good faith with AT&T to conduct the requested test.[114] Pelto attempted to contact Ward to follow up on the letter and to discuss the test. Ward never responded. The meeting with Chair Scott never occurred because of "calendar issues" with Halvorson and what AT&T regarded as "disinterest" from Qwest. [115]

94. Lynn Notarianni, an Information Technologies Director for Qwest, became aware of the AT&T test proposal in late February 2001, when she received a telephone call from Hanson, the regulatory person in Minnesota. Hanson asked Notarianni to find out from technical personnel whether Qwest could provide billing information in a certain format AT&T was requesting. Notarianni checked with her boss, who had been involved in the earlier discussions on the UNE-P test. He told Notarianni that there were additional issues.[116] She then set up telephone meetings with the account team and other Qwest personnel for March 1 and 2, 2001, so that she could become familiar with the AT&T UNE-P test proposal. These meetings included Notarianni, Hanson, people from Halvorson's wholesale account team, and Andy Crain, a Qwest attorney.[117] On March 2, Miller sent Notarianni a copy of AT&T's February 15 list of certification scenarios to Notarianni.[118]

95. Notarianni then scheduled a meeting for March 7 to discuss what the technical group could do to overcome some of the technical concerns with the testing process and to decide what they could provide for AT&T, because she had come to understand that the request from AT&T was more involved than standard 1-2-3 testing, and contemplated "an entire trial."[119]

96. Sometime before March 7, 2001, Hanson had a discussion with Commission Chair Scott concerning AT&T's proposed test. Chair Scott told Hanson that the Commission "had jurisdiction to oversee anticompetitive behavior" and "if necessary, the Commission would look at that." Hanson related the "gist" of the conversation to Notarianni prior to the March 7, meeting.[120]

97. On March 5, 2001, Notarianni sent an e-mail to Crain, Hanson, Halvorson, and nine other Qwest managers and attorneys, with copies to Davis and Miller, forwarding an e-mail from Miller with the UNE-P test plan draft attached. She followed that up about an hour later forwarding Miller's e-mail with the certification scenarios attached. On March 6, 2001, Davis replied separately to the two e-mails, apparently as he read them. He copied everyone who had received Notarianni's two e-mails. The first e-mail stated:

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[114] Ex. 1005.
[115] Tr. 1327-29.
[116] Tr. 371-73.
[117] Tr. 420-21.
[118] Ex. 1018.
[119] Tr. 296-98.
[120] Tr. 299-300.

> Lynn, I assume that the answer to AT&T continues to be that we are not interested in engaging in an additional 271 systems test. If, on the other hand, AT&T wishes our cooperation in testing the capabilities or interoperability of a system AT&T has developed to provision UNE-P in Minnesota, we would be happy to meet with them to discuss appropriate arrangements.

The second e-mail, sent six minutes later to the same list of people, read: "Why are people talking to these guys about this?"[121]

98. The e-mails show that Davis was upset that Notarianni seemed to be ready to move beyond certification testing into working on AT&T's UNE-P test, apparently contrary to a directive he had issued at some prior time.

99. Several Qwest technical, business and operational personnel attended the March 7 telephone meeting, including Notarianni, Miller, Bessey, Christy Doherty (a Qwest vice-president who runs an operations center), EDI implementation contract employees Cim Chambers and Samantha Kratzet, and others.[122] Notarianni, Chambers, and Kratzet were in Notarianni's side office, the rest were on the telephone.[123]

100. Chambers and Kratzet each took notes at the meeting. In addition to the list of attendees, Chambers wrote:

> Tim: Email this morning from Steve Davis.
> - Why talking to AT&T about this? (lead Attorney)
>
> Not in favor of proceeding w/ project as AT&T outlined it.
>
> Strategy - position to take w/ AT&T re: trial.[124]
>
> Christy - conversations w/ Beth Halvorson.
> Commission - we are <u>not</u> doing this.
>
> Viewed as a "copy" of the ROC test and not something designed to test their systems.
>
> Qwest is not going to allow them to enter residential markets.
>
> No large test bed . . .

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[121] Exs. 2086 and 2087. Qwest did not produce these e-mails during the discovery process, nor were they disclosed on Qwest's privilege log as privileged communications. They were subsequently produced by order of the Administrative Law Judge pursuant to an AT&T motion on July 11, 2001. Tr. 943. Both e-mails were sent directly to Lynn Notarianni and thirteen others, including Qwest attorney Jason Topp.

[122] Tr. 32, 476.

[123] Tr. 298, 380-81, 927.

[124] The meeting notice referred to this meeting as a "Working meeting on AT&T/UNE-P MN trial." This group of Qwest personnel refer to certification under the 1-2-3 test as "implementation" and the production phase of the UNE-P test as "the trial" or the "friendly" or "friendlies" test.

JoAnn – Regulatory manager
- Chairman has told her that we need to move forward.

Copy Tim Bessey on meeting minutes

Invite Tim to meetings[125]

101. Kratzet's notes were similar. They indicate that Davis had said "stop!" and that the Commission had the issue as a complaint. They go on to state:

Andy – Msg w/ Steve Copy of ROC test & not designed to test their systems & how they work with ours.

Joanne Hansen Regulatory Mgr. (Qwest State MN) Chairman Scott, Commission Chair
*Anti-competitive behavior on Qwest's part to not participate w/ AT&T.

Her notes also indicate that Crain was to get further clarification from Davis and Hanson, that the Implementation Team was to acknowledge with the AT&T team that there were issues over the "friendly test" while proceeding with a regular IMA EDI implementation, and that the Halvorson letter of February 21 was discussed.[126]

102. Chambers and Kratzet were only familiar with IMA EDI implementation through the 1-2-3 test. Prior to March 7, 2001, no one from Qwest and no one from AT&T had ever talked with them about the UNE-P test. All the discussion their group had had with the AT&T team related to IMA EDI implementation. The AT&T people had made some mention of a "friendlies" test, but never explained it. Chambers was aware that Qwest would be interfacing with a different AT&T computer and system than the one she had worked with previously.[127]

103. Chambers' note that "Qwest is not going to allow them to enter residential markets," was a reference to what was explained to the group as a claim that AT&T might make if Qwest refused to perform the UNE-P test as requested.[128]

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[125] Ex. 2027 (emphasis in original).
[126] Ex. 36 (emphasis in original).
[127] Tr. 884-885; Ex. 1029.
[128] Based upon Chambers and Kratzet's notes, the discussion summarized in this note occurred at the end of the discussion about Davis' views, or at the beginning of the discussions about Hanson's discussion with Chair Scott, or in between. While it's possible that it was part of Davis' directions to the group, the evidence is not sufficient to prove that. It is most likely that Crain or one of the others was explaining how Chair Scott or others might view Qwest's refusal to do the UNE-P test as anti-competitive. Nonetheless, a generally credible witness despite her inability to remember the Davis e-mail addressed to her, testified believably that she and others on the conference were well aware that refusing to allow

104. The March 7, 2001, meeting confirmed what had been Davis' position since September 14, 2000--Qwest would not do the UNE-P test as requested by AT&T because it was only for 271 purposes; it would only do the 1-2-3 test of AT&T's readiness. Meanwhile, the Notarianni's IMA EDI implementation group was to continue working with AT&T team on the 1-2-3 test.

105. On March 8, 2001, the IMA EDI implementation group met with AT&T. After that meeting, Chambers called Bessey to clarify what her IMA EDI implementation group should say to their AT&T counterparts regarding the UNE-P test. Bessey told Chambers they should not say anything about the surrounding events and just proceed "blindly" as if it were any other IMA EDI implementation. He also told her that all communications regarding the "other items" were to come from the account and public policy teams.[129]

106. Notarianni and her IMA EDI implementation group never offered to expand the 1-2-3 test to include the testing of Qwest's systems requested by AT&T in its UNE-P test. Nor did the account or public policy teams.

107. On or about March 14, 2001, Qwest policy representatives Davis, Hanson, and Stanoch met with Commission Chair Scott to discuss the AT&T test. Davis reiterated Qwest's position that if AT&T truly wanted to enter the market with UNE-P, Qwest would do everything possible to facilitate AT&T's entry into the market, but that Qwest was concerned about AT&T's motives in demanding the particular UNE-P test parameters and questioned the necessity of those parameters. Chair Scott advised Qwest that refusal to allow the AT&T test could be viewed as anticompetitive under Minnesota statutes.[130]

AT&T's Complaint

108. Just prior to March 21, 2001, Pelto again called Davis, this time to give him a "heads up" that AT&T would be filing a complaint against Qwest with the Commission for its refusal to conduct the UNE-P test. Davis told Pelto to "go ahead, file your complaint." He then said that Qwest would not do the test even if the Commission ordered it, but that Qwest might if the Minnesota Supreme Court ordered it.[131]

109. On March 21, 2001, AT&T filed a complaint against Qwest with the Commission for Qwest's failure to conduct the proposed test, pursuant to Minn. Stat. § 237.462. The complaint sought penalties, temporary relief, and an expedited review of the matter. Specifically, AT&T alleged violation of § 251(c)(1) of the Telecommunications Act of 1996 (the Act) for Qwest's failure to negotiate in good faith the particular terms and conditions of interconnection. AT&T further alleged knowing and intentional violations of Minn. Stat. § 237.121(a)(2) (prohibits intentionally impairing

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AT&T to enter the market was illegal and would have "jumped all over any statement like that." Tr. 467-68.

[129] Tr. 889; Ex. 1029.

[130] Ex. 1002; Tr. 245-47.

[131] Tr. 1261.

the speed, quality or efficiency of services offered under contracts); Minn. Stat. § 237.121(a)(4) (unlawful to refuse to provide products, services or facilities in accordance with its contracts); and, Minn. Stat. § 237.121(a)(1) (failure to disclose in timely manner information necessary for the design of equipment that will meet specifications for interconnection).

110. On April 6, 2001, Qwest filed an Answer and Counterclaim with the Commission. In its Counterclaim, Qwest alleged that AT&T violated § 251(c) of the Act by failing to negotiate in good faith. Specifically, Qwest claimed that AT&T's true purpose for conducting the test was for advocacy in 271 proceedings against Qwest, and, therefore, AT&T failed to negotiate in good faith by misrepresenting the reasons for testing. Qwest further stated in its Answer that it was willing to offer AT&T the 1-2-3 testing that it provides to other CLECs and, if discovery established to Qwest's satisfaction that AT&T had legitimate business plans to provide UNE-P that requires testing beyond the 1-2-3 test offered, then Qwest would agree to negotiate a test agreement.[132]

111. The Commission quickly set a pre-hearing conference for April 19, 2001, pursuant to Minn. Stat. § 237.462, subd. 6(f). At that conference, Qwest continued to take the position that it would be willing to discuss providing more that the 1-2-3 testing offered if AT&T could establish that it needed more testing for business reasons.[133] At the April 19 hearing, Qwest also stated that it was having a difficult time agreeing to a waiver of its tariff to address the residential lines to a business location issue, but that if the Commission ordered the tariff waived they would not have much choice but to proceed.[134] At the conclusion of the hearing, the Commission voted to send the dispute to an Administrative Law Judge for resolution of the claims asserted, and further ordered the temporary relief requested by AT&T.[135] The Commission also ordered that Qwest's tariff on the residential line issue be waived.[136]

112. On May 1, 2001, the Administrative Law Judge convened a pre-hearing conference to discuss scheduling and discovery issues. Qwest continued to push for discovery of AT&T's business plans in order to assess AT&T's motives for conducting the test and their alleged "need" for doing so.[137] At the end of the hearing, the Administrative Law Judge ruled that discovery of business plans would not be permitted, but that Qwest could depose one technical employee at AT&T regarding the issue of why the 1-2-3 test would not be enough for AT&T's purposes.[138] The Administrative Law Judge further found that AT&T apparently acted in good faith in requesting the UNE-P test by virtue of the representations that it had made to the

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[132] *Qwest's Memorandum in Opposition to AT&T's Request for Temporary Relief*, p. 16.
[133] Transcript from April 19 Commission Hearing, p. 67-68.
[134] *Id.* at 70-72.
[135] *See Order Granting Temporary Relief and Notice and Order for Hearing*, issued April 30, 2001. The temporary relief ordered included that certification testing be completed by May 18, 2001, and that Qwest accept and install AT&T's order for 1,000 lines - 800 retail lines to be converted to UNE-P and 200 new UNE-P orders.
[136] *Id.* at 10.
[137] Transcript of May 1, 2001 Pre-Hearing Conference, at 19-20, 28-29.
[138] *Id.* at 83-85.

Commission and the Administrative Law Judge, together with the fact that it is a large telecommunications provider who has entered other states with UNE-P offerings. The Administrative Law Judge further determined that whether AT&T intended to use results of the test for advocacy in Qwest's 271 proceedings was irrelevant, given that the Act specifically established the 271 process as a mechanism to insure that an ILEC is meeting all the requirements of the Act before the FCC allows it to enter the long distance market.[139] The hearing was scheduled to commence on May 14, 2001.[140]

113. Meanwhile, AT&T and Qwest attempted to negotiate a settlement. On May 10, 2001, the deposition of Edward Gibbs of AT&T was taken.[141] On Friday, May 11, Qwest filed a Motion to Vacate the Contested Case Hearing. A telephone conference hearing on the motion was held at 3:00 p.m. that day. Quest argued that the hearing was unnecessary because all issues had been resolved by a Memorandum of Understanding (MOU) and an Initial Testing Plan that had been negotiated between Qwest and AT&T. However, AT&T argued that the MOU had not been finalized and the Department argued that it had not approved the MOU. During the telephone conference, Qwest stated, for the first time, that it would proceed with the test as set out in the Initial Testing Plan, regardless of the results of any further proceedings in this matter. AT&T conceded that Qwest's agreement to proceed satisfied AT&T's testing request, albeit belatedly. The Department also agreed that the testing issues were resolved by the Qwest decision to proceed with the requested testing. During the conference, the Administrative Law Judge determined that the time constraints imposed by the need to determine whether the UNE-P testing should proceed no longer applied, and ordered that the hearing previously scheduled to start May 14, 2001, be continued and that a prehearing conference be held May 15, 2001, to consider various motions and to reschedule subsequent proceedings.[142]

114. Following the prehearing conference on May 15, 2001, the Administrative Law Judge ruled that any settlement agreement that had been executed by AT&T and Qwest had been withdrawn and abandoned by the parties, that the Administrative Law Judge was still vested with the charge of the Commission to make findings on the parties' competing bad faith claims, and that the hearing on those claims would commence on July 9, 2001.[143]

115. Prior to the hearing, Qwest and AT&T proceeded with the UNE-P test. At some point, thereafter, Davis left Pelto a voice message congratulating Pelto on AT&T's

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[139] *First Pre-hearing Order*, dated June 6, 2001, at 3.
[140] Transcript of May 1, 2001 Pre-Hearing Conference, at 94.
[141] Ex. 46.
[142] *First Prehearing Order*, ¶¶ 10-14.
[143] *First Prehearing Order* at p. 5. The Administrative Law Judge also ruled on various discovery motions that had been filed by the parties at this time. Subsequent to the May 15 status conference, Qwest filed a Motion to Certify to the Commission the Issue of Enforceability of the Memorandum of Understanding, which the Administrative Law Judge had already determined was abandoned by the parties. The motion was denied by the Administrative Law Judge in the *Administrative Law Judge's Second Prehearing Order*, issued June 28, 2001.

"sham" test and on "seeking relief in the only one of Qwest's 14 states where the Commission would have required Qwest to do the test."[144]

Post-Hearing Actions

116. On July 13, 2001, during the break in the hearings, Dickinson of AT&T, sent Miller of Qwest an e-mail requesting confirmation of Halvorson's testimony on July 9 that Qwest would keep IMA EDI Version 6.0 available for the UNE-P trial through December.[145]

117. Qwest's systems are capable of supporting three versions of the EDI software simultaneously, but no more. At the time Qwest was offering Versions 6.0, 7.0, and 8.0. But it had committed to CLECs to upgrade to Version 9.0 on December 8, 2001.[146] Thus, Halvorson's commitment created a problem. Qwest requested a meeting to discuss the problem. That meeting took place on Thursday, August 9, 2001.[147]

118. Dickinson and Miller attended the August 9, 2001, meeting, along with several others from AT&T and Qwest. Qwest explained that its systems could not support Version 6.0 after it implemented Version 9.0 on December 8, 2001. It offered AT&T two options: Completely cease testing by December 7 or migrate to Version 7.0 or 8.0. Migration would require recertification, which would take up to 12 weeks to complete. AT&T said it would refer the question to Gibbs and respond to Qwest account manager Bessey.[148]

119. Dickinson immediately consulted with Gibbs. Gibbs told her that he had requested funding to migrate to Version 8.0 for purposes of the Minnesota UNE-P test, but it had not yet been approved. He told her to reiterate AT&T's desire to use Version 6.0 through the end of December. At the end of the day, still on August 9, 2001, Dickinson left a voice mail for Miller saying that it looked like AT&T "will not be migrating to another version, 6.0, 7.0, or 8.0, so it looks like the test will be over officially on the 7th of December." She said she could send an e-mail confirmation the next day. She actually sent it Monday, August 13, 2001, stating that per her voice mail, "AT&T will be ending the UNE-P consumer test trial in Minnesota on December 7, 2001." She did not mention that AT&T would not be migrating to a later version of the IMA EDI.[149]

120. Miller found the voice mail self-explanatory. However, he did have communications with Jason Topp, Qwest's Minnesota attorney, and Bessey where he indicated that by not upgrading, AT&T was "impairing its ability to enter the market rapidly upon completion of the UNE-P test," because it would have to certify its systems to a later version.

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[144] Tr. 1261.
[145] Ex. 67 (Affidavit of Mark Miller, admitted October 1, 2001).
[146] Ex. 67, ¶ 3.
[147] Ex. 67, ¶ 5; Ex. 1057 (Affidavit of Carla Dickinson Pardee, admitted October 1, 2001), ¶ 2.
[148] Ex. 67, ¶ 5; Ex. 1057, ¶¶ 4-6.
[149] Ex. 67, ¶ 6 and Exs. 1 and 2; Ex. 1057, ¶¶ 7-9 and Ex. A.

121. Miller states that he then decided to confirm his understanding of Dickinson's messages because the e-mail had not mentioned the decision not to migrate to a later version. With the help of counsel not identified in his affidavit, Miller drafted a letter to Dickinson and sent it to her on August 29, 2001.[150] It stated:

> Re: IMA upgrades and Minnesota UNE-P test completion date
>
> Dear Carla:
>
> This letter confirms your voice mail to me on August 9th, 2001 that AT&T does not plan on upgrading beyond IMA 6.0, and that the Minnesota UNE-P test will be completed on December 7, 2001.

It was signed by Miller and copied to Terry and Halvorson.[151]

122. On August 30, 2001, Qwest filed a request that it be allowed to supplement the record to put in newly discovered information that demonstrated "AT&T's lack of intention to enter the local market in Minnesota." Attached as that information was a copy of Miller's letter of the day before.[152] After receiving responses from AT&T and the Department, the Administrative Law Judge ordered that Qwest and AT&T file affidavits of Miller and Dickinson explaining that communication, which they did.[153]

123. Qwest's letter to AT&T of August 29, 2001, makes false and misleading statements and implications in the following ways:

> a) It falsely claims to be confirming a hasty, end-of-the-day voice mail. Qwest had Dickinson's confirming e-mail in it's possession two business days later. The e-mail said the UNE-P test would be ended December 7. Knowing the background of the two alternatives Qwest had given AT&T, Qwest did not need to confirm anything. If Miller had actually been confused about why the e-mail didn't mention not upgrading, he would have asked about the e-mail. Qwest's letter referred to the voice mail because Qwest wanted to capitalize on Dickinson's statement about not upgrading to a newer version of the IMA EDI, and that statement appeared only in the voice mail. The true purpose of Qwest's letter was to fabricate evidence for this case to bolster Qwest's allegation that the UNE-P test was not for market-entry purposes.
>
> b) It falsely states that AT&T did not plan on upgrading beyond Version 6.0. That allegation is based upon a false premise that AT&T would have to use its UNE-P test gateway for any subsequent real-market offering of local service using UNE-P and for other services it offers under

[150] Ex. 67, ¶¶ 8 and 9.
[151] Ex. 68, Qwest Outside Counsel letter dated August 30, 2001, attachment.
[152] Ex. 68.
[153] Post-Hearing Order, September 19, 2001; Exs. 67 and 1057.

interconnection agreements with Qwest. The truth is that the voice mail and e-mail only notified Qwest of AT&T's choice between the two alternatives offered by Qwest and that the choice was to end the UNE-P test December 7 rather that to upgrade AT&T's UNE-P test system gateway beyond Version 6.0. The messages had nothing to do with AT&T ever upgrading to later versions for market entry. AT&T will use a later version if and when it enters the UNE-P market in Minnesota or other Qwest states, but that will be on a new and separate EDI system on AT&T's end. Presumably, AT&T already had or was about to upgrade beyond Version 6.0 in its existing systems for ordering Local Number Portability and Unbundled Loops. As Miller pointed out, the new system will take some time for AT&T to program and to have certified, but AT&T will be able to use some of the knowledge it has gained in the UNE-P test.

124. Qwest's August 30, 2001, letter to the Administrative Law Judge claiming that certain information had come to light which it believed demonstrated AT&T's lack of intention to enter the local market was misleading because it was based upon the false and misleading evidence Qwest had fabricated and then carried that distortion further. Anyone with knowledge of the surrounding facts would know that nothing about AT&T's choice of the alternative to end the UNE-P test created any such inference. That Qwest would even make the argument is disturbing. It provides verification of Qwest's lack of candor and self-serving behavior in its dealings with AT&T.

125. Any of the foregoing findings more properly considered to be conclusions of law are adopted as such.

Based upon the foregoing findings, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and Commission have jurisdiction in this matter under Minn. Stat. §§ 14.50 and 237.02, 237.081, 237.16, and 237.462.

2. Minn. Stat. § 237.462, subd. 1, clauses (1), (3), and (4), empower the Commission to assess monetary penalties for knowing and intentional violations of Minn. Stat. § 237.121 and other statutes and rules; a Commission-approved interconnection agreement, if the violation is material; or any duty or obligation imposed under Section 251(a), (b) or (c) of the Telecommunications Act of 1996 that relates to service provided in this state.

3. Minn. Stat. § 237.462, subd. 2, allows the Commission to assess a penalty of between $100 and $10,000 per day for each violation, considering:

(1) the willfulness or intent of the violation;

(2) the gravity of the violation, including the harm to customers or competitors;

(3) the history of past violations, including the gravity of past violations, similarity of previous violations to the current violation to be penalized, number of previous violations, the response of the person to the most recent previous violation identified, and the time lapsed since the last violation;

(4) the number of violations;

(5) the economic benefit gained by the person committing the violation;

(6) any corrective action taken or planned by the person committing the violation;

(7) the annual revenue and assets of the company committing the violation, including the assets and revenue of any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company;

(8) the financial ability of the company, including any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company, to pay the penalty; and

(9) other factors that justice may require, as determined by the commission. The commission shall specifically identify any additional factors in the commission's order.

4. Under Minn. Stat. § 237.462, subd. 3, the Commission may not assess a penalty under unless the record in the proceeding establishes by a preponderance of the evidence that the penalty is justified based on the factors identified above.

5. Under Minn. R. 1400.7300, subp. 5, AT&T and the Department, because they accuse Qwest of violating the Interconnection Agreement and law, must prove the facts at issue by a preponderance of the evidence.

6. Under Minn. Stat. § 237.121, telecommunications carriers are prohibited from the following practices, among others:

(1) upon request, fail to disclose in a timely and uniform manner information necessary for the design of equipment and services that will meet the specifications for interconnection;

(2) intentionally impair the speed, quality, of efficiency of services , products, or facilities offered to a consumer under a tariff, contract, or price list:

. . .

(4) refuse to provide a service, product or facility to a telephone company or telecommunications carrier in accordance with its applicable tariffs, price lists, or contracts and with the commission's rules and orders.[154]

7. The Interconnection Agreement requires Qwest and AT&T to act in good faith and consistently with the intent of the Act and to provide notice, approval, or similar action without unreasonable delay or condition.

8. AT&T's UNE-P test request fit within the parameters established by § 14.1 of the Interconnection Agreement and was reasonable. Therefore, the Interconnection Agreement required Qwest to cooperate with AT&T in the conduct of the UNE-P test as requested.

9. Section 251(c)(1) of the Act requires ILECs and CLECs to negotiate interconnection agreements in good faith. 47 C.F.R. § 51.301(c), a regulation implementing the Act, lists certain actions and practices that are expressly considered to violate the duty to negotiate in good faith. These include demanding that another party sign a nondisclosure agreement prohibiting a party from providing information requested by the FCC or a state commission, intentionally misleading or coercing another party, and intentionally obstructing or delaying negotiations or resolution of disputes.

10. The Federal Communications Commission has interpreted "good faith" to mean "honesty in fact in the conduct of the transaction concerned," and has stated that "at a minimum the duty to negotiate in good faith "prevents parties from intentionally misleading or coercing parties into reaching an agreement they would not otherwise have made.[155]

11. Minnesota courts have defined "bad faith" as "a party's refusal to fulfill some duty or contractual obligation based on an ulterior motive, not an honest mistake regarding one's rights or duties. . . . Actions are done in 'good faith' when done honestly, whether it be negligently or not."[156] Good faith "is an issue of honesty of intent rather than of diligence or negligence."[157]

12. Qwest did not fail to act in good faith by attempting to determine for itself its obligations under the Interconnection Agreement. It was entitled to do so. However, Qwest's determination that it could refuse to engage in the cooperative testing requested by AT&T unless it was satisfied that AT&T was using the test for marketing purposes was not simply a mistaken interpretation of its obligation under the Interconnection Agreement. It was a position taken by Qwest before it had examined

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[154] Minn. Stat. § 237.121(a)(1) and (a)(4).
[155] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FIRST REPORT AND ORDER*, CC Docket No. 96-98 (rel. August 8, 1996) at 148.
[156] *Sterling Capital Advisors, Inc. v. Herzog*, 575 N.W.2d 121, 125 (Minn. Ct. App. 1998), see also, *Lassen v. First Bank of Eden Prairie*, 514 N.W.2d 831, 837 (Minn. Ct. App. 1994).
[157] *Wohlrabe v. Pownell*, 307 N.W.2d 478, 83 (Minn. 1981).

the terms of the Interconnection Agreement and it was not supported by the terms of the Interconnection Agreement. Instead, the position was developed and used by Qwest in an attempt to prevent AT&T from developing data that AT&T might present to ROC test officials and regulatory bodies in opposition to Qwest's Section 271 applications.

13. Qwest committed a knowing, intentional, and material violation of its obligation to engage in cooperative testing under § 14.1 of the Interconnection Agreement by its refusal to conduct AT&T's UNE-P test from September 14, 2000, to May 11, 2001. Such action also constitutes a knowing and intentional refusal to provide a service, product, or facility to a telecommunications carrier in accordance with a contract under Minn. Stat. § 237.121(a)(4). Qwest is therefore subject to penalties under Minn. Stat. § 237.462, subd. 1, (1) and (3).

14. Qwest failed to act in good faith and committed knowing, intentional, and material violations of its obligations to act in good faith under the Interconnection Agreement and under Section 251(c)(1) of the Act by the following conduct:

a) Creating a specious position to support its refusal to conduct AT&T's UNE-P test, when that refusal was actually based upon what Qwest saw as an assault against its 271 initiative and by its desire to prevent or delay AT&T from conducting a true market entry test--both pure retail business interests of Qwest.

b) Imposing its position regarding its testing obligations upon AT&T, whether specious or correct, without informing AT&T, by delaying AT&T's opportunity to challenge that position, by concealing its true intent to allow only certification testing, and by attempting to avoid and by delaying the UNE-P test by engaging AT&T in long and unnecessarily difficult negotiations over UNE-P testing that Qwest never intended to allow. These deceptions continued from September 14, 2000, until April 6, 2001, when Qwest filed its Answer and Counterclaim declaring openly for the first time that it would not do the UNE-P test unless AT&T demonstrated to its satisfaction that it had legitimate business plans to enter the market.

c) Sending the letter of August 29, 2001, to AT&T making false and misleading statements

Such actions also constitute knowing and intentional failure to disclose necessary information under Minn. Stat. § 237.121(a)(1). Qwest is therefore subject to penalties under Minn. Stat. § 237.462, subd. 1, (1), (3) and (4).

15. Qwest's violations continued from September 14, 2000, to May 11, 2001, a period of 239 days. Substantial penalties are appropriate, considering the following factors:

a) The violations were knowing and intentional.

b) The violations were serious. Qwest's conduct delayed by several months AT&T's ability to enter the local service market via UNE-P in Minnesota and other Qwest states. This harmed AT&T financially and also harmed Minnesota consumers by delaying significant competition in the local service market.

c) There is one significant violation, a continuing pattern of conduct, and several lesser individual violations consistent with that pattern

d) Qwest conduct in this case was for the purpose of protecting its entry into the long-distance market through the Section 271 process. Long-distance will provide very substantial revenue to Qwest.

e) Qwest ultimately agreed to cooperate in AT&T's UNE-P test, but only after AT&T had initiated this complaint proceeding.

f) Qwest has enormous assets, but is suffering revenue problems in the current economy. It has the financial ability to pay significant penalties.

g) Qwest's actions would be appropriate in a competitive market. But this is a regulated market where Qwest's actions are subject to the Act and state law. Its actions were anti-competitive and cannot be condoned under the Act and state law.

16. AT&T's conduct in this matter did not violate the Interconnection Agreement or law. The few statements AT&T made to Qwest that were not totally accurate were minor deviations, concealed no material facts, and did not mislead Qwest. Qwest's Counterclaim against AT&T should be dismissed.

NOTICE

THIS REPORT IS NOT AN ORDER. THE PUBLIC UTILITIES COMMISSION WILL ISSUE THE FINAL AGENCY ORDER, WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

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

RECOMMENDATIONS

IT IS RESPECTFULLY RECOMMENDED that the Public Utilities Commission issue an Order:

1. Adopting the foregoing Findings and Conclusions.

2. Assessing monetary penalties under Minn. Stat. § 237.462 against Qwest in the amount of $5,000.00 per day for 239 days, a total of $1,195,000.00.

3. Dismissing Qwest's Counterclaim against AT&T.

Dated February 22, 2002

STEVE M. MIHALCHICK
Administrative Law Judge

Exhibit C

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of U.S. WEST COMMUNICATIONS, INC., for Approval of Compliance with 47 U.S.C. ' 271(d)(2)(B)	))))	DOCKET NO. 00-049-08 PROCEDURAL ORDER

ISSUED: December 6, 2001

By The Commission:

The Commission is interested in determining if agreement can be reached concerning the Utah Staff=s proposed post-entry assurance performance plan (hereafter referred to as the QPAP). In order to facilitate these discussions and encourage agreement, the Commission designates Judith Hooper, of the Division of Public Utilities, to be a staff advocate for the purpose of participating in these negotiations. The term of this appointment shall be from the issuance of this Order until such time as the Commission issues its Report and Order with respect to the QPAP.

Representatives of Qwest and of the interveners in this Docket may contact Ms. Hooper to participate in the negotiations regarding the Utah Staff=s proposed QPAP. The Commission directs that at a minimum one meeting will be held on Wednesday the 12th day of December 2001 in room 426 of the Heber M. Wells Building in Salt Lake City, Utah to determine if parties can reach agreement concerning these issues. Any authorized representative of the parties to this Docket may attend the December 12th meeting as desired. Participants may attend in person or by phone bridge. The Commission directs the parties to file a report with the

Commission by the 18th of December concerning any agreements reached and the public policy justifications for said agreements. Any party to this Docket may petition the Commission to extend the time allowed for negotiations beyond December 18, 2001 if it can be shown that additional significant agreements are likely.

The designation of Ms. Hooper as advocacy staff is strictly limited to the time periods previously mentioned in this Order. The designation does not extend to any other issue or any other time period for which Ms. Hooper is currently designated as advisory staff. The current limited term designation will not preclude Ms. Hooper from returning to her previous role as an advisory staff member on this issue following the issuance of the Commission=s report and Order on the QPAP.

Based upon the foregoing, the Commission Orders the following.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that.

1. Judith Hooper is temporarily designated as advocacy staff for the purpose of engaging in discussions and negotiations directed towards developing an acceptable proposed post entry assurance plan that effectively protects the public interest in the Utah service territory of Qwest.

2. This designation is in effect from the time of this Order=s issuance to the time the Commission issues a Report and Order on the QPAP.

3. The parties to this Docket must file a report on any agreement reached on December 18th 2001. Said report will contain an explanation of the public policy justifications of any agreements reached. If the parties are not able to complete their work by December 18th, and if a likelihood of significant agreement in the near future can be shown, the parties may petition the Commission to extend the period of negotiation beyond the December 18, 2001 cutoff date.

4. The parties will meet on December 12th, 2001 in room 426 of the Heber M. Wells building in Salt Lake City, Utah, and at other times as they judge to be necessary. Interested parties may attend the December 12th meeting in person or by phone.

DATED at Salt Lake City, Utah, this 6th day of December, 2001.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

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May 31, 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 AT&T's Additional Statement of Supplemental Authority. Please call me if there are any questions.

Sincerely,

Steven H. Weigler

SHW:jb

Enclosures

cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May 2002, the original and 10 copies of AT&T's Additional Statement of Supplemental Authority 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 31, 2002 addressed to:

Colleen Sevold
Manager~Regulatory Affairs
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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 ADDITIONAL STATEMENT OF SUPPLEMENTAL AUTHORITY

AT&T Communications of the Midwest, Inc. submits this Additional Statement of Supplemental Authority regarding the Qwest Performance Assurance Plan, stating as follows:

On May 29, 2002, the New Mexico Commission issued its Order Regarding Qwest's Performance Assurance Plan (Attachment A). Also on May 29, 2002, the Nebraska Commission issued its Motion for Rehearing Granted In Part, Denied In Part (Attachment B). AT&T submits these orders to the South Dakota Commission as supplemental authority in support of its and the South Dakota Commission's positions on Qwest's Performance Assurance Plan.

Respectfully submitted on May 31, 2002.

AT&T COMMUNICATIONS
OF THE MIDWEST, INC.

By: Steven H. Weigler

Mary B. Tribby
Steven H. Weigler
AT&T Law Department
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202
(303) 298-6957

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF QWEST CORPORATION'S SECTION 271 APPLICATION AND MOTION FOR ALTERNATIVE PROCEDURE TO MANAGE THE SECTION 271 PROCESS	)	Utility Case No. 3269

and

IN THE MATTER OF QWEST CORPORATION'S STATEMENT OF GENERALLY AVAILABLE TERMS PURSUANT TO SECTION 252(f) OF THE TELECOMMUNICATIONS ACT OF 1996	)	Utility Case No. 3537

ORDER REGARDING QWEST'S PERFORMANCE ASSURANCE PLAN

Mexico. Qwest intends the QPAP to be included in its SGAT as Exhibit K, and to be adopted as part of a CLEC's approved interconnection agreement with Qwest.

The QPAP is a self-executing remedy plan with a two-tiered payment structure; it requires Qwest to make payments to competitive local exchange carriers (Tier 1 payments) and/or to the state (Tier 2 payments) when Qwest fails to meet certain performance measurements (parity standards or benchmarks), on a per-occurrence or per-measurement basis. The Tier 1 and Tier 2 payment structures and the methods for calculating payments are described in §§ 6 through 9 of the QPAP. Section 12 of the QPAP establishes an annual limit or cap on Tier 1 and Tier 2 payments.

The QPAP's performance measurements are defined in the Performance Indicator Definitions (PIDs) developed in the Qwest Regional Oversight Committee (ROC) Operational Support System (OSS) collaborative and included in the SGAT as Exhibit B. *See* QPAP § 3. The statistical measurements (modified "z-tests") for determining conformance with the parity and benchmark measurements are described in QPAP §§ 4 and 5.

The QPAP imposes on Qwest the duty to submit reports to state commissions and competitive local exchange carriers (CLECs) concerning Qwest's wholesale performance during prior months. The monthly reporting requirements are set forth in § 14 of the QPAP. Section 15 of the QPAP provides for integrated joint audits and investigations by participating state commissions. Participating commissions would choose an independent auditor and approve the audit/investigation plan. Expenses for such audits and investigations would be paid for out of a combination of Tier 1 and Tier 2 funds.

Section 16 of the QPAP provides for a six-month review to determine whether any performance measurements should be added, deleted or modified, whether the parity or benchmark measurements should be modified, and whether the payment structure should be modified. Finally,

Covad Communications Company (Covad), and the Commission's Utility Division Staff ("Staff"), filed with this Commission "10-day" comments or exceptions in response to the *QPAP Report*. Further, pursuant to the Commission's *Amended Third Procedural Order* in Utility Case No. 3269, Qwest, AT&T and Staff subsequently filed Commission-specific briefs. The Commission entertained oral arguments concerning the *QPAP Report* on January 8, 2002.

Having reviewed the *QPAP Report*, the parties' comments, briefs and arguments regarding the *QPAP Report's* recommendations, the record concerning this matter generally and being otherwise fully advised, the Commission **FINDS AND CONCLUDES**:

I. INTRODUCTION

1. Performance assurance plans have become the vehicle by which BOCs such as Qwest partially fulfill the section 271 requirement that an application to provide in-region interLATA service be found "consistent with the public interest, convenience and necessity" pursuant to section 271(d)(3)(C).[6] The public interest inquiry considers both whether a BOC has opened its local market to meaningful competition prior to garnering section 271 approval and that it provide assurances the local market will remain open after receiving section 271 approval.[7] In fulfilling the requirements of the latter part of the public interest test, every BOC obtaining section 271 authority to date has demonstrated anti-backsliding measures are in place to assure future compliance by implementing a performance assurance plan.

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[6] 47 U.S.C. § 271(d)(3)(C).

[7] *See, e.g., 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*, FCC 01-130, 16 FCC Rcd 8988, at ¶ 233 (2001) (*Verizon Massachusetts Order*).

4. The *QPAP Report* is organized, for the most part, around the five "important characteristics" for determining whether a performance assurance plan is within the "zone of reasonableness. This *Order* generally follows the same organizational format as the *QPAP Report*.

5. In the *QPAP Report*, the Facilitator made numerous recommendations that were uncontested by the participants in these proceedings. Unless otherwise addressed in this *Order*, the Commission accepts and adopts all such recommendations.

6. The Commission restates and incorporates the background findings and conclusions made by the Commission in previous interim orders in this case in lieu of repeating those background findings and conclusions here.

7. As with previous interim orders in this case, this interim order addresses only some of the requirements of section 271 of the Act. The Commission anticipates that a series of interim orders including this one will form the basis for a single final order, incorporating previous interim orders, updated as appropriate.

II. STANDARD OF REVIEW

8. The Facilitator laid out his standard of review on pp. 4-6 of the *QPAP Report*. The Facilitator included not only the five characteristics of the FCC's zone of reasonableness test, but also a number of additional "considerations," such as whether the incentives of the plan impose an "irrational price" on in-region, interLATA entry.[12] Several of the parties, including AT&T and Staff, object to the Facilitator's use of the additional criteria delineated in the *QPAP Report*.

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[12] *QPAP Report* at 6.

sections of the QPAP in an incumbent-biased direction even more than that proffered by Qwest in advance of the Multi-State QPAP hearings.[18]

12. Staff's views about the Facilitator's standard of review generally are congruent with those expressed by AT&T. Staff therefore urges the Commission to abide by the standard of review as set forth in the FCC's section 271 orders.[19]

13. For its part, Qwest apparently would have the Commission adopt the Facilitator's standard of review. Although it did not address the issue directly in the comments submitted to this Commission, Qwest states that we should find "that the QPAP, as modified by Qwest as the result of the Facilitator's Report, provides adequate assurance that Qwest will not backslide and that its section 271 application is in the public interest."[20]

14. As the Commission has done throughout these proceedings, we will assess the *QPAP Report* as we have all of the Facilitator's other reports, namely as a recommended decision akin to those issued by the Commission's hearing examiners. That being the case, we are not constrained to accept the analysis or recommendation made by the Facilitator on every issue, let alone any single recommendation. Consequently, as has been the Commission's consistent practice in these proceedings, we will review the evidence of record and the arguments of the parties in examining the Facilitator's QPAP recommendations in the same manner that we review the recommended decisions of the hearing examiners in every other proceeding before the Commission.

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[18] AT&T's Exceptions to the Liberty Consulting Group's QPAP Report (AT&T's Exceptions), at 2.

[19] Staff's Updated Proposed Findings And Conclusions And Interim Order On Report On Qwest's Performance Assurance Plan (Staff's Proposed Findings), at 6.

[20] Qwest's Updated Proposed Recommendation Regarding Qwest's Performance Assurance Plan (Qwest's Proposed Findings), at 4.

for Verizon, which contained significant differences from both the New York and Texas plans, the FCC said:

> In prior section 271 orders, the Commission has reviewed performance assurance plans modeled after either the New York Plan or the Texas Plan. Although similar in some respects, the current Pennsylvania plan, however, *differs significantly from each of these two plans*. As stated above, we do not require any monitoring and enforcement plan and therefore, we do not impose requirements for its structure if the state has chosen to adopt such a plan. We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-271 authority monitoring and enforcement.[21]

19. The FCC reiterated this position in the *Verizon Connecticut Order* where it stated:

> As the Commission has recognized, *individual state PAPs may vary*, and our task is to determine whether the PAP at hand falls within a zone of reasonableness and is "likely to provide incentives that are sufficient to foster post-entry checklist compliance.[22]

20. We address the matter of our jurisdiction to modify the QPAP and oversee its implementation and operation in more detail below in our treatment of the QPAP's six-month review process.

III. CONSIDERATION OF OTHER STATE AND/OR BOC PLANS

21. There was considerable discussion in the briefs as well as at the oral argument before us regarding the propriety and advisability of considering other state plans as well as BOC plans approved by the FCC.

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[21] *Verizon Pennsylvania Order*, 17 FCC Rcd 17419, at ¶ 128 (emphasis added; internal citations omitted).

[22] *In the Matter of Application of Verizon New York 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 Connecticut*, Memorandum Opinion and Order, FCC 01-208, 16 FCC Rcd 14147 (2001), at ¶ 77 (*Verizon Connecticut Order*) (emphasis added; internal citations omitted).

is an evolutionary process that requires changes to both measures and remedies over time."[29]

Consistent with its earlier conclusions in this regard, the FCC recently recognized

> that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's SQM [Service Quality Measurement Plan] 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.[30]

Finally, our review of the QPAPs developed by other states to date is consistent with what virtually every other state commission has done in relation to the key components of Qwest's proposed plan.

26. For these reasons, and given the Commission's statutory obligation to safeguard and promote the public interest, we find it is entirely apposite and, in point of fact, necessary for the Commission to review other state and BOC performance assurance plans and to adopt from them those elements and/or concepts we deem most appropriate for ensuring that the local marketplace for telecommunications services remains open to competition in New Mexico. Indeed, given the relatively nascent nature of local competition in New Mexico, it is particularly incumbent on the Commission to ensure that the playing field remain as level as feasible in order to develop more robust and meaningful competition in the local marketplace for telecommunications services in this State.

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[29] *Id.*

[30] *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*, Memorandum Opinion and Order, CC Docket No. 02-35, FCC 02-147 (rel. May 15, 2002) (*BellSouth Georgia/Louisiana Order*), at ¶ 294 (internal citations omitted).

consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's resolutions of the total payment liability issues addressed in this paragraph.

30. We now turn our attention to the three total payment liability issues about which the parties raised points of contention in their post-*QPAP Report* comments and briefs.

1. The 36% of net revenues standard

31. The 36% of net revenues standard calls into question whether the amount Qwest places at risk through its QPAP every year should be capped at 36% of Qwest's 1999 ARMIS net interstate revenues. This issue is conceptually related to the question of whether the Commission should adopt a procedural cap. The procedural cap issue essentially involves whether or not a trigger should be established, based on the level of fines accrued by Qwest, which would cause the Commission to initiate an inquiry into Qwest's performance under the PAP.

32. The debate over the parameters of the cap essentially boils down to addressing the following issues that we do not perceive as being mutually exclusive: (i) should there be an absolute or "hard" cap, which may not be raised no matter how bad Qwest's performance may be; if so, at what percentage of net revenues should the cap be set such that an adequate incentive to avoid backsliding is created; or (ii) should the cap be a procedural or "soft" cap, which can be exceeded if Qwest's performance under the plan is sufficiently poor that the procedural cap is reached; if so, at what percentage of net revenues should the cap be set.

under the cap through reasonable and prudent efforts. AT&T therefore cautions that under the scenario recommended by the Facilitator, the Commission would be prevented from raising the cap, seeking to take corrective action or other measures, or even launching an investigation into why the cap was reached before Qwest's performance became so bad that it exceeded the cap for twenty-four months in a row.[37] AT&T also objects to the Facilitator's cap reduction mechanism, asserting the FCC has never allowed a plan to dip below a 36% cap and contending, therefore, that public interest principles combined with the lack of precedent make the Facilitator's position untenable.[38]

37. AT&T therefore urges the Commission to reject the Facilitator's adjustable cap and establish instead a procedural cap in the range of 20 to 40 percent. AT&T further recommends that the Commission direct Qwest to adopt QPAP language stating that once this cap is reached,

> the Commission shall have the authority to open a proceeding to determine the reason the cap was met. If the Commission determines that the meeting of the cap was performance related it shall lift the cap for that given calendar year. If the Commission determines the meeting of the cap was not performance related, it shall keep the cap in place for that calendar year."[39]

38. Covad likewise requests that we reject a "hard" cap, suggesting instead that we adopt a procedural cap set at 44%. Covad notes this is the cap currently set in the Verizon plan by the New York commission, which raised the cap after having found the initial 36% cap insufficient to provide an adequate BOC incentive to meet the requisite performance standards.[40]

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[37] AT&T's Updated Proposed Order Re: QPAP (AT&T's Proposed Findings), at 5.

[38] *Id.* at 5.

[39] *Id.* at 7.

[40] Covad Communication Company's Comments on the Report on Qwest's Performance Assurance Plan (Covad's Comments), at 11.

42. We find both the 25% procedural cap and the 44% annual cap provide adequate incentives against backsliding and fall squarely within the zone of reasonableness; this is particularly true in light of the performance assurance plans approved by the FCC in the *BellSouth Georgia/Louisiana Order* just two weeks ago.[43]

43. The hybrid approach with respect to capping net revenues at risk we are hereby adopting will enable the Commission to intervene in a proactive manner if the 25% cap is reached in order to determine the reason or reasons the cap was met. If the cap is met as the result of performance-related problems, the Commission will have the ability to take corrective action in an expeditious manner. Moreover, this approach should avoid, or at least is intended to avoid, the problem of non-payment to CLECs occurring where there is solely a hard cap (such as 36% or 44%) in place and that cap is reached. Furthermore, this approach is entirely consistent with the Commission's authority and, indeed, duty to intercede at any time we may deem necessary and appropriate to administer and modify the QPAP.[44] At the same time, the 44% annual cap affords Qwest a degree of certainty as to the maximum amount of net revenues that will be placed at risk in any given year.

44. In sum, we consider our resolution with respect to capping payment liability to be a fair and balanced approach that provides adequate incentives against backsliding, takes into account the Commission's authority as well as our duty to promote the public interest, addresses CLEC concerns over a hard cap being exceeded by a BOC that has decided it is more efficient to pay than

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[43] *See BellSouth Georgia/Louisiana Order*, FCC 02-147, at ¶ 296 (wherein the FCC endorsed both the Georgia Service Performance Measurements and Enforcement Mechanisms (SEEM) plan, which places at risk 44% of BellSouth's annual net revenues in Georgia, and the Louisiana SEEM plan, which features a 20% procedural cap).

[44] *See infra* our discussion of the six-month review process, ¶¶ 161-184.

> 4. This calculation begins in the first month that payments are expected to exceed the annual cap and continues in each month of that year. Qwest will recover any debited amounts by reducing payments due from any CLEC for that month and any succeeding months as necessary.[46]

47. Qwest does not oppose Tier 1 equalization. In fact, Qwest has incorporated the Facilitator's language into the QPAP at § 12.3, but with some changes it views necessary to clarify the operation of the complex equalization process. Because QPAP monthly payments may fall below or exceed the monthly cap, accounts must be balanced using year-to-date payments and a cumulative monthly cap. Qwest believes its modifications of the Facilitator's recommended language accomplish this purpose.[47]

48. Staff indicates that Tier 1 equalization is fair only to the extent it creates a process for CLECs to "share the pain" of not receiving full QPAP payments they would otherwise have been entitled to receive.[48] Staff maintains that, in any event, the removal of the 36% hard cap would obviate the need for equalization or "apportionment of pre-cap QPAP payments among CLECs."[49]

49. AT&T did not address the equalization principle in its New Mexico-specific briefs. However, it is on record at least in Montana as stating that "if a procedural cap is instituted, the need for equalization principles wanes and when the Commission conducts an investigation after Qwest reaches the cap, payment equalization can be determined then, if any is appropriate."[50]

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[46] *QPAP Report*, at 19-20.

[47] Qwest's Comments, at 3-4.

[48] Staff's Proposed Findings, at 10.

[49] *Id.* at 15.

[50] *In The Matter Of The Investigation Into Qwest Corporation's Compliance With Section 271 Of The Telecommunications Act Of 1996*, Public Service Commission of the State of Montana, Utility Division Docket No. D2000.5.70, Final Report on Qwest's Performance Assurance Plan and Responses to Comments Received on Preliminary Report (Apr. 19, 2002) (*Montana Order*), at 14.

1999 data to capture post Qwest-U S WEST merger efficiencies and economies. Covad concludes that the source data must be reviewed regularly to ensure Qwest's total exposure "remains constant."[52]

54. Various other CLECs criticized the freezing of the cap at 36% percent of 1999 net revenues, suggesting that if Qwest's net revenues increase in the future, the cap will represent less than 36% of Qwest's net revenues for any year in which revenues are greater than those reported for 1999.[53]

55. The Facilitator considered the implicit premise behind the CLECs' position – that net intrastate operating revenue will continue to increase despite growth in competition for local exchange business – to be speculative at best. For this reason, among others, the Facilitator found there was no reason to conclude that the ongoing use of 1999 net intrastate revenues was more likely to increase or decrease Qwest's net financial exposure and, consequently, he declined to recommend revisiting the base year for calculation of the cap.[54]

56. Qwest supports the Facilitator's recommendation on this issue.[55]

57. Neither staff nor AT&T commented on this particular issue.

58. The Commission finds merit in staying at this time with the certainty of the 1999 ARMIS values. Consequently, we accept and adopt the Facilitator's recommendation respecting this issue.

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[52] Covad's Comments, at 11-13.

[53] *QPAP Report*, at 21.

[54] *Id.* at 21-22.

[55] Qwest's Proposed Findings, at 6.

standard by Qwest.[57] The Facilitator reasoned that the probability of Qwest failing a performance standard may not occur independently of other performance measures due to the effect of a common underlying factor, thus greatly increasing the chances of simultaneous failure.[58] The Commission acknowledges the potential significance of AT&T's probability analysis and, therefore, we are inclined to be less dismissive of AT&T's calculations than the Facilitator was.

64. In any event, whatever relative merits or demerits may inhere in AT&T's statistical analysis, this much is abundantly clear: the probability of Qwest failing performance measures whether such failures are triggered by a common event or a truly independent variable will be demonstrated on a real-time basis once the performance data is reported to the Commission upon the QPAP taking effect. We believe we will be able to assess through the performance reporting and six-month review processes whether or not a specific measure should be modified or payments adjusted so that the performance measure in question provides Qwest a sufficient incentive to provide proper wholesale service to CLECs.

C. Compensation for CLEC Damages

65. The following issues were raised regarding the sufficiency of the QPAP's proposed compensation for CLEC damages:

1) Relevance of compensation as a QPAP goal;
2) Evidence of harm to CLECs;
3) Preclusion of other CLEC remedies;
4) Indemnity for CLEC payments under state service quality standards;
5) Offset provision (§ 13.7);

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[57] *See* Staff's Proposed Findings, at 17-18.

[58] *QPAP Report*, at 25-26.

causes of action founded on theories of liability arising from the same, or analogous, non-conforming performance. Qwest stated that the election of remedies provisions in its proposed plan are based on the SBC Texas, Oklahoma and Kansas plans.[60] QPAP § 13.6, in its original form, provided as follows:

> 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.

69. The Facilitator found that this section, when read in conjunction with § 13.5, could not be interpreted consistently. The Facilitator consequently recommended revisions to the election of remedies provision designed to make clear that CLECs that elect the QPAP surrender other contractual remedies, but retain noncontractual remedies that would be subject to an offset for any damages that represent compensatory recovery.[61] Therefore, the Facilitator recommended that Qwest strike all of the quoted portions of § 13.6, following the phrase "in its interconnection agreement with Qwest" and replace it 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.[62]

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[60] *Id.* at 30.

[61] *Id.* at 31-32.

[62] *Id.* at 31.

as Qwest purports to do in its revision of the Facilitator's revision presented in Qwest's November 9, 2001 comments."[66]

73. Staff concludes by urging the Commission to require Qwest to strike its proposed clarifying language for QPAP § 13.6 and to revise it in conformity with the Facilitator's recommended language.[67]

74. AT&T asserts that Qwest's proposed language for § 13.6 differs from the FCC's general mandate, which does not require a performance assurance plan to be the sole remedy, as well as the Texas plan, which Qwest purportedly modeled its own plan after. According to AT&T, under Qwest's proposed language, there can be no liquidated damages under interconnection agreements because a CLEC would have to pick the QPAP as its exclusive remedy. Furthermore, Qwest would be allowed to unilaterally limit remedies associated with antitrust and other legal actions pursuant to § 13.6 combined with § 13.7.[68]

75. AT&T goes on to point out that under proposed QPAP language for § 13.6, contrary to FCC precedent, CLECs would not have the right to sue for contractual remedies, including for measures not even measured by the QPAP. AT&T also maintains a CLEC would not be able to avail itself of remedies found elsewhere in the SGAT. Additionally, AT&T avers that for non-contractual remedies, CLECs would have the right to sue, but would not recover based on the proposed language in § 13.6. Moreover, according to AT&T, if a CLEC were able to obtain a judgment in a court of

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[66] Staff's Proposed Findings, at 20-21.

[67] *Id.* at 21.

[68] AT&T's Proposed Findings, at 8.

Commission that the SGAT is not a normal bilateral contract involving traditional liquidated damage analysis. As the Colorado commission's Chairperson, Raymond Gifford, aptly stated,

> It is true that, in an ordinary commercial contract, parties would not have the ability to supplement liquidated damages. The SGAT, though, is not an ordinary commercial contract. Rather it is a regulatory hybrid of a contract and a tool for furthering public policy. This Commission has the authority to ensure that Qwest's interconnection agreement with CLECs promote competition and adhere to the Act. This Commission also has the authority to levy fines on Qwest for providing poor retail and wholesale service. These principles, combined with the broad concern about post-271 backsliding, justify the risk that occasionally Qwest may overcompensate the CLECs for their damages, while preserving the right of the CLECs to sue when they are under compensated. The risk to Qwest is mitigated substantially by the probability that a court would not allow double recovery and would require an offset of any amount the CLEC received under the CPAP.[72]

80. Moreover, Qwest's concerns about overexposure could be alleviated if Qwest merely adopted the same language found in the Texas plan on which Qwest repeatedly emphasized it modeled its proposed plan. The Texas plan language, approved by the FCC, makes it manifest that CLECs would not be able to receive duplicative damages for contractual claims but could receive damages if they could establish damages under other theories of liability.

81. For these reasons, we direct Qwest to replace § 13.6 of the QPAP with the following, provisions which are derived directly from CPAP §§ 16.3, 16.4 and 16.6 and which strike a more just and reasonable balance between limiting Qwest's financial exposure and providing adequate remedies to CLECs for non-conforming performance:

> 13.6 This PAP contains a comprehensive set of performance submeasures, 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,

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[72] *Colorado Order*, at 65.

83. The Facilitator recommended that the Commission adopt Qwest's offset provision. However, as reflected above, the Facilitator also recommended that the language of § 13.7 should be revised to provide that (a) Qwest is not entitled to reduce QPAP payments for damage awards for physical injury to persons or property, even where those awards arise from the provision of wholesale service to CLECs, and that (b) CLECs retain the ability to recover damages awarded on non-contractual theories, as discussed above in connection with § 13.6.[73] The Facilitator also concluded that SGAT § 5.8.1 should be changed in order to prevent an inappropriate limit from being placed on Qwest's liability for property damage and personal injury.[74]

84. Qwest accepted the Facilitator's recommended changes to § 13.7, and those changes are reflected in the language quoted above. Moreover, our review of Qwest's most recent SGAT filing indicates that Qwest has added the language to § 5.8.1 that the Facilitator recommended.[75]

85. Responding to AT&T's arguments that, as discussed below, are sharply critical of the Facilitator's recommendation concerning the offset, Qwest contends AT&T's concern that the offset provision will be unilaterally applied by Qwest is miplaced. In support of this position, Qwest draws attention to the fact that the Facilitator recognized that

> It is ultimately not helpful here to cast the issue in terms of allowing Qwest a unilateral right to offset QPAP payments. If Qwest's language is adopted, nothing in it gives Qwest the right to make an unreviewable decision about whether an offset is allowable. . . . The AT&T approach would have a judicial authority, which we may presume to be much less familiar with the QPAP's context, purpose, and contents, decide how its intent can best be implemented in the circumstances. Under the Qwest approach, a commission much more familiar with the goals and features of the

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[73] *QPAP Report*, at 35-36.

[74] *Id.* at 41.

[75] Qwest New Mexico SGAT, 6th Revision (April 12, 2002).

89. Covad concurs with AT&T.[83]

90. Having considered the relative merits of the positions presented, the Commission rejects the Facilitator's recommendation, which without sufficient legal or reasonable policy justification, would allow Qwest to unilaterally offset damages a court or other agency orders it to pay a CLEC.

91. In arriving at this conclusion, we recognize that double recovery for the same damages should be and is legally barred. However, the offsetting of remedies is a judicial concept for the trier of fact to determine in assuring that an aggrieved party does not receive a double recovery.

92. It also bears noting that, although Qwest repeatedly stated that its proposed plan is modeled on the Texas plan approved by the FCC and urged the Commission to not look to other state or BOC plans, Qwest did not adopt the Texas plan's offset language, which provides, at § 6.2, "whether or not the nature of damages sought by CLEC is such that an offset is appropriate will be determined in the relevant proceeding," instead of the BOC *unilaterally* making the offset, as Qwest would have it.

93. Therefore, consistent with the Texas plan as well as the holdings of the Montana, Nebraska and Washington commissions on this issue, the Commission finds that the appropriate entity to determine whether an award to a CLEC should be offset is not Qwest, but is the same court or other adjudicatory body that awarded damages to a CLEC. Accordingly, the Commission directs Qwest to revise QPAP § 13.7 to read as follows:

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[83] Covad's Comments, at 18-19.

96. Qwest has agreed to make all the recommended changes, except for one modification that is discussed below.[86]

97. No party contested the Facilitator's recommendations regarding exclusions from payment liability.

98. There having been no challenge to the Facilitator's recommendations and having found no matter of particular concern, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. The Commission therefore accepts and adopts the Facilitator's recommended resolutions of the issues pertaining to exclusions from payment liability and instructs Qwest to modify QPAP § 13.3 accordingly. In this regard, we note that while Qwest has modified its QPAP to incorporate the Facilitator's recommendations, it has not deleted certain language referring to parity measurements. We further note that consistent with the Washington commission's recent findings on this issue,[87] Qwest does not oppose the Facilitator's recommendation that parity measures not be subject to force majeure exclusions; rather it is the fact that the last sentence of § 13.3 includes "or other excusing event" immediately after "a Force Majeure event" that causes Qwest to retain the subsequent reference to parity measures. Accordingly, in the interests of efficiently resolving lingering issues and in order to avoid a latent ambiguity in the language of

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86 Qwest's Comments, at 7-8.

87 *In the Matter of the Investigation Into U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996* and *In the Matter of U S WEST Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Washington Utilities and Transportation Commission Docket Nos. UT-003022 & UT-003040, 33rd Supplemental Order, Order Denying in Part and Granting in Part Qwest's Petition for Reconsideration of the 30th Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan (May 20, 2002) (*33rd Supplemental Order*), at 17-18, ¶¶ 72-73, 78.

CONTINUATION

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1. Tier 2 payment use and special fund

102. Tier 2 payments are payments made to the state of New Mexico when Qwest fails to meet certain performance standards. Certain performance measures are subject to Tier 2 payments because the performance results are only available on a regional basis, such as Gateway Availability. Consistent with our endorsement above of the Facilitator's recommended resolution of the fourth issue under this heading, CLECs receive no payment when Qwest fails to meet these performance standards. Other performance measures that are subject to individual CLEC payments are also subject to Tier 2 payments because of their importance to the CLECs' ability to compete. These measures are referred to as Tier 2 measures having Tier 1 counterparts.

103. Section 7.5 of the QPAP originally required that Tier 2 payments be limited to use for purposes related to Qwest's service territory. In reaction to AT&T's argument that the service territory requirement be eliminated, the Facilitator found that § 7.5 should 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.[90]

104. The Facilitator also recommended that this Commission and other state commissions in Qwest's region join together to participate in a multistate QPAP oversight effort featuring a common administrative structure. To this end, the Facilitator recommended that a percentage of certain QPAP payments should be paid into a special fund that would be available for states

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[90] *QPAP Report*, at 42.

Resolved, That participation in any such collaborative approach by any state is voluntary and that each participating state Commission may act independently on issues where it might differ from the multistate group decision or recommendation.

The Commission takes this opportunity to reiterate our strong endorsement of the *Resolution* and incorporates the intent and purpose of the *Resolution* in this *Order*.

108. Regarding the disposition of Tier 2 funds, as we have observed on many occasions, New Mexico law requires that the Commission obtain legislative authority to spend Tier 2 funds for activities such as QPAP oversight. The Commission intends to address this issue in the next regular session of New Mexico Legislature where we plan on presenting proposed legislation that would create a Tier 2 Fund.

109. Insofar as the Special Fund provisions are concerned, the Commission notes that QPAP § 11.3 needs to be revised to reflect that the six-month review, as addressed below, will be conducted by the Commission and not an independent arbitrator. Accordingly, in conformity with our findings below, the Commission instructs Qwest to strike QPAP § 11.3(b) in its entirety.

110. The Commission also notes the QPAP oversight activities contemplated by §§ 11.3, 11.3.1, 11.3.2 and 11.3.3 may run afoul of New Mexico law because the Commission does not at this time posses the requisite authority to use these funds. For this reason, the Commission directs Qwest to revise all pertinent provisions of § 11.3 to provide that the Commission will seek to have the New Mexico Legislature create a special fund for the general purpose of conducting its QPAP oversight activities, and that nothing in the QPAP prevents the Commission from joining with other state commissions to fund QPAP oversight activities that are conducted jointly. We further order Qwest to amend §11.3.1 and §11.3.2 to reflect the fact that the Commission will be acting on its own in its QPAP oversight activities unless and until it agrees to join a suitable and formal multi-state long-term administration and dispute resolution process.

115. Staff's position is well taken. We agree with Staff that the State of New Mexico has an interest in having Qwest perform adequately because it is consistent with State policy to encourage the promotion of competition. A blanket policy holding that Tier 2 payments do not start until numerous months of poor performance have occurred weakens Qwest's incentives. Therefore, we will reject the Facilitator's recommended approach.

116. Accordingly, the Commission instructs Qwest to revise QPAP §§ 7.3 and 9.1.2 to reflect that Tier 2 payments shall be made for any month in which Qwest fails to meet the applicable standard.

3. Limiting escalation to 6 months

117. The payment escalation process is one of two monetary caps we discuss in the QPAP. First, as discussed above, the QPAP will feature a procedural, non-dollar trigger cap as well as an annual, maximum cap on Qwest's liability for non-conforming performance. In contrast, the escalation issue goes to whether or not there should be a six-month limit on payment escalation for failure to meet any of the performance measurements identified in the PIDs. Qwest proposed, and the Facilitator concurred, that there should be a six-month limit on payment escalation.

118. The Facilitator adopted Qwest's position for the following reasons: (1) it is not clear that poor performance past six months means Qwest methodically calculated that the continuing costs of compliance exceeds the continuing costs of violation; (2) 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

deem unpersuasive Qwest's assertion, as supported by the Facilitator, that poor performance beyond six months is due to circumstances beyond its control. Covad argues that limiting payment escalation to six months would merely allow Qwest to discriminate against CLECs for extended periods of time. Covad cites the Colorado commission's Special Master's Final Report, which requires escalation beyond six months and recommends adopting such an approach.[99]

121. Like AT&T and Covad, Staff disagrees with the Facilitator. Staff believes that the six-month cap on escalation should be removed because continuing escalation is necessary to create the necessary incentive for Qwest to do what it takes to fix recurring performance problems. Staff points out that, as noted by the Facilitator elsewhere in the *QPAP Report*, a forum has been established for considering the need to add or revise performance measures should it be determined that a poorly designed performance measure is causing a problem.[100]

122. We decline to accept the Facilitator's recommendation for a six-month limitation on Tier 1 payment escalation. Instead, we find persuasive the reasons identified by AT&T, Covad and Staff for not limiting escalation: (i) to deter Qwest from providing poor service to CLECs for extended periods of time, and (ii) to help to ensure Qwest's payment for noncompliance is higher than the amount Qwest is willing to absorb as a cost of doing business.

123. Moreover, the Facilitator's suggestion that recurring problems might be due to poorly designed performance measures is, at best, speculative. For one thing, Qwest has been deeply involved in the process of developing the relevant performance measures and the ROC OSS test should be able to identify any problems with performance measures. Further, as pointed out by

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[99] Covad's Comments, at 13-16.

[100] Staff's Proposed Findings, at 27-29.

> missed consecutive month by an increment of $100. The payment would be calculated by subtracting six from the number of consecutively missed months, multiplying the remainder by $100, and adding to that amount increments of $800 for measures classified as high, $600 for measures classified as medium, and $400 for measures classified as low. (Example: In month 7 of 7 consecutive misses on a measure, the per-occurrence payment due for a measure classified as high would be $900. [7-6=1, x $100 + $800 = $900.] In month 8 for the same missed measure, the payment would be $1000; in month 9, the payment would be $1100, etc.) For per-measurement payments, after 6 missed months in a row, the per-measurement payment for low-weighted measures would continue to increase by $5,000 each month, for medium-weighted measures, payments would continue to increase by $10,000 each month, and for high-weighted measures, payments would continue to increase by $25,000 each month. The per-measurement payment would be calculated by subtracting six from the number of consecutively missed months, multiplying the remainder by $25,000, $10,000, or $5,000 for measures classified as high, medium and low, respectively, and adding to that amount increments of $150,000 for measures classified as high, $60,000 for measures classified as medium, and $30,000 for measures classified as low. (Example: In month 7 of 7 consecutive misses on a measure, the per-measurement payment due for a measure classified as low would be $35,000. [7-6=1, x $5,000 + $30,000 = $35,000.] In month 8 for the same missed measure, the payment would be $40,000; in month 9, the payment would be $45,000.[102]

126. We agree with the Montana Commission that this approach is reasonable and fair because it continues escalation in the same increments after six months of non-conforming performance as those occurring prior to six months. Accordingly, Qwest is directed to revise the QPAP to allow for payment escalation for failure to meet any of the performance measurements identified in the PIDs in conformity with the preceding paragraph.

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[102] *Montana Order*, at 41.

5) including PO-1C preorder inquiry timeouts in Tier 1;
6) adding change management measures;
7) adding a software release quality measure;
8) adding a test bed measurement; and
9) adding a missing-status-notice measure.

130. Of these nine issues only one, requiring payments for "diagnostic" PIDs, was addressed by any party in its 10-day comments. There having been no challenge to the Facilitator's findings and conclusions regarding the remaining eight issues[104] and having found no matters of particular concern in the resolution of those issues, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of these eight issues.

131. We now turn our attention to the sole outstanding issue in this category.

1. Requiring payments for "diagnostic" PIDs

132. The Facilitator recognized the importance of enhanced extended links (EELs) to CLECs and acknowledged 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. The PID applies no benchmark or parity standards for EELs at present; the performance measures related to them are diagnostic in nature. The Facilitator also noted Qwest's brief acknowledged that, as the ROC OSS collaborative changes measures from diagnostic to a firm benchmark or parity standard, such measures are to be included in the QPAP.[105]

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[104] *Id.* at 47-48, 49-52.

[105] *Id* at 48.

measurements 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.[109] The Facilitator found that the PEPP collaborative had reached agreement on collapsing the seven transaction types (appointment scheduling, service availability, facility availability, street address validation, customer service records, telephone number, loop qualification) into two individual measurements and that the terms of the agreement establish significant and more balanced payment responsibilities for failure to meet the standards.[110]

138. No party addressed this issue in its post-*QPAP Report* comments or briefs.

139. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no matters of particular concern in the Facilitator's recommended resolution of this issue, the Commission hereby finds and concludes that the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolution of aggregating the PO-1A and PO-1B performance measures.

D. Measure Weighting

140. There were three issues involved in measure weighting: (1) changing measure weights, (2) eliminating low weighting, and (3) LIS trunks weighting.

141. No party addressed these three issues in its post *QPAP Report* comments or briefs.

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[109] 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.

[110] *Id.* at 53.

public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolution of determining collocation payment amounts.

F. Including Special Access Circuits

146. The Facilitator found 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 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.[113]

For these reasons, the Facilitator recommended that special access circuits should not be included in the PID performance measures as one of the product disaggregations and that the QPAP not be changed to provide for payments associated with such circuits.[114]

147. WorldCom is the only party on record as opposing the Facilitator's recommendation respecting special access circuits. WorldCom asserts the Facilitator erred in reasoning that because CLECs purchase the majority of special access trunks from federal tariffs, they should pursue remedies at the FCC. WorldCom contends that because the FCC has long held it will consider discriminatory and anticompetitive BOC conduct as part of the public interest inquiry, states should address such alleged conduct in exercising their authority to take measures to prevent backsliding; this may occur, according to WorldCom, concurrent with FCC efforts.[115]

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[113] *Id.* at 57.

[114] *Id.* at 57-58.

[115] WorldCom's Exceptions, at 1-6.

152. No party addressed this issue in its post *QPAP Report* comments or briefs.

153. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having found no matters of particular concern in the Facilitator's recommended resolution of this issue, the Commission hereby finds and concludes the Facilitator's recommendation is appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolution respecting the proper measure of UNE intervals.

H. Low Volume CLECs

154. Covad argued in the Multi-State Proceeding that Qwest designed the QPAP primarily to compensate high-volume CLECs with the result that lower volume CLECs would be under-compensated.

155. The Facilitator concluded that Qwest had adduced substantial evidence that the QPAP would not under-compensate lower volume CLECs.[119] However, the Facilitator also concluded that changes to the QPAP were necessary to address the "free miss" issue.[120] To address this problem, the Facilitator recommended the following:

> 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 provisions will be applicable to any month where any miss occurred for CLECs with order volumes at the level in question, and where the annual calculation shows evidence

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[119] *QPAP Report* at 59.

[120] This refers to a QPAP provision that CLECs argued would provide Qwest with one "free miss" each month in the case of small volume CLECs. As the Facilitator notes, the goal of excluding one miss from compensation was to provide (in the case measurements with CLEC volumes of 5 or fewer) having a 90% benchmark use a 100% one. *QPAP Report* at 59.

having been no challenge to the Facilitator's findings and conclusions regarding the remaining eight categories and having found matters of particular concern in the Facilitator's recommended resolutions of them,[123] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of these eight issue categories.

160. We now turn our attention to the sole remaining category that was engaged by the parties in their comments and briefs to the Commission.

A. Six-Month Plan Review Process

161. Section 16 of Qwest's proposed plan provides the process for amending the plan. As conceived by Qwest, only the following types of changes are allowed: (a) addition, deletion, or change of measurements (based on whether there was an omission or failure to capture intended performance); (b) change of benchmark standards to parity standards (based on whether there was an omission or failure to capture intended performance); (c) changes in weighting of measurements (based on whether the volume of "data points" was different from what was expected); and (d) movement of a measure from Tier 1 to Tier 2 (based on whether the volume of "data points" was different from what was expected). As proposed, § 16 requires any change to the plan to be approved by Qwest.

162. In the *QPAP Report*, the Facilitator determined that Qwest's proposed plan was, in almost all respects, comparable to the plan approved in Texas, including the power to veto changes

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[123] *QPAP Report*, at 62-71.

then existing conditions and reporting to the FCC on the continuing adequacy of the QPAP to serve its intended functions.[126]

165. The Facilitator therefore recommended changes to the QPAP that would: (i) provide for normal SGAT dispute resolution procedures in the event there is disagreement with a recommendation in the six-month review process regarding proposed addition of new measures to the QPAP payment structure; (ii) 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; (iii) 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.[127]

166. AT&T avers the Facilitator's recommendations still afford Qwest too much control over the six-month review process. AT&T believes the Facilitator misinterpreted the Colorado approach, perceiving limits in the CPAP that do not, in fact, exist. As AT&T describes it, the Colorado review and amendment process is considerably more flexible than the plan proposed by Qwest here, even after considering the Facilitator's recommended changes.[128]

167. Under the Colorado process, according to AT&T, all issues that implicate shifting the relative weighting of, deleting and adding new measures are routinely considered in the six-month review process. AT&T notes that it is the Colorado commission that determines what modified

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[126] *Id.* at 61-62.

[127] *Id.* at 62.

[128] AT&T's Exceptions, at 32-33.

determine if changes should be made to the QPAP; (2) this Commission should have the ultimate authority to change any provisions of the QPAP after notice and opportunity to be heard during the six-month review process; and (3) the Commission should hear any arbitrations regarding the six-month review.[133]

170. Staff also urges the Commission to reject the Facilitator's recommendations. Staff emphasizes that Qwest has repeatedly volunteered in these proceedings that, because the QPAP is a part of Qwest's SGAT, the Commission has authority to administer the QPAP. Staff submits that the ability to judiciously require changes to the QPAP on a showing of legitimate need is inherent in the authority to administer it.[134]

171. Staff therefore requests that Qwest be instructed

> to revise the 6-month review provisions of its QPAP to indicate that all issues of shifting the relative weighting of, deleting, adding and modifying performance measures are routinely and appropriately considered in the 6-month review process. The Commission shall determine what changes, additions or deletions, if any are appropriate and Qwest is required to file an amended SGAT to reflect those Commission determined changes. Parties may suggest more fundamental changes to the plan in the 6-month review process but, unless it is established that the need for such change is 'highly exigent', the matter will be deferred to the more comprehensive bi-annual review. Qwest may not retain the right to agree to all changes required by the Commission. Rather, the Commission retains authority to require changes in the review process.[135]

172. For its part, Qwest maintains the Facilitator's recommendations and Qwest's modifications to the plan in response to his recommendations are consistent with the scope of the

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[133] AT&T's Proposed Findings, at 14.

[134] Staff's Proposed Findings, at 40.

[135] *Id.* at 40-41.

174. The Commission disagrees with Qwest's contention that we do not possess the inherent authority to modify the QPAP during the six-month review process and that all authority for so doing resides solely with Qwest. This is manifestly not the case. As Qwest by now should be well aware, the Commission has broad authority under New Mexico state law to regulate the rates, services, facilities and practices of public telecommunications carriers in the public interest, and to promote competition in the provision of telecommunications services.[140]

175. In addition, we find support in federal law for our authority to amend the QPAP. For instance, section 261(c) of the Act provides:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are *necessary to further competition in the provision of telephone exchange service or exchange access*, as long as the state's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part. (emphasis added).

176. Moreover, section 252(f) of the Act provides that a BOC "may prepare and file with the state commission a statement of generally acceptable terms and conditions." The SGAT is also a "voluntary" filing, yet Qwest has not questioned the Commission's authority to order changes to the SGAT. Inasmuch as Qwest intends to incorporate the QPAP into the SGAT, it is logical for us to

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[140] *See, e.g.*, N.M. Const. art. XI, § 2 (regulation of telephone companies); NMSA 1978, §§ 8-8-4(A) (duty to administer and enforce the laws with which we are charged and have every power conferred by law), 8-8-4(B)(5) (take administrative action "to assure implementation of and compliance with the provisions of law for which the commission is responsible"), 8-8-4(B)(7) (conduct investigations as necessary to carry out our responsibilities), 63-7-1.1(A)(1) (duty to fix, determine, supervise, regulate and control all rates and charges of telephone companies), 63-7-1.1(A)(2) (authority to determine any matters of public convenience and necessity with respect to matters subject to our regulatory authority as provided by law), 63-7-10 (authority to inspect the books, papers and records of all companies subject to our jurisdiction relating to any matter pending before or being investigated by the Commission), 63-9A-2 (encourage competition in the telecommunications industry), 63-9A-5 (regulation of public telecommunications service), 63-9A-8.2(B)(4) ("ensure the accessibility of interconnection by competitive [LECs] in both urban and rural areas of the state"), 63-9A-9 (regulation of individual contracts to facilitate competition), 63-9A-10 (examination of books and records), 63-9A-11 (determining complaint proceedings for alleged violation of any provision of the New Mexico Telecommunications Act), 63-9A-11 (complaint proceedings); 17.11.18 NMAC (rules governing interconnection facilities and UNEs); 17 NMAC 1.2.25 (rules regarding Commission investigations).

performance assurance plans.[141] Qwest's insistence on a unilateral right to reject any changes to the plan would preclude any meaningful Commission role in overseeing the plan. Indeed, if there was ever any reasonable doubt in any quarter regarding state commission authority to modify, refine and improve performance assurance plans, any such doubt should have been permanently dispelled by the FCC's most recent section 271 order, where the FCC observed as follows:

> 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....*
>
> 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 to expect that these commissions could modify the penalty structure if BellSouth's performance is deficient post approval.*[142]

180. Accordingly, the Commission finds it is well within our authority as well as our responsibility to administer the QPAP and oversee its operation. Qwest is directed to change the QPAP in conformity with the foregoing findings and conclusions. Specifically, Qwest is instructed to amend § 16.1 of the QPAP to strike "Changes shall not be made without Qwest's agreement" and replace it with the following:

> After the Commission considers such changes through the six-month process, it shall determine what set of changes should be embodied in an amended SGAT that Qwest will file to effectuate these changes.

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[141] *See, e.g., Verizon Pennsylvania Order*, 17 FCC Rcd 17419, at ¶¶ 127-32 (indeed, there the FCC took note of the fact that in response to certain commenters' assertions that the public interest requires Verizon to commit not to challenge the Pennsylvania Commission's authority to implement or modify the PAP, "the Pennsylvania Commission was satisfied by Verizon's withdrawal of its previous lawsuit challenged the Pennsylvania Commission's authority to implement the PAP").

[142] *BellSouth Georgia/Louisiana Order*, FCC 02-147, at ¶¶ 294, 300 (emphasis added; internal citations omitted).

concept of a multi-state review and dispute resolution process in principle, the multi-state process is still under development under the auspices of the ROC. For this reason, we will defer our final determination regarding a specific multi-state review process for the six-month and biennial reviews pending the development of a final proposal for a multi-state process.

184. Accordingly, the Commission directs Qwest to revise §§ 16.1 and 16.2 to refer only to this Commission. Qwest should also include in this revision new language providing that nothing in the QPAP prohibits the Commission from joining a multi-state effort to conduct QPAP reviews and developing a process whereby the multi-state group would have the authority to act on the Commission's behalf. Qwest must also delete the language in § 16.1 concerning the use of an arbitrator to resolve disputes. As provided above, the Commission will preside over the six-month review process and resolve any disputes between the parties.

VII. SELF-EXECUTING MECHANISM

185. The Facilitator identified six issue categories involving the analysis of whether Qwest's QPAP is a self-executing mechanism. These six categories are: (i) dispute resolution, (ii) payment of interest, (iii) escrowed payments, (iv) effective dates, (v) QPAP inclusion in the SGAT and Interconnection Agreements, and (vi) and form of payment to CLECs.

186. Of these six categories, only two, effective dates and QPAP inclusion in the SGAT and interconnection agreements, were addressed by the parties in the post-*QPAP Report* comments and briefs. Additionally, although no party specifically addressed the Facilitator's dispute resolution recommendation, the Commission deems it necessary to address that recommendation given the related findings and conclusions inherent in this *Order*. As for the remaining three categories of

190. Given our findings and conclusions above respecting the six-month review process, we reject the Facilitator's recommendation. As we found above, it is our responsibility to oversee and administer the QPAP, including resolving disputes over the meaning and application of QPAP provisions. Therefore, it would not be appropriate for the QPAP to incorporate the SGAT dispute resolution process, which features processes that do not include the Commission. We recognize that it would be possible for the Commission to develop either a formal arbitration process of its own for this purpose or an expedited dispute resolution process. At this time, however, as we have expressed above, it is our intention to pursue and encourage the development of a multistate approach for dispute resolution that is part and parcel of a multistate process for QPAP reviews, audits and administration of performance measurements. In the multistate process we envision, consistent with the Multi-State Proceeding that spawned the *QPAP Report* and the Facilitator's other reports on checklist items and other section 271 issues, each state commission would preserve its right to act independently on issues where it may differ from the multistate group's decisions. We agree with the Montana commission[145] that it seems unlikely disputes over the meaning or application of the QPAP could be state-specific, but if such is the case, it may be necessary to resolve such disputes on a New Mexico-specific basis before the Commission.

191. Accordingly, consistent with the foregoing findings and conclusions, Qwest is instructed to strike the entirety of § 18 from the QPAP.

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[145] *Montana Order*, at 64.

Qwest has been submitting the performance data reports in this case since late December 2001 (beginning with the submission of its October 2001 monthly report).

196. According to the Facilitator "there were no claims that Qwest's wholesale performance history to date was of a nature that would require unique or special inducements."[151] As noted above, the Facilitator also found the risk of near term backsliding would be mitigated by the fact that current information can and likely will be provided to the FCC.[152] Furthermore, consistent with the Facilitator's recommendation, Qwest has been submitting wholesale performance data for every month beginning with October 2001. Additionally, as pointed out by the Facilitator, there already exists an opportunity for states and CLECs to supplement the record through the submission of additional comments directly to the FCC. Given the foregoing, we find that Qwest will have more than sufficient incentive not to backslide while its section 271 application is pending before the FCC.

197. For these reasons, the Commission accepts and adopts the Facilitator's recommendation that the QPAP become effective when section 271 authority is granted and that Qwest be required to provide monthly QPAP reports as if the QPAP had become effective on October 1, 2001.

2. "Memory" at initial effective date

198. Having decided the QPAP should be become effective upon Qwest receiving section 271 authority and that other remedies apply before that time for CLECs opting into the QPAP, the Facilitator proceeded to find it would be inappropriate to start the QPAP payment structure in "mid-stream." Otherwise, according to the Facilitator, the effect would be to mix remedies

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[151] *QPAP Report*, at 75.

[152] *Id.*

that for the same reasons that the QPAP should only be effective upon Qwest's entry into that market, it should terminated upon the end of Qwest's authority to serve that market.[155]

203. Staff concurred with the Facilitator's recommendation.[156] No other party addressed this issue.

204. The Commission is concerned that CLECs may be left without adequate remedies if the QPAP were to terminate automatically upon Qwest leaving the long distance market. Therefore, we will adopt the following language for the New Mexico QPAP, which is derived from CPAP § 13.11[157] and which the Washington commission recently ordered Qwest to implement:[158]

> Except as provided in this Section, this PAP will expire six years from its effective date. Only Tier 1 submeasures and payments will continue beyond six years, and these Tier 1 submeasures and payments shall continue until the Commission orders otherwise. Five and one-half years after the PAP's effective date, a review shall be conducted with the objective of phasing-out the PAP entirely. This review shall focus on ensuring that phase-out of the PAP is indeed appropriate at that time, and on identifying any submeasures in addition to the Tier 1 submeasures that should continue as part of the PAP.

205. This language will permit Qwest to eliminate certain payments upon leaving the market, but also allow for Commission review of the necessity of certain payments, as well as provide time to implement any necessary wholesale service quality rules to replace the QPAP, if such rules have not already been adopted. Qwest is directed to modify the QPAP accordingly.

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[155] *QPAP Report*, at 75.

[156] Staff's Proposed Findings, at 46.

[157] *In the Matter of the Investigation Into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Public Utilities Commission of the State of Colorado, Docket No. 01I-041T, Colorado Performance Assurance Plan, Decision No. C02-399 (Apr. 10, 2002) (*Colorado Order on Remand*), Attachment A.

[158] *35th Supplemental Order*, at 14, ¶ 60.

VIII. ASSURANCES OF THE REPORTED DATA'S ACCURACY

208. The Facilitator identified four issue categories involved in determining whether Qwest's proposed plan provides sufficient assurances of the reported data's accuracy. The categories are (i) audit program, (ii) PUC access to CLEC raw data, (iii) providing CLECs their raw data, and (iv) late reports.

209. The parties did not separately address any of the four issue categories in their post-*CPAP Report* comments or briefs. There having been no challenge to the Facilitator's findings and conclusions regarding the foregoing and having no matters of particular concern in the Facilitator's recommended resolutions of PUC access to CLEC raw data, providing CLECs their raw data, and late reports,[88] the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of these three issue categories.

210. However, consistent with our findings and conclusions above, we do find matters of particular concern in the Facilitator's recommendations concerning the remaining issue category, the Audit Program.

A. Audit Program

211. The audit program is intended to provide "sufficient assurance that a high level of confidence can be placed in the performance results that Qwest measures – results that will drive CPAP payments and will serve as a primary basis for [state commission] oversight of wholesale

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[88] *CPAP Report*, at 83-86.

independent auditor to coordinate with other audits to avoid duplication, provide a process for contesting aspects of the audits, provide a materiality criterion to data discrepancies, prevent a CLEC proposed audit while dispute resolution is pending, and prevent a CLEC from proposing an audit of data older than three years.[illegible] Qwest made no changes to § 15.5 of its proposed plan, which addresses investigations to determine the root cause for consecutive Tier 2 misses.

[illegible]. Consistent with our findings and conclusions above regarding the creation of a special fund and six-month reviews, we support in principle the Facilitator's recommendation that state commissions should jointly participate in and oversee the QPAP auditing function in a manner that allows each participating state to act independently on issues where it might differ from other states.

[illegible]. However, we perceive several flaws in the audit program as it is currently delineated in Qwest's proposed plan, *i.e.*, the November 7, 2001 revision submitted in this case. For instance, Qwest's proposed § 15 is written as if there is a multistate oversight regime already in place and, therefore, does not take into account the unfortunate but nonetheless real possibility that states will not have a joint oversight body, which would necessitate that we conduct the QPAP's audit responsibilities on our own. Other provisions of § 15 inappropriately dictate the method by which the multistate commission oversight group will resolve audit-related disputes and appeals of disputes. Additionally, the current § 15 contains provisions that limit the Commission's discretion to determine the procedure, scope, timing and conduct of audits.

[illegible] Qwest's Proposed Findings, at [illegible]

be reported to the independent auditor. Reports to the auditor will be presented at meetings in which the auditor may ask questions about changes made in the Qwest management processes. The reports must include sufficient detail to enable the auditor, and other parties, to understand the scope and nature of the changes. The meetings, which will be limited to Qwest and the independent auditor, will permit an independent assessment of the materiality and propriety of any Qwest changes, including, where necessary, testing of the change details by the independent auditor. The information gathered by the independent auditor may be the basis for reports by the independent auditor to the Commission and, where the Commission deems it appropriate, to other participants. The Commission may review in the PAP review process the propriety of any discretionary changes made by Qwest pursuant to this section.

15.3 In the event of a disagreement between Qwest and CLEC as to any issue regarding the accuracy of integrity of data collected, generated, and reported pursuant to the PAP, Qwest and the CLEC shall first consult with one another and attempt in good faith to resolve the issue. If an issue is not resolved within 45 days after a request for consultation, CLEC and Qwest may, upon a demonstration of good cause (e.g., evidence of material errors or discrepancies), request an independent audit to be conducted, at the requesting party's expense. The independent auditor will assess the need for an audit based upon whether there exists a material deficiency in the data or whether there exists an issue not otherwise addressed by the audit plan for the current cycle. The Commission will resolve any dispute by any party questioning the independent auditor's decision to conduct or not conduct a CLEC requested audit and the audit findings, should such an audit be conducted. Audit findings will include: (a) general applicability of findings and conclusions (i.e., relevance to CLECs or jurisdictions other than the one causing test initiation), (b) magnitude of any payment adjustments required and, (c) whether cost responsibility should be shifted based upon 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). CLEC may not request an audit of data more than three years from the later of the provision of a monthly credit statement or payment due date.

15.4 Expenses for the audit of the PAP and any other related expenses, except that which may be assigned under section 15.3, shall be paid first from the Tier 2 funds in the Special Fund. If no Special Fund is in existence or Tier 2 funds are not otherwise sufficient to cover audit costs in whole or in part, the Commission

220. The parties addressed only one issue, prohibiting QPAP payment recovery in rates, in their post-*QPAP Report* comments and briefs. There having been no challenge to the Facilitator's findings and conclusions regarding the remaining three issues[168] and having found no matters of particular concern in the Facilitator's recommended resolutions of those issues, the Commission hereby finds and concludes that the Facilitator's recommendations are appropriate, reasonable and resolved in a manner that is consistent with the public interest. Accordingly, the Commission accepts and adopts the Facilitator's recommended resolutions of the aforementioned issues.

221. We now turn our attention to the remaining issue about which concerns were expressed in post-*QPAP Report* comments or briefs.

A. Prohibiting QPAP Payment Recovery in Rates

222. During the Multi-State Proceeding, AT&T requested that the QPAP include specific language precluding QPAP payment recovery in rates. The Facilitator recommended against the inclusion of such a provision, agreeing with Qwest that it was unnecessary, given that the FCC and states have clearly held that the recovery of PAP payments in rates is prohibited.[169]

223. AT&T continues to maintain that the Commission should mandate that Qwest spell out in the QPAP that it may not recover QPAP costs from ratepayers. According to AT&T, because the FCC has concluded that any attempt by a BOC to recover those fines through increased rates would "seriously undermine the incentive meant to be created by the Plan," this is not just a matter of rate recovery, as the Facilitator implied. AT&T thus proposes language for a new provision to be

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[168] *QPAP Report*, at 86-87.

[169] *QPAP Report* at 86.

approved by the Commission.[172] Accordingly, Qwest is directed to file with the Commission no later than June 14, 2002 a revised version of the November 7, 2001 QPAP that incorporates the modifications required by this *Order*. All revisions must be appear in redline and strikeout as appropriate so that all modifications are readily identifiable. The Commission thereafter will consider what proceedings, if any, may be necessary to determine whether Qwest's revised QPAP complies with this *Order* in all material respects.

IT IS THEREFORE ORDERED:

A. Consistent with the foregoing findings and conclusions and the Commission's other orders entered in these proceedings, before receiving a favorable recommendation of compliance with section 271 of the Act and in order to ensure Qwest's continued compliance with the requirements of section 271 should the FCC grant it authority to offer in-region interLATA service in New Mexico, Qwest shall adopt and implement a QPAP that is consistent with the above-mentioned directions and instructions.

B. To that end, Qwest shall file with the Commission no later than June 14, 2002 a revised version of the November 7, 2001 QPAP that incorporates the modifications required by this *Order*. All revisions must be appear in redline and strikeout as appropriate so that all of the modifications are readily identifiable. Subsequent to Qwest's filing of a QPAP that purports to comply with this *Order*, the Commission will consider what further proceedings, if any, are necessary to determine whether Qwest's revised QPAP is in compliance with all material aspects of this *Order*.

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[172] *See supra* ¶ 178.

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Qwest Corporation, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify compliance with Section 271(c).	) Application No. C-1830))) MOTION FOR REHEARING) GRANTED IN PART, DENIED IN) PART)) Entered: May 29, 2002

APPEARANCES:

For the Nebraska Public Service Commission Staff:	Chris A. Post 300 The Atrium 1200 N Street Lincoln, NE 68508
For AT&T Communications of the Midwest, Inc. and AT&T Local Services:	Steven H. Weigler 1875 Lawrence Street Suite 1575 Denver, CO 80202
For Qwest Corporation:	Lynn Anton Stang Qwest Corporation 1801 California Street Suite 4900 Denver, CO 80202 Jill Vinjamuri Kutak Rock 1650 Farnam Street Omaha, NE 68102-2186
For Cox Nebraska Telcom:	Jon C. Bruning Bruning Law Office 1079 North 204th Avenue Elkhorn, NE 68022

BY THE COMMISSION:

On April 23, 2002, this Commission entered its initial order finding that Qwest's Performance Assurance Plan (QPAP) was "Approved in Part." (QPAP order.) Subsequently, Qwest Corporation (Qwest) filed a Motion For Rehearing of QPAP Recommendations on May 6, 2002. The Commission heard oral arguments on Qwest's Motion on May 22, 2002, with appearances as shown above.

"the Washington language is completely acceptable to AT&T. The same holds true with the Colorado language . . ."[1]

Upon review of its order, the Commission agrees that the language originally ordered for paragraphs 13.6 and 13.7, is not a full and accurate excerpt from the Colorado CPAP. The Washington Commission in its order on Qwest's petition for reconsideration[2] picked out the corresponding Colorado provisions, which the parties agreed were acceptable. Qwest has apparently filed a compliance filing in Washington that includes in the QPAP, language, as ordered by the Washington Commission and based upon the CPAP, which addresses these issues.

In light of Qwest's and AT&T's acceptance of such language, the Commission finds this the most acceptable resolution to this issue. This Commission likewise directs Qwest to incorporate language similar to what Washington ordered based on the Colorado provisions for Sections 13.6, 13.6.1, 13.6.2 and 13.7, rather than the Sections 13.6 and 13.7 previously ordered by this Commission.

As such, Qwest shall incorporate the following modifications to its revised QPAP:

13.6

This PAP contains a comprehensive set of performance submeasures, 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, into its interconnection agreement with Qwest in lieu of other alternative standards or relief, except as stated in Sections 13.6.1, 13.6.2, and 13.7.

13.6.1

In electing the PAP, CLEC shall surrender any rights to remedies under state wholesale service quality rules or under any interconnection agreement designed to provide such monetary relief for the same performance issues addressed by the PAP. The PAP shall not limit either non-contractual legal or non-contractual regulatory remedies that may be available to CLEC.

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[1] AT&T's RESPONSE TO QWEST'S SUPPLEMENTAL AUTHORITY ON ITS MOTION FOR REHEARING, FILED IN APPLICATION C-1830, MAY 28, 2002.

[2] 31ST SUPPLEMENTAL ORDER; ORDER DENYING IN PART, AND GRANTING IN PART, QWEST'S PETITION FOR RECONSIDERATION OF THE 30TH SUPPLEMENTAL ORDER, COMMISSION ORDER ADDRESSING QWEST'S PERFORMANCE ASSURANCE PLAN, May 20, 2002.

While this argument alone does not persuade the Nebraska Commission, testimony related to the significant potential financial impact on Qwest of such unlimited escalation does raise concern. Therefore, in light of these arguments, the Commission is of the opinion that such escalation should be capped at six months.

Sticky Duration

The Commission also modifies its decision by eliminating the requirement of "modified sticky duration." As Qwest noted, the FCC has repeatedly approved plans submitted by SBC that permit much more accelerated de-escalation of monthly payment levels following months of compliance.

Upon reconsideration, the Commission does believe that such "sticky duration" could ignore, at least in part, certain levels of successful performance by Qwest. Therefore, as long as the Commission retains the ability to review and make changes to the QPAP, the Commission is willing to strike the modified sticky duration requirement.

The Commission remains firm in its belief that the FCC recognizes that the Nebraska Commission must be allowed to create a PAP that ultimately varies in its strengths and weaknesses as a tool for post-section 271 authority monitoring and enforcement.[3] By limiting Tier 2 escalation and removing "sticky duration", in our opinion, this order reflects that appropriate balance.

In light of the size, character, composition and physical distribution of Nebraska's telecommunications markets, as well as the level of cost of providing service in our state, a QPAP for Nebraska can clearly be different from other states. The Nebraska Commission has a legitimate basis for the additional requirements that have been set forth, as it is acting in a manner consistent with the pro-competitive and public interest intent of the Federal Telecommunications Act of 1996, the FCC and Nebraska law.

Finally, the Commission reiterates that it is in the public interest to assure that the Commission has the ultimate authority to determine if and when changes should be made to the QPAP.

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[3] SEE VERIZON PENNSYLVANIA ORDER, FCC 01-029, RELEASED SEPT. 19, 2001, PARAGRAPH 128.

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From the offices of Gene N. Lebrun
e-mail address: glebrun@lynnjackson.com

June 4, 2002

Debra Elofson, Executive Director
Public Utilities Commission
Capital Building, 1st Floor
500 East Capital Avenue
Pierre, SD 57501-5070

RE: TC01-165

Dear Ms. Elofson:

Pursuant to the electronically submitted letter of June 4, 2002, enclosed herewith is the original and ten copies of TOUCH AMERICA'S PETITION TO INTERVENE AND MOTION TO REOPEN ISSUES, dated June 4, 2002, which is being filed on behalf of Touch America, Inc. Also enclosed is the original and ten copies of the CERTIFICATE OF MAILING also dated June 4, 2002. In accordance with the Certificate of Mailing, copies are being sent to all names and addresses on the Certificate of Mailing. Those names and addresses were provided to us by Delaine Kolbo of the PUC staff.

An electronic copy of the Petition and Certificate of Mailing were transmitted to you on June 4, 2002.

Sincerely yours,

Lynn, Jackson, Shultz & Lebrun, P.C.

Gene N. Lebrun

GNL:clc
Encls.
cc w/encls: Certificate of Mailing List
R. Dale Dixon
Daniel Waggoner
Susan Callaghan

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 1996	))))	TC01-165

TOUCH AMERICA'S PETITION TO INTERVENE AND MOTION TO REOPEN ISSUES

Touch America, Inc. ("Touch America") hereby submits this Petition to Intervene and Motion to Reopen Issues in the above-captioned docket. By its Motion, Touch America seeks from the Public Utilities Commission of South Dakota (the "Commission") an order reopening issues to receive evidence vital to finalizing the recommendation to the Federal Communications Commission (the "FCC") regarding Qwest Corporation's ("Qwest") compliance with Sections 271 and 272 of the Telecommunications Act of 1996 (the "Act"), the competitive checklist and the public interest. Further, Touch America seeks an order from the Commission staying these proceedings pending resolution of Touch America's complaints before the FCC that raise critical questions concerning Qwest's current and potential future compliance with these provisions. In the alternative, Touch America requests that the Commission condition its recommendation regarding Qwest's 271 application on the FCC's determination regarding the Touch America complaints.

I. INTRODUCTION AND SUMMARY

This Commission is responsible for providing a recommendation to the FCC regarding the most important reward offered to Qwest under the Act: authority to provide in-region, interLATA service pursuant to Section 271 of the Act. In arriving at its recommendation, the Commission examines, among other items, Qwest's compliance with the competitive checklist under Section 271(c)(2)(B) and the public interest implication of granting to Qwest in-region, interLATA service authority. The Commission, prior to finalizing its recommendation concerning Qwest's 271 application, should examine certain Qwest activities recently brought to light. These activities, which are highlighted below, demonstrate serious public interest concerns and a failure by Qwest to comply with the competitive checklist items under the Act.

Although the 271 proceedings are entering the final phase prior to Qwest's submitting its 271 applications to the FCC, the issues raised in this Motion have a tremendous impact on all competitors in the Qwest region. Touch America and Qwest are engaged in arbitration[1] and litigation, including complaint actions before the FCC[2] and in federal district court in Colorado,[3] over several disputes, some of the facts of which relate to the issues presented in this Motion. By the instant Motion, Touch America is not requesting an opportunity to litigate the various complaint cases before this Commission; rather, Touch America is introducing important factual

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[1] *Qwest Communications Corporation v. Touch America Services, Inc. and Touch America, Inc.*, AAA No. 74 Y 181 013 09 01 JEC (filed Aug. 7, 2001).

[2] Pursuant to Section 208 of the Act, Touch America brought complaint actions before the FCC regarding the lit fiber IRUs and the Qwest in-region, interLATA divestiture. The complaints are pending. *See In the Matter of Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-003 (filed Feb. 8, 2002) ("*IRU Complaint*"); *see also In the Matter of Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-004 ("*Divestiture Complaint*") (filed Feb. 11, 2002).

[3] *Qwest Communications International, Inc. et al. v. Touch America, Inc. and Touch*

information that should be considered when assessing Qwest's compliance with the competitive checklist requirements of Section 271. The facts noted and the issues raised in this Motion affect all Qwest competitors, not just Touch America; therefore, Touch America believes it is necessary to present this Commission with relevant information to ensure a complete record in these proceedings.

Because it did not want to be premature in interjecting these points in the 271 proceedings, Touch America has not previously raised these matters before this Commission. However, since the FCC has determined that it will decide the *IRU Complaint* on the merits, it is now appropriate to present issues related to the 271 proceedings.[4] Furthermore, Touch America realized the full panoply of 271 implications – as set forth in this Motion – only after Qwest filed answers to the FCC complaints and submitted additional information in response to related discovery.[5] In any event, Touch America is not the first party to raise similar matters in the context of the 271 proceedings. For example, in the Washington 271 proceeding on April 19, 2002, Public Counsel submitted comments to the Washington Utilities & Transportation Commission ("WUTC") addressing the Public Interest aspects of Qwest's activities and Qwest's responses to Public Counsel's data requests concerning the very facts at issue in this Motion.

America Services, Inc., Case No. 01-B-1696 (D. Colo. filed Aug. 27, 2001).

[4] In addition, the FCC has ordered discovery and further briefing with regard to the *Discovery Complaint*. Prior to the FCC's decision to move forward with the complaints, Qwest would have attempted to present a colorable argument concerning the frivolity of the actions.

[5] Pursuant to ARSD 20:10:01:15.02, "[a] petition to intervene which is not timely filed with the commission may not be granted by the commission unless the denial of the petition is shown to be detrimental to the public interest or to be likely to result in a miscarriage of justice." Although the Commission's deadline for intervention has passed, Touch America's Petition for Intervention should be granted under ARSD 20:10:01:15:02. Indeed, the very heart of the instant Petition and Motion goes to public interest concerns related to examining and approving Qwest's 271 application.

It is imperative that Touch America raise these matters before this Commission prior to the submission of Qwest's 271 application to the FCC. The FCC has explained that checklist item concerns should not be raised for the first time during the FCC's review of a 271 application. As the FCC noted in the *Massachusetts 271 Order*, "[C]LECs should raise issues [concerning checklist items] in the relevant state proceedings where they can be properly addressed."[4] Thus, Touch America presents facts regarding three important issues to this Commission as the proper initial forum to address such concerns.

First, the Commission should not ignore the public interest consequences of Qwest's rich history of anti-competitive actions and unlawful behavior. Qwest's lit fiber IRU service offerings (as described in Touch America's complaints to the FCC) represent no less than the fourth Section 271 violation by Qwest or U S WEST Communications, Inc. ("U S WEST"). On three previous occasions the FCC found U S WEST in violation of Section 271 in its provision of certain in-region, interLATA services: (1) the provision of 1-800-4USWEST service; (2) the teaming arrangement between U S WEST and Qwest; and (3) U S WEST's offering of National Directory Assistance. Unlike the previous violations, which Qwest presumably no longer offers, the lit fiber IRUs represent an ongoing violation of the Act.

Second, Qwest's lit fiber IRUs violate the nondiscrimination safeguards of Section 272(c). In its provision of information regarding long distance services and customers, including access to databases containing customer information, billing data, and circuit and facilities

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[4] *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*, Memorandum Opinion and Order, FCC 01-130, CC Docket No. 01-9, ¶ 392 (rel. Apr. 16, 2001) ("*Massachusetts 271 Order*").

identification information, Qwest provides Touch America with inadequate and discriminatory access to such information. Further, the Qwest affiliate, Qwest Communications Corporation ("QCC"), that provides the lit fiber IRUs has not represented that the IRUs are available to other carriers at the same rates, terms and conditions. The arrangement demonstrates that Qwest and QCC have the ability to prevent competitors from purchasing facilities as UNEs by placing assets and facilities in the non-BOC affiliate.

Third, Touch America strongly believes and thus unequivocally contends that Qwest offers lit fiber IRUs as interLATA services in violation of Section 271. But Qwest's arguments regarding the classification of the IRUs as "facilities" raises serious questions whether the IRUs are subject to the competitive checklist under Section 271(c)(2)(B). In light of recent Qwest arguments that the IRUs are akin to unbundled network elements ("UNEs"); therefore, the time is right to examine the lit fiber IRUs for checklist compliance and nondiscriminatory access and pricing under Sections 251(c)(3) and 252(d)(1) of the Act.

II. QWEST'S HISTORY OF ANTI-COMPETITIVE ACTIONS AND SECTION 271 VIOLATIONS PRESENTS PUBLIC INTEREST CONSEQUENCES THAT SHOULD NOT BE IGNORED

Qwest's lit fiber IRUs violate Sections 251, 252 and 272 of the Act and further demonstrate Qwest's penchant for violating Section 271. With the lit fiber IRU offerings, Qwest (including the legacy U S WEST entity) has achieved an unprecedented fourth violation of Section 271. As highlighted in this Motion, Touch America's complaints before the FCC regarding Qwest's unlawful lit fiber IRU offerings go right to the heart of the matter regarding Qwest's intention and/or ability to comply with the promises it is currently making to the Commission in the 271 proceeding.

Without rehashing the specifics of each violation, it is important for Touch America to

remind the Commission of Qwest's and U S WEST's previous violations of Section 271. For example, the FCC found that U S WEST violated Section 271 by offering in-region, interLATA services through the provision of 1-800-4USWEST service.[7] In addition, prior to their merger, Qwest and U S WEST teamed to offer in-region, interLATA services bundled with local exchange services, in violation of Section 271.[8] And in another example of unlawful conduct, the FCC found that U S WEST's National Directory Assistance service offering was a violation of Section 271 of the Act.[9]

While parties to the Qwest 271 proceedings have addressed the previous Section 271 violations in the provision of 1-800-4USWEST service, the Qwest-U S WEST teaming arrangement and National Directory Assistance, the lit fiber IRU presents a different set of circumstances. Most important, the lit fiber IRU is a current and ongoing violation of Section 271. While the Section 271 violations regarding 1-800-4USWEST, the teaming arrangement and National Directory Assistance are historic violations, the lit fiber IRUs exist at this very moment, demonstrating that Qwest is a continuing bad actor in the telecommunications marketplace.

Qwest's anti-competitive behavior is unlikely to improve once it obtains 271 authority. Because Qwest continues to violate Section 271 prior to receiving proper 271 authority from the FCC, Touch America believes that Qwest cannot be trusted to keep its promises made in the 271

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[7] *See In the Matter of AT&T Corp. v. U S WEST Communications, Inc., and MCI Telecommunications Corp. v. U S WEST Communications, Inc.*, File Nos. E-97-28 and E-97-40A, DA 01-418 (rel. Feb. 16, 2001).

[8] *See In the Matter of AT&T Corp. v. Ameritech Corp. and Qwest Communications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 21438 (1998) ("*Teaming Order*"), *aff'd sub nom., U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999), *cert. denied* 120 S. Ct. 1240.

[9] *See MCI Telecommunications Corp. v. U S WEST Communications, Inc., and MCI Telecommunications Corp. v. Illinois Bell et al.*, Memorandum Opinion and Order, DA 99-2479

proceeding. The Commission should not ignore Qwest's anti-competitive behavior and unlawful actions. When 271 authority is granted, Qwest will simply step up its anti-competitive efforts to the detriment of competition and consumers.

III. QWEST'S LIT FIBER IRUS, PROVIDED THROUGH A SEPARATE AFFILIATE, DISCRIMINATE AGAINST CARRIERS, IN VIOLATION OF SECTION 272(C) OF THE ACT

In its Answer to the IRU Complaint, Qwest explains that QCC, an affiliate separate from the local exchange carrier Qwest, provides the lit fiber IRUs.[10] Section 272 of the Act requires that in-region, interLATA services, when offered by an RBOC after receipt of 271 authority, must be offered through a separate affiliate; however, it is premature for Qwest to offer in-region, interLATA services without 271 authority, regardless of the entity used to offer such services.

In addition to offering in-region, interLATA services through a separate affiliate, the RBOC and affiliate must comply with the nondiscrimination safeguards of Section 272(c). Under Section 272(c)(1), an RBOC may not discriminate between itself or its Section 272 affiliate and any other entity "in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards."[11] The FCC has determined that "the protection of section 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate."[12] More specifically, the FCC "construe[s] the term 'services' to encompass any service the BOC provides to its section 272 affiliate, including the

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(rel. Nov. 8, 1999).

[10] *See Answer of Defendants Qwest Communications International Inc., Qwest Corporation, and Qwest Communications Corporation*, File No EB-02-MD-003, at 11 (filed March 4, 2002) ("*Qwest Answer*").

[11] 47 U.S.C. § 272(c)(1).

[12] *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order, FCC

development of new service offerings."[13]

In the proceedings before the FCC, Touch America has demonstrated that Qwest discriminates against Touch America vis-à-vis Qwest in its provision of information regarding long distance services and customers.[14] Qwest provides Touch America with inadequate and discriminatory access to various databases containing, among other things, customer information, billing data, and circuit and facilities identification information. Touch America has made a significant showing that Qwest has access to Touch America customer information, software systems and other databases that Qwest or an affiliate can access or manipulate without Touch America's authorization, consent or knowledge.

With respect to the lit fiber IRUs offered by QCC, the Qwest local exchange carrier leases dark fiber and transport from QCC while other carriers are unable to obtain the same services at the same rates, terms and conditions. In addition, Qwest and QCC have not represented that other carriers will be able to obtain those services on nondiscriminatory terms. Qwest and QCC are able to engage in a shell game by placing assets and facilities in the non-BOC affiliate and claiming that the BOC has no facilities available for purchase as UNEs. Thus, the BOC and the 272 affiliate can avoid complying with the nondiscrimination safeguards of Section 251 and 272.

It would be illogical for the FCC to approve a Qwest 271 application at this time. Touch America urges the Commission and the FCC not to turn a blind eye to the unlawful lit fiber IRU offerings of Qwest. If Qwest were granted in-region, interLATA authority today, Touch America would immediately move for a "stand-still" order based on violations of the nondiscrimination

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96-489 ¶ 218 (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*").

[13] *Id.* ¶ 217.

[14] *See supra* n.2.

provisions of Section 272(c) of the Act. As the FCC has explained in its orders granting Section 271 approval, such authority is subject to review and potential suspension of revocation.[15]

Touch America is not presenting an argument based on hypothetical or potential discrimination. Rather, Touch America has shown actual discrimination by Qwest in favor of itself and its affiliates over other carriers like Touch America. That discrimination will not simply disappear with the grant of Section 271 authority, and the FCC has explained that it will not hesitate to remedy such discrimination in violation of Section 272 by issuing "stand-still" orders and freezing a carriers subscribership as of the date of such order.[16] Moreover, as the FCC explained in its Verizon New York 271 Order, Section 271(d)(6)(A) of the Act permits the FCC to issue such "stand-still" orders and freeze subscribership without conducting a full-blown trial type hearing beforehand.

Qwest's outrageous actions in violation of Section 271 are bad enough without considering the fact that it is also prematurely acting in violation of Section 272. This Commission should not ignore such information as it evaluates the Qwest 271 checklist, particularly as it considers the public interest aspect of recommending approval of Qwest's Section 271 application.

IV. BASED ON QWEST'S POSITION THAT ITS LIT FIBER IRUS ARE AKIN TO UNES, THE IRUS SHOULD BE EXAMINED FOR COMPLIANCE WITH THE NONDISCRIMINATION REQUIREMENTS OF SECTIONS 251 AND 252

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15 *See, e.g., In the Matter of Application of 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*, FCC 99-404, CC Docket No. 99-295, ¶¶ 446-453 (rel. Dec. 22, 1999) (noting that Section 271(d)(6)(A)(iii) of the Act permits the FCC to suspend or revoke 271 approval if the BOC has ceased to meet any of the conditions required for such approval) ("*New York 271 Order*").

16 *Id.*

On June 30, 2000, Qwest and U S WEST merged to form a single entity, which remained subject to the regional RBOC restrictions and incumbent local exchange carrier ("ILEC") obligations under the Act. Pursuant to the FCC's *Merger Order*, Qwest and U S WEST where ordered to comply with Section 271 of the Act by divesting Qwest's interLATA business in the U S WEST region.[17] Despite divestiture requirements under the *Merger Order*, Qwest continued – and, to this day, continues – to provide indefeasible rights of use (IRUs) in lit fiber in the Qwest region. The lit fiber IRUs provided by Qwest are in-region, interLATA services in violation of section 271 of the Act.[18]

In a complaint action filed before the FCC, Touch America has detailed the many reasons why the lit fiber IRUs violate Section 271.[19] In its answer to the *IRU Complaint*, Qwest denies that the lit fiber IRU arrangements constitute in-region, interLATA services and claims that the IRUs do not violate Section 271.[20] As one element of its defense, Qwest argues that the dark fiber and lit fiber IRUs are facilities rather than services.[21] Furthermore, Qwest states that Qwest Communications Corporation, a separate affiliate of the Qwest local exchange carrier, sells the IRUs.[22]

In drawing analogies to support its position that IRUs are interests in facilities and not telecommunications services, Qwest likens the IRUs to the permissible transfer of facilities,

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17 *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application o Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 11909 (2000) ("*Merger Order*").

18 *See IRU Complaint*.

19 *Id.*

20 *See generally Qwest Answer*.

21 *See, e.g., Qwest Answer* at 5-12 and ¶¶ 8, 81-85.

22 *Id.* at 11 ("The IRUs here are sold by Qwest Communications Corporation, a separate

including such transfers as international undersea cables and bare satellite transponder capacity.[23] In addition, Qwest asserts that its lit fiber IRUs are facilities with competitive importance "as a potential alternative to constructing one's own facilities."[24] Further, Qwest admits that some of the lit fiber IRUs are in-region and that the lit fiber IRUs in question "only can be of use to an extremely small number of sophisticated parties (typically, but not necessarily always, carriers or ISPs) as part of their own network systems."[25] Qwest argues further that its lit fiber IRUs are facilities akin to lit fiber transport capacity required to be offered as unbundled network elements ("UNEs").[26]

Touch America has no doubts concerning the correctness of its position that Qwest's lit fiber IRUs are prohibited in-region, interLATA service offerings. To the extent such IRUs are found by the FCC to be in-region, interLATA service offerings, Qwest is in clear violation of Section 271. However, Qwest's argument that the lit fiber IRUs are comparable to UNEs raises important issues. If the FCC determines that Qwest is correct in its position that the lit fiber IRUs are akin to UNEs, then this Commission should determine that it has a duty under Section 271(c)(2)(B)(ii) of the Act to ensure that Qwest offers nondiscriminatory access to and pricing for the lit fiber IRUs in accordance with Sections 251(c)(3) and 252(d)(1) of the Act.[27] The Commission has been reviewing Qwest's checklist compliance but has not investigated this issue at all to date.

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affiliate of the local exchange carrier....").

23 *Qwest Answer* at 7-8 and ¶¶ 95, 110, 112.

24 *Qwest Answer*, ¶ 112 (citing an FCC decision addressing lit and unlit fiber IRUs).

25 *Qwest Answer*, ¶¶ 83, 169.

26 *Qwest Answer*, ¶ 112 ("The Commission has also held that incumbent local exchange carriers are required to offer both lit fiber transport capacity and dark fiber as unbundled network elements.").

CONCLUSION

For the foregoing reasons, Touch America seeks an order from this Commission staying these proceedings pending resolution of Touch America's complaint at the FCC. In the alternative, Touch America requests that the Commission condition its recommendation regarding Qwest's compliance with Sections 271 and 272 on the FCC's determination regarding the Section 271 and 272 issues.

Respectfully submitted this 4th day of June, 2002.

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[27] 47 U.S.C. § 271(c)(2)(B)(ii).

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	)	TC01-165
TELECOMMUNICATIONSACT OF 1996	)	

CERTIFICATE OF MAILING

I hereby certify that copies of TOUCH AMERICA'S PETITION TO INTERVNE AND MOTION TO REOPEN ISSUES are being deposited with the United States Postal Service with sufficient postage as First Class Mail in envelopes addressed to all persons listed below, on the 4th day of June, 2002.

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Larry Toll
Vice President – South Dakota

ride the light
Qwest

June 11, 2002

Ms. Debra Elofson
Executive Director
Public Utilities Commission
State Capitol Building
Pierre, South Dakota 57501

Dear Ms. Elofson:

Please find enclosed Qwest's Opposition to Touch America's Petition to Intervene and Motion to reopen Issues relative to TC01-165. The original and ten copies of this opposition have been mailed to the commission. Also enclosed is a Certificate of Service. This letter and the filing is also being sent via facsimile.

If you have any questions I can be reached at the above listed number.

Sincerely,

Larry Toll

Enclosure

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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'S OPPOSITION TO TOUCH AMERICA'S PETITION TO INTERVENE AND MOTION TO REOPEN ISSUES

Qwest Corporation ("Qwest"), through undersigned counsel, respectfully opposes "Touch America's Petition to Intervene and Motion to Reopen Issues," dated June 4, 2002 ("Touch America's motion").[1]

I. Touch America's Motion Is Untimely and Unjustified

[1] Touch America's Petition to Intervene and Motion to Reopen Issues, *In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996*, TC01-165 (June 4, 2002).

Many months after these proceedings began, Touch America has moved to intervene in order to inject new evidence and arguments into the deliberations. Touch America's eleventh hour motion is inexcusably late, and should be denied for this reason alone.

Pursuant to ARSD 20:10:01:15.02, a petition to intervene "shall be filed with the Commission within the time specified in the commission's order establishing time for intervention." The Commission has established a November 16, 2001 intervention deadline for this proceeding.[2] Touch America fails to provide any justification for why it is filing so long after the required date, even though it raised these same issues with Qwest long before that date. Touch America's suggestion that the seriousness of this issue has just come to its attention is disingenuous at best. Touch America filed testimony and comments on these very issues elsewhere as early as November of 2001.[3] And, as the Commission is aware, AT&T was able to raise these same issues in its comments filed in the time required by the Commission's procedural schedule.[4] The Washington Commission has already denied Touch America's nearly identical motion (which has been filed in at least thirteen states) as clearly untimely, finding that

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[2] *See* Order For and Notice of Procedural Schedule and Hearing dated December 18, 2001, *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, ("On November 1, 2001, the Commission electronically transmitted notice of the filing and the intervention deadline of November 16, 2001 to interested individuals and entities.").

[3] *See* Comments of Touch America, Inc. on Public Interest Issues, *In the Matter of U S WEST Communications, Inc. Section 271 Compliance Investigation,* North Dakota Public Service Comm'n, Case No. PU-314-97-193 (Nov. 30 2001); Direct Testimony of Kevin Dennehy on Behalf of Touch America, Inc., *In the Matter of U S WEST Communications, Inc. Section 271 Compliance Investigation,* North Dakota Public Service Comm'n, Case No. PU-314-97-193 (Nov. 30 2001).

[4] *See* AT&T's Verified Comments Regarding Public Interest, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996.* Docket No. TC01-165, at 27 (Mar. 18, 2002).

Touch America's reasons for intervention were "insufficient to grant the petition."[5] This Commission should do the same.

II. Touch America's Motion Should Be Dismissed As Entirely Unrelated to This Proceeding

In any event, Touch America's motion adds nothing to the still-pending complaints it has already filed before the FCC, and provides no basis to reopen this inquiry. Touch America's as-yet-unadjudicated complaints, which it seeks to import into this proceeding, do not involve local competition issues at all. Nor has Touch America even demonstrated that it has any CLEC operations in South Dakota. Rather, its complaints allege that Qwest's in-region dark fiber and lit fiber IRU transactions (1) amount to the provision of in-region interLATA services in violation of section 271, and (2) violate the terms of the FCC's U S WEST-Qwest merger orders regarding divestiture of such services. The FCC has made clear that disputes arising from BOC merger orders that are currently being considered in its complaint dockets are best resolved in those other pending dockets, and not in connection with section 271 applications.[6] In its most recent section 271 order, the FCC again rejected an attempt to address issues in a section 271

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[5] 35th Supplemental Order Denying Petition for Intervention, Motion to Reopen, *In the Matter of the Investigation into U S WEST COMMUNICATIONS, INC's Compliance with Section 271 of the Telecommunications Act of 1996; In the Matter of U S WEST COMMUNICATIONS, INC's Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket No. UT-003022; Docket No. UT-003040, Washington Utilities and Transportation Comm'n (June 7, 2002).

[6] *See* Memorandum Opinion and Order, *Application of Verizon New York 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 Connecticut*, 16 FCC Rcd 14147 ¶ 79 (2001) (noting that concerns with "Verizon's compliance with the conditions of the Bell Atlantic/GTE merger . . . [should] be appropriately addressed in the Commission's" merger audit proceedings, not the public interest inquiry).

docket that relate to "open issues before [the] Commission" in another proceeding.[7] It also expressly rejected the idea that the section 271 process should "resolve all complaints, *regardless of whether they relate to local competition*, as a precondition to granting a section 271 application."[8] Touch America's complaints have demonstrated no relationship to such local competition issues in South Dakota, involve a dispute about the scope of the FCC's own merger orders, and should not be smuggled into this wholly separate 271 application proceeding.

Three states to consider Touch America's complaints have already agreed. The Arizona Staff determined that because Touch America's complaints "are currently pending with the FCC and no ruling has yet been rendered," it "[could not] conclude at this time that granting Qwest 271 relief is inconsistent with the public interest."[9] The Montana Commission similarly concluded that "the FCC is the proper regulatory agency to decide the complaint and the complaint's significance vis-à-vis Qwest's expected 271 bid."[10] In addition, the New Mexico Commission denied the Attorney General's motion to reopen the public interest inquiry with respect to issues regarding Touch America, which the Commission noted are "already the subject

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7 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*, FCC 02-147, CC Docket No. 02-35, ¶ 208 (rel. May 15, 2002) ("*BellSouth Georgia/Louisiana Order*").

8 *BellSouth Georgia/Louisiana Order* at ¶ 305 (emphasis added).

9 Arizona Staff's Proposed Report on Qwest's Compliance with Public Interest and Track A, *In the Matter of U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, ¶ 330 (May 1, 2002).

10 Preliminary Report on Qwest's Compliance with the Public Interest, *In the Matter of the Investigation into Qwest's Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Montana Public Service Comm'n, Docket No. D2005.70, at 25 (Feb. 14, 2002).

of ongoing proceedings before the FCC."[11] Touch America's motion is precisely the same kind of tactic excoriated by the Chairman of the Colorado Commission, as a "let's throw everything against the wall and see what sticks" approach to the public interest.[12] The Commission should not tolerate such strategies.

Touch America's efforts at the end of its pleading to cobble together some tenuous relationship of its FCC complaints to these 271 proceedings fall far short of the mark. First, those complaints address the actions of Qwest's affiliate, Qwest Communications Corporation ("QCC"), not Qwest Corporation (the BOC). They thus do not, as Touch America asserts, implicate section 272(c). Section 272 of the Telecommunications Act of 1996, which is designed to prevent *the BOC* from favoring or subsidizing its 272 affiliate, applies only to the BOC, not to QCC.[13] Nor does Touch America's effort to relate its FCC complaints to the section 271 checklist have any merit. As the FCC has explained, the public interest inquiry is not a basis for "extend[ing] the terms of the competitive checklist of section 271(c)(2)(B)."[14] But Touch

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11 Order, *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, New Mexico Public Regulation Comm'n, Utility Case No. 3269 (Apr. 16, 2002).

12 Order on Staff Volume VII Regarding Section 272, the Public Interest, and Track A, *In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Colorado Public Utilities Comm'n, Docket No. 97I-198T, Decision No. R02-318-I, at 51 (Mar. 15, 2002).

13 47 U.S.C. § 272. *See also* 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*, 16 FCC Rcd 20719 ¶ 122 (2001).

14 Memorandum Opinion and Order, *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a) Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island*, 17 FCC Rcd 3300, at ¶ 102 (2001) (footnotes omitted).

America's argument makes no sense in any event. Touch America misunderstands Qwest's argument that transactions related to facilities are not telecommunications services. In describing the types of capabilities that constitute facilities and permissible 271 transactions, Qwest has pointed to the FCC's characterization of a number of different types of facilities, including undersea IRUs and satellite transponder capacity. But Qwest has never suggested that an IRU is a UNE. Nor has Touch America made any demonstration that an IRU is a UNE (and therefore subject to either section 251 or the 271 checklist).

III. Touch America's Motion Lacks Any Substantive Merit

Touch America's efforts to import its FCC complaints into this proceeding at such a late date should be denied for the reasons explained above. But in any event, Touch America's as-yet-unadjudicated complaints are wholly without merit. As Qwest has demonstrated to the FCC,[15] the FCC previously approved the Qwest transactions at issue, in light of Qwest's formal Divestiture Compliance Report detailing the aspects of its plans for complying with section 271 prior to the merger. That report specifically stated that Qwest was not planning to unwind any pre-existing sales of IRUs "both for the conveyance of dark fiber and for the conveyance of lit fiber capacity," and that it "intend[ed] to continue selling similar telecommunications facilities in the future."[16] As the FCC subsequently concluded: "Based upon the description of the customers, services and assets being transferred to Touch America," the "proposed divestiture . . .

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15 *See* Answer of Defendants Qwest Communications International Inc., Qwest Corporation, and Qwest Communications Corporation, *Touch America, Inc. v. Qwest Communications International Inc.*, FCC File No. EB-02-MD-003 (Mar. 4, 2002).

16 Divestiture Compliance Report, *Qwest Communications International Inc. and U S WEST, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, FCC CC Docket No. 99-272, at 28-30 (filed Apr. 14, 2000).

. will ensure that Qwest will not provide prohibited in-region interLATA services."[17] Qwest has also demonstrated to the FCC in response to Touch America's complaints that the sale of IRUs constitutes the conveyance of network facilities, not the provisioning of "telecommunications services." As the FCC has held, "the one-time transfer of ownership and control of an interLATA network is not an interLATA service, which means it falls entirely outside the section 271/272 framework that governs interLATA services."[18]

Touch America filed its formal complaint alleging that Qwest's IRU transactions implicate section 271 with the FCC in February of this year. Qwest has answered that complaint,[19] and the FCC is reviewing these matters to determine whether Qwest's interpretation of the FCC's own orders, and the provisions of federal law, are reasonable. Touch America selected the FCC as its forum. Because these complaints are already being addressed in the appropriate forum, this Commission does not need to consider them here.

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17 Memorandum Opinion and Order, *Qwest Communications International Inc. and U S WEST, Inc.*, 15 FCC Rcd 11909 ¶¶ 5, 13 (2000).

18 *See, e.g.*, Second Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 12 FCC Rcd 8653 ¶ 54 n.110 (1997).

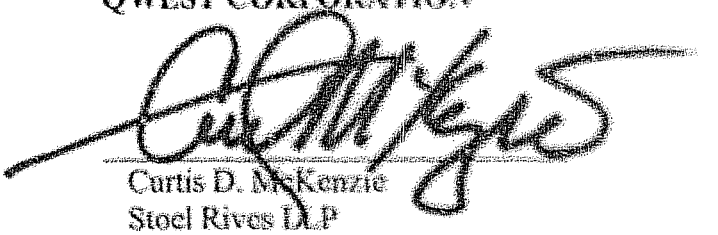
19 *See* Answer of Defendants Qwest Communications International Inc., Qwest Corporation, and Qwest Communications Corporation, *Touch America, Inc. v. Qwest Communications International Inc.*, FCC File No. EB-02-MD-003 (Mar. 4, 2002).

For the reasons stated above, Qwest respectfully requests the Commission to deny Touch America's motion.

Dated this 10th day of June, 2002.

RESPECTFULLY SUBMITTED,

QWEST CORPORATION



Curtis D. McKenzie
Stoel Rives LLP
101 S. Capitol Blvd., Suite 1900
Boise, Idaho 83702

John Munn
Qwest Corporation
1801 California Street, Suite 4900
Denver, Colorado 80202

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June 2002, the original and 10 copies of Qwest's Opposition to Touch America's Petition to Intervene and Motion to Reopen Issues, 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 June 11, 2002 addressed to:

Gregory J. Bernard
Attorney at Law
Morrill Thomas Nooney & Braun LLP
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Rapid City, SD 57709-8108

David A. Gerdes
Attorney at Law
May Adam Gerdes & Thompson
P.O. Box 160
Pierre, SD 57501-0160

Marlon Griffing, PhD.
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Mark Stacy
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5300 Meadowbrook Drive
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Larry Toll

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Sioux Falls, SD 57101-1020
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REPLY TO: Rapid City 605-342-2592

From the offices of Gene N. Lebrun
e-mail address: glebrun@lynnjackson.com

June 12, 2002

Debra Elofson, Executive Director
Public Utilities Commission
Capital Building, 1st Floor
500 East Capital Avenue
Pierre, SD 57501-5070

RE: TC01-165

Dear Ms. Elofson:

Pursuant to the electronically submitted letter of June 12, 2002, enclosed herewith is the original and ten copies of TOUCH AMERICA'S REPLY TO QWEST'S OPPOSITION, dated June 12, 2002, which is being filed on behalf of Touch America, Inc. Also enclosed is the original and ten copies of the CERTIFICATE OF MAILING also dated June 12, 2002. In accordance with the Certificate of Mailing, copies have been sent to all names and addresses on the Certificate of Mailing and an electronic copy was sent by email on June 12, 2002 to Curt McKenkie, attorney for Qwest. Those names and addresses were provided to us by Delaine Kolbo of the PUC staff.

An electronic copy of the Reply Brief and Certificate of Mailing were transmitted to you on June 12, 2002.

Sincerely yours,

Lynn, Jackson, Shultz & Lebrun, P.C.

Gene N. Lebrun
GNL:bjc
Encls.
cc w/encls: Certificate of Mailing List
R. Dale Dixon
Daniel Waggoner
Susan Callaghan

BEFORE THE PUBLIC UTILITY 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 1996	))))	TC01-165

TOUCH AMERICA'S REPLY TO QWEST'S OPPOSITION

Touch America, Inc. ("Touch America") hereby submits this Reply to Qwest Corporation's ("Qwest") Opposition to Touch America's Petition to Intervene and Motion to Reopen Issues ("Touch America Motion").[1]

The Touch America Motion requests that the South Dakota Public Utility Commission (the "Commission") reopen issues in the above-captioned proceeding to take additional, critical evidence directly relating to the Commission's analysis of Qwest's Section 271 application. Touch America is not seeking an opportunity to litigate before this Commission the issues currently before the Federal Communications Commission ("FCC") in the Touch America formal complaints[2] and, thus, will not respond to Qwest's allegations that the Touch America

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[1] Qwest's Opposition to Touch America's Petition to Intervene and Motion to Reopen Issues, *In the Matter of The Analysis Into Qwest Corporation's Compliance with Section 271(C) of the Communications Act of 1996* ("Qwest's Opposition").

[2] *See In the Matter of Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-003 (filed Feb. 8, 2002) ("*IRU Complaint*"); *see also In the Matter of Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-004 ("*Divestiture Complaint*") (filed Feb. 11, 2002).

Motion and the FCC complaints have no substantive merit. The FCC has already determined that it will decide the *IRU Complaint* on its merits, and the *Divestiture Complaint* is currently subject to discovery and additional briefing.[3] Although Touch America has been aware of the issues underlying its FCC complaints for many months, the FCC's recent validation of the issues in the *IRU Complaint* gives rise to Touch America's Motion.

Touch America's request to the Commission is logical and reasonable. This Commission will issue a recommendation on Qwest's Section 271 application based on its examination of, among other things, the Public Interest and Qwest's proven compliance with Sections 251, 252, 271 and 272 of the Telecommunications Act of 1996 (the "Act"). Touch America asks that the Commission develop a full and complete record in this proceeding. In the context of Section 271 proceedings, the FCC has noted that "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."[4] Touch America has demonstrated that Qwest's lit fiber indefeasible right of use ("IRU") offerings present vital concerns regarding the Public Interest and other areas of inquiry that the Commission considers when it submits a recommendation regarding the Qwest 271 application.

Qwest's likening the lit fiber IRUs to unbundled network elements ("UNEs") should

---

[3] Qwest's position that merger-related disputes should not be considered in this proceeding is misplaced. The suggestion that the lit fiber IRU offerings are part of a reconsideration of the FCC's *Qwest Merger Order* is Qwest's misleading characterization of the disputes before the FCC.

[4] *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, ¶ 397 (1997).

cause serious alarm for the Commission. It is not Touch America that thought up the UNE analogy. In its Answer to the *IRU Complaint*, Qwest justifies its lit fiber IRU offerings by citing the *UNE Remand Order* and stating that "[ILECs] are required to offer both lit fiber transport capacity and dark fiber as unbundled network elements."[5] In addition, Qwest points to lit fiber IRUs as "a potential alternative to constructing one's own facilities" and states that it is "selling IRU capacity to certain large carriers and others...who use IRUs to fill out their telecommunications networks."[6] In an effort to avoid liability for the lit fiber IRUs at either the federal or state level, Qwest appears to be taking a "let's throw everything against the wall and see what sticks" approach to characterizing the lit fiber IRU offerings.

Touch America's Motion does not attempt to expand the competitive checklist at Section 271(c)(2)(B) of the Act. Touch America has no doubts that the Qwest lit fiber IRUs are prohibited in-region interLATA service offerings. If the Qwest lit fiber IRUs are akin to UNEs, however, then the nondiscriminatory pricing and access provisions of Sections 251(c)(3) and 252(d)(1) certainly apply to such offerings, and the lit fiber IRUs should be examined for compliance with the competitive checklist at Section 271(c)(2)(B)(ii).

In light of the issues in the *IRU Complaint* and Qwest's mercurial position regarding the characterization of the lit fiber IRU offerings, it would be premature for the Commission to recommend approval of Qwest's 271 application. If the Commission were to move forward with its recommendation, it should, at a minimum, condition such recommendation on the FCC's

---

[5] *See Answer of Defendants Qwest Communications International Inc., Qwest Corporation, and Qwest Communications Corporation*, File No EB-02-MD-003, ¶ 112 (filed March 4, 2002) ("*Qwest Answer*") (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, 15 FCC Rcd 3696, ¶¶ 322-323, 325-330 (1999) ("*UNE Remand Order*").

[6] *Qwest Answer* at 3 and ¶ 112.

future findings regarding the *IRU Complaint* issues. It is because of this uncertainty that the Commission should stay these proceedings pending resolution of Touch America's complaints at the FCC. In the alternative, the Commission should condition its recommendation regarding Qwest's compliance with Section 271 on the FCC's determination regarding those issues.

Respectfully submitted this 12 day of June, 2002.

TOUCH AMERICA, INC., Petitioner

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Tel: (406) 497-5556
Fax: (406) 497-5203

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	)	TC01-165
TELECOMMUNICATIONSACT OF 1996	)	

CERTIFICATE OF MAILING

I hereby certify that copies of TOUCH AMERICA'S REPLY TO QWEST'S OPPOSITION are being deposited with the United States Postal Service with sufficient postage as First Class Mail in envelopes addressed to all persons listed below, on the 12th day of June, 2002.

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MANAGER-REGULATORY AFFAIRS
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ATTORNEY AT LAW
BOYCE MURPHY MCDOWELL & GREENFIELD
PO BOX 5015
SIOUX FALLS, SD 57117-5015

MS. MARY S HOBSON
ATTORNEY AT LAW
STOEL RIVES LLP
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MR. BRETT KOENECKE
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MS. MARY B TRIBBY
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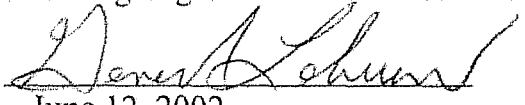
DENVER, CO 80202

MS. JOANNE RAGGE
QWEST CORPORATION
1801 CALIFORNIA STREET, SUITE 4900
DENVER, CO 80202

I further certify that on June 12, 2002, a copy of the same was sent by email to Curtis McKenzie, attorney for Qwest at cdmckenzie@stoel.com.

Name of Person Signing Certificate: Gene N. Lebrun

Signature: 
Signing: June 12, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996

TC 01-165

NOTICE OF FILINGS OF AFFIDAVITS OF TODD LUNDY AND DAN HULT

During the evidentiary hearings in this proceeding, the Public Utilities Commission of State of South Dakota ("the Commission"), through its attorney, requested that Qwest Corporation ("Qwest") answer several questions in writing by sworn affidavit. In response to the request by the Commission, Qwest files the Affidavits of Todd Lundy, Corporate Counsel of the Eastern Region for Qwest, and Dan Hult, Senior Director of Business Development, Wholesale, for Qwest.

In answering the questions propounded by the Commission, Qwest will have to necessarily disclose confidential agreements made with third parties who are not parties to this proceeding. In addition, there are certain terms and conditions in the agreements that are filed that require notice to be provided to these third parties. Qwest has provided notice to the third parties as to this filing. In addition, Qwest has filed the agreements that are subject to confidentiality with third parties in a sealed envelope and has requested confidential treatment of those agreements pursuant to the Commission regulations. The parties to this proceeding have not been furnished with the agreements claimed to be confidential in Exhibit 2 attached to the Affidavit of Todd Lundy. Qwest has notified third parties that such agreements may be disclosed and it will be incumbent upon those third parties to seek what protection may exist for such information if such third parties desire such protection.

DATED this 13th day of June, 2002.

Thomas J. Welk
Boyce, Murphy, McDowell & Greenfield, L.L.P.
101 North Phillips Avenue, Suite 600
Sioux Falls, SD 57104
Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

I, Thomas J. Welk, do hereby certify that I am a member of the law firm of Boyce, Murphy, McDowell & Greenfield, L.L.P. and on the 13th day of June, 2002, a true and correct copy of this Notice of Filings of Affidavits of Todd Lundy and Dan Hult, the Affidavit of Dan Hult with attached Exhibit 1 and the Affidavit of Todd Lundy with Exhibit 1, a redacted Index of Exhibit 2 and those agreements not claimed as confidential in Exhibit 2, were served by US first class mail, postage prepaid on the following:

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A T & T Communications for the Midwest
1875 Lawrence Street
Denver, CO 80202

Black Hills Fiber Com
Gregory J. Bernard
Morrill, Thomas, Nooney & Braun
Post Office Box 8108
Rapid City, SD 57709

Midcontinent Communications
David A. Gerdes
May, Adam, Gerdes & Thompson LLP
503 South Pierre Street
Pierre, SD 57501-0160

Harlan Best, Staff Analyst
Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

Karen Cremer, Staff Attorney
Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

Thomas J. Welk

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996

TC 01-165

REQUEST FOR CONFIDENTIAL TREATMENT OF INFORMATION

Pursuant to ARSD 20:10:01:41, Qwest Corporation ("Qwest "), through the undersigned counsel, requests confidential treatment for the following information in this docket:

1. The agreements described as confidential on Exhibit 2 to the Affidavit of Todd Lundy dated June 13, 2002. The exhibits are marked as confidential and are provided in a sealed envelope filed separately from the Affidavit of Todd Lundy.

2. The exhibits must be protected for the life of this docket. When the docket is closed all protected information must be returned to Qwest.

3. The person to be notified is Colleen Sevold, Qwest Corporation, 125 South Dakota Avenue, 8th Floor, Sioux Falls, SD 57194, telephone (605) 335-4596.

4. The claim for protection is based on ARSD 20:10:01:39 (4) and (6) and SDCL 37-29-1(4).

5. The exhibits contain proprietary business documents. Disclosure of these documents will provide actual and potential competitors with information which could provide them with a unique and unfair competitive advantage. Accordingly, Qwest respectfully requests that the Commission grant this request for confidential protection.

DATED this 13th day of June, 2002.

Thomas J. Welk
Boyce, Murphy, McDowell & Greenfield, L.L.P.
101 North Phillips Avenue, Suite 600
Sioux Falls, SD 57104
Attorneys for Qwest Corporation

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996

TC 01-165

AFFIDAVIT OF TODD LUNDY

STATE OF COLORADO)
:SS
COUNTY OF DENVER)

Todd Lundy, Corporate Counsel, Eastern Region Regulatory Law for Qwest, being duly sworn upon oath and authorized to answer on behalf of Qwest Corporation, states as follows in answering certain questions propounded by the Commission in this proceeding:

Number 1. Has Qwest entered into any written agreements with any CLEC concerning the provisioning of wholesale services pursuant to its obligations under Section 251 that have not been filed with the Commission? If so, provide a copy of all the written agreements.

Response: As a matter of law and as explained in detail in Qwest's Petition for Declaratory Ruling filed with the FCC, Qwest believes that it has filed all terms and conditions of interconnection services and network elements to the South Dakota Commission as required under section 252(a) of the Telecommunications Act of 1996.

Qwest has entered into other types of agreements with CLECs who are certified within Qwest's region. These agreements generally include settlements of disputes, business-to-business details of their working relationships, and other terms and conditions that as a matter of law Qwest believes are not within the filing requirements of section 252(a).

Qwest has responded to the concerns raised in the "unfiled agreements" to address both the underlying legal issues and the overriding policy concerns, as outlined in the letter from R. Steven Davis, Senior Vice President for Policy and Law, attached to this Response as Exhibit 1. As stated in Mr. Davis's letter, because of the controversy surrounding the scope of section 252(a)'s filing requirement, Qwest has filed a Petition for Declaratory Ruling with the Federal Communications Commission. And, until the FCC rules on Qwest's FCC Petition, Qwest is committing voluntarily to file and seek approval of all contracts, agreements, and letters of understanding with CLECs that create obligations to meet the requirements of sections 251(b) or (c) – a commitment and standard that Qwest believes go well beyond the requirements of section 252(a). Further, Qwest has begun the process of forming a committee of senior managers that will review

all agreements involving Qwest's in-region wholesale activities and ensure that Qwest complies with both the above commitment and any ruling the FCC issues on Qwest's petition.

However, in the interest in full disclosure, and although Qwest believes that certain agreements are not within the filing requirements of section of 252(a) of the Act, Qwest is providing agreements and letters of understanding that it has with Competitive Local Exchange Carriers ("CLECs") certified to do business in South Dakota that have not been filed with the Commission. See Exhibit 2 which contains an index of all agreements filed and those agreements that are not subject to confidentiality agreements with third parties. To the extent that many of such CLECs do not operate, do not provide services, and have not been provided services by Qwest in South Dakota, Qwest asserts that such agreements do not serve as the basis for conduct in South Dakota and would not have to be filed in South Dakota even if they constituted agreements that should be filed under section 252(a). These agreements contain confidentiality clauses, and therefore Quest is providing these agreements as confidential documents under the Commission regulations and providing notice to the affected parties of this filing. Parties to this proceeding will need to obtain copies of the confidential agreements from the Commission or obtain permission from the third party.

Number 2. Has Qwest made any verbal agreements with any CLEC concerning the provisioning of wholesale services pursuant to its obligations under Section 251? If so, provide a written description of any verbal agreement, the date or dates of any agreements, the name of the CLEC, and the names of the Qwest and CLEC representatives who were involved in any verbal agreements.

Response: Account mangers and employees at all levels and throughout Qwest's wholesale organization regularly and routinely communicate with customers and with other persons with whom Qwest has business relationships, regarding numerous subjects and through a variety of media. Such communications could result in "understandings" or "agreements", however granular or trivial, that may in some fashion "concern" the provisioning of wholesale services under section 251. In an organization as large and as widely dispersed as Qwest, identifying and producing all such communications would be an impossible task. Accordingly, Qwest respectfully objects to the breadth of this request, and, if and to the extent the Commission requires information and disclosures beyond the scope of what Qwest is providing in Exhibit 2, Qwest respectfully asks and invites the Commission to specify in a relatively definitive fashion the additional information and disclosures requested.

Dated this 12th day of June, 2002.

QWEST CORPORATION

By Todd Lundy
Todd Lundy
Corporate Counsel, Eastern Region
Regulatory Law

STATE OF COLORADO)
:SS
COUNTY OF DENVER)

Todd Lundy, being first duly sworn, deposes and says that he is Corporate Counsel, Eastern Region Regulatory Law for Qwest, and is an authorized agent of Qwest Corporation for the purposes of answering the above affidavit, that he does not have personal knowledge of all of the facts recited in the foregoing responses, but the information has been gathered by and from employees or representatives of Qwest Corporation; that the answers represent all information available to Qwest Corporation; and that the foregoing answers are verified by him as agent for Qwest Corporation.

Todd Lundy
Todd Lundy

Subscribed and sworn to before me on this the 12th day of June, 2002.

{SEAL}

Barbara Spence
Notary Public Colorado

My Commission Expires: 3-3-2003

R. Steven Davis
Sr. Vice President
Policy and Law

1801 California Street, Suite 4750
Denver, CO 80202
Phone 303 896-4200
Facsimile 303 298-8763

May 21, 2002

Mr Jim Burg, Chairperson
Ms. Pam Nelson, Vice Chairperson
Mr. Robert Sahr, Commissioner

Dear Commissioners:

There has been a lot of publicity over the past few weeks related to certain agreements that Qwest has entered into with competitive local exchange carriers. I am writing to advise you of new policies that Qwest is implementing in this area.

As you may know, ILECs routinely enter into agreements of many kinds with CLECs. Some of them may take effect immediately as in the normal business world. Others must be filed with and pre-approved by state commissions. Qwest itself has filed over 3,200 agreements with CLECs since the passage of the Telecommunications Act, including both initial agreements and amendments. This large number reflects our efforts to work with individual CLECs to meet their specific business needs. However, questions have been raised regarding a relative handful of our arrangements with CLECs. Some parties allege that under Section 252(a) of the Telecommunications Act such agreements also should have first been filed and approved

Qwest disputes these allegations and is defending the legal line it drew between those agreements that did, and did not, need to be filed Qwest also has filed a petition with the FCC asking for guidance on where the filing line is drawn.

Meanwhile, however, Qwest is implementing two new policies that will eliminate debate regarding whether Qwest is complying fully with applicable law. First, Qwest will file all contracts, agreements or letters of understanding between Qwest Corporation and CLECs that create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis. We believe that commitment goes well beyond the requirements of Section 252(a). However, we will follow it until we receive a decision from the FCC on the appropriate line drawing in this area. Unless requested by the Commission, Qwest does not intend to file routine day-to-day paperwork, orders for specific services, or settlements of past disputes that do not otherwise meet the above definition.

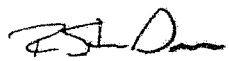
Second, Qwest has reviewed and is enlarging its internal procedures for evaluating contractual arrangements with CLECs and making all necessary filings. Qwest is forming a committee of senior managers from the corporate organizations involved in wholesale agreements: wholesale business development, wholesale service delivery, network, legal affairs attorneys, policy and law attorneys, and public policy. This committee will review agreements involving in-region wholesale activities to ensure that the standard described above is applied prior to the issuance of an FCC ruling, and that any later FCC decision also is implemented fully and completely.

EXHIBIT
1

Qwest is implementing these policies to eliminate any question about Qwest' compliance with the requirements of Section 252(a) in this state while Qwest's petition to the FCC is pending. We hope to continue to work with CLECs to meet their individual needs, as we have in the past. This is a practice that we are proud of, and we do not want to see it obscured by controversy over the meaning of Section 252(a), or decisions on line drawing in a small number of situations.

To the extent there are questions or concerns associated with the procedure outlined in this letter, please contact me.

Sincerely,



R. Steven Davis

CC: Rolayne Ailts-Wiest, General Counsel

Begin

Confidential

INDEX OF RESPONSIVE DOCUMENTS

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2.

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EXHIBIT

14.

15.

16.

17.

18. U S West Service Level Agreement with Covad Communicatoins Company Unbundled Loop Services dated April 19, 2000. (previously made public as exhibit in Minnesota)

19. Subject to Rule of Evidence 408 Confidential Billing Settlement Agreement (between U S West and McLeodUSA) dated April 28, 2000. (previously made public as exhibit in Minnesota)

20. Confidential Agreement in letter format (between Blake Fisher, McLeod USA and Greg Casey, Qwest) dated October 26, 2000. (previously made public as exhibit in Minnesota)

CONFIDENTIAL

[2] 0

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996

Docket No. TC 01-165

ORDER ADMITTING NON-RESIDENT ATTORNEY

It is hereby

ORDERED that the Motion for Admission for Todd Lundy, a non-resident attorney, to appear on behalf of Qwest Corporation before the Public Utilities Commission for the State of South Dakota relating to this matter is granted.

Dated this 13, day of June, 2002.

BY THE COURT:

Circuit Court Judge
Sixth Judicial District

ATTEST:
Christal Espeland, Clerk

By: Christal L. Espeland
Deputy
(SEAL)

BOYCE, MURPHY, McDOWELL & GREENFIELD, L.L.P.

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June 14, 2002

Debra Elofson, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

Re: In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 (C) of the Telecommunications Act of 1996 (TC01-165) (Our File No. 2104.006)

Dear Ms. Elofson:

Enclosed for filing please find the original Affidavit of Dan Hult to replace the faxed copy filed on June 13th.

Sincerely yours,
BOYCE, MURPHY, MCDOWELL
& GREENFIELD, L.L.P.

Thomas J. Welk

TJW/vjj
Enclosures
cc: Colleen Sevold
Mary Hobson
John Munn
Todd Lundy
Dan Hult
Steven H. Weigler
Gregory J. Bernard
David A. Gerdes
Harlan Best, Staff Analyst
Karen Cremer, Staff Attorney

Replace the first Affidavit we received with the original signature page.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996

TC 01-165

AFFIDAVIT OF DAN HULT

STATE OF NEBRASKA)
:SS
COUNTY OFDOUGLAS)

Dan Hult, Senior Director of Business Development – Wholesale, for Qwest Corporation, being duly sworn upon oath and authorized to answer on behalf of Qwest Corporation, states as follows in answering certain questions propounded by the Commission in this proceeding:

Number 3. Has Qwest entered into any written or verbal agreements in which Qwest agreed to do something for a CLEC in exchange for that CLEC's promise to not oppose Qwest's entry into the interLATA long distance market? If so, provide copies of any written agreements, a written description of any verbal agreements, the date or dates of any agreements, the name of the CLEC, and the names of the Qwest and CLEC representatives who are involved in any verbal agreements.

On November 15, 2000, Qwest entered into a letter agreement with Eschelon, who is not providing any services in South Dakota which is attached as Exhibit 1. As a result, Qwest believes this letter agreement does not serve as the basis for any conduct in South Dakota. Nonetheless, in the interest of full disclosure, and without waiving the issue of whether this agreement serves as the basis for the parties' conduct in South Dakota, this agreement contains the following provisions:

By no later than December 31, 2000, the parties agree to meet together (via telephone, live conference or otherwise), and as necessary thereafter, to develop an Implementation Plan. The purpose of the Implementation Plan ("Plan") will be to establish processes and procedures to mutually improve the companies' business relations and to develop a multi-state interconnection agreement. Both parties agree to participate in good faith and dedicate the necessary time and resources to the development of the Implementation Plan and to finalize an Implementation Plan by no later than April 30, 2001. Any necessary escalation and arbitration of issues during development of the Plan must also be completed by April 30, 2001.

During development of the Plan, and thereafter, if an agreed upon Plan is in place by April 30, 2001, Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreements.

A copy of this letter agreement is being provided to the Commission as Exhibit I; it is a public document.

Thus, in exchange for an agreement to establish processes and procedures to benefit the parties' business relations and to enter into a multi-state interconnection agreement, Eschelon agreed not to engage in the section 271 litigation. Productive cooperation to improve processes and procedures help the provisioning for all CLECs, thereby improving the delivery of wholesale services.

McLeod has orally agreed to remain neutral on Qwest's 271 applications as long as Qwest is in compliance with all agreements between McLeod and Qwest and with all applicable statutes and regulations.

Number 4. Has Qwest proposed any such agreement referenced in Question 3 to any CLEC? If so, provide a written description of any such proposals, the date or dates when the proposals were made, the name of the CLEC, and the names of the Qwest and CLEC representatives who were involved in the proposed agreements.

Response: Qwest has not offered or proposed the same terms as stated in the November 15, 2000 Eschelon letter agreement or the McLeod verbal agreement to any CLEC operating in South Dakota.

Dated this 13th day of June, 2002.

QWEST CORPORATION

By Dan Hult

Dan Hult - Senior Director of Business Development – Wholesale

STATE OF NEBRASKA)
:SS
COUNTY OF DOUGLAS)

Dan Hult, being first duly sworn, deposes and says that he is Senior Director of Business Development – Wholesale for Qwest Corporation, and is an authorized agent of Qwest Corporation for the purposes of answering the above Affidavit, that he does not have personal knowledge of all of the facts recited in the foregoing responses, but the information has been gathered by and from employees or representatives of Qwest Corporation; that the answers represent all information available to Qwest Corporation; and that the foregoing answers are verified by him as agent for Qwest Corporation.

Dan Hult

Subscribed and sworn to before me on this the 13th day of June, 2002.

{SEAL} GENERAL NOTARY-State of Nebraska
TERESA M. PEATROWSKY
My Comm. Exp. March 17, 2004

Notary Public – Nebraska

My Commission Expires: March 17 2004

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 1996	)))))	ORDER FOR AND NOTICE OF PROCEDURAL SCHEDULE AND HEARING TC01-165

On October 25, 2001, Qwest Corporation (Qwest) filed with the Commission a Petition for Commission Recommendation that the Federal Communications Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act Of 1996. Specifically, Qwest requests that this Commission find, based upon the record presented, that Qwest has met the competitive checklist and other requirements of 47 U.S.C. section 271, which prescribe the mechanism by which Qwest may be found eligible to provide in-region interLATA services and rely upon that finding to provide a favorable recommendation to the Federal Communications Commission (FCC). In support of its petition, Qwest submitted 25 affidavits, a revised Statement of Generally Available Terms, and seven Reports submitted in the Seven-State Process.

On November 1, 2001, the Commission electronically transmitted notice of the filing and the intervention deadline of November 16, 2001, to interested individuals and entities. A Petition for Leave to Intervene was received from Black Hills FiberCom, L.L.C. (Black Hills) on November 7, 2001, a Petition to Intervene was received from Midcontinent Communications (Midcontinent) on November 9, 2001, and a Petition for Leave to Intervene was received from AT&T Communications of the Midwest, Inc. (AT&T) on November 15, 2001. At its November 27, 2001, meeting, the Commission granted the interventions. The Commission also requested that the parties submit proposed procedural schedules by December 7, 2001. The Commission received proposed procedural schedules from all of the parties.

At its December 12, 2001, meeting, the Commission considered the proposed procedural schedules. The Commission set the following procedural schedule:

January 18, 2002 - Intervenors and Staff identify disputed issues (except for issues relating to the final OSS report which has not been issued yet);

February 7, 2002 - A prehearing conference will be held beginning at 2:30 p.m., in Room 468, State Capitol Building, Pierre, South Dakota;

March 18, 2002 - Staff and Intervenors' testimony is due;

April 2, 2002 - Qwest may file rebuttal testimony; and

April 22-26, 2002 - A hearing will be held beginning at 9:00 a.m. on April 22, 2002 and continuing through April 26, 2002, in Room 412, State Capitol Building, Pierre, South Dakota.

The hearing was held as scheduled, beginning on April 22, 2002 and ending on April 30, 2002. At the conclusion of the hearing, the Commission set a post-hearing briefing schedule.

At its May 30, 2002, meeting, the Commission listened to comments from the parties on how to proceed with consideration of the Regional Oversight Committee (ROC) Operational Support Systems (OSS) test. The Commission has jurisdiction in this matter pursuant to SDCL Chapter 49-31, specifically 49-31-81 and 47 U.S.C. section 271. The Commission sets the following procedural schedule to consider the ROC OSS test:

July 3, 2002 - Parties may file comments on the ROC OSS test. These comments are optional. A party may present testimony at the hearing without filing comments;

July 11, 2002 - A hearing will be held beginning at 8:30 a.m. on July 11, 2002, in Room 412, State Capitol Building, Pierre, South Dakota. The ROC OSS vendors will present testimony on the ROC OSS test. The following vendors will be giving presentations: MTG - Denise Anderson and Marie Bakunas; KPMG - Mike Weeks and Joe Dellatorre; and HP - Geoff May, Liz Gragert, and Don Petry. All parties will be allowed an opportunity for cross-examination. Following that testimony, all parties will be allowed the opportunity to present additional testimony, which will also be subject to cross-examination. The Commission is scheduling only one day for this hearing. If necessary, the hearing may extend into the evening hours;

July 22, 2002 - Qwest may file a post-hearing brief concerning issues related to the ROC OSS test;

August 5, 2002 - Staff and Intervenors may file a post-hearing brief concerning issues related to the ROC OSS test; and

August 12, 2002 - Qwest may file a rebuttal brief.

It is therefore

ORDERED, that the parties shall comply with the procedural schedule as set forth above.

Dated at Pierre, South Dakota, this 19th day of June, 2002.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 6/19/02

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

ROBERT K. SAHR, Commissioner

CONFIDENTIAL

[1]