Direct Testimony

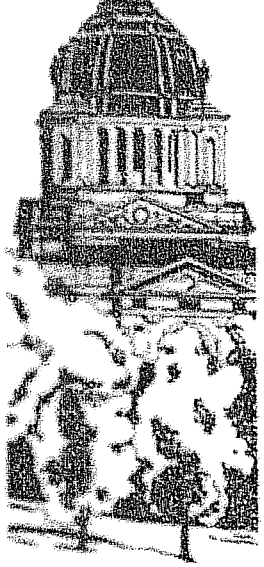
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Qwest Data Request

10/25/01 - Filed and Docketed;
11/01/01 - Weekly Filings;
11/07/01 - Petition for Leave to Intervene (Black Hills FiberCom);
11/09/01 - Petition to Intervene (Midcontinent Communications);
11/15/01 - AT&T's Petition for Leave to Intervene;
11/28/01 - Notice of Filing Report of Independent Auditor;
12/03/01 - Qwest's September 2001 Performance Data for South Dakota as Reported under the ROC Created Performance Metrics;
12/05/01 - Order Granting Intervention;
12/07/01 - Qwest's Report on the Status of Change Management Process Redesign;
12/07/01 - Qwest's Proposed Procedural Schedule;
12/07/01 - AT&T's Proposed Procedural Schedule;
12/07/01 - Midcontinent's Proposed Procedural Schedule;
12/07/01 - Joinder in AT&T's Proposed Procedural Schedule (Black Hills FiberCom);
12/12/01 - Qwest's Response to Procedural Schedule Comments of AT&T and Black Hills FiberCom;
12/12/01 - Motion for Admission of Non-Resident Attorney (John L. Munn);
12/12/01 - Order Admitting Non-Resident Attorney (John L. Munn);
12/18/01 - Order for and Notice of Procedural Schedule and Hearing;
12/21/01 - Qwest Submission of Supplemental KPMG Declaration;
01/07/02 - Qwest's October 2001 Performance Data as Reported under the ROC Created Performance Metrics;
01/17/02 - Contract between QSI Consulting and SDPUC;
01/18/02 - Section 271 Issues List (Staff);
01/18/02 - Midcontinent's Comments to Docket TC01-165;
01/18/02 - AT&T's List of Disputed Issues;
01/18/02 - Statement of Issues (Black Hills FiberCom)
02/07/02 - Response to Staff Data Request;
02/20/02 - Transcript of Prehearing Conference held 2/7/02;
03/05/02 - Black Hills' Motion for Order Denying Petition;
03/05/02 - Brief in Support of Black Hills' Motion for Order Denying Petition;
03/06/02 - Notice of Filing Motion to Remove Document from Commission Record;
03/06/02 - Motion to Remove Document from Commission Record;
03/07/02 - Motion for Definition of Track A Analysis;
03/07/02 - Brief in Support of Motion for Definition of Track A Analysis;
03/11/02 - Motion to Suspend Procedural Schedule or Supplement Prefiled Testimony;
03/13/02 - AT&T's Joinder on Midcontinent's Motion to Suspend Procedural Schedule and Request for Expedited Decision;
03/13/02 - Qwest's Performance Data;
03/18/02 - Direct Testimony of Mark L. Stacy;
03/18/02 - Direct Testimony of Marlon Griffing, Ph.D.;
03/18/02 - Prefiled Testimony of W. Tom Simmons;
03/19/02 - Direct Testimony of Kyle D. White;
03/19/02 - Direct Testimony of Ronald Schaible;
03/19/02 - Direct Testimony of Michelle Merchen;
03/19/02 - Direct Testimony of Jheri Turner;
03/19/02 - Affidavit of Michael Hydock;
03/19/02 - Four Affidavits of Kenneth L. Wilson;
03/19/02 - Four AT&T Verified Comments;
03/19/02 - John Finnegan's Verified Comments;
03/19/02 - AT&T's Comments;
03/19/02 - Verification of Kenneth L. Wilson;
03/19/02 - Certificate of Service;
03/20/02 - Order Granting Motion and Denying Motion;
03/22/02 - Brief in Response to the Motions filed by Black Hills FiberCom

and Midcontinent;
03/25/02 - Corrected Page 1 to Qwest's Brief;
03/25/02 - Qwest's Data Requests to Black Hills FiberCom, Midcontinent and AT&T;
03/27/02 - Black Hills FiberCom's Reply Brief Re: Track A Proceedings;
03/27/02 - Reply to Qwest's Response to Motions filed by Black Hills FiberCom and Midcontinent Regarding Qwest's Section 271 Application;
03/28/02 - Order Admitting Nonresident Attorney (Jonathan Frankel);
04/03/02 - Rebuttal Affidavit of Larry B. Brotherson;
04/03/02 - Seven Rebuttal Affidavits of Margaret S. Bumgarner and Request for Confidential Treatment of Information;
04/03/02 - Three Rebuttal Affidavits of Thomas R. Freeberg;
04/03/02 - Affidavit of Mary Ferguson LaFave;
04/03/02 - Rebuttal Affidavit of Jean M. Liston;
04/03/02 - Rebuttal Affidavit of Lynn M. V. Notarianni;
04/03/02 - Rebuttal Affidavit of Mark S. Reynolds;
04/03/02 - Affidavit of Judith M. Schultz;
04/03/02 - Rebuttal Affidavit of Marie E. Schwartz;
04/03/02 - Four Rebuttal Affidavits of Lori A. Simpson;
04/03/02 - Two Rebuttal Affidavits of Karen A. Stewart;
04/03/02 - Pre-Filed Testimony and Data Reconciliation Reports of Robert L. Stright;
04/03/02 - Rebuttal Affidavit of David L. Teitzel;
04/03/02 - Reply Affidavit of Michael G. Williams;
04/04/02 - Order Granting Motions; Order Amending Procedural Schedule and Extending Hearing Dates;
04/04/02 - AT&T's Procedural Motion Regarding the Section 271 Process;
04/10/02 - Errata to the Affidavit of Kenneth L. Wilson;
04/12/02 - Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan;
04/15/02 - Qwest's Proposed Order of Witnesses;
04/16/02 - AT&T's Motion for Extraordinary Protective Order;
04/16/02 - Midcontinent's Request for Confidential Treatment of Information;
04/16/02 - Midcontinent's Response to Qwest's Data Requests of March 22, 2002;
04/17/02 - Supplemental Prefiled Testimony of W. Tom Simmons;
04/19/02 - Orders Admitting Nonresident Attorney (Lynn Stang, Robert Cattanach, John Devaney, Kara M. Sacilotto, Mary Rose Hughes, Shannon Heim, William Richardson, Charles Steese, Blair Rosenthal and Andrew Crain);
04/19/02 - Black Hills' Responses to Qwest's Data Requests for Black Hills;
04/22/02 - Revised Order of Witnesses;
04/22/02 - Affidavits of Barbara Brohl and Dennis Pappas;
04/22/02 - Supplemental Affidavit of Karen A. Stewart;
04/22/02 - Response to AT&T's Motion for Extraordinary Protective Order;
04/22/02 - Order Admitting Nonresident Attorney to Practice (Steven H. Weigler);
04/22/02 - Motion to Strike Supplemental Testimony, Public Exhibits and Confidential Exhibits of W. Thomas Simmons Received April 18, 2002;
04/22/02 - Motion Regarding Proceeding on Third Party Testing of Qwest's OSS;
04/22/02 - Supplemental Affidavit of Larry B. Brotherson;
04/24/02 - Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan;
04/25/02 - AT&T's Request for Confidential Treatment of Information;
04/25/02 - AT&T's Responses to Qwest's Requests for Information;
04/29/02 - Qwest's Submission of Alternative QPAP Proposals;
04/29/02 - QPAP Approved as Amended;
04/29/02 - Qwest's Motion to Enter AT&T's Track A Data Request Response into Evidence;
05/01/02 - Qwest's November 2001 through February 2002 Performance Data as



South Dakota Public Utilities Commission

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

DATE: March 18, 2002

TO: All of the Parties in Docket TC01-165

FROM: Karen E. Cremer
Staff Attorney

RE: In the Matter of the Analysis into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996

Enclosed you will each find copies of Direct Testimony of Mark L. Stacy and Direct Testimony of Marlon Griffing. Ph.D with reference to the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Karen E. Cremer

Karen E. Cremer
Staff Attorney

KEC:dk
Enc.

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Patti Jennings
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Bob Knadle
Delaine Kolbo
Gregory A. Rislov
Keith Senger
John Smith
Roxanne Alta Wiest

CERTIFICATE OF SERVICE

I hereby certify that copies of Direct Testimony of Mark L. Stacy and Direct Testimony of Marlon Griffing, Ph.D. were served on the following by mailing the same to them by United States Post Office First Class Mail, postage thereon prepaid, at the addresses shown below on this the 18th day of March, 2002.

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March [illegible], 2002

HAND DELIVERED

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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Debra Elofson
Executive Secretary
Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

RE: **MIDCONTINENT TELECOMMUNICATIONS; QWEST 271 COMPLIANCE APPLICATION**
Docket TC01-165
Our file: 0053

Dear Debra:

Enclosed are original and ten copies of the prefiled testimony of Tom Simmons, which please file. Also enclosed is a certificate of service showing service of the prefiled testimony upon the service list.

With a copy of this letter, I am sending copies of the enclosures to the service list.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP

BY:

DAG:mw
Enclosures
cc/enc: Service List
Tom Simmons
Mary Lohnes

RECEIVED
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996

CERTIFICATE OF SERVICE OF PREFILED TESTIMONY OF TOM SIMONS

David A. Gerdes of May, Adam, Gerdes & Thompson LLP certifies that on the 18th day of March, 2002, he mailed, by United States mail, first class postage thereon prepaid, a true and correct copy of the Prefiled Testimony of Tom Simons dated March 18, 2002, in the above-captioned matter to the following named known addresses, to-wit:

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Dated this 11th day of March, [illegible].

MAY, ADAM, [illegible]

By: [signature]
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March 18, 2002

RECEIVED

Ms. Debra Elofson
Executive Director
Public Utilities Commission
State Capitol Building
500 East Capitol Avenue
Pierre, SD 57501

RE: Black Hills FiberCom/US West 271 Application
TC01-165
Our File No. BH-1231

Dear Ms. Elofson:

Please find enclosed for filing the original and ten (10) copies of Pretrial Testimonies of Kyle White, Jheri Turner, Ron Schaible and Michelle Meacham of Black Hills FiberCom, LLC.

Please call if you have any questions.

Sincerely,

Gregory J. Bernard

GJB:so

Enclosures
cc: Clients
Service List

DIRECT TESTIMONY OF KYLE D. WHITE
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996
DOCKET NO. TC01-165

RECEIVED
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Q Please state your name and business address.

A. Kyle D. White, 625 Ninth Street, Rapid City, South Dakota.

Q. By whom are you employed and in what capacity?

A. I am Vice President of Corporate Affairs for Black Hills Corporation (Black Hills). My areas of responsibility include regulatory affairs, governmental affairs, and corporate marketing and public relations.

Q. For whom are you testifying on behalf today?

A. I am testifying in support of Black Hills Corporation's subsidiary, Black Hills FiberCom, LLC, which is an intervenor in this proceeding.

Q. Please describe your educational and business background.

A. I graduated with honors from the University of South Dakota in May of 1982 with a Bachelor of Science degree in Business Administration, majoring in management. In August of 1989 I graduated with a Masters degree in Business Administration, also from the University of South Dakota. I have been employed by Black Hills in rate- and marketing-related work since July of 1982 and have been in my present position since January of 2001. I have been responsible for the preparation of the utility's rate studies and filings for fifteen years. In addition to on-the-job training in utility rate making, I have attended numerous seminars,

trade association meetings, and regulatory conferences covering a variety of subjects including utility rate-making principles. My experience in telecommunications is the result of being assigned to the business evaluation and start-up team for Black Hills FiberCom. My activities generally were in the marketing, public relations, and regulatory areas. My support assignment began in 1997 and continued through 2000. My current activities include providing regulatory support for Black Hills FiberCom, as well as Black Hills Power.

Q. Have you previously testified before this Commission or other Commissions?

A. Yes, before the South Dakota Public Utilities Commission and the Wyoming Public Service Commission.

Q. Do you support Qwest's proposal to implement a Performance Assurance Plan (QPAP) for its business transactions with South Dakota competitive local exchange carriers (CLECs)?

A. Yes, in principle I do. However, to be effective in a small state like South Dakota, it will require some modifications of the voluntary plan that Qwest has proposed in its application. It is my opinion that this type of performance assurance plan is sorely missing from Qwest's current efforts to facilitate competition as provided for by the 1996 Telecommunications Act. In fact, Black Hills FiberCom believes performance standards and penalties should be mandatory for Qwest interconnection agreements in South Dakota, and we are certain that a QPAP-like mechanism is required to incent Qwest to continue to provide adequate and timely wholesale services to CLECs in South Dakota.

Q. Have you read the Liberty Consulting Group's (Liberty Consulting) report regarding the QPAP collaborative result and Liberty Consulting's resulting recommendations?

A. Yes, and I agree with probably 80% of Liberty Consulting's conclusions regarding the QPAP filed with this Commission by Qwest. Given the significant differences between the QPAP and Liberty Consulting's conclusions, I'm surprised Qwest included the report with its application. It's clear to me that Liberty Consulting doesn't believe that the QPAP is sufficiently drafted to ensure future compliance with the public interest.

Q. What is the primary concern you have regarding Qwest's proposed voluntary QPAP?

A. I am concerned that the design of the QPAP as proposed by Qwest will not provide adequate incentives or penalties to deter poor performance here in South Dakota. In its testimony, Qwest attempts to comfort us with statements that would have us believe that the plan is largely an FCC approved SBC plan and that, "the QPAP meets the FCC expectations." Qwest also claims that the QPAP, "satisfies the necessary criteria for the Commission to recommend 271 is in the public interest and will provide protection against performance backsliding after Qwest obtains long-distance entry."

Black Hills FiberCom well remembers the difficulties of transacting business with US West before Qwest's acquisition of them and Qwest's strategic interest in entering the interstate long-distance business in US West's fourteen

state service area. Since Qwest's acquisition of US West, we have seen vast improvements in Qwest's interest and ability in providing wholesale services to Black Hills FiberCom; unfortunately, the improvements came well after the critical stages of our start-up. We longed for performance standards and penalties that would compensate Black Hills FiberCom for Qwest's poor performance in providing services critical to our business. Through our experience we are fearful that Qwest will not have a long-term desire to provide quality services to CLECs. If they were sincere about maintaining high-quality service, they would offer the QPAP with or without 271 approval.

Q. Do you believe that Qwest's voluntary QPAP will be adequate to ensure performance and protect the public interest?

A. No. After reviewing Qwest's testimony and the language proposed in the QPAP, I believe that Qwest has once again used its monopoly position to maintain a favored position in the design and implementation of the QPAP.

Q. Do you have examples that support your conclusion?

A. Yes. First, Qwest offers its voluntary QPAP only in exchange for the right to offer interstate long-distance services to its South Dakota local exchange customers. Second, Qwest states that the voluntary QPAP was the result of "substantial consensus with many participating CLECs over the three major structural aspects of the QPAP." Although the phrasing of this statement is nice, as is often said, "The devil is in the details," and the details of the QPAP do not support the "substantial consensus of the participating CLECs" regarding the

details as evidenced by the report of Liberty Consulting (Qwest Attachment 33). Black Hills FiberCom knows well how words can be used by Qwest to mask the reality of a situation. For example, we have an "arms-length negotiated" interconnection agreement with Qwest in which the only items we were allowed to modify were our business name and the name and title of the officer signing the agreement. Not even the effective date of the agreement could be changed, even though it was over four months prior to our actually entering into the agreement. Qwest is well skilled in utilizing its monopoly position to its advantage, and the voluntary QPAP is just another vehicle to help Qwest strengthen its competitive position, this time through the entry into the previously forbidden interstate long-distance business. We shouldn't forget that the Telecommunications Act was passed in 1996 and, of all the RBOCs, US West was not in the least bit eager to accept the incentive offered by 271. So, why are they eager now? Could it be the current poor financial status of the competitive telecommunications industry?

Q. Is it reasonable for Qwest to be required by this Commission to implement a QPAP in exchange for the Commission's support of Qwest's petition to the FCC to enter the interstate long-distance service business in South Dakota?

A. Yes. The opportunity and likely results are not insignificant to Qwest's South Dakota operations. A recent Wall Street Journal article said, "According to the Federal Communications Commission, the average household made 116 minutes of long-distance calls each month in 2000." The article reported that Regional

Bell Operating Companies (RBOCs) entering the interstate long-distance business, "typically snap up market share of 20% or more in a matter of months."

If we assume 200,000 Qwest residential customers in South Dakota, the annual billing for long-distance at ten cents per minute is $27,840,000. If Qwest only gets 20% of these dollars, their take will be $5,568,000 per year and this only considers the residential business. The commercial interstate long-distance market opportunity is also significant.

Q. Have you reviewed Mark S. Reynolds Exhibit MSR-QPAP-3 which provides a calculation of the payments Qwest would have made for poor performance for the months of May, June and July of 2001?

A. No. Qwest has claimed this information as confidential, but given the payment caps within the QPAP, I suspect that they are striking a good business deal if they can exchange the QPAP for a shot at South Dakota's lucrative interstate long-distance business.

Q. Has anyone at Black Hills Corporation or its subsidiaries been able to review this exhibit?

A. No. As a small CLEC, each employee is required to be involved in a wide variety of activities. Qwest's confidentiality agreement effectively prohibits our management team from reviewing this information as to the likely results of a QPAP implementation. However, we suspect that if we pushed Qwest, we could get a modified agreement to accommodate our situation.

We are not like Qwest; we do not have a huge staff of specialists that work in specific areas. Due to our size, we tend to be more generalists in our efforts. This needs to be recognized when Qwest claims that it, "will be subject to a comprehensive self-executing mechanism." South Dakota CLECs and, I might add, this Commission are not currently staffed to audit Qwest's interpretation and implementation of the QPAP. The burden of continuing audits needs to remain with Qwest.

Q. Have you had the opportunity to review the performance indictors (PIDs) that Qwest has included in its proposed QPAP?

A. No. The QPAP as filed indicated that these were still under development. As a result, it is impossible for me to determine whether we feel the PIDs will be effective in appropriately incenting Qwest's performance in providing services to CLECs. Qwest has indicated in its testimony that last year they were making the grade for 93% of the PIDs. The trouble is we don't know what makes up the 7% that they failed to meet.

Q. Do you think Qwest is offering its voluntary QPAP strictly as a "loss leader" designed to gain it access to the lucrative interstate long-distance business?

A. Absolutely. It is clear that they have designed the QPAP to result in minimal damage to their business.

Q. In what ways has the QPAP been designed to limit impacts?

A. The QPAP provides two tiers of penalties for poor performance. Tier 1 payments are paid to CLECs for poor performance specific to their companies. Tier 2 payments are paid to states for general poor performance.

Q. Please discuss first the impact limitations inherent in the design of the Tier 2 payments.

A. In order for Tier 2 payments to even be made, Qwest must fail to meet performance standards for three consecutive months. However, the penalty is not for the three consecutive months, but instead payment is made for a single month at the average missed performance rate for the three-month period. In effect, Qwest can take two months of poor performance for free. If Qwest meets the performance standards in the following month, then it again requires three consecutive months of poor performance before the State could again be paid for Qwest's poor performance and the resulting harm to South Dakota's public interest.

If Qwest were inclined to "game" the system, this approach would allow Qwest eight out of twelve months of poor performance without making a single payment to the State. I doubt that this is the performance expectation the PUC has in mind.

Qwest limits its exposure in other ways as well. Under the Tier 2 payment structure, the performance measurements are only calculated for those South Dakota CLECs that have amended their interconnection agreements to include the QPAP. Without these amendments, neither the State nor the CLECs are eligible

for penalty payments for performance and the resulting harm to South Dakota's public interest. Whether a CLEC accepts the "take it or leave it" QPAP or not, Qwest's poor performance in meeting the CLECs' wholesale services needs still is damaging to the public interest. In addition, to this eligibility limitation, Tier 1 and Tier 2 payments are subject to monthly and annual payment caps. I will address these caps in more detail when I discuss Tier 1 payments, but let me share with you at this point the fact that if CLEC payments under Tier 1 meet or exceed the monthly cap, Tier 2 payments are forfeited.

In addition, Qwest has set the per occurrence payment levels and justifies them by stating that they are near the actual revenue that Qwest would receive for the service from the CLEC. In many cases what the CLEC pays Qwest is not relevant in relation to the business impacts of either increased internal costs or damaged reputation with customers and potential customers that result from Qwest's poor performance. Regardless of the payment levels under the annual cap, Qwest can put an end to CLEC services by paying a little more than $40,000 per day. If we assume Qwest has 200,000 South Dakota customers, the per customer cost to Qwest to end competition in South Dakota under the QPAP is about 20 cents per day. With access to the lucrative interstate long-distance business, the QPAP payments, along with a monopoly position in South Dakota, may be a great bargain for Qwest.

Q. Has Qwest also designed the QPAP Tier 1 payments to limit their impact?

A. Yes. As I mentioned earlier, Qwest has incorporated both monthly and annual limits to the Tier 1 and Tier 2 payments it is obligated to make under the QPAP. The monthly limit is 1/12 the $15,000,000 annual cap or $1,250,000. Payments are made on a first come, first served basis with Tier 1 payments having priority over Tier 2 payments. If the payments for the month are below the cap, then the difference is carried forward. If the payments exceed the monthly cap, those who haven't been paid don't get paid. The unfairness of this is even greater when you consider the annual cap. Only CLECs receiving poor service early in the year are compensated even though Qwest's performance may be worse and more detrimental to the CLEC's business; for example, a facilities-based CLEC in the start-up construction phase.

Black Hills FiberCom believes that monthly caps are not appropriate. We support a pro rata distribution of Qwest's payments for the year between the eligible payment recipients. In addition, we believe that it is reasonable and appropriate that Qwest's annual cap be increased for years when Qwest's payments reach the annual cap before year-end. We recommend that for each month remaining after Qwest has reached the annual cap of $15,000,000, Qwest should be required to put at risk another $1,250,000. For example, if Qwest's payments as of its September calculation had reached the $15,000,000 threshold, then Qwest would be required to place at risk another $3,750,000, for an annual total of $18,750,000.

The annual cap is a fixed dollar amount that is intended to match an FCC so-called standard of 36% of net return. The amount is based upon Qwest's 1999 South Dakota financial results. It is Black Hills FiberCom's position with regard to the annual cap that it should be tied to Qwest's 36% of calculated return in the previous calendar year. By doing this, the cap will float with Qwest's earnings.

Q. Do you believe that the QPAP audit and revision processes, within the proposed QPAP, are appropriately structured?

A. No. Qwest's audit proposal is not sufficient to protect the CLECs or the long-term public interest. At a minimum, Qwest should be required to fund an outside audit of its QPAP implementation. Since the QPAP, as proposed, is the direct result of Qwest being granted the privilege of entering the interstate long-distance business, Qwest, not the CLECs or the state, should have the burden of proving that Qwest is appropriately meeting its QPAP obligations.

Although the QPAP provides for periodic review by the parties, Qwest has retained the right to reject any and all proposed revisions. This reservation is contrary to the public interest that this Commission is charged with protecting. Liberty Consulting proposes to fix this flaw through binding arbitration. Black Hills FiberCom does not believe that public interest issues like the QPAP should be the subject of binding arbitration. We recommend that disputes regarding proposed revisions to the QPAP should be heard and decided by the Commission. We also believe that the public would be best served if the Commission were charged with dispute resolution for both the SGAT and the QPAP. Only through

this role can the Commission be fully apprised of the complexities and realities of these documents that Qwest is using to gain access to the forbidden fruit of interstate long-distance service.

Q. Do you agree with Qwest's witness, Mark S. Reynolds, when he claims, "The remaining unresolved issues raised in the ROC PEPP collaborative are either appropriately left out of the QPAP or addressed in a way that is consistent with the FCC's expectations. Accordingly, this Commission should accept Qwest's plan, in its entirety, and recommend that the QPAP is in the public interest?"

A. No, and neither does Liberty Consulting Group in their report of the results of the ROC PEPP collaborative. They state on page 3 of their report to the New Mexico Regulation Commission, dated October 22, 2001, entitled, *Report on Qwest's Performance Assurance Plan*, "We find the record adequate to render conclusions on all material issues respecting the document's satisfaction of the relevant portion of the public interest test to which the FCC subjects 271 applications." On page 6 of their report, Liberty Consulting provides a "Summary of Recommended QPAP Changes." To quickly provide the Commission with the scope of their findings, I'll list the topic headings from their summary. They include:

- Provisions for Changing the Cap
- Foreclosing Recovery for CLEC Harm Occurring Late in the Year
- Allowing CLEC Recovery of Non-Contractual Damages in Other Proceedings

- Offsetting QPAP Payment Liabilities by Other Awards
- Excluding Qwest Payment Responsibilities in the Case of CLEC Bad Faith
- Differing SGAT and QPAP Force Majeure Provisions
- Timing of Force Majeure Events of Interval Measures
- Applying Force Majeure Provisions to Parity Measures
- CLEC Failures to Forecast as a Qwest Performance Excuse
- Tier 2 Payment Use
- Funding Commission Qwest CLEC Oversight Activities
- Three-month Trigger for Tier 2 Payments
- Changing the Weights of Some QPAP Measures
- Collocation
- Rounding Problems with Small Order Volumes
- Limits in QPAP Amendments
- Minimum Payments
- Dispute Resolution
- Assuring Continuing Data Accuracy
- PUC Access to CLEC Data
- Retention Period for CLEC Data
- Late Reports
- Payment of Interest
- Performance Reports Pending 271 Approval

- Incorporating the QPAP into SGAT and Interconnection Agreements
- Billing Credit Format
- Uncontested Qwest Changes to the QPAP
- State Commission Powers

In the 88-page report of Liberty Consulting Group, they address 29 areas of dispute among the ROC parties and provide recommendations for resolution. In most cases, the report identifies ways to improve the QPAP. As Qwest has introduced this report to the record, they should be required to explain to the Commission's satisfaction why the recommendations of Liberty Consulting should not be incorporated into the QPAP that South Dakota CLECs will be effectively "required" to incorporate into their Qwest interconnection agreements.

Q. Does this conclude your direct testimony?

A. Yes. As I have stated, only a significantly revised QPAP will be effective in protecting the public interest here in South Dakota.

Being first duly sworn upon oath, I declare under penalty of perjury under the laws of the United State of America that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on this 18th day of March, 2002.

Kyle D. White

KYLE D. WHITE

STATE OF SOUTH DAKOTA

COUNTY OF PENNINGTON

Subscribed and sworn to before me this 18th day of March, 2002.

Marlena Hinzman

Notary Public

2-26-2004

DIRECT TESTIMONY OF JHERI TURNER
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S
COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS
ACT OF 1996
DOCKET NO. TC01-165

RECEIVED
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Q: Please state your name and business address?

A: Jheri Turner. I work for Black Hills FiberCom at 809 Deadwood Avenue, Rapid City, South Dakota.

Q: What is your position with FiberCom?

A: I am currently the manager of FiberCom's Customer Service/Service Delivery Department.

Q: Please describe your educational, training and employment background in telecommunications.

A: In 1996 I began working for MCI Worldcom in Tulsa, Oklahoma. I worked for MCI for 4 years, during which time I received formal training in Lucent switch and fiber optics transmission systems. At MCI I worked as a manager of Network Support and Switch Supervisor. I began working at FiberCom in August 2000.

Q: What are your job duties as Customer Service Manager?

A: Primarily, with the help of FiberCom staff, I am responsible for the intake of customer complaints regarding the provisioning of FiberCom products and services. For example, when a customer calls FiberCom with a service problem, the FiberCom person taking the call usually records the customer's information and the nature of the problem. Customer Service then determines whether the problem is caused by a FiberCom system error or by an outside vendor error. If we determine the problem

lies in FiberCom's system, the necessary people and technicians are dispatched to resolve the issue. If we determine the problem is in an outside vendor's system, such as Qwest, Customer Service generally records the progress of the problem from inception through resolution and is the principal contact for the customer and the outside vendor throughout the process.

Q: FiberCom has filed a "Statement of Issues" in this proceeding identifying those issues which FiberCom raises relative to Qwest's compliance with Section 271(c) of the Telecommunications Act of 1996. On which such issues are you providing testimony?

A: Checklist Item Number 11 number portability; and Checklist Item Number 7 Operator Services and Directory Assistance Services (branding).

1. NUMBER PORTABILITY - CHECKLIST ITEM NUMBER 11.

Q: In your position as manager of Customer Service at FiberCom, do you have occasion to troubleshoot problems related to number porting?

A: Yes.

Q: **What is number porting?**

A: Number porting is the ability of a customer to switch local exchange service providers yet keep his old telephone number and obtain local service from the new provider under the old number. For example, when Customer A changes his local telephone service provider from Qwest to FiberCom, he has the option of keeping his old Qwest telephone number (348-XXXX) or obtaining a new FiberCom number (721-XXXX).

If Customer A keeps his old number, the number is "ported" from Qwest to FiberCom. When a person thereafter calls 348-XXXX from a FiberCom or Qwest line, he or she should reach Customer A who is now a FiberCom customer.

Q: **Has FiberCom experienced any problems porting numbers from Qwest which impair the quality, reliability or convenience of new FiberCom customers' telecommunications services?**

A: Yes. FiberCom has documented several instances since May 2001, where Qwest has reassigned its former customers' telephone numbers to new Qwest customers after they are ported to FiberCom. Essentially what occurs is, after Customer A switches his local telephone service from Qwest to FiberCom and ports his 348-XXXX telephone number, Qwest then reassigns the 348-XXXX number to Customer B, a Qwest customer. FiberCom Customer A and Qwest Customer B now have the same telephone number. If a person calls 348-XXXX from a Qwest line, intending to reach Customer A, he will reach Customer B or hear a message indicating that 348-XXXX has been disconnected. If the same person calls 348-XXXX from a FiberCom line, he will reach Customer A.

FiberCom's records since May, 2001, show that Qwest has reassigned ported numbers to new Qwest customers at least seven times and in one instance, Qwest activated a ported number in its switch, despite FiberCom's instructions not to do so, thereby knocking out a Qwest business customer's service. I am submitting FiberCom's documentation of these various incidents as Exhibits JT-1 through JT-8 attached to this testimony.

Exhibit JT-1 is FiberCom's documentation of a FiberCom business customer,

Rushmore Gloves, Inc., whose ported number was reassigned by Qwest. On April 30, 2001, FiberCom customer Rushmore Gloves, Inc. contacted FiberCom and informed FiberCom that calls to Rushmore's business line (348-0567) were being routed to another business. Rushmore's 348-0567 number was ported from Qwest to FiberCom on April 11, 2001. On April 30, FiberCom personnel contacted "Debbie" at Qwest and learned that on April 27, 2001, Qwest had reassigned 348-0567 to a Qwest customer despite the fact that it had been ported to FiberCom. FiberCom opened a Qwest trouble ticket on April 30, 2001. By the morning of May 1, 2001, the problem was still not fixed. Ultimately, FiberCom was referred to at least six different Qwest people and was made to open three separate Qwest trouble tickets before the problem was solved. In his complaint to Mary Healy at the PUC, the owner of Rushmore Glove, George Larson, indicated that for several days when customers called his business, they received a message that the number had been disconnected. Mr. Larson described the disruption as "the kiss of death" for his business and indicated that Qwest denied any fault for the mistake. See Exhibit JT-1 at p. 3. Page 4 of Exhibit JT-1 is my response to Ms. Healy's inquiry into the matter.

Exhibit JT-2 is FiberCom's documentation of another FiberCom business customer, CheckRite, whose ported number was reassigned by Qwest. Although resolution required FiberCom to open two separate Qwest trouble tickets, the problem was resolved within hours.

Exhibit JT-3 is FiberCom's documentation of another FiberCom business customer, Quinn, Day & Barker, whose ported number was reassigned by Qwest more than one year after the number was ported to FiberCom. The customer's number was

ported to FiberCom on February 9, 2000. On August 1, 2001, the customer informed FiberCom that some calls to its 343-6400 number were being routed to Mr. Don Schmall, a Qwest customer. FiberCom contacted Qwest and Qwest confirmed that it had reassigned the ported number to Mr. Schmall. Ultimately, FiberCom had to enlist the help of four different Qwest personnel and open three separate trouble tickets over the course of two days in order to get the problem resolved. See Exhibit JT-3 at page 2. The customer filed a complaint with Mary Healy at the PUC. Page 3 of Exhibit JT-3 is my response to Ms. Healy's inquiry.

Exhibit JT-4 is FiberCom's documentation of a FiberCom residential customer, Toni Heiser, whose ported number was reassigned by Qwest. On September 1, 2001, Ms. Heiser contacted FiberCom and indicated that when Qwest customers tried to call her, they received a message indicating her phone was disconnected. FiberCom opened a trouble ticket with Qwest later that same day. FiberCom contacted Qwest and was informed that the problem had been fixed. However, a representative from FiberCom tried calling the customer using a cell phone (391-5156) and from a land line (348-7912) and still received the disconnect message. The FiberCom representative called back to Qwest and Qwest indicated that the trouble ticket was in fact still open and had a repair commitment date of the following day. Ultimately Qwest resolve the problem within a few hours.

Exhibit JT-5 is FiberCom's documentation of another FiberCom residential customer, Gladys Fraley, whose ported number was reassigned by Qwest. Ms. Fraley contacted FiberCom on August 29, 2001, indicating she could not receive calls from Qwest customers. FiberCom contacted Qwest and was informed Qwest had

reassigned Ms. Fraley's ported number to Associated General Contractors of South Dakota. FiberCom opened a Qwest trouble ticket on September 1, 2001. FiberCom had to enlist the assistance of at least four Qwest people and opened three separate trouble tickets to get the matter resolved. See Exhibit JT-5 at page 2. Ultimately, it took Qwest four days to correct their error and in the interim, FiberCom was forced to assign a temporary number to its customer.

Exhibit JT-6 is FiberCom's documentation of an incident wherein Qwest activated a FiberCom customer's telephone number in Qwest's switch thereby causing the FiberCom customer's telephone service to go down. On September 25, 2001, FiberCom customer Joel Zwaniger wanted to port his 388-0469 telephone number back to Qwest as he was switching back to Qwest for his local telephone service. When Qwest made the port request of FiberCom, it requested a port for both Mr. Zwaniger's 388-0469 number and for the number 721-9685. FiberCom declined the porting of the 721-9685 number because the number belonged to a FiberCom business customer, RapidNet. Qwest, nevertheless, activated the 721-9685 number in its switch, thus causing a disruption in service to RapidNet. RapidNet is an Internet service provider and many of its customers were not able to access the Internet because of Qwest's error. RapidNet is one of FiberCom's larger business customers. Qwest's error placed considerable strain on the business relationship between FiberCom and Rapidnet as the error was perceived by Rapidnet as incompetence and poor service on the part of FiberCom rather than Qwest. Rapidnet threatened to run ads in the local paper apologizing for the outage while placing blame for the outage on FiberCom. Ultimately, after several calls by FiberCom to Qwest's repair group

and LNP group, Qwest corrected its error. Rapidnet's faith in FiberCom was restored after FiberCom was able to demonstrate Qwest's fault. Another similar failure on Qwest's part would likely result in FiberCom losing this significant business customer.

Exhibit JT-7 is FiberCom's documentation of a new FiberCom business customer, Highmark Federal Credit Union, whose telephone service was disrupted by a Qwest data entry error. On December 4, 2001, FiberCom submitted a Local Service Request (LSR) for a port of Highmark's 388-3763 telephone number on January 10, 2002. FiberCom received a confirmation that the port would be completed on January 10, 2002. On December 5, 2001, however, FiberCom was informed that the Qwest technician mistakenly entered a port date of January 10, 2001, instead of 2002. This caused Highmark's phone service to go down. Qwest instructed FiberCom that in order to correct the problem, FiberCom would have to enter another LSR. When that was attempted, however, Qwest's system would not accept the new LSR because the ported number was no longer recognized by Qwest's system as an active Highmark number. Again, FiberCom had to go through at least five different Qwest people and open three separate Qwest trouble tickets to finally get the problem resolved. (Exhibit JT-7, pp. 2-3).

Exhibit JT-8 is FiberCom's documentation of another FiberCom residential customer, John Sharkey, whose ported number was reassigned by Qwest twice within a ten-day period. Mr. Sharkey's 342-9381 telephone number was ported to FiberCom in May 2001. On December 24, 2001, Mr. Sharkey notified FiberCom that calls to his 342-9381 number were not delivered to his home, but were instead being routed to

a fax machine somewhere. FiberCom contacted Qwest and confirmed that Qwest had reassigned Mr. Sharkey's 342-9381 to a new Qwest customer. FiberCom opened a Qwest trouble ticket and the problem was resolved within a few hours. On January 2, 2002, however, Mr. Sharkey again called FiberCom and indicated that calls to his 342-9381 number were not being delivered to his home. FiberCom again contacted Qwest who confirmed that Mr. Sharkey's number had been reassigned by Qwest yet again. Qwest corrected its error within a few hours, but FiberCom's customer was understandably upset over the matter. (Exhibit JT-8 at page 2.) Mr. Sharkey filed a Complaint with Charlene Lund at the PUC. Page 3 of Exhibit JT-8 is my response to Ms. Lund's inquiry into this matter.

Q: **Has FiberCom been able to discern any standard procedure established by Qwest for the timely and efficient resolution of the problems caused by Qwest reassigning ported numbers?**

A: No. As evidenced by FiberCom's experience and the documentation submitted herein, resolution of the problem requires FiberCom to proactively keep pressing Qwest, sometimes over the course of days, as to the status of a given trouble ticket, and for commitments as to when the problem will be resolved. Very frequently FiberCom must contact more than one, and sometimes several, Qwest personnel in order to get resolution. Very frequently the initial trouble tickets somehow get "lost" by Qwest and FiberCom is made to open one or more subsequent trouble tickets in order to get the problem moved through Qwest's system. Based on FiberCom's experience, I have very little confidence that Qwest is able to prevent the reassignment of ported numbers, and even less confidence that when numbers are

reassigned, that Qwest would consistently be able to process a trouble ticket through resolution within 24 hours after only one call to Qwest by an affected CLEC.

BRANDING - CHECKLIST ITEM NO. 7.

Q: How does FiberCom provision Operator Services and Directory Assistance Services?

A: FiberCom purchases Operator Services and Directory Assistance Services wholesale from Qwest and in turn resells these services to FiberCom customers.

Q: What is branding?

A: Branding is service provided within the Operator Services/Directory Assistance Services of an RBOC. Under the Telecommunications Act of 1996, RBOCs are required to provide CLECs access to Directory Services to allow the CLECs to obtain telephone numbers and operator call completion services. Branding is a part of the RBOC's directory services to which CLECs must be given access. For example, a CLEC can access Qwest's Operator Services and Directory Assistance databases when its customers dial 1-411. The customer is connected to the Qwest Operator Service or Directory Assistance Service that provides the requested service on behalf of the CLEC. When the CLEC uses this method of providing Operator Services and Directory Assistance, it may request that Qwest "brand" its calls. For example, when customers call the Operator for Directory Assistance, they typically hear a message such as "Thank you for using XYZ Telephone Company." CLECs may request that Qwest brand the call with its own name: "Thank you for using Black Hills

FiberCom."

Q: Has FiberCom ever requested branding from Qwest?

A: Yes. In about June 2001, I began what turned out to be a seven-month process to obtain branding for FiberCom. In June 2001, FiberCom began the process of turning up its 605-717-XXXX central office code. Pursuant to Qwest's instructions, I submitted a completed "Directory Assistance Questionnaire" for the 717 code. This was the first time I was involved in completing a Directory Assistance Questionnaire and turning up a central office code. Part of the questionnaire asked whether FiberCom wanted branding on calls to Qwest's Directory Assistance from the 717 code. I indicated on the form that FiberCom did want branding on the code. A few weeks after I submitted the questionnaire, I received an invoice from Qwest in the amount of $7,310.00 for the cost of the set up and recording of FiberCom's branding message. On about August 1, 2001, I contacted Qwest representative Mary Paprocki, and inquired about the invoice. Primarily, my question was whether FiberCom would be charged a $7,310.00 fee for every central office code on which branding was requested. Ms. Paprocki informed me that the $7,310.00 was a one-time charge made to CLECs upon their first request for branding, and that once established, all of FiberCom's central office codes would be branded. I then asked Ms. Paprocki to doublecheck to make sure FiberCom had not been charged sometime in the several months prior to my request for branding because I knew that FiberCom had previously requested branding on other active central office codes. Ms. Paprocki informed me that prior to my request for branding on the 717 code, Qwest had been unable to provide branding, but that it was now available.

From my phone call with Ms. Paprocki in August until October 18, 2001, FiberCom participated in a number of conference calls with Qwest technicians in an attempt to get the branding provisioned. During that time, FiberCom was instructed to change the routing of its Directory Assistance calls, to submit an Access Service Request (ASR) changing the SecLoc of the Directory Assistance calls, and to submit another ASR requesting that the branding be provided over a new T1 rather than over a rerouted T1 as originally requested. On October 24, 2001, FiberCom submitted an ASR for branding that was finally accepted by Qwest's OSS. Fifteen days later, on November 8, 2001, Qwest responded to the October 24 ASR with a commitment date of December 11, 2001, on which the branding would be operational. The December 11 commitment date came and went without any contact from Qwest and without any branding being provided. In fact, FiberCom heard nothing more from Qwest until after FiberCom filed its Issue Statement in this proceeding on January 18, 2002, identifying the problem it was having with Qwest in provisioning branding. Shortly thereafter, Qwest contacted me with a new sense of urgency in getting the branding completed. I explained to Qwest that we still did not have branding despite our commitment date of December 11, 2001. After some more research into the problem, Qwest contacted FiberCom in late January 2000 to attempt a test of the branding. During the testing, it was discovered that a portion of the new circuit over which the branding would be provided had been improperly designed by Qwest. Approximately three weeks later, Qwest contacted FiberCom and indicated the circuit redesign was complete and they were prepared to test the branding once again. During this test, it was discovered that the recorded message did not properly identify Black Hills

FiberCom as the LEC providing the Directory Assistance. After some more research into the problem, Qwest discovered FiberCom's trunk signaling had to be changed before the branding would work. The necessary changes were made and on February 11, 2002, the branding was working properly on all of FiberCom's central office codes.

Q: What is the purpose of your testimony regarding FiberCom's experience in obtaining branding?

A: By this testimony I hope to highlight for the Commission the discrepancies between Qwest's representation in its Section 271 Application regarding its ability to provision branding, and a "real world" test of that ability. Although Qwest represents that as of October 23, 2001, no CLECs had requested branding in South Dakota, I requested branding for FiberCom in about June, 2001, and my request was preceded by other branding requests made by FiberCom in its completed "Directory Assistance Questionnaires" forwarded to Qwest. Although Qwest represents it conducted a successful "bench" test of its ability to provide CLEC-specific branding in May and June, 1999, FiberCom's branding requests were apparently not acted upon because, according to Qwest's representative, Qwest was unable to provide the service prior to June 2001. More importantly, however, I hope to highlight the unacceptable seven-month time lag between the initial request in June 2001, and the ultimate service date of FiberCom's branding in February 2002. As with my testimony regarding number porting, this highlights that in FiberCom's experience, many aspects of access and interconnection are only provided when FiberCom actively and aggressively manages its service and repair requests through Qwest's bureaucracy. It is also my experience

that these aspects of access and interconnection which require active and aggressive management usually are accompanied by delayed and missed service confirmation dates.

Q Does that conclude your testimony?

A Yes.

Being first duly sworn upon oath, 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 18th day of March, 2002.

JHERI TURNER

STATE OF SOUTH DAKOTA)

County of Pennington)

Subscribed and sworn to before me this ___ day of March, 2002.

Notary Public for South Dakota
My Commission Expires: 2/19/04

(SEAL)

Black Hills FiberCom

Call Log

Log ID: CL-[illegible]

Date: 05/01/2001

Printed By: Donna Heiden

Customer Info:

Open Call Log

Telephone Number: 605 341 0567

Name: RUSHMORE GLOVES, INC

Node RC053

Street Address: 715 MOUNTN VIEW RD

City: RAPID CITY State: SD Zip: 577020000

Log Info:

Orginator: Donna Heiden Closed By: Call type: Customer Outage

Date Opened: 05/01/2001 Date Closed: 00/00/0000 Service Type: Phone

Time: 11:18:18 Time: 00:00:00

Problem:

Customer called and some other company was receiving their business calls to this number.

Resolution:

Checked SOA and it showed our subscription was frozen and another subscription had been input on 4/27/01. Caller 4/31/01 and opened a trouble ticket (817633) and spoke with Debbie. After researching the number Debbie discovered that Qwest had assigned the number to another end user. Debbie worked to get this resolved and at 7:00 p.m. she was able to cancel the other subscription and make ours active. When I came into work 5/1/01 at 7:00 a.m. I tried the num and was still getting a disconne

EXHIBIT

JT-1

Additional Infomation:

Message: I called to open another trouble ticket since Debbie wouldn't be in until 9:00 a.m. Opened trouble ticket number 818128 with Karen who transferred me to Julie who got Hank on the line in their CMAC group. He said he would have the number within 2 hours. It still wasn't out at 10:00 a.m. so I called back. The intereconnect group, Marilyn, couldn't find the original ticket so they created a new ticket (818301). Marilyn transferred me to Linda who told me I would have to go through the Business Office to have this resolved. I asked her why and she just said that's what I would have to do. I called Debbie back and Debbie said the Interconnect group would have to help me that the Business Office couldn't do anything. Debbie was rather frustrated that Linda didn't read her notes. Debbie said she would work on nothing else until she got thsi fixed and would call be back within the hour. Debbie called back and said the number was working now and that she had called Rushmore Gloves just to make sure. I called Rushmore Gloves to check the number out and spoke with Rich. He wanted to know what we were going to do to prevent this from happening again. I explained that Debbie had told me she was going to take the necessary steps to make sure this number wasn't reassigned and the facilities reused. I relayed that information to Rich but also explained that I don't have any control over what Qwest really does. I told him if he has any other questions or issues to call me back again.

Healy, Mary

From: George Larson [geoglove@rapidnet.com]
Sent: Monday, May 07, 2001 2:52 PM
To: Mary.Healy@state.sd.us
Subject: Re: Business Phone Service Disruption

605-341-0567

715 MT VIEW RD
Baken Park
Rapid City, SD 57702

Thank You
George

----- Original Message -----
From: <Mary.Healy@state.sd.us>
To: <geoglove@rapidnet.com>
Sent: Monday, May 07, 2001 10:09 AM
Subject: RE: Business Phone Service Disruption

> Please provide me with the telephone numbers and location address.
>
> ----Original Message----
> From: George Larson [mailto:geoglove@rapidnet.com]
> Sent: Monday, May 07, 2001 10:58 AM
> To: mary.healy@state.sd.us
> Subject: Business Phone Service Disruption
>
>
> Recently my company switched local service providers, QWest to BH Fibercom,
> and a service disruption resulted. 2 weeks after our primary business phone
> number was "ported" to BHF our phone number was reacquired and subsequently
> reassigned to another business by QWest. This occurred over a full weeks
> worth of intermittent disruptions.
>
> What can I do to censure the parties involved? Qwest says it wasn't their
> fault. BHF says it was a due to a miskey by Qwest
>
> All I know is that I had several days during which the only thing my
> customers could reach was a machine saying "this number has been disco, no
> further info is avail."
>
> This is the kiss of death for a MOTO such as ours.
>
> Any help will be greatly appreciated.
>
> George Larson II
> COO
> Rushmore Gloves, Inc
> dba Rushmore Safety Supplies
>
>



P.O. Box 2115 • 609 Deadwood Avenue • Rapid City, SD 57709
ph. (605) 721-2000 • fax (605) 342-1693
www.blackhillsfiber.com

May 16, 2001

Ms. Mary Healy
Consumer Affairs
South Dakota PUC
500 E. Capitol
Pierre, South Dakota 57501

Sent Via Facsimile 605-773-3809

Re: Rushmore Safety Supplies
715 Mt View Road
Rapid City, SD 57702
605-341-0567

Ms. Healy:

Rushmore Safety Supplies transferred service to Black Hills FiberCom on 4/1/2001. Qwest contacted our office on 4/31/2001 indicating that calls were not being received.

Black Hills FiberCom contacted Qwest and opened trouble ticket #818128, at this time Qwest representative Debbie stated that Qwest had assigned the number to another end user. Following on 5/1/2001 Black Hills FiberCom was told that Debbie wasn't in yet and if we wanted assistance we would have to open another trouble ticket; to that end, trouble ticket 818128 was opened with Qwest representative Kara with commitment that the issue would be corrected in two hours.

Following up on ticket #818128 at 10:00am on 5/1/2001, Qwest representative Marsha stated she could find ticket #818128; thus ticket #818301 was opened, within the hour Qwest Representative, Brad contacted Black Hills FiberCom to confirm the issue had been resolved and that she (Debbie) had resolved the issue was corrected with Rushmore Safety/Glove.

In discussing this issue with George Larson of Rushmore Safety/Glove, Black Hills FiberCom has confirmed the issue has been corrected and learned that Mr. Larson has received confirmation that Qwest did in fact re-assign to another Qwest end-user.

If I can answer any questions, please feel free to contact me at 605-721-2033.

Sincerely,

BLACK HILLS FIBERCOM

Jheri Turner
Manager, Customer Service
:jt

cc: J. Feehan

Black Hills FiberCom

Call Log

Log ID: [illegible]
Date: [illegible]
Printed By: [illegible]

Customer Info:

Open Call Log

Telephone Number: 605 341 1660

Name: CHECKRITE

Node RC132

Street Address: 916 MAIN ST APT 108

City: RAPID CITY State: SD Zip: 577010000

Log Info:

Orginator: Donna Heiden Closed By: Call type: Customer Outage

Date Opened: 05/01/2001 Date Closed: 00/00/0000 Service Type: Phone

Time: 10:31:22 Time: 00:00:00

Problem:

Customers are getting a disconnect message when calling this number from a Qwest line.

Resolution:

Called Qwest, spoke with Emily to open up a trouble ticket. The trouble ticket number is 919491. Transferred me to Emily who said they would have it done within an hour. Emily called back and said they couldn't see the number in th switch and that I should open a ticket with repair. Called repair and spoke with Dorothy, opened trouble ticket 605-341-1660. They gave a commit time of repairing the number of 7:00 p.m. tomorrow. I requested they escalate the repair, which she said they would.

EXHIBIT

Additional Infomation:

At 12:30 p.m. received a call from Qwest stating that when they ported the number they put an intercept message on the line. She wasn't sure why they did that. She is going to cancel the intercept message and get the number working correctly. She will call me when she is done.

Called 341-1660 from our Qwest line at 12:45 p.m. and the call went right through. Spoke with Dianna at Checkrite to let her know what had happened and that the line was working again.

Received a call from Lucy with Qwest at 12:50 p.m. letting me know that the line was fine now

Black Hills FiberCom

Quality of Service

Log In: [redacted]

Date: [redacted]

Printed By: [redacted]

Customer Info:

Pending Follow-up

Telephone Number: 605 343 6400

Name: QUINN, DAY & BARKER

Address: 4200 BEACH DR APT 2

City: RAPID CITY State: SD Zip: 577020000

Node RC010

Hardware Located

Cut Over Date [redacted]

Drop Contractor

Inside Contractor

HiSU ID#1

Voltage Results

Set Top#1

Set Top #2

Modem#

MAC Address

Log Info:

Orginator: NOCC

Date Opened: 08/02/2001 Call type: Quality of Service

Time: 09:35:35 Service Type: Phone

Ticket Info:

Assigned To: Donna Heiden

Ticket Date: 08/02/2001 Closed Date: 08/03/2001

Ticket Time: 09:43:31 Closed Time: 10:01:25

Problem:

noce rec msg transferred from cindy bourne, kim reported tht qwest has gv their ph # to a don schmall Cell # 381-5134 only bhfc #s can reach Quinn, Day, Barker. When calling from qwset line get msg from the schmalls tht qwest has screwed up ph # to contact them at 381-5134. i tt kim abt this sd i would check on. wl

Notes:

who said they really messed up and he was going to get it repaired probably within the next hour. (I kept the voice mail from him.)

I tried to return Kevin's call to the number he left (800-756-7264) but could not get to Kevin.

8/2/01 @ 10:07 a.m. I called the interconnect group and openned a trouble ticket with Emily. The escalation ticket number is 977814. The call was escalated to Dianne (303-298-2201) who said she would call the typist and have the

Resolution:

8/1/01 Opened a trouble ticket with Chris in the Qwest AMSC group (ticket number 605-343-6400). Gave me a 24 hour time frame and would not expedite. (Qwest had reassigned the number to another individual even though it had been ported to us for over 1 year.)

8/2/01 - Called Qwest first thing in the morning to get an update. The lady I spoke with at Qwest said the number reassigned and I would have to call the business office.

EXHIBIT

JT-3

Barker, Wilson Reynolds & Burke
August 3, 2001

8/1/01 Opened a trouble ticket with Chris in the Qwest AMSC group (ticket number 001-[illegible]-6400). Gave me a 24-hour time frame and would not expedite (Qwest had reassigned the number to another individual even though it had been ported to us for over 1 year.)

8/2/01 - Called Qwest first thing in the morning to get an update. The lady I spoke with at Qwest said the number reassigned and I would have to call the business office.

8/3/01 @ 9:23 a.m. received a voice mail from Kevin with Qwest who said they really messed up and he was going to get it repaired probably within the next hour. (I kept the voice mail from him.)

I tried to return Kevin's call to the number he left (800-756-7264) but could not get to Kevin.

8/2/01 @ 10:07 a.m. I called the interconnect group and opened a trouble ticket with Emily. The escalation ticket number is 977814. The call was escalated to Dianne (303-298-2301) who said she would call the typist and have the Schmall's reassigned a new number and if the typist didn't return her call she would call the supervisor.

8/2/01 – Spoke with Diane several times throughout the day and at 4:00 p.m. she told me it would be completed no later than 5:00 p.m.

8/3/01 – Received a call from Kim with Barker, Wilson, Reynolds & Burke stating that they were getting a disconnect message when they call their main number from a Qwest line.

8/3/01 @ 8:35 a.m. – called and opened another ticket with the interconnect group (Vicki). Ticket number is 979666. Told Vicki the number had to be released from their switch. She transferred me to escalations, Julie, and Julie spoke with Dianne who said she would work the ticket as soon as she was done with the one she was working on. I called Dianne back at 8:50 a.m. to get an update but got no answer. I then called the duty pager. I got a call back from Dianne at approximately 9:15 and she said the number was not in their switch. I told her it had to be because we were getting the disconnect message. She asked me to call the number again and see I called with Dianne on the line and let her listen to the message. She said she would call me back.

8/3/01 @ 9:32 a.m. – I called 343-6400 to test the line and the call completed. I spoke with Kim with Barker, Wilson, Reynolds & Burke. I also called Mike Wilson and spoke with him to let him know the calls were completing correctly now.

8/3/01 @ approximately 9:40 a.m. – Dianne called me back to let me know the programmers had put an intercept message on the line rather than completely releasing it from their switch so that is why callers from Qwest were getting the disconnect message.

Black Hills FiberCom
No One Else Has Our Connections
P.O. Box 2115 • 809 Deadwood Avenue • Rapid City, SD 57709
ph. (605) 721-2000 • fax (605) 342-1693
www.blackhillsfiber.com

August 3, 2001

Ms. Heather Fourney
Consumer Affairs
South Dakota PUC
500 E. Capitol
Pierre, South Dakota 57501

Sent Via Facsimile: 605-773-3809

Re: Baker, Wilson, Reynolds and Burke
4200 Beach Drive, #2
Rapid City, South Dakota 57702
605.343.6400

Ms. Fourney:

This letter is being sent to in response to your voicemail regarding FiberCom disconnecting services for the aforementioned consumer.

On 8/1/2001 Black Hills FiberCom was contacted by reporting a phone outage. Black Hills FiberCom opened trouble ticket (#605.343.6400) with a resolution time frame of 24 hours. Qwest reported assigning this number to another Qwest end-user (Don Schmall). Qwest would not expidite resolution request.

On 8/2/2001 Black Hills FiberCom opened an escalation ticket (#977814) as the issue had not been corrected. Completion time was 5pm local time.

On 8/3/2001 Black Hills FiberCom was contacted to report a disconnect message had been put on 605-343-6400. Black Hills FiberCom opened escalation ticket (#979666) at 8:30am. Qwest had put an intercept message on the line rather than completely releasing the number from their switch. Qwest corrected the issue within an hour; test calls at 9:30 confirmed calls were completing correctly.

Sincerely,

BLACK HILLS FIBERCOM

Jberi Turner
Manager, Customer Service
jt

cc: J. Feehan

3

Black Hills FiberCom

Quality of Service

Log ID: [redacted]
Date: [redacted]
Printed By: [redacted]

Customer Info:

Pending Follow-up

Telephone Number: 605 342 7140
Name: HEISER, TONI
Address: 215 FRANKLIN ST
City: RAPID CITY State: SD Zip: 577010000

Node RC143

Hardware Located

Cut Over Date [redacted]
Drop Contractor
Inside Contractor
HSU Ord
Voltage Results
Set Top #1
Set Top #2
Modem#
MAC Address

Log Info:

Orginator: NOCC
Date Opened: 09/01/2001 Call type: Quality of Service
Time: 13:59:16 Service Type: Phone

Ticket Info:

Assigned To: Cole Davis
Ticket Date: 09/01/2001 Closed Date: 09/01/2001
Ticket Time: 14:02:21 Closed Time: 18:15:32

Problem:

toni called sd when qwest cnrs caller get n=msg her ph is disco'd, tried w/ nmcr cell and rec msg also, out of this line happened once before. wl

Notes:

test calls preformed from quest line worked ctd

Resolution:

open trouble ticket with quest 24hr ticket repair ctd
recieved phone call from a John at quest lnp dept. said that the problem had been fixed. (9/1 5:58)
tried calling from cell phone 391-5[illegible]6 and from land line 3487912 and still recieving message the number has been disconnected. called back to quest lnp repair and they said that the ticket was still open and a [illegible] at 2:30
carol from quest lnp called and said that she had remove the intercept message. ctdd

EXHIBIT

Black Hills FiberCom

Quality of Service

Log ID: [illegible]
Date: [illegible]
Printed By: [illegible]

Customer Info:

Pending Follow-up

Telephone Number: 605 343 2771
Name: FRALEY, GLADYS
Address: 201 ANAMARIA DR APT 208
City: RAPID CITY State: SD Zip: 577010000

Node RC149

Hardware Located

Cst Own Serv: [illegible]
Drop Category: [illegible]
Inside Connector: [illegible]
Hub Ckt: [illegible]
Voice Tech: [illegible]
Int Tap #1: [illegible]
Int Tap #2: [illegible]
Modem: [illegible]
MAC Addrs: [illegible]

Log Info:

Orginator: NOCC
Date Opened: 08/31/2001 Call Type: Quality of Service
Time: 14:59:42 Service Type: Phone

Ticket Info:

Assigned To: Cole Davis
Ticket Date: 09/02/2001 Closed Date: 09/05/2001
Ticket Time: 11:04:22 Closed Time: 14:35:37

Problem:

krista called for cnr from 342-6821. sd tht cnr cannot dial local qwest #s 342-6821, 342-2744, 394-5325, 394-1937, 343-2771, can call LD fine. wl

Notes:

gladys called 5 xsin 10 min 9-1-01 left vm each time abt ph issue. original issue is not in queue. the prob is tht cnr cannot rec calls from qwest #s, 342-7544, 394-5325, 394-1937, however, 342-2771 west hills will call cnr fine each time. i called cnr and west hills and info'd them on this. wl

Resolution:

see additional notes

EXHIBIT
21-1

Additional Information

Problem first reported on 8/29 at the same time the fiber cut occurred, customer called back in on 8/31 to report that they still could not recieve calls from quest customers. Open trouble ticket with qwest lnp on 9/1 @ 11:22. Talked with Brain at quest lnp, he informed me that quest had reassigned the number to associated general contractors of ID. That he sent a ticket to have number removed from switch since it was ported. Then on 9/3 received a call from customer who left a voice message stating that she knew the number being ported on 12/22/99 to associated general contractors of ID and that she really didn't understand the trouble ticket that lnp opened up and that she was closing the ticket because it was due and that I needed to call customer repair at 18005731311 I called back to qwest and spoke to a lady at customer service he told me that since the number had been reassigned that we would have to wait until number came available to a location and call the business office and have them open up a service order to reassign associated contractors a new number and turn 3432771 back over to fiber com.

Temp. sign a customer ring number to Gladys of 718-2771 until we get this problem fixed. spoke to a Doree at the west hill village office and explained the situation to her and she would let gladys know

doree who works at the front desk of west hills village called on status of gladys's ph. it only does out he still working on issue, had to reopen trbl ticket w/ qwest, cuz they closed the first one. call doree bk and relayed info, told her to write a letter to the p.u.c. mentioning qwests removal of our ph # may help things. wl

On tuesday 9/4 I called lnp repair again and opened another ticket and I also called the interconnect group and spoke to Kevin (18887969087) ticket # 1027283 diane kennedy 303-299247[illegible]. Diane informed me that she closed the number being reassigned of 1/15/01.

Wed. morning recieved a vm message from Kevin qwest lnp stating he thought that the problem was that qwest had reassigned the number out to associated general contractors of id and that the number actually belonged to fiber com which we ported over on 12/22/1999, but he wanted me to call him and confirm. (18007[illegible]200 option 3 then option 1) Called him back and confirmed the above with him he said he would call the interconnect group and get the number reassigned back to fiber com.
I called and left a message for Diane at the interconnect group to call me. She call me back and said that she had a order in (c-22480190) and was to be completed today by 5:00 pm. received a vm message from diane that they had the problem fixed and preformed a test call. Called Gladys and confirmed that was working. wl

Black Hills FiberCom

FIRM ORDER CONFIRMATION
Attn: Debbie Paillette

REQUEST HAS BEEN:

X ISSUED REJECTED

SVC COORDINATOR SIGN OFF Bobbie Blumer

BOBBIE BLUMER 605 721 2859 Fax 605 343 1663

BLACK HILLS FIBERCOM
DATE: 09/28/2001

ADMINISTRATIVE SECTION:
ACCOUNT TELEPHONE: 6053880469
PON NUMBER: 010921zwanpi
ORDER NUMBER: D092901
END USER: JOEL ZWANIGER
REQUESTED PORT DATE: 10/03/2001

REQUEST RCVD FROM: USW
NUMBER OF LINES: 1 LINES
NUMBER OF DISCONNECTS 1 DISCONNECTED
TOTAL PORTS 1 #'S ADDRESSED

REMARKS

EXHIBIT

CONTINUATION

[] 1

Scan ~ _____ ~ # Pages [___]

Local Service Request

Administrative Section

Bill Section

BILLNM

STREET

ZIP CODE

BILLNM

FLOOR

ROOM

CITY

STATE

DR CON

TEL NO

VIA

Contact Section

INIT: DEBBIE PAILLETTE

TEL NO: 602 - 665 - 2752 -

EMAIL

FAX NO: 602 - 630 - 6108

STREET: 20 E THOMAS

FLOOR: 22

ROOM/MAIL STOP

CITY: PHOENIX

STATE: AZ

ZIP CODE: 85012

IMPCON

TEL NO

PAGER

ALT IMPCON

TEL NO

PAGER

DSGCON

DRC

TEL NO

FAX NO

EMAIL

STREET

FLOOR

ROOM/MAIL STOP

CITY

STATE

ZIP CODE

REMARKS

PORT 2# INTO QWEST LNP

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Telephone number 202-434-8845, e-mail enowell@atis.org

Sep-25-01 05:25pm From-qwest

End User Information

Administrative Section

Location and Access

Inside Wire

IWO | IWBAN | IWCON | TEL NO

Bill Section

EAN | EATN | FBI (E) | BILLNM

SBILLNM | STREET | FLOOR | ROOM

CITY | STATE | ZIP CODE | BILLCON

TEL NO | SSN

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Telephone number: 202-434-5823; e-mail: mnichol@atis.org

Number Portability

Administrative Section

FOM | VER | REF | DAY | MON | YEAR | S | P

Service Details

LOCNUM | LNUM | NPT | LNA | CIC | LRN | TDT

ECCKT

PORTED NBR | TNP | CFTN | NPT | RTI | NPTO

BA | BLOCK | BA | BLOCK | FPI | LPIC | TC OPT | TC TO PRI | TC TO SEC

TCID | TC NAME | TCID | TC NAME

TC PER | LEAN | LEATN

LOCNUM | LNUM | NPT | LNA | CIC | LRN | TDT

ECCKT

PORTED NBR: 605 - 721 - 9685 | TNP | CFTN | NPT: d | RTI | NPTO

BA | BLOCK | BA | BLOCK | FPI | LPIC | TC OPT | TC TO PRI | TC TO SEC

TCID | TC NAME | TCID | TC NAME

TC PER | LEAN | LEATN

REMARKS

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Telephone number: 202-434-4812; e-mail: mnichol@atis.org

Sep-25-01 05:25pm From-qwest T-459 P.003/003 F-000

CONTINUATION

[1] 2

S

Pgs [

Interconnect@qwest.com
12/04/2001 03:09 PM

To:
cc:
Subject: LSRC Summary PON HIGHMARK 3 V6?

LSRC Summary for LSR_ID: 3616715

######## Administration Section ########

CCNA	CC--	PON-------	VER	AN----------	LSR RD	CPLAS
B06	4256	HIGHMARK 3		605-388-3330-588		N

INIT--------	D/TSENT----------
Donna Heiden	12/04/2001 15:09, MST

RT	CHC	DFDT--	DDD-------
C		1000AM	01/10/2002

BAN1

######## Line Information Section ########

REF-NUM	PORTED-NBR--	AN----------	SAN
1	605-388-3763	605-388-3330-588	

ISPID

SDI CFA

CFTN RTI

######## ORDER SECTION FOR LINE REF NUM: 1 ########

ORDER-REF-NUM	NPORD----	DD--------	EDD	DESIGN ISD
1	C23380336	01/10/2002		non-design

######## REMARKS SECTION ########

REMARKS
Port 1 ln lnp ocn spi/oldp 9631 fdt 10a adc angela s 5304398234)

Qwest Private
Disclose and Distribute Solely to Qwest Employees, Partners or Affiliates
Having a
Need to Know.
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of Qwest.
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Privacy: http://www.qwest.com/legal/privacy.html

EXHIBIT
JLS

Interconnect@qwest.com
12/04/2001 03:09 PM

To:
cc:
Subject: LSRC Summary PON: HIGHMARK 3 VER

LSRC Summary for LSR_ID: 3616715

######## Administration Section ##

CCNA	CC--	PON-------	VER	AN----------	LSR NO	CFLAG
B06	4256	HIGHMARK 3		605-388-3330-586		N

INIT-------- D/TSENT----------
Donna Heiden 12/04/2001 15:09, MST

RT	CHC	DFDT--	DDD-------
C		1000AM	01/10/2002

BAN1

######## Line Information Section ##

REF-NUM	PORTED-NBR--	AN----------	SAN
1	605-388-3763	605-388-3330-586	

ISPID

SDI CFA

CFTN RTI

######## ORDER SECTION FOR LINE REF NUM: 1 ##############################

ORDER-REF-NUM	NPORD----	DD--------	END	DESIGN TID
1	C23380336	01/10/2002		[illegible]

######## REMARKS SECTION ##

REMARKS
Port 1 ln lnp ocn spi/oldp 9631 fdt 10a adc angela # 5266392941

Qwest Private
Disclose and Distribute Solely to Qwest Employees, Partners or Affiliates
Having a
Need to Know.
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of Qwest.
Legal: http://www.qwest.com/legal/index.html
Privacy: http://www.qwest.com/legal/privacy.html

EXHIBIT
11

Issue with Qwest and Highmark Federal (redir I ann
December 5, 2001

December 4, 2001 @ 2:35 p.m. I submitted I SR [illegible] PON HIGHMARK I circuit to port 605-388-3763 on January 10, 2002 @ 10:00 a.m. I received an FOC on December 4, 2001 indicating order C23380336 was to be worked and completed on January 10, 2002.

December 5, 2001 @ 8:15 a.m. I received a call from Angela with Qwest order control stating that she had incorrectly entered into the Qwest system a date of January 10, 2001 when the January 10, 2002. This cause Highmark's number (605-388-3763) to go complete through Qwest's system and to take Highmark out of service. She told me I would have to enter a new I SR before they would restore the service to the customer. She also said she had called escalations and opened trouble ticket 1166920 but escalations wouldn't work the ticket until I spoke to I SR.

I asked Angela if they didn't have a process in place to handle a situation like this. She said no they don't. It's up to the customer requesting the port to submit the paperwork to get the number back up and working.

I told Angela I would enter the I SR and I asked her exactly how she wanted me to do it. She told me to call the PON HIGHMARK I WB. I tried to enter the I SR but kept getting the message that the number was not on the account.

I called Angela back (520-433-2343) to let her know that I would not enter the I SR as she requested. I asked her if she would help me or give me some other suggestions to try. She was a business customer and they needed their number back up and working. Her concern was that I should talk to someone else here in our group and see how they have been handling it. I explained to her that I have been here longer than anyone else and that we don't do workbacks since they changed their process.

I asked Angela if I could speak with a supervisor. She didn't want to transfer me to a supervisor because she didn't feel a supervisor could help me. I explained to her that maybe they could give me some other ideas on how to get the I SR submitted. I had to request to speak to a supervisor at least 3 or 4 times. When the supervisor (Ray) came on the phone I felt he was very sarcastic and viewed the problem as ours and not theirs even though they were the ones that made the change. He suggested I speak with someone in our group that has done a workback before and I explained to him that we haven't done a workback since they changed the process. He told me he would have to check into the situation and then he would give me a call back.

I has also asked Angela if someone had called Highmark Federal (redir I need to let them know what had happened and what was being done to correct the issue. She said that they couldn't contact the customer that we would have to do that, it is the CLEC's responsibility to call the customer. (After consideration I felt it would be better if we did call the customer rather than having Qwest call them.)

8:45 a.m. - I called Colleen Reynolds on her direct line who use to work in escalations and asked for her help. She explained to me that I needed to call escalations and open a trouble ticket and explain to them that it was the fault of the typist.

9:05 a.m. – I spoke with Meagan at Qwest and opened trouble ticket 1166921. She transferred me to Jerry and after realizing this was a Mel and account Jerry said she had to contact [illegible]

and type a new ticket to send to the Minneapolis group. She gave me ticket number [illegible]. I asked her if there was a number I could call in Minneapolis to get the escalated and to check on the status of the ticket. She said no but she would request that they call me.
I also asked Jerry to check on trouble ticket [illegible] that had been opened by Angela to see if they were actually working that ticket. Jerry said they hadn't touched that ticket yet.

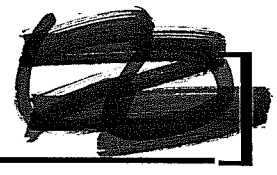
I called Highmark, westside, and gave them the information so they would be aware of the problem.

10:00 a.m. - Angela called to let me know that I did not have to submit an LSR although they were going to work it. I asked Angela how soon the customer could expect to be up and working again. She said the customer would be up by 5:00 p.m. today. Again I told her that wasn't good enough.

10:05 .am. – I called and spoke with Mark Posthuma with Highmark Federal Credit Union to let him know that what happening. He said he had received a call from Mel and approximately ½ hour earlier letting him know that the number was back up and working. He had tested the number with McLeod on the line.

11:30 a.m. – Still have not received a call from Angela's supervisor nor from the Minneapolis group.

CONTINUATION

[] 3

Scan ~ _____ ~ # Pages [___]

Quality of Service

Pending Follow-up

CL-2001-12-24-05

RC043

Customer Info

AN020402 605-342-9381
SHARKEY, JOHN & ILENE
1711 SHERIDAN LAKE RD
RAPID CITY SD 57702-____

Work Order Info

Originator	DOMAN	12/24/2001 11:42
Call Type	Quality of Service	Service Phone
Closed By	JTURNER	01/09/2002 13:57
Resolution	QWEST ERROR	

Assignment Info

Assigned To	JTURNER	12/26/2001 17:29
	JTURNER	12/26/2001 11:47

Equipment List

Cut Over

Drop Type	Aerial		
IBSE	6100026431	Model	
		Voltage	60
Svc Logo	(none)		
Modem Sn	0000CA342176	IP Addr	10.15.43.1
Router Pwr	0	Signal Strength	1.6 -4

Problem:

CUSTOMER CAN CALL OUT BUT CANNOT GET OUTGOING CALLS FROM HOME. CUSTOMER STATES [illegible] CALL AT 10:45AM [illegible] 10:45am also turns called qwest, stated the after qwest hours they had assigned the fix to another one the 10:45pm she called qwest and they still had done nothing to fix the problem, qwest st that they would have to perform Double Pops 10:45 am 10:45pm she called qwest and they were waiting for a programmer to come in to fix the problem, qwest said they would have it fixed by 5:00pm on 10:45pm she called and each qwest will be done nothing with the problem ms

Activity log:

Resolution:

CUSTOMS cannot make calls to Qwest at 10:45am CST. The switch after 5:45pm CST from Vermont was switched at 5:00pm [illegible] my computer will ignore the 10:45am and continue processing at 5:00pm. Then 5:00pm will go through to my switch [illegible] problem was resolved. ms

[illegible]

Quality of Service CL-2002-01-02-142

Closed Call Log RC043

Customer Info

AN020402 605-342-9381
SHARKEY, JOHN & ILENE
1711 SHERIDAN LAKE RD
RAPID CITY SD 57702-____

Work Order Info

Originator JTURNER 01/02/2002 13:52
Call Type Quality of Service Service Phone

Closed By
Resolution QWEST ERROR

Assignment Info

Equipment List

Cut Over:
Drop Type: Aerial
HISU 610026435 Model
Voltage 89.0
Set Type (none)
Modem No 0000CA341136 IP Addr 10.15.43.25
Transit Pair 47 Signal Strength 16.40

Problem:

Customer called at 1:30 to let me know that his number had been swapped again, customer is quite upset about this happening again over previous to late and has to pay $3 per month to keep his number. Quest wouldn't order w/Qwest at this point, provide help desk at 800-223-5555, spoke with Robyn and she couldn't open a trouble ticket - was of the time opinion that Qwest didn't assign numbers, so she transferred me to the billing office - and the long up, didn't help with me so I would say this is a learning opportunity. I confirmed order number 1288887 w/Carolyn, she confirmed that Mr Sharkey's number had been swapped in error to a Qwest and was on a 2FX line to dial up a BBS. Will call Qwest back at 2:30pm. Rem. Called at 2:50pm to 800-244- spoke with Diane reference 1288700 and asked to speak with a supervisor for time to leave msg. Rem. 3:20 Carolyn called back, will escalate and close call. Rem. 3:30PM. Made test call to customer, came to mailbox, I verified left message on my cell phone (605-343-8870) to this effect and that the had completed necessary internal Qwest paperwork to correct issue. Called 800-244- to confirm status of ticket, spoke with Dottie reference 1288887 and order is closed.

Activity Log:

Resolution:

Qwest had issued our client a number however as a function any service he was to receive Qwest rep Randy outlined that their computers had been swamped with 2002. She says that Carolyn left me two callbacks on 1/2/02. Both confirmations call re-customer at 2:40 and these confirmed that Qwest would be open today the new telephone number and apologized. Rem.

CONTINUATION

[5.]4

S

Pgs [

January 17, 2002

Ms. Charlene Lund
Consumer Affairs
South Dakota PUC
500 E. Capitol
Pierre, South Dakota 57501

Sent Via Facsimile 605-773-3809

Re: John Sharkey
605-342-9381

Ms. Lund:

This letter is being sent in response to your fax dated 01/04/2002, regarding John Sharkey having his phone number reassigned.

Black Hills FiberCom was notified by Mr. Sharkey on 12/24/2001 at 11:43AM that when he calls his home number it rings on a fax machine. Trouble ticket [illegible] was opened with Qwest representative Allen at 12noon. Qwest confirmed to Black Hills FiberCom that Mr. Sharkey's ported number ported from Qwest to Black Hills FiberCom 5/2001 on LSR 2413471/[illegible] had been reassigned by Qwest to exist to another end user. Qwest corrected the issue at 5:09pm, test calls were made to Black Hills FiberCom to Mr. Sharkey confirming this.

Black Hills FiberCom was notified by Mr. Sharkey again on 01/04/2002 that his number had been reassigned again by Qwest to another end user. Trouble ticket number [illegible] was opened at 1:40pm with Qwest representative Carolyn. Qwest confirmed that 605 342 9381 had again been reassigned to exist. Qwest corrected issue at 3:15PM, test calls were made by Black Hills FiberCom to Mr. Sharkey confirming this.

Black Hills FiberCom charges $2 per month, per line to residential customers who choose to keep their number assigned by Qwest to off set costs associated with maintaining the ported number.

Sincerely,
BLACK HILLS FIBERCOM

Jheri Turner
Manager, Customer Service
:jt

cc: J. Feehan

January 17, 2002

Ms. Charlene Lund
Consumer Affairs
South Dakota PUC
500 E. Capitol
Pierre, South Dakota 57501

Sent Via Facsimile 605-773-3809

Re: John Sharkey
605-342-9381

Ms. Lund:

This letter is being sent in response to your fax dated 01/04/2002, regarding John Sharkey having his phone number reassigned.

Black Hills FiberCom was notified by Mr. Sharkey on 12/24/2001 at 11:42AM that when he calls his phone number it rings on a fax machine. Trouble ticket (605342938l)was opened with Qwest representative Tara at 12noon. Qwest confirmed to Black Hills FiberCom that Mr. Sharkey's partial number ported from Qwest to Black Hills FiberCom 5/2001 on LSR 2413471/D340108446 had been reassigned by Qwest in error to another end user. Qwest corrected the issue at 5:09pm. Test calls were made by Black Hills FiberCom to Mr. Sharkey confirming this.

Black Hills FiberCom was notified by Mr. Sharkey again on 01/04/2002 that his number had been reassigned again by Qwest to another end user. Trouble ticket number 1201387 was opened at 1:40pm with Qwest representative Carolyn. Qwest confirmed that 605 342-9381 had again been reassigned in error. Qwest corrected issue at 3:15PM; test calls were made by Black Hills FiberCom to Mr. Sharkey confirming this.

Black Hills FiberCom charges $2 per month, per line to residential customers who choose to keep their number assigned by Qwest to off set costs associated with maintaining the ported numbers.

Sincerely,
BLACK HILLS FIBERCOM

Jheri Turner
Manager, Customer Service
:jt

cc: J. Feehan

DIRECT TESTIMONY OF RONALD SCHAIBLE
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S
COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS
ACT OF 1996
DOCKET NO. TC01-165

RECEIVED
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

Q: What is your name and business address?

A Ronald Schaible. I work for Black Hills FiberCom at 809 Deadwood Avenue in Rapid City, South Dakota

Q: What is your position with FiberCom?

A: I am the Vice President & General Manager of FiberCom, with responsibility for all aspects of the business.

Q: Please describe your educational, training and employment background.

A: I received an Electrical Engineering degree from South Dakota State University in 19??. I have more than 25 years experience in the telecommunications industry. During that time I have worked for AT&T/Mountain Bell as an Account Executive and National Strategic Manager. Accounts Manager for US West and the Telecommunications Manager for Digital Equipment Corporation in Colorado Springs. I have also served as Director of Development for Kiewit Network Technologies/MFS in Omaha and more recently, as Vice President and General Manager with St. Louis based Brooks Fiber Properties, Inc. I began my current position with FiberCom in 1998.

Q: Describe briefly the nature of FiberCom's business.

A: FiberCom is a South Dakota LLC that received a Certificate of Authority from

the South Dakota Public Utilities Commission in 1998 to begin construction and operation of a fiber optic telecommunications network in Rapid City, South Dakota, and the Northern Black Hills, including the cities of Sturgis, Spearfish, Lead, Deadwood, Belle Fourche, and Whitewood. FiberCom's system consists of a fiber optic cable (FOC) "SONET" ring stretching approximately 214 miles and connecting all of the cities within its local exchange area. The FOC network is the backbone of FiberCom's system. The system also consists of a hybrid fiber coaxial cable network (HFC) for distribution of services from the backbone to individual customers. FiberCom provides telecommunication services consisting of local and long distance telephone service, high-speed Internet access, and cable television services to individual homes and businesses throughout its Black Hills service territory.

Q: **How many total phone lines does FiberCom provide in its Local Exchange Areas?**

A: FiberCom has approximately 22,000 residential phone lines and approximately 17,000 business lines for a total of approximately 39,000 phone lines in its service territory.

Q: **FiberCom has filed a "Statement of Issues" in this proceeding identifying those issues which FiberCom raises relative to Qwest's compliance with Section 271(c) of the Telecommunications Act of 1996. On which such issues are you providing testimony?**

A: Checklist Item No. 4 – Unbundled Loops

Q: **Does FiberCom have an approved interconnection agreement with**

Qwest?

A: Yes. FiberCom and US West entered into an Interconnection Agreement in the fall of 1998. The Commission approved the Agreement on January 6, 1999. On September 17, 2001, FiberCom and Qwest agreed to extend the term of their Interconnection Agreement, as amended, to September 1, 2004.

Q: **Does part of FiberCom's business plan include the use of unbundled local loops acquired from Qwest to serve customers in FiberCom's local exchange?**

A: Yes. Although FiberCom is primarily a facilities-based provider, there are some business customers in its local exchange area to whom it is not economically feasible to extend FiberCom's plant. In these situations, if FiberCom could obtain appropriate Unbundled Local Loops from Qwest, FiberCom would provision services to these customers.

Q: **What is an unbundled local loop?**

A: A "loop" is a physical transmission facility between a distribution frame in Qwest's Central Office in Rapid City and the "demarcation point" at a customer's premises. A loop is "unbundled" when it is made available without local switching or other services attached or included. When a CLEC acquires an Unbundled Loop, it basically rents the facilities from the RBOC. FiberCom would use an Unbundled Loop to provision its services to customers who otherwise do not have access to its services. Essentially, FiberCom transmits its services over FiberCom's facilities to the distribution frame collocated in Qwest's Central Office. The distribution frame connects

FiberCom's facilities to the Qwest loop and FiberCom's services then continue over the loop to the customer at the other end of the loop. The demarcation point is the physical point at the customer's premises where the loop ends and the transmission is passed from the loop on to FiberCom's facilities located on the customer's premises over which the services are distributed to the customer. Unbundled Loops enable FiberCom to provide services to customers without having to physically build facilities to the customer's premises. Unbundled Loops make it possible to offer customers choice among competing telecommunication service providers. Without Unbundled Loops, choice is not available to many customers because it is not economically feasible to build a duplicate facility to those customers.

Q: **How is an unbundled loop configured?**

A: An Unbundled Loop can be provided in several different flavors depending on the features, functions and capabilities required by the CLEC. In its most basic form, an Unbundled Loop consists of either a 2-pair or 4-pair copper wire extending from the distribution frame collocated in the Central Office to the demarcation point at the customer's premises. The Unbundled Loop types provided by Qwest include Analog Loops and Digital Capable Loops. Analog Loops are available as a 2-wire or 4-wire voice grade point-to-point configuration suitable for local exchange type services. Digital Capable Loops are 2-wire or 4-wire transmission paths capable of carrying specifically formatted and line coded digital signals. A T-1/DS-1 loop is a digital capable loop. FiberCom has ordered, and Qwest has provided, several analog

Unbundled Loops under the Interconnection Agreement, which are adequate to provide single line services to businesses, but not multi-line services. T-1/DS-1 Capable Loops would provide a cost-effective method of providing service to a multi-line (5-24 trunks) business customer who would not otherwise have access to FiberCom's services.

Q: **Does the Interconnection Agreement between FiberCom and Qwest require Qwest to provide unbundled local loops to FiberCom?**

A: Yes. I am submitting Exhibit RS-1 which is the Interconnection Agreement between FiberCom and Qwest. Section IV, pages 18-28 of the Agreement provides for "Nondiscriminatory Access To Network Elements" including "Unbundled Basic Loops" and "Basic Loops With Conditioning for ISDN ADSL/HDSL, and T-1/DS-1 (4-wire) where such conditioning is technically feasible." The Interconnection Agreement defines "T-1/DS-1 (4-wire) Capable Loops" as "Loops that will support full duplex transmission of isochronous serial data at 1.544 Mbps." The Agreement also provides that "[Qwest] will provide Loop Service at the prices set forth on Appendix A." Appendix A is included at pages 68-72 of the Agreement. In about July 2000, Qwest circulated a revised Appendix A which modified the Interconnection Agreement prices to reflect the deaveraged price structure for Unbundled Loops adopted by the Commission's Order in docket number TC99-106. I am submitting the Revised Appendix A as Exhibit RS-2.

Q: **Has FiberCom attempted to obtain unbundled local loops from Qwest?**

A: Yes. FiberCom has attempted to order T-1/DS-1 4-wire capable loops from

Qwest on several occasions only to be told that they were unavailable under the terms of our Interconnection Agreement. Qwest refuses to provide the requested Loops until FiberCom executed an Addendum to the Agreement essentially raising the cost to FiberCom of obtaining these Loops. Given that our Interconnection Agreement defines our ability to order Unbundled Loops, FiberCom has been resistant to sign new Agreements with higher prices at Qwest's request. Qwest has repeatedly refused to honor the Interconnection Agreement and provision the Unbundled Loops per FiberCom's request

Q: **Has FiberCom been able to provision unbundled local loops from Qwest in the specifications and quantities required by FiberCom?**

A: No. We have, however, requested Special Access Circuits in lieu of the Unbundled Loops in the Interconnection Agreement to provide services to our customers in certain circumstances.

Q: **What is a Special Access Circuit?**

A. The Special Access Circuit that FiberCom orders is a T-1/DS-1 Channel Termination from Qwest's Central Office to the customer's premises. In reality, it is technically and functionally the same as a T-1/DS-1 Unbundled Loop FiberCom has been trying to order under the Interconnection Agreement, but at a higher price. The price is higher because these Circuits are ordered and provisioned under Qwest's Special Access Tariff rather than under its Agreement with FiberCom. The price for a T-1/DS-1 Unbundled Loop provisioned under the Interconnection Agreement is about $40.00 per month. The same Loop costs about $125.00 per month if it is provisioned under the

Special Access Tariff. The Amendment Qwest is requiring, prices the same Loop at about $80.00 per month. In essence, every time FiberCom tries to order a T-1/DS-1 Unbundled Loop, Qwest tells them "it will cost you $125.00 per month, unless you agree to pay twice as much as we originally agreed to for every one you order thereafter."

Q: **How many T-1/DS-1 Loops has FiberCom had to provision out of Qwest's Special Access Tariff instead of its Interconnection Agreement with Qwest?**

A: In some circumstances, it is economically feasible for FiberCom to provide service to business customers through the Special Access Circuits, even though the price is nearly three times the price under the Interconnection Agreement. To date, FiberCom has provisioned 28 Special Access Circuits to serve business customers.

Q: **If T-1/DS-1 Unbundled Loops were available to FiberCom at the rates and terms provided in the Interconnection Agreement, would FiberCom be able to cost effectively serve more customers in its local exchange area?**

A: Yes. If T-1/DS-1 Unbundled Loops were available at the price agreed to in our Interconnection Agreement, FiberCom could expand its serving area and provide services to many customers to which it has not yet built facilities or to which it is technically or financially unfeasible to build services to at this time.

By my estimation, if Qwest would provide T-1/DS-1 Unbundled Loops as agreed, roughly 1,300 more business customers in FiberCom's market area would have another choice for their telecommunications services provider.

Q: **Has Qwest's refusal to provide the requested unbundled local loops to FiberCom in the specifications and quantities required by FiberCom effectively precluded FiberCom from competing with Qwest in certain segments of their common local exchange areas?**

A: Yes. FiberCom is precluded from utilizing existing facilities to provide services to the customers outside of the area to which it has built facilities. Without the availability of these Unbundled Loops, FiberCom cannot compete with Qwest for these customers' business.

Q: Does that conclude your testimony?

A: Yes.

Being first duly sworn upon oath, 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 18th day of March, 2002.

RONALD SCHAIBLE

STATE OF SOUTH DAKOTA)

County of Pennington)

Subscribed and sworn to before me this 18 day of March, 2002

Notary Public for South Dakota

My Commission Expires: 2/19/04

(SEAL)

INTERCONNECTION AGREEMENT BETWEEN

BLACK HILLS FIBERCOM, INC.

AND

U S WEST COMMUNICATIONS, INC.

FOR THE STATE OF

SOUTH DAKOTA

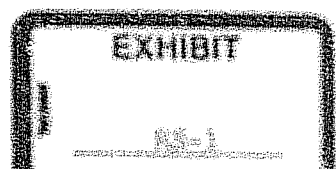


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INTERCONNECTION AGREEMENT

THIS INTERCONNECTION AGREEMENT, made as of the _____ day of _____, 1998, is between **Black Hills FiberCom, Inc.**, a South Dakota Corporation ("Black Hills") and **U S WEST Communications, Inc.** ("USWC"), a Colorado corporation.

RECITALS

WHEREAS, a major purpose of the Telecommunications Act of 1996 ("TA 1996") is to permit and encourage the vigorous competition that provides widespread consumer choice and less government regulation in all segments of the telecommunications industry; and

WHEREAS, this Agreement is intended to promote independent, facilities-based local exchange competition by encouraging the rapid and efficient interconnection of competing local exchange service networks; and

WHEREAS, the Parties seek to accomplish interconnection in a technically and economically efficient manner in accordance with all requirements of TA 1996 including the entire "Competitive Checklist" as set forth in TA 1996, Section 271(c)(2)(B); and

WHEREAS, the public will benefit if the local exchange networks of the Parties are interconnected so that customers of each carrier can seamlessly exchange telecommunications traffic; and

WHEREAS, Section 252 of TA 1996 mandates good faith negotiations between incumbent Local Exchange Carriers and any telecommunications carrier requesting interconnection without regard to the standards set forth in subsections (b) and (c) of Section 251 of TA 1996; and

WHEREAS, Black Hills notified USWC of its request for negotiations with USWC pursuant to Section 252 of TA 1996; and

WHEREAS, USWC and Black Hills utilized this negotiation process; and

NOW, THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Black Hills and USWC hereby covenant and agree as set forth in this Agreement.

DEFINITIONS

1 "Automatic Number Identification" or "ANI" is a Feature Group D signaling parameter which refers to the number transmitted through the network identifying the billing number of the calling party.

2 "Basic Loops" are 2-wire analog voice grade Loops that support analog transmission of 300-3000 Hz with loss no greater than 8.5db, dial repeat loop start, loop reverse battery or ground start seizure and disconnect in one direction (toward the End Office Switch).

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and repeat ringing in the other direction (toward the end user). This Loop is commonly used for local dial tone service for residence and business customers.

3 "Busy Line Verification" or "BLV" refers to a service in which an end user requests an operator to confirm the busy status of a line.

4 "Busy Line Verification and Interrupt" or "BLVI" refers to a service in which an end user requests an operator to confirm the busy status of a line and requests an interruption of the call.

5 "Calling Party Number" or "CPN" is a CCS parameter which refers to the number transmitted through the network identifying the calling party.

6 "Central Office Switch" or "Central Office" means a switching entity within the public switched telecommunications network, including but not limited to:

"End Office Switches" which are switches from which end user Exchange Services are directly connected and offered.

"Tandem Switches" which are switches that are used to connect and switch trunk circuits between and among Central Office Switches and IXC switches.

Central Office Switches may be employed as combination End Office/Tandem Switches.

7 "Centralized Message Distribution System" ("CMDS") is the transport system that LECs use to exchange outcollect and Carrier Access Billing System ("CABS") access messages among each other and other parties connected to CMDS.

8 "Charge Number" is a CCS parameter which refers to the number transmitted through the network identifying the billing number of the calling party.

9 "CLASS Features" mean certain CCS-based features available to end users. CLASS features include, but are not necessarily limited to: Automatic Call Back; Call Trace; Caller ID and Related Blocking Features; Distinctive Ringing/Call Waiting; Selective Call Forward; and Selective Call Rejection.

10 "Commission" means the South Dakota Public Utilities Commission.

11 "Common Channel Signaling" or "CCS" means a method of digitally transmitting call set-up and network control data over a special network fully separate from the public switched network elements that carry the actual call. Signaling System 7 ("SS7") is the CCS network presently used by telecommunications carriers.

12 "Conditioning" means use of the appropriate technical treatment for the provision of particular service

13. "Control Office" is an exchange carrier center or office designated as its company's single point of contact for the provisioning and maintenance of its portion of interconnection arrangements.

14. "Cross Connect" means an intra-wire center channel connecting separate pieces of telecommunications equipment.

15. "DSX Panel" is a cross-connect bay/panel used for the termination of equipment and facilities operating at digital rates.

16. "DS-1" is a digital signal rate of 1.544 Megabits Per Second ("Mbps").

17. "DS-3" is a digital signal rate of 44.736 Mbps.

18. "EICT" or "Expanded Interconnection Channel Termination" refers to the connection between the collocation point of termination ("POT Bay") and the unbundled Network Element or interconnection point to a switched or dedicated arrangement or service in USWC's network.

19. "Electronic File Transfer" refers to any system/process which utilizes an electronic format and protocol to send/receive data files.

20. "Exchange Message Record" or "EMR" is the standard used for exchange of telecommunications message information among LECs for billable, non-billable, sample, settlement and study data. EMR format is contained in BR-010-200-010 CRIS Exchange Message Record, a Bellcore document which defines industry standards for exchange message records.

21. "Exchange Service" means a service offered to end users which provides the end user with a telephonic connection to the public switched telecommunications network, and which enables such end user to generally place calls to, or receive calls from, other stations on the public switched telecommunications network. Exchange Service includes but may not be limited to basic residence and business line service, PBX trunk line service, Public Access Lines ("PAL") service, Centrex line service and ISDN line services. Exchange Service does not include Private Line, Switched and Special Access services.

22. "FCC" means the Federal Communications Commission.

23. "Interconnection" means the connection of separate pieces of equipment, transmission facilities, etc., between or among networks.

24. "Interexchange Carrier" or "IXC" means a provider of interexchange telecommunications services.

25. "Interim Number Portability" or "INP" means the delivery of SPNP capabilities through the use of switch-based call routing. INP arrangements cannot support certain CLASS features.

26 "ISDN" means Integrated Services Digital Network, which is a digital switched network service. "Basic Rate ISDN" provides for channelized (2 bearer and 1 data) end-to-end digital connectivity for the transmission of voice and/or data on either or both bearer channels and packet data on the data channel. "Primary Rate ISDN" provides for 24 bearer and 1 data channels.

27 "LATA" means Local Access Transport Area, which denotes a geographical area established for the provision and administration of communications services. It encompasses one or more designated exchanges, which are grouped to serve common social, economic and other purposes (based on the Modification of Final Judgment).

28 "Local Exchange Carrier" or "LEC" shall have the meaning set forth in TA 1996.

29 "Local Exchange Routing Guide" or "LERG" is a Bellcore Reference Document used by LECs and IXCs to identify NPA-NXX routing and homing information as well as network element and equipment designations.

30 "Local Interconnection Trunks/Trunk Groups" are used for the termination of Local Traffic, using the Bellcore Technical Reference GR-317.

31 "Local Traffic" means traffic originated on the network of an LEC in a LATA and completed directly between that LEC's network and the network of another LEC in that same LATA, within the same local calling area as is provided by the incumbent LEC for local calls in that LATA.

32 "Loop" is a component of an Exchange Service. For purposes of general illustration, the Loop is the transmission facility (or channel or group of channels on such facility) which extends from a Main Distribution Frame, DSX-panel, or functionally comparable piece of equipment in a USWC Wire Center, to the Network Interface Device in/at a customer's premises.

33 "MECAB" refers to the Multiple Exchange Carrier Access Billing document prepared by the Billing Committee of the Ordering and Billing Forum ("OBF"), which functions under the auspices of the Carrier Liaison Committee of the Alliance for Telecommunications Industry Solutions ("ATIS"). The MECAB document, published by Bellcore as Special Report SR-BDS-000983, contains the recommended guidelines for the billing of an access service provided by two or more LECs or by one LEC in two or more states within a single LATA.

34 "MECOD" refers to the Multiple Exchange Carriers Ordering and Design Guidelines for Access Services - Industry Support Interface, a document developed by the Ordering/Provisioning Committee under the auspices of the OBF, which functions under the auspices of the Carrier Liaison Committee of the ATIS. The MECOD document, published by Bellcore as Special Report SR STS-002643, establishes methods for processing orders for access service which is to be provided by two or more LECs.

35 "Meet Point Billing" refers to a billing arrangement used when two LECs jointly provide a Switched Access service over Meet Point Trunks, with each LEC receiving an

appropriate share of the revenues. The access services will be billed using Switched Access rate structures, and the Parties will send multiple bills.

36. "Meet Point Trunks/Trunk Groups" are used for the joint provision of Switched Access services, utilizing the Bellcore Technical Reference GR-394.

37. "Mid Span Meet" is an interconnection between two LECs whereby each provides its own cable and equipment up to the meet point of the cable facilities. The meet point is the demarcation establishing ownership of and responsibility for its portion of the transmission facility.

38. "NANP" means the "North American Numbering Plan," the system of telephone numbering employed in the United States, Canada, and certain Caribbean countries.

39. "Network Interface Device" or "NID" means a device wired between a telephone protector and the inside wiring to isolate the customer's equipment from the network at the subscriber's premises. It is a device for the termination of inside wire that is available in single and multiple pair configurations.

40. "Network Element" is a facility or item of equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing or other provision of a telecommunications service.

41. "Numbering Plan Area" or "NPA" is also sometimes referred to as an area code. This is the three digit indicator which is defined by the "A", "B" and "C" digits of each 10-digit telephone number within the NANP. Each NPA contains 800 possible NXX codes. There are two general categories of NPA. "Geographic NPA" is associated with a defined geographic area, and all telephone numbers bearing such NPA are associated with services provided within that geographic area. A "Non-Geographic NPA," also known as a "Service Access Code" ("SAC Code") is typically associated with a specialized telecommunications service which may be provided across multiple geographic NPA areas; 500, Toll Free Service NPAs, 900, and 700 are examples of Non-Geographic NPAs.

42. "NXX", "NXX Code" or "Central Office Code" is the three digit switch entity indicator which is defined by the "D", "E" and "F" digits of a 10-digit telephone number within the NANP. Each NXX Code contains 10,000 station numbers.

43. "Public Access Line" or "PAL" Service is provided for use with customer-owned coin/coinless telephones at locations accessible to the public, subject to the availability of existing CO facilities and special operator equipped locations, as appropriate.

44. "Permanent Number Portability" or "PNP" means the delivery of SPNP capabilities through the use of call routing and addressing capabilities using new database queries, without impairment of quality, reliability, or convenience. PNP arrangements will be designed to support all CLASS features.

45. "Physical Collocation" means the physical placement of equipment of one LEC, necessary for interconnection or access to unbundled Network Elements, at the Wire Center of the other LEC. It is an interconnection architecture in which the collocated carrier extends network transmission facilities to a collocation space, with access on a seven days a week, 24 hours a day basis, within a Wire Center in the network of a second carrier.

46. "Point of Interconnection" or "POI" means the physical location(s) at which the Parties' networks meet for the purpose of establishing interconnection. POIs may include a number of different technologies and/or technical interfaces based on the Parties' mutual agreement.

47. "Port" means a component of an Exchange Service; for purposes of general illustration, the Port includes a line card and associated peripheral equipment on an end office switch which serves as the hardware termination for the customer's exchange service on that switch and generates dial tone and provides the customer a pathway into the public switched telecommunications network. Each Port is typically associated with one (or more) telephone number(s) which serves as the customer's network address.

48. "Rate Center" means the specific geographic point and corresponding geographic area which have been identified by a given LEC as being associated with a particular NPA-NXX code which has been assigned to the LEC for its provision of Exchange Services.

49. "Rating Point" is the V&H coordinates associated with a particular telephone number for rating purposes.

50. "Routing Point" means a location which an LEC has designated on its own network as the homing (routing) point for traffic inbound to Exchange Services provided by the LEC which bear a certain NPA-NXX designation. The Routing Point is employed to calculate mileage measurements for the distance-sensitive transport element charges of Switched Access services. The Routing Point must be the same as the Rating Point and pursuant Bellcore document BSP 795-100-100. The Rating/Routing Point must be located within the rate center area.

51. "Service Control Point" or "SCP" is the node in the CCS network to which informational requests for service handling, such as routing, are directed and processed. The SCP is a real time database system that, based on a query from a Service Switching Point ("SSP"), performs subscriber or application-specific service logic and then sends instructions back to the SSP on how to continue call processing.

52. "Service Provider Number Portability" or "SPNP" means the ability of users of telecommunications services to retain existing telephone numbers when switching from one LEC to another but remaining in the same geographic area.

53. "Signal Transfer Point" or "STP" performs a packet switching function that routes signaling messages among SSPs, SCPs, Signaling Points ("SPs"), and other STPs in order to set up calls and to query databases for advanced services.

54. "Switched Access" service means an offering of facilities for the purpose of the origination or termination of traffic from or to Exchange Service customers in a given area pursuant to a Switched Access tariff. Switched Access services include: Feature Group A, Feature Group B, Feature Group D, Toll Free Service, and 900 access. Switched Access does not include traffic exchanged between LECs for purpose of local interconnection.

55. "T-1/DS1 (4-Wire) Capable Loops" are Loops that will support full duplex transmission of isochronous serial data at 1.544 Mbps.

56. "Tariff" means and includes tariffs, price lists, catalog pages, and similar documents filed with the FCC or the Commission that designate rates, terms and conditions for the offering of services.

57. "Toll Free Service" means service provided with any dialing sequence that invokes toll-free (i.e., 800-like) service processing. Toll Free Service includes calls to the Toll Free Service 800/888 NPA SAC codes.

58. "Trunk-Side" refers to a Central Office switch connection that is capable of, and has been programmed to treat the circuit as, connecting to another switching entity, for example, another Central Office switch. Trunk-Side connections offer those transmission and signaling features appropriate for the connection of switching entities, and cannot be used for the direct connection of ordinary telephone station sets.

59. "Virtual Collocation" means a collocation arrangement in which the collocator's facilities are terminated into a Wire Center of an LEC and are connected to LEC facilities that are provided and maintained by the LEC on behalf of the collocator for the primary purpose of interconnecting the collocator's facilities to the facilities of the LEC.

60. "Wire Center" denotes a building or space within a building which serves as an aggregation point on a given carrier's network, where transmission facilities and circuits are connected or switched. Wire Center can also denote a building in which one or more Central Offices, used for the provision of Exchange Services and access services, are located. However, for purposes of collocation, Wire Center shall mean those points eligible for such connections as specified in the FCC Docket No. 91-141, and rules adopted pursuant thereto.

61. "Wireless Service Provider" or "WSP" means a provider of Commercial Mobile Radio Services ("CMRS") (e.g., cellular service provider, Personal Communications Services provider or paging service provider).

I. SCOPE OF AGREEMENT

1.1 Pursuant to this Interconnection Agreement Black Hills and USWC, collectively "the Parties", will extend certain arrangements to one another within each LATA in which they both operate within the State of South Dakota. This Agreement is a combination of agreed terms and terms imposed by arbitration under Section 252 of the Communications Act of 1934, as modified by the Telecommunications

Act of 1996 ("the Act"), and as such does not necessarily represent the position of either Party on any given issue. The Parties enter into this Agreement without prejudice to any position they may have taken previously, or may take in the future in any legislative regulatory, or other public forum addressing any matters, including matters related to the types of arrangements prescribed by this Agreement.

1.2 The Parties have agreed to certain provisions in this Agreement, based, in large part, on the existing state of the law, rules, regulations and interpretations thereof, as of the date hereof (the "Existing Rules"). To the extent that certain of the Existing Rules are changed and modified, and it reasonably appears that the Parties would have negotiated and agreed to different term(s), conditions(s), or covenant(s) than as contained herein had such change or modification been in existence before execution hereof, then this Agreement shall be amended to reflect such different term(s), condition(s), or covenant(s). Where the Parties fail to agree upon such an amendment, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement.

II. NETWORK INTERCONNECTION

Compensation terms for services described in this Section are set forth in the Reciprocal Compensation Section below.

This Section describes the interconnection of the facilities and equipment of Black Hills and USWC for interconnection of their networks for the transmission and routing of Exchange Service and jointly provided Switched Access service.

The Parties shall reciprocally terminate Local Exchange, IntraLATA Toll and Switched Access traffic, as follows:

A. Interconnection Within Each LATA

The Parties will interconnect with each access tandem in each LATA in which the Parties originate and terminate IntraLATA Toll and Switched Access traffic, as needed or agreed, so as to permit the interexchange of such traffic. The Parties also will interconnect with each other in each and every local calling area in which the Parties originate Local Traffic so as to permit the interexchange of such traffic. However, where multiple local calling areas are served by a single local tandem, the Parties will interconnect with each other at that local tandem for origination and termination of Local Traffic.

The Parties agree to interconnect their networks through existing and/or new facilities between their respective switches.

In addition to the interconnection described above, either Party may establish end office-to-end office or end office-to-tandem or tandem-to-tandem trunk groups. In the case of host-remote end offices, such interconnection.

1. for origination and termination of Local Traffic, shall occur at the location of the host or remote, at the option of the Party deploying the host-remote end office, without mileage charges if the host option is selected; and

2. for origination and termination of IntraLATA Toll and Switched Access traffic, shall occur at the location of the host, with applicable tariff charges.

B. Fixed Points of Interconnection

Each trunk group between pairs of the Parties' switches and/or routing points for the exchange of Local Exchange, IntraLATA Toll and jointly provided Switched Access Traffic shall be assigned a fixed POI. Black Hills will be responsible for engineering its network on its side of the POI. USWC will be responsible for engineering the POI frame (if any) and its network on its side of the POI.

This Section is not intended to limit the Parties' options to choose the facilities over which to route their originated Local Exchange and IntraLATA Toll Traffic.

C. Sizing and Structure of Interconnection Facilities

The Parties will mutually agree on the appropriate sizing for facilities based on the standards set forth below. The interconnection facilities provided by each Party shall be Alternate Mark Inversion Line Code and Superframe Format Framing ("AMI") at either the DS-1 or DS-3 level, except as modified below.

When interconnecting at USWC's tandems, the Parties agree to establish Binary 8 Zero Sum Extended Super Frame ("B8ZS ESF") two-way trunks where available for the sole purpose of transmitting 64Kbps Clear Channel Capability ("CCC") data calls between them. In no case will these trunks be used for calls for which the User Service Information parameter (also referred to as "Bearer Capability") is set for "speech." Where additional equipment is required, such equipment would be obtained, engineered, and installed on the same basis and with the same intervals as any similar growth job for IXC, LEC, or USWC internal customer demand for 64K CCC trunks.

When interconnecting at USWC's digital End Offices, the Parties have a preference for use of B8ZS ESF trunks for all traffic between their networks. Where available, such trunk equipment will be used for these Local Interconnection Trunk Groups and Meet Point Trunk Groups. Where AMI trunks are used, either Party may request upgrade to B8ZS ESF when such equipment is available.

All interconnection facilities between the Parties will be sized according to mutual forecasts and sound engineering practice, as mutually agreed to by the Parties during planning - forecasting meetings.

Tandem Interconnection:

1. Black Hills will separate its local traffic to USWC onto local interconnection trunks. While the Parties anticipate the use of two way trunks for the delivery of local traffic, either Party may elect to provision its own one-way trunks for delivery of local traffic to be terminated on the other Party's network.

2. The local trunk groups may be terminated through USWC's local tandem, so long as USWC has capacity at its local tandem and so long as USWC provides B8ZS ESF capability at its local tandem to be used in accordance with the other provisions of this Agreement.

3. All toll trunk groups will be terminated through USWC's access tandem or end office.

4. Whenever Local Traffic for a particular subtending end office sent by Black Hills to USWC's tandem achieves a standard of 512 ECCS, Black Hills will deliver such local traffic on a separate trunk group to that end office.

D Trunking Directionality

1. Local Interconnection Trunk Groups and Meet Point Trunk Groups will be installed as two-way trunk groups. Separate two-way trunks will be established for Switched Access traffic where one of the Parties is operating as an IXC. Interconnection will be provided using two-way trunks, unless the Parties agree to the use of one-way trunks.

   The following represents the Parties' agreement concerning the directionality of the separate trunks carrying the following types of traffic:

   a. IntraLATA toll and switched access trunks - two way
   b. EAS/local trunks - two way
   c. Directory assistance trunks - one way
   d. 911/E911 trunks - one way
   e. Operator services trunks - one way
   f. Commercial Mobile Radio Service/Wireless which terminates on USWC's network - See subsection 2 below
   g. Meet point toll and non-USWC toll - two way
   h. Transit local (wireless and wireline) - two way
   i. Mass Calling Trunks, if applicable

2. WSP traffic will be delivered either on a separate trunk group or on a Switched Access trunk group. If a Switched Access trunk group is used, the Party delivering the traffic will be responsible for the payment of access charges.

E Common Channel Signaling and Signaling Protocol

The Parties will interconnect their networks using SS7 signaling, where available, as defined in GR-317 and GR-394, including ISDN User Part ("ISUP") for trunk signaling and Transaction Capabilities Application Part ("TCAP") for CCS-based features in the interconnection of their networks and access to databases such as 800 and Line Information Data Base ("LIDB"), where Black Hills requests such access from USWC. Black Hills may establish CCS interconnections with USWC either directly and/or through a third party. The Parties will cooperate in the exchange of TCAP messages to facilitate full interoperability of CCS-based features between their respective networks, including all current CLASS features and functions, to the extent each Party offers such features and functions to its own end users. All CCS signaling parameters, as may be deployed by either Party for its use, will be provided, including CPN. Neither Party will be required by the other Party to deploy any CCS signaling parameters not already deployed within its network. All privacy indicators will be honored.

F. Local Interconnection Trunk Arrangements

1. The Parties shall deliver traffic over the Local Interconnection Trunk Group(s) to the appropriate tandem only for those publicly-dialable NPA NXX codes served by end offices that directly subtend that tandem or to those WSPs that directly subtend that tandem.

2. Where end office trunking is used, the Parties shall deliver traffic over the Local Interconnection Trunk Group(s) to an end office only for those publicly-dialable NPA NXX codes served by that end office.

3. The source for the routing instructions shall be the LERG, when available. In any case, USWC will not be required to route calls destined to Black Hills NXXs via another LEC tandem.

4. Where either Party delivers over the Local Interconnection Trunk Group miscellaneous calls (i.e., time, weather, NPA-555, Busy Line Verify/Interrupt, 976, 900, Mass Calling Codes) destined for the other Party, it shall deliver such traffic in accordance with the serving arrangements defined in the LERG.

5 Toll Free Service calls will be routed over appropriate trunks carrying Switched Access Traffic unless the end office Party performs the SSP function and the 800 SCP returns an IntraLATA POTS-routable number and a CIC of 110. In such a case, these calls will be routed over the appropriate trunk groups carrying Local Exchange or IntraLATA Toll Traffic, if the POTS-routable number returned is located in one of the Party's networks.

6 Neither Party shall terminate Switched Access Traffic over Local Interconnection Trunks.

7 N11 codes (i.e., 411, 611, 911) shall not be sent between the Parties' networks over the Local Interconnection Trunk Groups.

8 Each Party shall establish procedures whereby its operator bureau will coordinate with the operator bureau of the other Party in order to provide BLV/BLVI services on calls between their respective end users. The Parties will interconnect as follows:

A. For Black Hills:

BLV and BLVI inquiries to Black Hills' operator bureaus shall be routed using network-routable access codes published in the LERG.

B. For USWC:

BLV and BLVI inquiries to USWC's operator bureaus shall be routed either:

(1) utilizing network-routable access codes published in the LERG over message trunks to the access tandem (if Black Hills has and utilizes a Carrier Identification Code); otherwise

(2) utilizing separate Feature Group D trunks to the TOPS tandem.

9 Notice of Changes

If a Party makes a change in its network which it believes will materially affect the interoperability of its network with the other Party, the Party making the change shall provide at least ninety (90) days advance written notice of such change to the other Party.

10 Meet Point Trunking Arrangements

1 In meet point trunking arrangements, either Party can provide the tandem transport and switching functions and either Party may use Meet Point Trunks to send and receive Feature Group B and D ("FGB" and "FGD") calls from Switched Access customers who are connected to the other Party's access tandem. Switched Access customers will direct which Party will provide each function based on Access Service Requests ("ASRs") placed with both Parties.

2 Two-way trunks will be established to enable Black Hills and USWC to jointly provide FGB and FGD Switched Access services.

3 The Parties will use facilities and two-way trunk groups separate from the Local Interconnection Trunk Groups for Meet Point Trunks.. Where

separate facilities are used for Meet Point Trunks, neither Party will charge the other Party for these facilities, including multiplexing and Cross Connects.

4 In the case of Switched Access services provided through either Party's access tandem, neither Party will offer blocking capability for Switched Access customer traffic delivered to the other Party's tandem for completion on that Party's network. Neither Party shall have any responsibility to ensure that any Switched Access customer will accept traffic the other Party directs to the Switched Access customer.

5 The tandem Party in meet point trunking arrangements shall direct traffic received from Switched Access customers directly to the other Party's end office where such connection exists and is available. Where no end office connection exists or is available, traffic received from Switched Access customers shall in all cases be sent to the other Party's tandem under which the end office is homed.

Traffic sent to Switched Access customers shall in all cases be routed from the end office through only one tandem of either Party to the Switched Access customer. The Parties understand and agree that the Switched Access customer may select which Party's access tandem is used for traffic sent to the Switched Access customer. Proof of such selection shall be in the form of ASRs from the Switched Access customer.

The Parties agree to cooperate in determining the future technical feasibility of a switch vendor supported method of routing originating meet point traffic via a tandem of one Party and a tandem of the other Party for the purpose of delivering such traffic to the Switched Access customer (e.g. Carrier Identification Parameter (CIP)). If such an arrangement is found to be technically feasible, and in the best interest of each Party so that both Parties wish to implement such an arrangement, then the Parties will cooperate in implementing such an arrangement, including the adoption of appropriate compensation terms. The Parties agree that they will make any necessary modifications to their tariffs to implement any of their items in this subsection.

6 The Parties will provide CCS to one another, where and as available, in conjunction with two-way Meet Point Trunk Groups. The Parties will provide all CCS signaling including Charge Number, originating line information ("OLI"), etc. For terminating FGD, either Party will pass CPN if it receives CPN from FGD carriers. All privacy indicators will be honored Where available, network signaling information such as Transit Network Selection ("TNS") parameter (CCS environment) and CIC/OZZ information (non-CCS environment) will be provided by the end office Party wherever such information is needed for call routing or billing. Where CIC/OZZ or TNS information has not been provided to the end office Party, the tandem Party will route originating Switched Access

traffic to the IXC using available translations. The Parties will make reasonable efforts to obtain any necessary CIC/OZZ codes directly from Switched Access customers who use such codes. The Parties will follow all OBF adopted guidelines pertaining to TNS and CIC/OZZ codes, unless the Parties agree otherwise.

7 CCS shall be used in conjunction with Meet Point Trunks, except multifrequency ("MF") signaling must be used on a separate Meet Point Trunk Group for originating FGD access to Switched Access customers that use MF FGD signaling protocol. For terminating FGD access from Switched Access customers that use MF FGD, the tandem Party will, as a first choice, complete those calls to the end office provider over the CCS Meet Point Trunk Group.

8 All originating Toll Free Service calls for which the end office Party requests that the tandem Party perform the SSP function (e.g., perform the database query) shall be delivered to the tandem Party using GR-394 format over the Meet Point Trunk Group. Carrier Code "0110" and Circuit Code of "08" shall be used for all such calls.

9 All originating Toll Free Service calls for which the end office Party performs the SSP function, if delivered to the tandem Party, shall be delivered by the end office Party using GR-394 format over the Meet Point Trunk Group for calls destined to IXCs, or shall be delivered by the end office Party using GR-317 format over the Local Interconnection Trunk Group for calls destined to end offices that directly subtend the tandem or the designated LATA-wide tandem to which the calls are delivered.

10 Originating Feature Group B calls delivered to either Party's tandem shall use GR-317 signaling format unless the associated FGB carrier employs GR-394 signaling for its FGB traffic at the serving access tandem.

H Control Office Functions

The Parties shall share responsibility for all Control Office functions for trunks carrying Local Traffic, and both Parties shall share the overall coordination, installation, and maintenance responsibilities for these trunks and trunk groups.

The end office Party is responsible for all Control Office functions for the Meet Point trunks, and shall be responsible for the overall coordination, installation, and maintenance responsibilities for these trunks.

I Testing and Trouble Responsibilities

At the time of installation of Local Interconnection Trunks, and at no additional charge, the Parties will cooperatively install and test the trunks. Additionally, Black Hills and USWC shall

1. Cooperatively plan and implement coordinated repair procedures for the Meet Point and Local Interconnection Trunks and facilities to ensure trouble reports are resolved in a timely and appropriate manner.

2. Provide trained personnel with adequate and compatible test equipment to work with each other's technicians.

3. Notify each other when there is any change affecting the service requested, including the due date.

4. Coordinate and schedule testing activities of their own personnel, and others as applicable, to ensure its interconnection trunks/trunk groups are installed per the interconnection order, to ensure that its Local Interconnection Trunk Groups meet agreed-upon acceptance test requirements, and to make commercially reasonable efforts to place the Local Interconnection Trunk Groups in service by the due date.

5. Perform sectionalization to determine if a trouble condition is located in its facility or its portion of the interconnection trunks prior to referring the trouble to each other.

6. Advise each other's Control Office if there is an equipment failure which may affect the interconnection trunks.

7. Provide each other with a trouble reporting number to a work center that is staffed 24 hours a day/7 days a week.

8. Provide to each other test-line numbers and access to test lines, including a test-line number that returns answer supervision in each NPA-NXX opened by a Party.

9. Based on the network architecture, the Parties agree to the mutual exchange of test calls to ensure the proper recording of usage records in each company's switch, where applicable. These tests are repeatable on demand by either Party upon reasonable notice.

III. INTERCONNECTION FORECASTING

A. General

1. The Parties agree that during the first year of interconnection, joint forecasting and planning meetings will take place no less frequently than once per quarter.

2. The Parties shall establish joint forecasting responsibilities for traffic utilization over trunk groups. Intercompany forecast information must be provided by the Parties to each other four times a year. The quarterly forecasts shall include:

A. (1) tandem Local Interconnection and Meet Point Trunks;

(2) tandem-subtending Local Interconnection and end office equivalent Meet Point Trunk requirements; and

(3) direct end office interconnection trunks

for a minimum of three (current and plus-1 and plus-2) years;

B. The use of Common Language Location Identifier (CLLI-MSG), which are described in Bellcore documents BR 795-100-100 and BR 795-400-100;

C. A description of major network projects anticipated for the following six months that could affect the other Party. Major network projects include trunking or network rearrangements, shifts in anticipated traffic patterns, or other activities that are reflected by a significant increase or decrease in trunking demand for the following forecasting period. This planning will include the issues of network capacity, forecasting and compensation calculation, where appropriate.

3 If differences in quarterly forecasts of the Parties vary by more than 24 additional DS0 two-way trunks for each Local Interconnection Trunk Group, the Parties shall meet to reconcile the forecast to within 24 DS0 trunks.

4 If a trunk group is under 75 percent of centum call seconds (ccs) capacity on a monthly average basis for each month of any three month period, either Party may request to resize the trunk group, which resizing will not be unreasonably withheld. If a resizing occurs, the trunk group shall not be left with less than 25 percent excess capacity. In all cases, grade of service objectives identified below shall be maintained.

5 Each Party shall provide a specified point of contact for planning, forecasting and trunk servicing purposes.

B Interconnection Grade Of Service

Local Interconnection Trunk Groups shall be engineered with a goal to maintain a blocking standard of one percent (.01) during the average busy hour for final trunk groups.

C Interconnection Deployment

The Parties agree to develop and implement engineering guidelines which will encourage the economic deployment of increasingly robust and diverse interconnection between their networks. The Parties agree that these guidelines,

when developed, will form the basis for creation of additional direct trunk groups to end offices. The Parties agree to establish these additional direct trunk groups to end offices, subject to the availability of facilities and trunk equipment, as soon as the traffic volumes between any two switches or Routing Points reaches a total volume equivalent to 512 CCS in the busy hour per month for a period of two consecutive months. However, the Parties may choose not to establish these trunks only by mutual agreement.

D. Interconnection Trunk Servicing

Orders to and from the Parties to establish, add, change or disconnect trunks shall be processed by use of an Access Service Request ("ASR") using an electronic ordering interface, when available, as the means of transmitting such orders. The Parties agree to cooperate in the establishment of an electronic interface to exchange orders.

Orders that comprise a major project shall be submitted at the same time, and their implementation shall be jointly planned and coordinated. In this context, major projects are those that require the coordination and execution of multiple orders or related activities between and among the Parties' work groups, including but not limited to the initial establishment of interconnection trunk groups and service in an area, NXX code moves, re-homes, facility grooming, or network rearrangements.

E. Network Management

1. Protective Controls. Either Party may use protective network traffic management controls such as 7-digit and 10-digit code gaps on traffic toward each other's network, when required to protect the public switched network from congestion due to facility failures, switch congestion or failure or focused overload. The Parties will immediately notify each other of any protective control action planned or executed.

2. Expansive Controls. Where the capability exists, originating or terminating traffic reroutes may be implemented by either Party to temporarily relieve network congestion due to facility failures or abnormal calling patterns. Reroutes will not be used to circumvent normal trunk servicing. Expansive controls will only be used when mutually agreed to by the Parties.

3. Mass Calling. The Parties shall cooperate and share pre-planning information regarding cross-network call-ins expected to generate large or focused temporary increases in call volumes, to prevent or mitigate the impact of these events on the public switched network.

4. High Volume Calling Trunk Groups. Black Hills and USWC shall cooperate to establish separate trunk groups for the completion of calls to high volume customers such as radio station contest lines.

F. Tariffed Services

Either Party may opt at any time to terminate to the other Party some or all of its traffic via any tariffed service offered by the other Party (within the terms of the other Party's tariff), or any service governed by a contract (within the terms of the contract) between the two Parties. Any such rearrangements resulting from such election shall require appropriate notification to the other Party, joint planning, forecasting and project management.

G. End User Repair Calls

The Parties will educate their respective customers as to the correct telephone numbers to call in order to access their respective repair bureaus. In the case of misdirected repair calls, neither Party shall make disparaging remarks about the other Party, nor shall they use these repair calls as the basis for internal referrals or to solicit customers to market services, nor shall they initiate any extraneous communications, beyond the direct referral (if any) to the correct repair telephone number. Either Party may respond with correct information in answering customer questions. The Parties will provide their respective repair contact numbers to one another on a reciprocal basis.

H. Referral Services

When an end user customer changes from USWC to Black Hills, or from Black Hills to USWC, and does not retain its original telephone number, and the end user customer (or the customer's new provider on behalf of the customer) requests provision of a referral announcement, the Party formerly providing service to the end user will provide a referral announcement on the abandoned telephone number. This announcement will provide the new number to be dialed to reach this customer. This announcement will be provided for the standard period and on the terms specified in each Party's exchange service tariff in effect as of the date this Agreement is executed.

IX. NONDISCRIMINATORY ACCESS TO NETWORK ELEMENTS

USWC shall provide Black Hills access to the following unbundled Network Elements for the provision of telecommunications services by Black Hills. Black Hills, at its option, may combine such Network Elements from USWC with elements of its own network to provide such services. USWC's prices charged to Black Hills will be no greater than the cost of providing the Network Element, including a reasonable profit. USWC will not separate USWC's unbundled Network Elements to provide a finished service to Black Hills. USWC agrees, however, to offer finished retail services to Black Hills for resale pursuant to the Resale section of this Agreement.

A. Loops

USWC will make unbundled Basic Loops available as set forth below.

1. Description of Loop Service. Loop Service consists of various network elements (including an EICT and an unbundled loop) and that provide for transport between the Network Interface Device ("NID") at an end user premises and a mutually-agreed upon point of interconnection between USWC and Black Hills in the USWC Wire Center from which the transport is extended. (When the Loop Service is connected to Black Hills' collocated facility at a USWC Wire Center, the point of interconnection is the POT Bay in the Wire Center.) The Loop Service includes the Network Interface Device, for which there is no separate charge. At its sole discretion, USWC will provide Loop Service over technology that meets the defined parameters for each Loop type.

2. Use and Suitability of Loop Service. Loop Service may not be used to provide any service that would degrade or otherwise adversely affect USWC's network services.

3. Availability of Loop Service. Loop Service is available to Black Hills from all USWC Wire Centers on a first-come, first-served basis (applicable to all carriers, including USWC) and subject to the availability of facilities at the premises of the Black Hills end user customer. Certain of USWC's geographical areas are served solely via Digital Loop Carrier. In such areas, ISDN-capable Loops will be provided unless the Digital Loop Carrier does not have the technological capability to provide ISDN to end-users.

4. Interconnection to Service at Central Office POI. Black Hills must connect Loop Service either:

   A. via cross connect to an Black Hills collocated transport facility in the USWC central office from which Loop Service is extended; or

   B. by means of USWC Special Access Service that terminates at an Black Hills Point of Presence ("POP") or to an Black Hills collocated transport facility (via EICT) in another USWC Wire Center; or

   C. via cross connect to a third party's collocated transport facility in the USWC central office from which Loop Service is extended.

5. Loop Service Prices.

USWC will provide Loop Service at the prices set forth on Appendix A. The prices set forth on Appendix A do not include Commission or FCC mandated surcharges or applicable taxes. For partial months, USWC will prorate the monthly charge on a per day rate.

USWC shall charge nonrecurring and monthly recurring rates as set forth in Appendix A for each Loop, plus applicable EICT charges, and applicable multiplexing charges, if multiplexing is requested. If the Loop

and the EICT are ordered by Black Hills as associated orders, USWC will not impose any nonrecurring charge for the EICT. All Loop prices include any applicable End User Common Line and Carrier Common Line flat rate equivalent charges.

In addition to Basic Loops, Black Hills may order Basic Loops with conditioning for ISDN, ADSL/HDSL, and T-1/DS1 (4-Wire), where such conditioning is technically feasible. USWC may charge Black Hills for conditioning of these Loops on the same terms which it charges its own retail customers for conditioning. If USWC normally charges its customers an up-front fee for such conditioning, it may require Black Hills to pay the same up-front fee. Where Black Hills requests conditioning and the conditioning or facilities are not such that USWC has a retail end user service using such requested conditioning, then USWC may charge Black Hills for such conditioning. If the fee for conditioning for a particular type of Loop is built into the monthly costs for its customers, USWC may not charge Black Hills an up-front fee for such conditioning.

A cancellation charge may apply if Black Hills cancels an order for any type of Loop after provisioning has begun and prior to completion.

6. Assigned Telephone Number. Black Hills is responsible for assigning any telephone numbers necessary to provide its end users with Exchange Service.

7. Billing and Payment. USWC will bill and Black Hills will pay Loop Service bills in accordance with USWC's billing, bill dispute resolution, late payment charges and disconnection for nonpayment requirements as set forth in applicable tariff.

8. Ordering. Black Hills must order Loop Service via service order request forms, and subsequently via an electronic interface using USWC's appropriate system (as soon as that interface is available to any telecommunications carrier). USWC will provide Black Hills access to this system initially at no charge, unless and until a charge associated with the use of such system is authorized by any state in which the Parties have signed an interconnection agreement, in which case that charge shall be used as an interim rate. At the time the Commission authorizes a permanent rate for this service, if any, such rate will be imposed in accordance with the Commission's order and the Parties will true-up the amounts owed, if any, under the permanent rate. USWC will also provide initial training in its use for ordering Loop Service.

9. Provisioning Intervals. Basic Loops and conditioning will be provided within the same period of time USWC provisions its like exchange service at that time in the same area using similar facilities requiring field work (wiring) Conditioning for ADSL, HDSL and T-1/DS1 will have intervals identical to the intervals for USWC's provisioning of its own hi-cap services Intervals for a project (10 or more lines to a single end user

premises on a request at the same time) will be established on a negotiated interval basis (not to exceed the intervals USWC provides to itself and its customers).

10. Service Coordination. Loop Service will be provided on the due date and on the same basis that USWC provides similar service to its own customers. Additional service coordination is charged as additional labor billing per USWC's tariff.

The following coordination procedures apply only to Basic Loops, with Basic Testing at Designated Time, ordered as a project (10 or more lines to a single end user premises on a request at the same time):

a. On each unbundled Loop order, Black Hills and USWC will agree on a cutover time at least 48 hours before that cutover time. The cutover time will be defined as a 30 minute window within which both the Black Hills and USWC personnel will make telephone contact to complete the cutover.

b. Within the appointed 30 minute window, the Black Hills person will call the USWC person designated to perform cross-connection work and when the USWC person is reached in that interval such work will be promptly performed. If the Black Hills person fails to call or is not ready within the appointed interval, and if Black Hills had not called to reschedule the work at least 2 hours prior to the start of the interval, USWC and Black Hills will reschedule the work order and Black Hills will pay the non-recurring charge for the unbundled Loops scheduled for the missed appointment. In addition, nonrecurring charges for the rescheduled appointment will apply. If the USWC person is not available or not ready at any time during the 30 minute interval, Black Hills and USWC will reschedule and USWC will waive the nonrecurring charge for the unbundled Loops scheduled for that interval. If unusual or unexpected circumstances prolong or extend the time required to accomplish the coordinated cut-over, the Party responsible for such circumstances is responsible for the reasonable labor charges of the other Party. Delays caused by the customer are the responsibility of Black Hills.

In addition, if Black Hills has ordered INP or call referral in association with the Basic Loop installation, USWC will coordinate implementation of INP or call referral with the Basic Loop installation; provided, separate INP or call referral nonrecurring charges will apply.

11. Maintenance and Testing. Black Hills is responsible for receiving and coordinating resolution of all end user trouble reports involving Loop Service. Black Hills will isolate any trouble to the Loop portion of the service before contacting USWC to report the trouble. USWC will charge

Black Hills additional labor billing charges (at USWC tariffed rates) when the trouble is referred to USWC and the trouble is found to be either on the customer side of the NID or on the Black Hills side of the POI or collocation POT Bay. In the event that USWC reports no trouble found, and it is subsequently determined that there was a trouble on USWC's side of the POI (excluding an intermittent trouble), Black Hills will charge USWC additional labor billing charges (at Black Hills tariffed rates) associated with testing for the trouble. Each Party will provide to the other Party the results of any testing that is undertaken pursuant to this paragraph.

12. Responsibilities of the Parties.

A. Black Hills and USWC will work cooperatively to develop forecasts for unbundled Loop Service. USWC requests an eighteen (18) month forecast of unbundled Loop Service. The forecast will include the specific serving Wire Center that will be requested, plus the specific quantity of each service desired. The forecast will be provided quarterly and will be treated as Proprietary Information under this Agreement.

B The Parties agree that Black Hills will be the single point of contact for its end user customers.

C. USWC will not provide repair or other assistance to Black Hills end user customers (who identify themselves as such) except to refer such persons who call USWC to Black Hills. Black Hills will provide USWC with Black Hills' toll-free service referral number.

D If, and only if, Black Hills' end user customer controls access to the NID, Black Hills must ensure that USWC has access to the NID at the Black Hills end user customer's premises.

E Black Hills warrants that for each end user for whom Black Hills orders disconnection of USWC exchange service, Black Hills has received proper authorization from that end user to order such disconnection. Black Hills shall obtain and verify such authorization using standard industry practices, such as in certain circumstances third-party verification.

F The Parties agree to abide by existing and future Commission rules that address slamming of local exchange customers by LECs

G If USWC terminates or Black Hills disconnects any Loop Service, USWC will have no obligation to have any communication with Black Hills' customer in connection with such termination or disconnection, unless required by an order or rule of the Commission

B. Transport

USWC will provide unbundled access to transmission facilities between end offices and the tandem switch (tandem transport). Further, USWC will provide unbundled access to dedicated transmission facilities between its central office or between such offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and servicing Wire Centers ("SWCs"), SWCs and IXC POPs, tandem switches and SWCs, end offices or tandems of USWC, and the wire centers of USWC and requesting carriers. USWC will also provide all available transmission capabilities, such as DS1 and DS3, that Black Hills could use to provide telecommunications services, provided that the foregoing does not require USWC to unbundle its fiber.

Until the Commission establishes permanent rates, the rates for transport shall be those set forth in Appendix A.

C. Ports/Local Switching

1. The switching network element includes facilities that are associated with the line (e.g. the line card), facilities that are involved with switching the call, and facilities used for custom routing. The local switching network element is comprised of three rate elements:

   A. Line-related (per line)

      (1) The switching elements encompass line-side and trunk-side facilities plus the features, functions and capabilities of the switch. This includes the functions of connecting lines to lines, trunks to lines, lines to trunks, lines to switched features, and trunks to trunks. The line-related local switching element includes:

         (A) Telephone number
         (B) Directory listing
         (C) Dial tone
         (D) Signaling (loop or ground start)
         (E) On/off hook detection
         (F) Audible and power ringing
         (G) Automatic message accounting (AMA) recording
         (H) Access to 911, operator services, and directory assistance
         (I) Blocking options (900 services)

      (2) The switching element does not include vertical services, including custom calling and CLASS features, that are currently offered as finished retail services and are available for resale.

(3) The access point for line-side local switching interconnection, depending upon the element, is the Distribution Frame (DF) or the Digital Cross-connect Bay (DSX) of the USWC designated serving Wire Center.

(4) Physical traits - line side elements

(A) Analog line side port will be two wire POTS type connection at the DF.

(B) Digital line side port will be two wire interface per ANSI standard T1.601-1988 ("U" Interface), four wire interface per ANSI standard T1-605-1989 ("T" Interface), or a Meridian Digital Centrex two wire type connection at the DF.

(5) Until the Commission establishes permanent rates, the rates for line related local switching shall be those set forth in Appendix A.

B. Trunk-side local switching element (per minute of use)

The trunk-side local switching interconnection element includes the switching functions of connecting lines to lines, trunks to lines, lines to trunks, lines to switched features, and trunks to trunks.

C. Customized routing

(1) Description

Customized routing will enable Black Hills to direct particular classes of calls to particular outgoing trunks. Black Hills can use customized routing to direct its customers' calls to 411, 555-1212, or 0- to its own directory assistance or operator services platform.

(2) Limitations

Because there is a limitation in the capacity of the 1A ESS switch, custom routing will be offered to Co-Providers on a first-come, first-served basis.

(3) The price for customized routing will be provided on a case-by-case basis.

D. Cross-connects

USWC will make available unbundled Cross Connects between Black Hills' collocation arrangements and any interconnection to USWC's unbundled

Network Elements. Until the Commission establishes permanent rates, the rates for cross-connects shall be those set forth in Appendix A. [Appendix A refers to this cross-connect as an EICT.]

E. Multiplexing

USWC will make available multiplexing services in connection with USWC's unbundled transport or other USWC services or USWC's unbundled Network Elements, including EICT to other collocators. Until the Commission establishes permanent rates, the rates for multiplexing shall be those set forth in Appendix A.

F. Nondiscriminatory Access to Databases and Associated Signaling

USWC will make available, as described elsewhere in this Agreement, interconnection to its SS7 signaling network to enable signaling necessary for call routing and completion between the Parties. USWC will also make available unbundled SS7 signaling Links (i.e., A, B, and D Links) for connection to USWC's STPs.

USWC will make available access to Toll Free Service and LIDB databases through its STPs on a per query basis. If any additional databases are determined to be required under TA 1996 as necessary for call routing and completion, USWC will make such databases and associated signaling available to Black Hills.

USWC offers a network-based calling name delivery service for sale to its own end users. Accordingly, USWC will provide to Black Hills access to the calling name database used to provide this service.

G. Forecasts for Certain Unbundled Network Elements

The Parties will cooperate in the provision of forecasts to USWC for relevant unbundled Network Elements.

H. Bona Fide Request Process

Any request for interconnection or access to an unbundled Network Element that is not already available as described herein shall be treated as a Bona Fide Request.

USWC shall use the Bona Fide Request Process to determine the terms and timetable for providing the requested items, where applicable.

1. A qualifying BFR must address the following:

   a. If the requested unbundled Network Element is a proprietary element as specified in Section 251(d)(2) of the Act, Black Hills must submit documentation that demonstrates that access to such Network Element is necessary; that the failure to provide

access to such Network Element would impair the ability of Black Hills to provide the services that it seeks to offer; and that Black Hills' ability to compete would be significantly impaired or thwarted without access to such requested proprietary element.

b. For non-proprietary elements as specified in Section 251(d)(2) of the Act, Black Hills must submit documentation that demonstrates that denial of access to such unbundled non-proprietary Network Elements would decrease the quality or increase the cost of the service sought to be offered by Black Hills.

2. USWC will consider and analyze a new request by Black Hills for interconnection or access to an unbundled Network Element with the submission of a Bona Fide Request hereunder, pursuant to the Bona Fide Request Process in this subsection.

3. A Bona Fide Request shall be submitted in writing and shall, at a minimum, include: (a) a technical description of each requested Network Element or interconnection; (b) the desired interface specifications; (c) each requested type of interconnection or access; (d) a statement that the interconnection or Network Element will be used to provide a telecommunications service; (e) the quantity requested; (f) the specific location requested; and (g) the required documentation set forth in this Section.

4 Within fifteen (15) business days of its receipt, USWC shall acknowledge receipt of the Bona Fide Request and in such acknowledgment advise Black Hills of any missing information, if any, necessary to process the Bona Fide Request. Thereafter, USWC shall promptly advise Black Hills of the need for any additional information that will facilitate the analysis of the Bona Fide Request.

5 Except under extraordinary circumstances, within thirty (30) calendar days of its receipt of the Bona Fide Request and all information necessary to process it, USWC shall provide to Black Hills a preliminary analysis of the Bona Fide Request. The preliminary analysis shall specify whether or not the requested interconnection or access to an unbundled Network Element complies with the unbundling requirements set forth above.

A If USWC determines during the thirty day period that a Bona Fide Request does not qualify as a Network Element or interconnection that is required to be provided under TA 1996, USWC shall advise Black Hills as soon as reasonably possible of that fact, and promptly provide a written report setting forth the basis for its conclusion, but in no case later than ten days after making such determination.

B. If USWC determines during the thirty day period that the Bona Fide Request qualifies under TA 1996, it shall notify Black Hills in writing of such determination but in no case later than ten days after making such determination.

C. As soon as feasible, but not more than ninety (90) days after USWC notifies Black Hills that the Bona Fide Request qualifies under the Act, USWC shall provide to Black Hills a Bona Fide Request quote which will include, at a minimum, a description of each interconnection and Network Element, the quantity to be provided, the installation intervals, and either:

(1) the applicable rates (recurring and nonrecurring) including the development costs and construction charges of the interconnection or the network elements; or

(2) the development costs of the interconnection or Network Element and the applicable rates (recurring and nonrecurring) excluding the development costs.

The choice of using option c(1) or c(2) shall be at USWC's sole discretion.

For the purposes of this section, the development costs shall be limited to the actual direct costs incurred in the development of the Network Element. The applicable rates (recurring and nonrecurring) for each Network Element shall be limited to the actual costs incurred plus reasonable shared and common costs, as determined by appropriate regulatory bodies or by agreement of the Parties.

6. If USWC has used option C(1) in its Bona Fide Request quote, then within thirty (30) days of its receipt of the Bona Fide Request quote, Black Hills must indicate its nonbinding interest in purchasing the interconnection or Network Element at the stated quantities and rates, cancel its Bona Fide Request, or seek arbitration.

7. If USWC has used option C(2) in its Bona Fide Request quote, then within thirty (30) days of its receipt of the Bona Fide Request quote, Black Hills must either agree to pay the development costs of the interconnection or Network Element, cancel its Bona Fide Request, or seek arbitration.

If Black Hills agrees to pay the development costs and requests USWC to proceed:

A USWC will additionally charge those development costs, on a prorated basis (set forth in (C) below), to the next nine parties who place an initial order after Black Hills for the interconnection or Network Element;

B. As each additional party places its initial order for the interconnection or Network Element, USWC will refund the appropriate prorated portion of the development costs to parties who have previously paid development costs (as set forth in (C) below); and

C. The charges and refunds will be made using the proration chart set forth in this Agreement with respect to collocation, except that the period of proration for charges and refunds shall be 36 months from when USWC first makes the interconnection or Network Element available.

8. If USWC has used option C(2) in its Bona Fide Request quote and Black Hills has accepted the quote, Black Hills may cancel the Bona Fide Request at any time, but will pay USWC's reasonable development costs of the interconnection or Network Element up to the date of cancellation.

9. Additionally, if USWC has used option C(2) in its Bona Fide Request quote and USWC later determines that the interconnection or Network Element requested in the Bona Fide Request is not technically feasible or otherwise does not qualify under TA 1996, USWC shall notify Black Hills within ten business days of making such determination and Black Hills shall not owe any compensation to USWC in connection with the Bona Fide Request. Any development costs paid by Black Hills to that point shall be refunded by USWC.

10. If either Party believes that the other Party is not requesting, negotiating or processing any Bona Fide Request in good faith, or disputes a determination, or price or cost quote, it may seek arbitration pursuant to the Dispute Resolution provision of this Agreement.

V. NONDISCRIMINATORY ACCESS TO POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY

A. Each Party will provide to the other Party access to its poles, ducts, conduits in, on or under public and private rights-of-ways and property and to the rights-of-way themselves on rates, terms and conditions that are consistent with applicable laws and regulations, including but not limited to, 47 U.S.C. § 224, and that are no less favorable than the rates, terms and conditions available to any competing provider of telecommunications services. USWC shall impute its own costs of providing telecommunications services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an amount equal to the pole attachment rate for which USWC (or such affiliate, subsidiary, or associate company) would be liable under 47 U.S.C. § 224, unless this obligation imposed by TA 1996 is modified by federal law, in which case USWC will conform to any such modification.

B. Whenever either Party inquires of the other in writing whether it intends to construct new poles, duct, or conduit or to acquire additional right-of-way, the other Party shall respond within 30 days of receipt of such inquiry to the other Party of such intention. Any entity, including the Parties to this Agreement, that adds an attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such new pole, duct, conduit, or right-of-way accessible.

C. Whenever either Party intends to modify or alter its pole, duct, conduit, or right-of-way in or on which the other Party shares or has an existing attachment, it shall provide written notification of such action to the other Party so that the other Party may have a reasonable opportunity to add to or modify its existing attachment. The notified Party, if it adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the other Party in making such pole, duct, conduit, or right-of-way accessible.

D. Whenever either USWC or Black Hills obtains an attachment to a pole, duct, conduit or right-of-way of the other Party, it shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit or right-of-way).

E. The Parties agree to negotiate and execute a separate agreement for pole attachment and conduit usage within 30 days of either Party requesting the other to negotiate such an agreement. Such agreement shall include among its provisions, for the occupancy of conduit, the following:

1. Neither Party will terminate the other Party's occupancy without cause;

2. Since multiple parties may occupy different innerducts within a conduit, the conduit owner will place innerduct to prepare the conduit for occupancy and either proportionately recover such costs through its conduit charges or recover such costs through an "up-front" charge. In the event that the conduit owner imposes an "up-front" charge, the charge shall be subject to refund as follows, for a period of 60 months from the time the "up-front" charge is first imposed:

CONTINUATION

[redacted] 5

Scan ~ ~ # Pgs [ ]

Occupant	Up-Front Charge	Refund
1st	100%	NA%
2nd	50%	50%
3rd	33.33%	16.67%
4th	25%	8.33%
5th	20%	5%
6th	16.67%	3.33%
7th	14.29%	2.38%
8th	12.5%	1.79%
9th	11.11%	1.39%
10th	10%	1.11%
11th and beyond	0%	

3. The Parties agree that egress from the conduit system should be at the location of the manhole, vault or handhole (collectively "manhole") nearest to the desired point of egress. If such egress is not feasible, the conduit owner will inform the other Party. Upon that other Party's request:

   A. the Parties will agree to suitable egress at a nearby manhole; or

   B. the conduit owner will provide a quote, accepted by the other Party, for construction of suitable egress, and the conduit owner will construct such egress; or

   C. the other Party will construct, under the conduit owner's supervision, suitable egress, with all costs paid by the other Party, including the reasonable cost of the conduit owner's supervision.

4. The charge to Black Hills for the use of USWC's conduit is set forth in Appendix A. USWC shall provide cost studies to Black Hills supporting its interim proposed standard innerduct rental charges.

VI. EMERGENCY SERVICES, DIRECTORY ASSISTANCE AND OPERATOR CALL COMPLETION SERVICES (E9-1-1, 0-)

A. Emergency Services.

1. Each Party will cooperate to ensure the seamless operation of emergency call networks, including E9-1-1 and 0- emergency calls.

2. Except as otherwise specified in this Agreement, USWC will provide any of the services discussed in this Section in accordance with the rates, terms and conditions of its tariffs.

3 USWC will permit Black Hills to interconnect to the USWC E9-1-1 tandems which serve the areas in which Black Hills provides exchange

services so that Black Hills' customers may place calls to Public Safety Answering Points ("PSAPs") by dialing 911.

4. Black Hills and USWC will work cooperatively, including where necessary, meeting with PSAP operators and/or state, county and municipal government officials, to explain Black Hills' interconnection with the Public Safety emergency network.

5. USWC will not use information obtained from Black Hills in connection with establishing and maintaining the E9-1-1 databases for any purpose not directly associated with the operation of the Public Safety emergency network.

6. USWC, as operator of the Automatic Location Identifier ("ALI") database will maintain processes and procedures to receive and process Black Hills customer information within two business days. USWC will maintain an electronic interface process to permit Black Hills to electronically update the ALI database with Black Hills subscriber information at no charge. The Parties further agree to work in industry fora, such as the National Emergency Numbering Association ("NENA"), to establish an industry standard format for transfer of E9-1-1 customer records.

7. USWC will provide to Black Hills, at no charge, copies of the current Master Street Address Guides ("MSAGs"), on magnetic tape or diskette, for the counties in which Black Hills provides Exchange Service, whenever USWC receives an update to the MSAGs. Both Parties agree to work with the MSAG administrator to obtain online read-only access to the MSAGs as soon as possible.

8. Upon approval of its requested modification to the nonpublished number section of its exchange service tariff, USWC will provide Black Hills with the ten-digit subscriber number for each PSAP which sub-tends each USWC E9-1-1 tandem to which Black Hills is interconnected so that Black Hills or its Operator Services contractor may transfer 0- calls to the PSAP. This information will be provided to Black Hills within ten days of the approval of the modification to USWC's tariff. Black Hills agrees to hold this information in confidence and will use the information solely for the purpose of routing 0- calls from the Black Hills Operator Services platform to the PSAPs. In addition, USWC agrees to provide Black Hills with updates to this information in the same time frame and manner in which that information is provided to USWC's Operator Services work centers.

9. USWC agrees to provide to Black Hills, at no charge, Selective Router Tandem Location maps which define the boundaries served by all controllers/tandems in the areas where Black Hills provides Exchange Service. USWC will provide updated maps if and when the maps are changed.

B. Directory Assistance Listings and White Pages

1. Competitive Local Exchange Carrier Listings Service ("Listings") consists of USWC placing the names, addresses and telephone numbers of Black Hills' end users in USWC's listing database, based on end user information provided to USWC by Black Hills. USWC is authorized to use Listings in Directory Assistance and as noted below.

2. Black Hills will provide in standard, mechanized format, and USWC will accept at no charge, one primary listing for each main telephone number belonging to Black Hills' end user customers. Primary listings are as defined for USWC end users in USWC's general exchange tariffs. Black Hills will be charged for premium listings, (including, but not limited to, additional, foreign, cross reference, and informational listings) and privacy listings (including non-published, non-list, and no solicitation) at USWC's general exchange listing tariff rates, less applicable wholesale discounts. However, there shall be no explicit charge to Black Hills associated with the process of delivering Listings information. When utilizing Remote Call Forwarding for local number portability, Black Hills can list only one number without charge - either the end customer's original telephone number or the Black Hills-assigned number.

3. USWC will furnish Black Hills the Listings format specifications. USWC cannot accept Listings with advance completion dates. Large volume activity (e.g., 100 or more listings) on a caption set is considered a project that requires coordination between Black Hills and USWC. USWC will process all Listings data received from Black Hills with the same frequency applicable to USWC's processing of its own database information.

4. Black Hills grants USWC a non-exclusive license to incorporate Listings information into USWC's directory assistance database. USWC may use Black Hills' Listings and disseminate Black Hills' Listings to third parties in the following manner:

   A. Treat the same as USWC's end user listings - No prior authorization is needed for USWC to release Listings to directory publishers or other third parties. USWC will incorporate Listings information in all existing and future directory assistance applications developed by USWC. Black Hills authorizes USWC to sell and otherwise make Listings available to directory publishers. USWC shall be entitled to retain revenue associated with any such sales. Listings shall not be provided or sold in such a manner as to segregate end users by carrier.

   Upon 60 days notice to USWC, Black Hills may select to change to the following method for USWC's use of Black Hills' Listings and dissemination of Black Hills' Listings to third parties.

B. Restrict to USWC's directory assistance -- Prior authorization required by Black Hills for all other uses. Black Hills makes its own, separate agreements with USWC, third parties and directory publishers for all uses of its Listings beyond DA. USWC will provide Listings to directory publishers (including USWC's publisher affiliate), other third parties and USWC products only after the third party presents proof of Black Hills' authorization. USWC shall be entitled to charge its tariffed rates associated with any such transaction, but the Parties agree to negotiate a division of these revenues in the future. Listings shall not be provided or sold in such a manner as to segregate end users by carrier.

5. USWC will make available to Black Hills and its end user customers any specific directory listing options, including, but not limited to, privacy protections, that are available to USWC's own customers. All such options will be made available through the electronic data exchange process used by Black Hills for Listings.

6. To the extent that state tariffs limit USWC's liability with regard to Listings, the applicable state tariff(s) is incorporated herein and supersedes the "Limitation of Liability" Section of this Agreement with respect to Listings only.

7. USWC Responsibilities

A. USWC is responsible for maintaining Listings, including entering, changing, correcting, rearranging and removing Listings in accordance with Black Hills orders. USWC will make commercially reasonable efforts to ensure Listings information provided to USWC is properly processed by USWC in an accurate and correct manner and agrees to hold Black Hills harmless for any errors in Listings information processed by USWC. USWC will accommodate non-published and non-listed Listings in the same manner that USWC accommodates its own customers' information, provided that Black Hills has supplied USWC the necessary privacy indicators on such Listings.

B. USWC will include Black Hills Listings in USWC's Directory Assistance service to ensure that callers to USWC's Directory Assistance service have non-discriminatory access to Black Hills' Listings.

C. USWC will incorporate Black Hills Listings provided to USWC in the white pages directory published on USWC's behalf. Black Hills' end user customer listings will be commingled with the end user customer listings of USWC.

D. USWC and Black Hills agree that certain issues, such as yellow page advertising, directory distribution, access to call guide

pages, and yellow page listings, will be the subject of negotiations between Black Hills and directory publishers, including U S WEST DEX. If requested by Black Hills, USWC will facilitate discussions between Black Hills and U S WEST DEX. USWC will make available to Black Hills USWC's publishing agreement with U S WEST DEX within five (5) business days of consummation of such agreement.

8. Black Hills Responsibilities

A. Black Hills will make commercially reasonable efforts to ensure Listings information provided to USWC is accurate and correct and agrees to hold USWC harmless for any errors in Listings information provided to USWC. Black Hills shall be solely responsible for knowing and adhering to state laws or rulings regarding Listings and for supplying USWC with the applicable Listings information.

B. Black Hills is responsible for all dealings with, and on behalf of, Black Hills' end users, including:

(1) All end user account activity, e.g. end user queries and complaints.

(2) All account maintenance activity, e.g., additions, changes, issuance of orders for Listings to USWC.

(3) Determining privacy requirements and accurately coding the privacy indicators for Black Hills' end user information. If end user information provided by Black Hills to USWC does not contain a privacy indicator, no privacy restrictions will apply.

9. USWC will accord Black Hills' directory listings information the same level of confidentiality which USWC accords its own directory listing information.

10. USWC shall ensure that access to Black Hills' customer directory information will be limited solely to those employees who immediately supervise or are directly involved in the processing or publishing of listings, directory publication or directory delivery, or in ensuring the accuracy of such information.

11. USWC will not use Black Hills directory listings for the marketing of telecommunications services by its own employees or those of its telephone operations line of business.

12. USWC agrees to provide Black Hills' non-published directory records the same protection accorded USWC's non-published directory records with respect to the sale of directory listings to third parties.

13. The Parties agree USWC will maintain in its processes the ability for Black Hills to ensure the formatting accuracy of the information it transmits to USWC for inclusion in the Directory Assistance database. Listing format errors will be returned to Black Hills for correction and a total count of listings received and accepted will also be provided. The Parties will work cooperatively through OBF or other industry groups to further define standards for transmittal of directory listing information.

C. Operator Call Completion.

1. The Parties will complete operator-assisted calls to each other's networks.

2. Additionally, at Black Hills' request, in conjunction with the provision of unbranded directory assistance service, USWC will provide caller-optional directory assistance call completion service which is comparable in every way to the directory assistance call completion service USWC makes available to its own end users.

VII. NONDISCRIMINATORY ACCESS TO NUMBER RESOURCES

A. Each Party will comply with Industry Carriers Compatibility Forum ("ICCF") Central Office Code Guidelines.

B. Unless the FCC adopts rules in accordance with TA 1996 that differ from the ICCF Central Office Code Administration Guidelines, USWC, where it functions as Number Administrator, will assign NXX codes to Black Hills, according to those Guidelines, on a basis no less favorable than that on which USWC assigns codes to itself or to any other entity. So long as USWC acts as the Number Administrator, the Parties agree that these Number Administrator functions will be provided without charge.

C. It shall be the responsibility of each Party to program and update its own switches and network systems to recognize and route traffic to the other Party's assigned NXX codes at all times. Neither USWC nor Black Hills shall charge each other for changes to switch routing software necessitated by the creation, assignment or reassignment or activation of NPA or NXX codes.

D. The Parties will each be responsible for the electronic input of their respective number assignment information into the LERG.

E. Each Party shall be responsible, consistent with its existing practices and any regulatory requirements, for notifying its customers of any changes in numbering

or dialing arrangements, including changes such as the introduction of new NPAs or new NXX codes.

VIII. NUMBER PORTABILITY

A. Interim Number Portability

1. Black Hills and USWC shall provide remote call forwarding functionality, or other INP capabilities, to each other at no charge, in accordance with the provisions of the FCC's First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116 ("FCC Number Portability Order").

2. The costs incurred by Black Hills and USWC of providing INP shall be recovered through a broad-based cost recovery mechanism, as described in the FCC Number Portability Order. The Parties will work together in encouraging state commissions to establish such a mechanism.

3. With regard to the division of Switched Access revenues associated with INP, each Party will bill Switched Access charges for its portion of the call. If the terminating Party is unable to identify the particular IXC carrying the forwarded call, the forwarding Party shall provide the necessary information to permit the terminating Party to issue a bill.

B. Permanent Number Portability

1. Unless otherwise determined by the FCC, the Parties will offer PNP to each other in the service territory in which both Parties offer Exchange Service as soon as technically and operationally feasible. The Parties will complete the transition to PNP in such areas on or before the dates set forth in the FCC's Number Portability Order or any modifications to those dates.

2. Both Parties will urge the FCC to require that any necessary central databases and other shared facilities should be owned and operated by a neutral third party.

3. The Parties agree that Query on Release ("QOR"), in conjunction with location routing number data for SPNP routing, may be implemented within their networks, at each Party's option and consistent with the FCC Number Portability Order, provided that QOR does not materially delay the implementation of PNP beyond the date that an FCC-approved database architecture for PNP is available. If both Parties choose to implement QOR, then the Parties will exchange, at no charge, any signaling messages required to enable QOR functionality between each other's networks.

IX. LOCAL DIALING PARITY

A. The Parties agree that they will provide local dialing parity to each other and will permit each other to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings, with no unreasonable dialing delays. In addition, USWC agrees that it will provide nondiscriminatory access to such services or information as is necessary to allow Black Hills to implement local dialing parity in accordance with the requirements of Section 251(b)(3) of TA 1996.

B. For Local Exchange and IntraLATA Toll Traffic between the Parties, neither Party's end user customers shall be required to dial any access codes or other special or extra digits to reach the end user customers of the other Party.

X. RECIPROCAL COMPENSATION ARRANGEMENTS

A. The following describes the compensation arrangements for transport and termination of Local Traffic between the Parties. For purposes of call reciprocal compensation, the initial Black Hills switch shall be treated as an end office, until such time as Black Hills deploys a tandem switch.

1. Local Calls

A. Call Termination

(1) The Parties agree that call termination rates as described in Appendix A will apply reciprocally for the termination of local/EAS traffic on a per minute of use basis.

(2) If the exchange of local/EAS traffic between the Parties is within a variation of plus or minus 5% (45% to 55%) of balance (as measured quarterly), the Parties agree that their respective call termination charges will offset one another, and no compensation will be paid for calls terminated during the following quarter.

(3) The Parties agree to perform quarterly joint traffic audits, based upon mutually agreeable measurement criteria and auditing standards. In the event that the exchange of traffic is not in balance as described above, the call termination charges in Appendix A will apply.

(4) Notwithstanding the above, the Parties agree to the presumption that traffic is in balance, and agree that no measurement needs to be conducted, until the total traffic exchanged between the Parties exceeds six million minutes per month. When the total traffic exchanged

between the Parties exceeds six million minutes per month, reciprocal compensation shall apply at the rates set forth in Appendix A (unless traffic is in balance per subsection (2) above).

B Transport

(1) If end-office local interconnection trunks between the Parties are used, no transport charges based on minutes of use shall apply. Black Hills may purchase unbundled dedicated interoffice transport from USWC at the rates set forth in Appendix A. USWC may buy private line services from Black Hills at Black Hills' tariffed intrastate rates.

(2) If local traffic is terminated to either Party's tandem, the Party originating the traffic shall pay the other the tandem switching rate per minute of use, as indicated in Appendix A, plus the Call Transport rates set forth in Appendix A.

2. Toll Calls

Applicable to intraLATA toll calls based on intrastate Switched Access rates as set forth in each Party's Switched Access tariff.

3. Transit traffic

Applicable Switched Access, Type 2 or LIS transport rates apply for the use of USWC's network to transport transit traffic. For transiting local traffic, the applicable local transit rate applies to the originating Party per Appendix A. For transiting toll traffic, the Parties will charge the applicable Switched Access rates to the responsible carrier. For terminating transiting wireless traffic, the Parties will charge their applicable rates to the wireless provider. For transiting wireless traffic, the Parties will charge each other the applicable local transit rate.

B. For intraLATA Toll Free Service calls where such service is provided by one of the Parties, the compensation set forth in subsection A, above, as well as any applicable database query charge set forth in that Party's tariff, shall be charged by the Party originating the call rather than the Party terminating the call. The Parties agree to exchange originating EMR records for intraLATA Toll Free Service calls provided by one of the Parties.

C. The Parties agree to use reasonable efforts to establish the capability to measure and bill tandem terminating interconnection minutes of use based on usage records made within each Party's network by as soon as reasonably possible. The Parties agree that end-office terminated interconnection may require exchange of originating EMR records. The Parties agree to exchange EMR records where such terminating records are not available. These records, whether developed within each Party's network or exchanged between the

Parties, shall form the sole basis for each Party to generate bills to the other Party. The Parties agree to exchange these records at no charge.

D. Measurement of minutes of use over Local Interconnection Trunk groups shall be in actual conversation seconds. The total conversation seconds over each individual Local Interconnection Trunk Group will be totaled for the entire monthly bill-round and then rounded to the next whole minute.

E. Each Party, unless both Parties agree otherwise, will provide to the other, within 15 calendar days after the end of each quarter, a usage report detailing: total traffic volume described in terms of minutes and messages terminated to each other over the Local Interconnection Trunk Groups.

F. Signaling Access to Call-Related Databases

1.1 When Black Hills is purchasing local switching from USWC, USWC will provide access via the STP to call related databases used in AIN services. The Parties agree to work in the industry to define the mediated access mechanisms for SCP access. Access to the USWC Service Management Systems (SMS) will be provided to Black Hills, via the BFR process, to activate, modify, or update information in the call related databases, equivalent to the USWC access.

1.2 USWC will offer unbundled signaling via LIS-Common Channel Signaling Capability (CCSAC). CCSAC service utilizes the SS7 network and provides access to call-related databases that reside at USWC's SCPs, such as the Line Information Database (LIDB) and the 800 Database. The access to USWC's SCPs will be mediated via the STP Port in order to assure network reliability.

1.3 CCSAC includes:

1.3.1 Entrance Facility - This element connects Black Hills' signaling point of interface with the USWC serving wire center (SWC). Black Hills may purchase this element or it may self-provision the entrance facility. If the entrance facility is self-provisioned, Black Hills would need to purchase Collocation and an Expanded Interconnection Channel Termination.

1.3.2 Direct Link Transport (DLT) - This element connects the SWC to the USWC STP. Black Hills may purchase this element or self-provision transport directly to the STP. If Black Hills provides the link to the STP, it must purchase Collocation, an Expanded Interconnection Channel Termination at the STP location, and a direct link from the EICT to the STP Port.

1.3.3 STP Port - This element provides the switching function at the STP. One STP Port is required for each DLT Link. The Port provides interaction with the Service Control Point (SCP). Port availability is limited.

1.3.4 Multiplexing - Multiplexing may be required at either/both the SWC and/or Port. The multiplexing options are the standard DS3 to DS1 and DS1 to DS0 requirements.

1.4 Access to Advanced Intelligent Network (AIN) functions is available only through the STP.

1.5 USWC will provide mediated access to SMS via the BFR process, for the purpose of activating, modifying or updating AIN service specification through its Service Creation Environment (SCE) on an equivalent basis as USWC provides to itself. SMS allows Black Hills to provision, modify, or update information in call related databases. Currently, the SCE process is predominantly manual via a service center.

1.6 The pricing for CCSAC service is provided in Appendix A.

G. If Black Hills elects to use Local Interconnection signaling arrangement option F(1) or F(2), above, in the future for its own Switched Access calls (e.g., FGB or FGD), the Parties agree to renegotiate the rates, terms and conditions prior to such use.

H. Each Party shall charge the other Party for BLV and BLVI at the rates contained in their respective tariffs.

I. If either Party terminates Directory Assistance calls over the Local Interconnection Trunk Groups to the other Party, the terminating Party shall charge the other Party for such Directory Assistance calls at the rates contained in its tariff or pursuant to a separately negotiated contract.

J. A Maintenance of Service charge applies whenever either Party requests the dispatch of the either Party's personnel for the purpose of performing maintenance activity on the Local Interconnection Trunks, and any of the following conditions exist:

1. No trouble is found in the interconnection trunks; or

2 The trouble condition results from equipment, facilities or systems not provided by the Party whose personnel were dispatched, or

3 Trouble clearance did not otherwise require a dispatch, and upon dispatch requested for repair verification, the interconnection trunk does not exceed maintenance limits.

If a Maintenance of Service initial charge has been applied and trouble is subsequently found in the facilities of the Party whose personnel were dispatched, the charge will be canceled.

Billing for Maintenance of Service is based on each half-hour or fraction thereof expended to perform the work requested. The time worked is categorized and billed at one of the following three rates:

1. basic time;

2. overtime; or

3. premium time

as defined for billing by USWC in its tariff and by Black Hills in its tariff.

XI. TELECOMMUNICATIONS SERVICES AVAILABLE FOR RESALE

The Parties shall provide for wholesale purchase of all retail services sold to end users in accordance with the price structure set forth in Appendix A, until the Commission determines the permanent avoided cost discount in its cost study proceeding.

Resold services are available only where facilities currently exist and are capable of providing such services without construction of additional facilities or enhancement of existing facilities. However, if Black Hills requests that facilities be constructed or enhanced to provide resold services, USWC will review such requests on a case by case basis and determine, in its sole discretion, if it is economically feasible for USWC to build or enhance facilities. If USWC decides to build or enhance the requested facilities, USWC will develop and provide to Black Hills a price quote for construction. If the quote is accepted, Black Hills will be billed the quoted price and construction will commence after receipt of payment.

XII. COLLOCATION AND MID-SPAN MEETS

A. General Description

1 Collocation allows Black Hills to obtain dedicated space in a USWC Wire Center and to place equipment in such spaces to interconnect with the USWC network. Black Hills may request Collocation at other USWC locations pursuant to the BFR Process or through additional Interconnection negotiations under the Act. USWC will provide the resources necessary for the operation and economical use of collocated equipment. USWC designated POIs for network interconnection can be established for Virtual or Physical Collocation arrangements.

2 Except when Black Hills purchases USWC's unbundled network transmission elements, Black Hills will construct its own fiber optic cable

to the USWC-designated Point of Interconnection. USWC will extend Black Hills' fiber optic cable from the POI to the cable vault within the Wire Center. For the purposes of Collocation, the POI shall be that point outside the USWC central office where the Black Hills and USWC fibers meet. If necessary, USWC may bring the cable into compliance with USWC internal fire code standards and extend the cable to the collocated space.

3. Black Hills will be provided two points of entry into the USWC Wire Center only when there are at least two existing entry points for USWC cable and when there are vacant entrance ducts in both. USWC will promptly remove any unused cabling to free up entrance ducts when no other ducts are available. Cable entry will be limited to fiber facilities.

4. Black Hills may collocate transmission equipment to terminate basic transmission facilities. Black Hills may request Collocation of other equipment pursuant to the BFR Process or through additional Interconnection negotiations under the Act. Black Hills must identify what equipment will be installed, to allow for USWC to use this information in engineering the power, floor loading, heat release, environmental particulant level, and HVAC.

5. Nothing in this part shall be construed to limit Black Hills' ability to obtain both Virtual and Physical Collocation in a single location.

B. Virtual Collocation

1. USWC shall provide Virtual Collocation for the purpose of Interconnection or access to unbundled Network Elements subject to the rates, terms and conditions of this Agreement.

2. Black Hills will not have physical access to the USWC wire center building pursuant to a Virtual Collocation arrangement.

3. Black Hills will be responsible for obtaining and providing to USWC administrative codes, e.g., common language codes, for all equipment specified by Black Hills and installed in Wire Center buildings.

4. Black Hills will be responsible for payment of training of USWC employees for the maintenance, operation and installation of Black Hills' virtually collocated equipment when that equipment is different than the equipment used by USWC.

5 Black Hills will be responsible for payment of charges incurred in the maintenance and/or repair of Black Hills' virtually collocated equipment.

6 USWC does not guarantee the reliability of Black Hills' virtually collocated equipment

7. Black Hills is responsible for ensuring the functionality of virtually collocated SONET equipment provided by different manufacturers.

8. Maintenance Labor, Inspector Labor, Engineering Labor and Equipment Labor business hours are considered to be Monday through Friday, 8:00am to 5:00pm (local time) and after business hours are after 5:00pm and before 8:00am (local time), Monday through Friday, all day Saturday, Sunday and holidays.

9. Black Hills will transfer possession of Black Hills' virtually collocated equipment to USWC via a no cost lease. The sole purpose of the lease is to provide USWC with exclusive possessory rights to Black Hills' virtually collocated equipment. Title to the Black Hills virtually collocated equipment shall not pass to USWC.

10. Installation and maintenance of Black Hills' virtually collocated equipment will be performed by USWC or a USWC authorized vendor.

11. Black Hills shall ensure that upon receipt of the Black Hills virtually collocated equipment by USWC, all warranties and access to ongoing technical support are passed through to USWC, all at Black Hills' expense. Black Hills shall advise the manufacturer and seller of the virtually collocated equipment that Black Hills' equipment will be possessed, installed and maintained by USWC.

12. Black Hills' virtually collocated equipment must comply with the Bellcore Network Equipment Building System (NEBS) Generic Equipment Requirements TR-NWT-000063, USWC Wire Center environmental and transmission standards and any statutory (local, state or federal) and/or regulatory requirements in effect at the time of equipment installation or that subsequently become effective. Black Hills shall provide USWC interface specifications (e.g., electrical, functional, physical and software) of Black Hills' virtually collocated equipment.

13. USWC may restrict the type of virtually collocated equipment. USWC will only permit basic transmission terminating equipment to be virtually collocated by Black Hills. Black Hills may request Collocation of other equipment pursuant to the BFR Process or through additional Interconnection negotiations under the Act.

14. Black Hills must specify all software options and associated plug-ins for its virtually collocated equipment.

15. Black Hills is responsible for purchasing and maintaining a supply of spares. Upon failure of Black Hills' virtually collocated equipment, Black Hills is responsible for transportation and delivery of maintenance spares to USWC at the Wire Center housing the failed equipment.

C. Physical Collocation

1. USWC shall provide to Black Hills Physical Collocation of equipment necessary for Interconnection or for access to unbundled Network Elements, except that USWC may provide for Virtual Collocation if USWC demonstrates to the Commission that Physical Collocation is not practical for technical reasons or because of space limitations, as provided in Section 251(c)(6) of the Act. USWC shall provide such Collocation for the purpose of Interconnection or access to unbundled Network Elements, except as otherwise mutually agreed to in writing by the Parties or as required by the FCC or the appropriate Commission subject to the rates, terms and conditions of this Agreement.

2. Where Black Hills is virtually collocated in a premises which was initially prepared for Virtual Collocation, Black Hills may elect to (i) retain its Virtual Collocation in that premises and expand that Virtual Collocation according to the rates, terms and conditions of this Agreement, or (ii) unless it is not practical for technical reasons or because of space limitations, convert its Virtual Collocation at such premises to Physical Collocation, in which case Black Hills shall coordinate the construction and rearrangement with USWC of its equipment (IDLC and transmission) and circuits for which Black Hills shall pay USWC at applicable rates, and pursuant to the other terms and conditions in this Agreement. In addition, all applicable Physical Collocation recurring charges shall apply.

3. Black Hills will be allowed access to the POI on non-discriminatory terms. Black Hills owns and is responsible for the installation, maintenance and repair of its transmission equipment located within the space rented from USWC.

4. Black Hills must use leased space promptly and may not warehouse space for later use or sublease to another provider. Physical Collocation is offered in Wire Centers on a space-available, first come, first-served basis.

5. The minimum standard leasable amount of floor space is 100 square feet. Black Hills must efficiently use the leased space; no more than 50% of the floor space may be used for storage cabinets and work surfaces. The Commission will be the final arbitrator in points of dispute between the Parties.

6. Black Hills' leased floor space will be separated from other competitive providers and USWC space through a cage enclosure. Black Hills may elect to have USWC construct the enclosure, or choose from USWC approved contractors to construct the cage, meeting USWC's installation Technical Publication 77350. Black Hills must determine at the time of application whether USWC or an approved contractor will construct the cage enclosure.

7. The following standard features will be provided by USWC:

7.1 Heating, ventilation and air conditioning.

7.2 Smoke/fire detection and any other building code requirement.

8. USWC Responsibilities.

8.1 Design the floor space within each wire center which will constitute Black Hills' leased space.

8.2 Ensure that the necessary construction work is performed to build Black Hills' leased physical space and the riser from the vault to the leased physical space.

8.3 Develop a quotation specific to Black Hills' request.

8.4 Extend USWC-provided and owned fiber optic cable from the POI through the cable vault and extend the cable to Black Hills' leased physical space or place the cable in fire retardant tubing prior to extension to Black Hills' leased physical space.

8.5 Installation and maintenance and all related activity necessary to provide channel termination between USWC's and Black Hills' equipment.

8.6 Work cooperatively with Black Hills in matters of joint testing and maintenance.

9. Black Hills Responsibilities

9.1 Determine who constructs the cage or enclosure for the physical space.

9.2 Where applicable, procure, install and maintain all fiber optic facilities up to the USWC designated POI.

Where applicable, procure and provide all necessary fiber interconnection cable and connectors from the USWC fiber distribution panel and the cage enclosure.

Where applicable, procure and provide all necessary cable and connectors from the cage to the USWC distributing frame designated as the single point of termination (SPOT).

9 3 Install, maintain, repair and service all Black Hills' equipment located in the leased physical space.

9 4 Ensure that all equipment installed by Black Hills complies with Bellcore Network Equipment Building System Generic Equipment requirements, USWC Wire Center environmental and transmission standards, and any statutory (local, federal, or state) or regulatory requirements in effect at the time of equipment installation or that subsequently become effective.

10. Once construction is complete for Physical Collocation and Black Hills has accepted its leased physical space, Black Hills may order its DS0, DS1, DS3 or other Expanded Interconnection Channel Terminations.

11. Black Hills may not extend USWC dark fiber to Black Hills' leased physical space or connect DS1/DS3 Channel Terminations to USWC dark fiber.

12. If, at any time, USWC determines that the equipment or the installation does not meet requirements, Black Hills will be responsible for the costs associated with the removal, modification to, or installation of the equipment to bring it into compliance. If Black Hills fails to correct any non-compliance within fifteen (15) days of written notice of non-compliance, USWC may have the equipment removed or the condition corrected at Black Hills' expense.

13. If, during installation, USWC determines Black Hills activities or equipment are unsafe, non-standard or in violation of any applicable laws or regulations, USWC has the right to stop work until the situation is remedied. If such conditions pose an immediate threat to the safety of USWC employees, interfere with the performance of USWC's service obligations, or pose an immediate threat to the physical integrity of the conduit system or the cable facilities, USWC may perform such work and/or take action as is necessary to correct the condition at Black Hills' expense.

0 Collocation Rate Elements

1 Common Rate Elements

The following rate elements specified in Appendix A are common to both Virtual and Physical Collocation:

1 1 Quote Preparation Fee. This covers the work involved in verifying space and developing a quotation for Black Hills for the total costs involved in its collocation request.

1.2 Entrance Facility. Provides for fiber optic cable on a two-fiber basis from the Point of Interconnection utilizing USWC owned, conventional single mode type of fiber optic cable to the collocated equipment (for Virtual Collocation) or to the leased space (for Physical Collocation). Entrance facility includes riser, fiber placement, entrance closure, conduit/innerduct, and core drilling.

1.3 Cable Splicing. Represents the labor and equipment to perform a subsequent splice to the Black Hills provided fiber optic cable after the initial installation splice. Includes per-setup and per-fiber-spliced rate elements.

1.4 -48 Volt Power. Provides -48 volt power to the Black Hills collocated equipment. Charged on a per ampere basis.

1.5 48 Volt Power Cable. Provides for the transmission of -48 volt DC power to the collocated equipment. It includes engineering, furnishing and installing the main distribution bay power breaker, associated power cable, cable rack and local power bay to the closest power distribution bay. It also includes the power cable (feeders) A and B from the local power distribution bay to the leased physical space (for Physical Collocation) or to the collocated equipment (for Virtual Collocation).

1.6 Inspector Labor. Provides for the USWC qualified personnel necessary when Black Hills requires access to the Point of Interconnection after the initial installation or access to its physical collocation floor space, where an escort is required. A call-out of an inspector after business hours is subject to a minimum charge of four hours. The minimum call-out charge shall apply when no other employee is present in the location, and an 'off-shift' USWC employee (or contract employee) is required to go 'on-shift' on behalf of Black Hills.

1.7 Expanded Interconnection Channel Termination (EICT). Telecommunications interconnection between Black Hills' collocated equipment and USWC's network is accomplished via an Expanded Interconnection Channel Termination (EICT). This element can be at the DS0, DS1, DS3 or other level depending on the USWC service it is connecting to. Connection to any other network or telecommunications source within the Wire Center is allowed only through USWC services.

1.8 Expanded Interconnection Channel Regeneration. Required when the distance from the leased physical

space (for Physical Collocation) or from the collocated equipment (for Virtual Collocation) to the USWC network is of sufficient length to require regeneration.

1.9 Collocation Cross Connection. A charge to connect two collocated Co-Providers within the same serving wire center. The cross connect is between like intermediary frames (e.g., DS0, DS1) within USWC's serving wire center. There is a monthly recurring charge and a nonrecurring installation charge, both will be billed to the specific Co-Provider requesting the cross connect.

1.10 Collocation Single Point of Termination (SPOT). A charge associated with the installation, change and maintenance of Black Hills' equipment on the USWC SPOT cross-connect bay or frame within a wire center. Recurring and nonrecurring charges are assessed per two-wire pair, per Analog PLTS/DDS termination, Unbundled Network terminations, and per termination for each DS1 or DS3 requested.

1.11 Collocation Cable Racking. A nonrecurring charge for cable racking required between Black Hills' equipment and USWC's SPOT. Cable Racking is assessed on a per foot basis for each two-wire pair, per Analog PLTS/DDS termination, Unbundled Network terminations and per termination for each DS1 or DS3 requested.

1.12 Collocation Grounding. A charge associated with providing grounding for Black Hills' cage enclosure and equipment. Recurring and nonrecurring charges are assessed per foot to Black Hills' cage enclosure.

E Physical Collocation Rate Elements

The following rate elements, as specified in Appendix A, apply only to Physical Collocation arrangements:

1 Floor Space Rental. Provides the monthly rent for the leased physical space, property taxes and base operating cost without -48 volt DC power. Includes convenience 110 AC, 15 amp electrical outlets provided in accordance with local codes and may not be used to power transmission equipment or -48 volt DC power generating equipment. Also includes maintenance for the leased space; provides for the preventative maintenance (climate controls, filters, fire and life systems and alarms, mechanical systems, standard HVAC); biweekly housekeeping services (sweeping, spot cleaning, trash removal) of the USWC

wire center areas surrounding the leased physical space and general repair and maintenance.

2. Enclosure Buildout. The Cage Enclosure Buildout element includes the material and labor to construct the enclosure. Black Hills may choose from USWC approved contractors to construct the cage, in accordance with USWC's installation Technical Publication 77350. It includes a nine foot cage enclosure, air conditioning (to support Black Hills loads specified), lighting (not to exceed 2 watts per square foot), and convenience outlets (3 per cage or number required by building code). Also provides for humidification, if required. Pricing for the Enclosure Buildout will be provided on an individual basis due to the uniqueness of Black Hills' requirements, central office structure and arrangements.

F. Virtual Collocation Rate Elements

The following rate elements, as specified in Appendix A, apply uniquely to Virtual Collocation:

1. Maintenance Labor – Provides for the labor necessary for repair of out of service and/or service-affecting conditions and preventative maintenance of the Black Hills virtually collocated equipment. Black Hills is responsible for ordering maintenance spares. USWC will perform maintenance and/or repair work upon receipt of the replacement maintenance spare and/or equipment for Black Hills. A call-out of a maintenance technician after business hours is subject to a minimum charge as specified above.

2. Training Labor – Provides for the billing of vendor-provided training for USWC personnel on a metropolitan service area basis, necessary for Black Hills virtually collocated equipment which is different from USWC provided equipment. USWC will require three USWC employees to be trained per metropolitan service area in which the Black Hills virtually collocated equipment is located. If, by an act of USWC, trained employees are relocated, retired, or are no longer available, USWC will not require Black Hills to provide training for additional USWC employees for the same virtually collocated equipment in the same metropolitan area. The amount of training billed to Black Hills will be reduced by half, should a second collocator in the same metropolitan area select the same virtually collocated equipment as Black Hills.

3. Equipment Bay – Provides mounting space for the Black Hills virtually collocated equipment. Each bay includes the 7 foot bay, its installation, all necessary environmental supports. Mounting space on the bay, including space for the fuse panel and air gaps necessary for heat dissipation is limited to 78 inches. The monthly rate is applied per shelf.

4. Engineering Labor – Provides the planning and engineering of the Black Hills virtually collocated equipment at the time of installation, change or removal.

5. Installation Labor – Provides for the installation, change or removal of the Black Hills virtually collocated equipment.

G. Collocation Installation Intervals

The following intervals are common to both Virtual and Physical Collocation:

1. Acknowledgment of Floor Space Availability. Within fifteen days of the receipt by USWC from Black Hills of a Request for Collocation, USWC will notify Black Hills whether sufficient floor space is available to accommodate Black Hills' request.

2. Quote Preparation. Within twenty-five business days of Black Hills' receipt of space availability by USWC, USWC will provide Black Hills with a written quotation containing all nonrecurring charges for the requested collocation arrangement.

3. Quote Acceptance. Within thirty days of the receipt by Black Hills of the USWC quotation, Black Hills will accept the USWC proposed quotation. Acceptance shall require payment to USWC of fifty percent of the non-recurring charges provided on the quotation.

4. Completion of Enclosure Construction (Physical Collocation only). Within 90 days of the acceptance of the quotation by Black Hills, the construction of the necessary cage enclosure shall be completed, subject to any delays caused by government agencies beyond USWC's control. At this time, the leased floor space will be available to Black Hills for installation of its collocated equipment.

5. Completion of Collocated Equipment Installation (Virtual Collocation only) -- USWC shall complete the installation of Black Hills' collocated equipment within 90 days of USWC's receipt of Black Hills' collocated equipment. The installation of line cards and other minor modifications shall be performed by USWC on intervals equivalent to those that USWC applies to itself, but in no instance shall any such interval exceed 90 days

14 Mid-Span Meet Arrangements

The Parties may also choose to interconnect via a Mid-Span Meet. Such interconnection shall be limited to facilities provided for the interconnection of any local exchange or jointly provided switched access traffic between the Parties.

1 Physical Arrangements of Mid Span Meets: In a Mid-Span Meet, each Party extends its facilities to meet the other Party. The point where the facilities meet is the Mid-Span point. Each Party bears its own costs to establish and maintain a Mid-Span Meet arrangement. However, the Parties also agree that a technical arrangement for a Mid-Span Meet may involve one Party placing and extending its fiber facilities to the Wire Center of the other Party, with sufficient additional length on the fiber to permit the receiving Party to terminate the fiber without requiring splicing of the fiber facilities prior to the terminal equipment in the receiving Party's Wire Center. In this situation, the Parties will negotiate reasonable compensation to be paid to the Party extending the facilities for the associated labor, materials, and conduit space used in extending its facilities beyond a negotiated Mid-Span point.

2 Engineering Specifications: The Parties agree to establish technical interface specifications for Mid-Span Meet arrangements that permit the successful interconnection and completion of traffic routed over the facilities that interconnect at the Mid-Span Meet. The technical specifications will be designed so that each Party may, as far as is technically feasible, independently select the transmission, multiplexing, and fiber terminating equipment to be used on its side of the Mid-Span Meet. Requirements for such interconnection specifications will be defined in joint engineering planning sessions between the Parties. The Parties will use good faith efforts to develop and agree on these specifications within 90 days of the determination by the Parties that such specifications shall be implemented, and in any case, prior to the establishment of any Mid-Span Meet arrangements between them. In the event the Parties cannot agree on the technical specifications required, the Parties will, after discussion at the Vice Presidential level, interconnect with each other using one of the other interconnection arrangements defined elsewhere in this Agreement.

Prior to the establishment of any Mid-Span Meet arrangement, the Parties agree to jointly develop all additional necessary requirements for such interconnection, including but not limited to such items as control and assignment of facilities within the fiber Mid-Span Meet arrangement, network management requirements, maintenance responsibilities, and operational testing and acceptance requirements for installation of Mid-Span Meets.

XIII. MEET POINT BILLING ARRANGEMENTS

A. For the purposes of this Section, the Parties agree that tandem and end office subtending arrangements shall be according to LERG with respect to interconnection between the Parties for jointly-provided Switched Access arrangements, except as mutually amended by the Parties. The Parties agree that where they jointly provide Switched Access services to third parties, they will share revenues received for such services in the following manner:

1. Each Party will bill the Switched Access customer based on its own Switched Access rates (multiple bill, multiple tariff).

2. Where the tandem Party switches directly to the end office Party's end office (and actually provides the transport to that end office) and the POI for the Meet Point Trunk Group:

   a. is in the Wire Center where the end office is located, the tandem Party receives 100% of the mileage-sensitive portion of tandem-switched transport; and

   b. is in a Wire Center other than where the end office is located, the end office Party receives a proportionate share of the mileage-sensitive portion of tandem-switched transport, to be reviewed annually.

   The Parties agree to file billing percentages in the National Exchange Carrier Association (NECA). Black Hills will file the initial data, and USWC will concur in the percentages within 30 days.

B. The Parties will bill Switched Access customers in accordance with the MECAB and MECOD guidelines. The Parties agree to work cooperatively to support the work of the OBF and to implement OBF changes to MECAB and MECOD in accordance with the OBF guidelines.

C. The Parties will use reasonable efforts to create the ability to provide to each other, when requested, the Switched Access Detail Usage Data and/or the Switched Access Summary Usage Data required for the billing and/or validation of the jointly provided Switched Access such as Switched Access FGB and FGD. The Parties agree to provide this data to each other at no charge.

D. Data Format and Data Transfer.

1. The tandem Party shall provide to the end office Party, where requested, the billing name and billing address of all IXCs originating or terminating traffic at the end office Party's end office.

2. Based on the individual call flows that can occur, certain types of records will have to be exchanged for billing purposes or the verification of billing. The Parties agree that the exchange of billing records will utilize the

Bellcore standard EMR 01, 11, 50, and 20 formats. These records will be exchanged on magnetic tape or via electronic data transfer (when available).

3 When Black Hills and USWC bill for jointly provided Switched Access service, the Parties will mutually agree to the format, time frame, and settlement terms that will be utilized. The Parties agree to work cooperatively in the industry fora to establish an industry format to be used by all carriers.

4 The end office Party shall provide to the tandem Party the Switched Access Detail Usage Data (category 1101XX records) for originating access usage on magnetic tape or via NDM, on a monthly basis, within fourteen (14) days of the last day of the billing period.

5 Upon request, when the tandem Party records terminating access usage or IXC Toll Free Service usage on behalf of the end office Party, the tandem Party will send the end office Party Switched Access Summary Usage Data (category 1150XX records) for usage validation.

6 Errors may be discovered by Black Hills, the IXC or USWC. Each Party agrees to provide the other Party with notification of any discovered errors within two (2) business days of the discovery.

7 In the event of a loss of data, both Parties shall cooperate to reconstruct the lost data and if such reconstruction is not possible, shall accept a reasonable estimate of the lost data based upon three (3) to twelve (12) months of prior usage data.

8 All data associated with the processing and settlement of messages under this Agreement shall be maintained by the Parties for the period currently used by each Party for such information in compliance with legal and/or regulatory rulings. Different data retention periods require the agreement of the Parties.

XIV. LOCAL INTERCONNECTION DATA EXCHANGE FOR BILLING

There are certain types of calls or types of interconnection that require exchange of billing records between the Parties, including, for example, alternate billed and Toll Free Service calls. The Parties agree that all call types must be routed between the networks, accounted for, and settled among the parties. Certain calls will be handled via the Parties' respective operator service platforms. The Parties agree to utilize, where possible and appropriate, existing accounting and settlement systems to bill, exchange records and settle revenue.

A The exchange of billing records for alternate billed calls (e.g., calling card, bill-to-third and collect) will be distributed through the existing CMDS processes, unless otherwise separately agreed to by the Parties.

B. Inter-Company Settlements ("ICS") revenues will be settled through the Calling Card and Toll Number Settlement System ("CATS"). Each Party will provide for its own arrangements for participation in the CATS processes, through direct participation or a hosting arrangement with a direct participant.

C. Non-ICS revenue is defined as collect calls, calling card calls, and billed to third number calls which originate on one service provider's network and terminate on another service provider's network in the same Local Access Transport Area ("LATA"). The Parties agree to negotiate and execute an agreement within 30 days of the execution of this Agreement for settlement of non-ICS revenue. This separate arrangement is necessary since existing CATS processes do not permit the use of CATS for non-ICS revenue. The Parties agree that the CMDS system can be used to transport the call records for this traffic.

D. Both Parties will provide the appropriate call records to the intraLATA Toll Free Service Provider, thus permitting the Service Provider to bill its subscribers for the inbound Toll Free Service. No adjustments to bills via tapes, disks or NDM will be made without the mutual agreement of the Parties.

6. SERVICE STANDARDS

USWC shall provision, install, maintain, repair and monitor all services, interconnection facilities, unbundled elements, collocation elements, and all other interconnection arrangements, facilities and services ordered by Black Hills to at least the same level of quality which USWC provides to itself or others and in compliance with any quality of service requirements imposed by the Commission.

In the event of a dispute over performance of the standards, the Parties will use an expedited arbitration proceeding with a mutually agreed upon arbitrator to resolve the dispute. The arbitration shall permit the arbitrator to award actual damages when appropriate.

7. INTERIM RATES

USWC's rates set forth in Appendix A are interim, and those rates will be corrected and this Agreement amended, to reflect the permanent rates determined by the Commission in its general cost methodology and rate docket. Those permanent rates will be applied on a "going forward" basis.

8. AUDIT PROCESS

"Audit" shall mean the comprehensive review of:

A. Data used in the billing process for services performed and facilities provided under this Agreement, and

(B) data relevant to provisioning and maintenance for services performed or facilities provided by either of the Parties for itself or others that are similar to the services performed or facilities provided under this Agreement for interconnection or access to unbundled elements.

The data referred to in subsection (B), above, shall be relevant to any performance standards that are adopted in connection with this Agreement, through negotiation, arbitration or otherwise.

The Audit shall take place under the following conditions:

A. Either Party may request to perform an Audit.

B. The Audit shall occur upon 10 business days written notice by the requesting Party to the non-requesting Party.

C. The Audit shall occur during normal business hours.

D. There shall be no more than one Audit requested by each Party under this Agreement in any 12-month period.

E. The requesting Party may review the non-requesting Party's records, books and documents, as may reasonably contain information relevant to the operation of this Agreement.

F. The location of the Audit shall be the location where the requested records, books and documents are retained in the normal course of business.

G. All transactions under this Agreement which are over 24 months old will be considered accepted and no longer subject to Audit.

H. Each Party shall bear its own expenses occasioned by the Audit, provided that the expense of any special data collection shall be born by the requesting Party.

I. The Party requesting the Audit may request that an Audit be conducted by a mutually agreed-to independent auditor. Under this circumstance, the costs of the independent auditor shall be paid for by the Party requesting the Audit.

J. In the event that the non-requesting Party requests that the Audit be performed by an independent auditor, the Parties shall mutually agree to the selection of the independent auditor. Under this circumstance, the costs of the independent auditor shall be shared equally by the Parties.

K. The Parties agree that if an Audit discloses error(s), the Party responsible for the error(s) shall, in a timely manner, undertake corrective action for such error(s).

L. All information received or reviewed by the requesting Party or the independent auditor in connection with the Audit is to be considered Proprietary Information as defined by this Agreement. The non-requesting Party reserves the right to require any non-employee who is involved directly or indirectly in any Audit or the resolution of its findings as described above to execute a nondisclosure agreement satisfactory to the non-requesting Party.

XVII. AUDIOTEXT AND MASS ANNOUNCEMENT SERVICES

A. The Parties agree that access to the audiotext, mass announcement and information services of each Party should be made available to the other Party upon execution of an agreement defining terms for billing and compensation of such calls. Services included in this category include 976 calls, whether flat rated or usage sensitive, IntraLATA 900 services and other IntraLATA 976-like services or as available. Such calls will be routed over the Local Interconnection Trunks.

B. Black Hills and USWC will work together in good faith to negotiate and execute the agreement for billing and compensation for these services within 90 days of the execution of this Agreement. The Parties agree that their separate agreement on audiotext and mass announcement services will include details concerning the creation, exchange and rating of records, all of which will occur without any explicit charge between the Parties, as well as a process for the handling of uncollectibles so that the originating Party does not have any responsibility for uncollectibles.

C. Until such time that such an agreement is executed, Black Hills may choose to block such calls, or Black Hills will agree to back-bill and compensate retroactively for such calls once the subsequent agreement is executed retroactive to the effective date of this Agreement.

D. Usage Sensitive Compensation.

All audiotext and mass announcement calls shall be considered toll calls for purposes of reciprocal compensation between the Parties. Compensation will be paid based on the compensation for toll calls referenced in this Agreement with respect to reciprocal compensation between the Parties, except that such compensation shall be paid by the Party terminating the call, rather than the Party originating the call.

E. Billing and Collection Compensation.

Billing and collection compensation will be dealt with in the agreement referenced in this section

IX. DISPUTE RESOLUTION AND BINDING ARBITRATION

The Parties agree that in the event of a default or violation hereunder, or for any dispute arising under this Agreement or related agreements the Parties may have in connection with this Agreement, the Parties shall first confer to discuss the dispute and seek resolution prior to initiating any dispute resolution action, or before authorizing any public statement about or authorizing disclosure of the nature of the dispute to any third party. Such conference shall occur at least at the Vice President level for each Party. In the case of USWC, its Vice President for Interconnection, or equivalent officer, shall participate in the meet and confer meeting, and Black Hills' equivalent officer, shall participate. In the event the Parties cannot resolve the dispute, they will employ the following procedure:

A Any controversy or claims arising out of or relating to this Agreement or any breach hereof, shall be settled by arbitration in accord with the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). Such arbitration shall be held in the State where the dispute arises or any other location to which the Parties agree. Written notice of intent to arbitrate shall be served on the opposing Party at least twenty (20) business days prior to the filing of such notice at the appropriate AAA regional office.

B The Parties agree to request an expedited hearing before the AAA and, if the AAA can arrange such, the hearing shall commence within sixty (60) days of the filing of the arbitration claim. If the AAA is not able to arrange for the hearing to be held within sixty (60) days of such filing, then the hearing shall commence on the AAA's first available date thereafter, but within ninety (90) days of the original filing of the arbitration claim. For disputes involving an alleged failure of a party to adhere to performance standards, the arbitrator shall issue a decision on the matter within ninety (90) days of the request for arbitration.

C Each Party shall bear its own costs and attorneys' fees, and the Parties shall share equally the fees and expenses of the arbitrator.

D The judgment upon the award rendered may be entered in the highest Court of the forum capable of rendering such judgment, either State or Federal, having jurisdiction and shall be deemed final and binding on both of the Parties.

X. FORCE MAJEURE

Neither Party shall be responsible for delays or failures in performance resulting from acts or occurrences beyond the reasonable control of such Party, regardless of whether such delays or failures in performance were foreseen or foreseeable as of the date of this Agreement, including, without limitation: fire, explosion, acts of God, war, revolution, civil commotion, or acts of public enemies; any law, order, regulation, or ordinance of any government or legal body; strikes; or delays caused by the other Party or any other circumstances beyond the Party's reasonable control. In such event, the Party affected shall, upon giving prompt notice to the other Party, be excused from such performance on a day-to-day basis to the extent of such interference (and the other Party shall

likewise be excused from performance of its obligations on a day-for-day basis to the extent such Party's obligations relate to the performance so interfered with). The affected Party shall act in good faith to avoid or remove the cause of non-performance and both Parties shall proceed to perform with dispatch once the causes are removed or cease.

XXI. COMMISSION DECISION

This Agreement shall at all times be subject to such review by the Commission or FCC as permitted by TA 1996. If any such review renders the Agreement inoperable or creates any ambiguity or requirement for further amendment to the Agreement, the Parties will negotiate in good faith to agree upon any necessary amendments to the Agreement.

XXII. TERM OF AGREEMENT

This Agreement shall terminate on December 1, 2000. The Parties agree to commence negotiations on a new agreement no less than six (6) months before the expiration of this Agreement.

XXIII. EFFECTIVE DATE

This Agreement shall become effective June 15, 1998.

XXIV. AMENDMENT OF AGREEMENT

Black Hills and USWC may mutually agree to amend this Agreement in writing. Since it is possible that amendments to this Agreement may be needed to fully satisfy the purposes and objectives of this Agreement, the Parties agree to work cooperatively, promptly and in good faith to negotiate and implement any such additions, changes and corrections to this Agreement.

XXV. LIMITATION OF LIABILITY

Except as otherwise provided herein, neither Party shall be liable to the other in connection with the provision or use of services offered under this Agreement for indirect, incidental, consequential, special damages, including (without limitation) damages for lost profits, regardless of the form of action, whether in contract, indemnity, warranty, strict liability, or tort.

XXVI. INDEMNITY

Each Party shall indemnify and hold the other harmless from any liabilities, claims or demands (including the costs, expenses and reasonable attorney's fees on account thereof) that may be made by third parties for:

a. personal injuries, including death, or

b. damage to tangible property

resulting from the sole negligence and/or sole willful misconduct of that Party, its employees or agents in the performance of this Agreement. Each Party shall defend the other at the other's request against any such liability, claim or demand. Each Party shall notify the other promptly of written claims or demands against such Party of which the other Party is solely responsible hereunder.

XXVII. ASSIGNMENT

Each party may assign this Agreement to a corporate affiliate or an entity under its common control or an entity acquiring all or substantially all of its assets or equity by providing prior written notice to the other Party of such assignment or transfer. Neither Party, however, may assign or transfer (whether by operation of law or otherwise) this Agreement (or any rights or obligations hereunder) to any other third party without the prior written consent of the other Party. Consent to such assignment may not be unreasonably withheld. Any attempted assignment that is not permitted is void ab initio. Without limiting the generality of the foregoing, this Assignment shall be binding upon and shall inure to the benefit of the Parties' respective successors and assigns.

XXVIII. CONTROLLING LAW

This Agreement was negotiated by the Parties in accordance with the terms of TA 1996 and the laws of the State of South Dakota. It shall be interpreted solely in accordance with the terms of TA 1996 and the applicable state law in the State of South Dakota.

XXIX. DEFAULT

If either Party believes the other is in breach of the Agreement or otherwise in violation of law, it shall first give sixty (60) days' notice of such breach or violation and an opportunity for the allegedly defaulting Party to cure. Thereafter, the Parties shall employ the Dispute Resolution and Arbitration procedures set forth in this Agreement.

XXX. NONDISCLOSURE

A. All information, including but not limited to specifications, microfilm, photocopies, magnetic disks, magnetic tapes, drawings, sketches, models, samples, tools,

technical information, data, employee records, maps, financial reports, and market data, (i) furnished by one Party to the other Party dealing with customer specific, facility specific, or usage specific information, other than customer information communicated for the purpose of publication of directory database inclusion, or (ii) in written, graphic, electromagnetic, or other tangible form and marked at the time of delivery as "Confidential" or "Proprietary", or (iii) communicated orally and declared to the receiving Party at the time of delivery, or by written notice given to the receiving Party within ten (10) days after delivery, to be "Confidential" or "Proprietary" (collectively referred to as "Proprietary Information"), shall remain the property of the disclosing Party. A Party who receives Proprietary Information via an oral communication may request written confirmation that the material is Proprietary Information. A Party who delivers Proprietary Information via an oral communication may request written confirmation that the Party receiving the information understands that the material is Proprietary Information.

B. Upon request by the disclosing Party, the receiving Party shall return all tangible copies of Proprietary Information, whether written, graphic or otherwise, except that the receiving Party may retain one copy for archival purposes.

C. Each Party shall keep all of the other Party's Proprietary Information confidential and shall use the other Party's Proprietary Information only in connection with this Agreement. Neither Party shall use the other Party's Proprietary Information for any other purpose except upon such terms and conditions as may be agreed upon between the Parties in writing.

D. Unless otherwise agreed, the obligations of confidentiality and non-use set forth in this Agreement do not apply to such Proprietary Information as:

1. was at the time of receipt already known to the receiving Party free of any obligation to keep it confidential evidenced by written records prepared prior to delivery by the disclosing Party; or

2. is or becomes publicly known through no wrongful act of the receiving Party; or

3. is rightfully received from a third person having no direct or indirect secrecy or confidentiality obligation to the disclosing Party with respect to such information; or

4 is independently developed by an employee, agent, or contractor of the receiving Party which individual is not involved in any manner with the provision of services pursuant to the Agreement and does not have any direct or indirect access to the Proprietary Information; or

5 is disclosed to a third person by the disclosing Party without similar restrictions on such third person's rights; or

6 is approved for release by written authorization of the disclosing Party; or

7. is required to be made public by the receiving Party pursuant to applicable law or regulation provided that the receiving Party shall give sufficient notice of the requirement to the disclosing Party to enable the disclosing Party to seek protective orders.

E. Effective Date Of This Section. Notwithstanding any other provision of this Agreement, the Proprietary Information provisions of this Agreement shall apply to all information furnished by either Party to the other in furtherance of the purpose of this Agreement, even if furnished before the date of this Agreement.

XXXI. EXECUTION IN DUPLICATE

This Agreement may be executed in duplicate copies, and, upon said execution, shall be treated as an executed document.

XXXII. MOST FAVORABLE TERMS AND TREATMENT

The Parties agree that the provisions of Section 252(i) of TA 1996 shall apply, including state and federal interpretive regulations in effect from time to time.

XXXIII. SERVICE PERFORMANCE RESULTS

A. USWC agrees to provide to Black Hills the same level of service that USWC provides to itself and/or its affiliates as determined by measuring and comparing a statistically significant number of activities listed below.

1. For those services procured by Black Hills and unless otherwise noted below, USWC shall measure its results and those of its affiliates as a percentage. USWC shall also measure the percentage results of Black Hills.

   Black Hills agrees to measure its performance related to these performance indicators in providing service to USWC.

2. In some instances, USWC may not provide the listed service to itself or its affiliates. If USWC does not provide a statistically significant number of a listed activity for itself or its affiliates, USWC will provide data which will allow comparison between Black Hills' performance results and the average performance results of the same performance indicator for a statistically significant number of total activities provided to all other Co-Providers within the state in which the service was provided.

3. In no event shall percentage results be provided if the number of measured activities is less than a statistically significant universe

of fewer than sixty (60) activities during the time period of measurement.

4. The list of performance indicators to be measured are as follows:

Resale Indicators
Residence Installation Intervals Offered (Facilities in Place)
Business Installation Intervals Offered (Facilities in Place)
Firm Order Confirmations within 48 hours (DS0) (Facilities in Place)
Firm Order Confirmations within 48 hours (DS1) (Facilities in Place)
Firm Order Confirmations within 48 hours (DS3) (Facilities in Place)
Firm Order Confirmations within 48 hours (Switched) (Facilities in Place)

Average Installation Intervals Delivered (Residence) (Facilities in Place) (Days and Hours)
Average Installation Intervals Delivered (Business) (Facilities in Place) (Days and Hours)
Average Installation Intervals Delivered (DS0) (Facilities in Place) (Days and Hours)
Average Installation Intervals Delivered (DS1) (Facilities in Place) (Days and Hours)
Average Installation Intervals Delivered (DS3) (Facilities in Place) (Days and Hours)
Average Installation Intervals Delivered (Switched) (Facilities in Place) (Days and Hours)

Residence Installation Commitments Met (Facilities in Place)
Business Installation Commitments Met (Facilities in Place)
Designed Installation Commitments Met (DS0) (Facilities in Place)
Designed Installation Commitments Met (DS1) (Facilities in Place)
Designed Installation Commitments Met (DS3) (Facilities in Place)
Designed Installation Commitments Met (Switched) (Facilities in Place)
Co-Provider-caused Installation Misses

Residence Disconnect Commitments Met
Business Disconnect Commitments Met

Residence Installation Reports (Repair Report After Installation) Within 7 Days
Business Installation Reports (Repair Report After Installation) Within 7 Days
Designed Installation Reports (Repair Report After Installation) Within 30 Days (DS0)
Designed Installation Reports (Repair Report After Installation) Within 30 Days (DS1)
Designed Installation Reports (Repair Report After Installation) Within 30 Days (DS3)
Designed Installation Reports (Repair Report After Installation) Within 30 Days (Switched Access)

Residence Percent Out of Service Cleared < 24 hours
Business Percent Out of Service Cleared in < 24 hours
Designed Percent Out of Service Cleared < 4 hours (DS0)
Designed Percent Out of Service Cleared in < 4hours (DS1)
Designed Percent Out of Service Cleared < 4 hours (DS3)
Designed Percent Out of Service Cleared in < 4 hours (Switched)

Residence Percent Out of Service and Service Affecting Cleared < 48 hours
Business Percent Out of Service and Service Affecting Cleared < 48 hours

Residence Repair Commitments Met
Business Repair Commitments Met

Residence Repair Repeated Reports Within 30 Days
Business Repair Repeated Reports Within 30 Days
Designed Repair Repeated Reports Within 30 Days (DS0)
Designed Repair Repeated Reports Within 30 Days (DS1)
Designed Repair Repeated Reports Within 30 Days (DS3)
Designed Repair Repeated Reports Within 30 Days (Switched)

Residence Report Rate per 100 Lines
Business Report Rate per 100 Lines
Co-Provider-caused Trouble Reports

Unbundled Loop Indicators
Firm Order Confirmations Within 48 hours (Facilities in Place) 2 Wire
Firm Order Confirmations Within 48 hours (Facilities in Place) 4 Wire
Average Installation Intervals Delivered (Facilities in Place) 2 Wire (Days and Hours)
Average Installation Intervals Delivered (Facilities in Place) 4 Wire (Days and Hours)
Percent Installation Commitments Met (Facilities in Place) 2 Wire
Percent Installation Commitments Met (Facilities in Place) 4 Wire
Installation Reports Within 30 Days 2 Wire
Installation Reports Within 30 Days 4 Wire
Percent Out of Service Cleared in < 24 hours 2 Wire
Percent Out of Service Cleared in < 24 hours 4 Wire
Percent Out of Service and Service Affecting Cleared in < 48 hours 2 Wire
Percent Out of Service and Service Affecting Cleared in < 48 hours 4 Wire
Mean Time to Restore 2 Wire
Mean Time to Restore 4 Wire
Repair Repeated Reports Within 30 Days 2 Wire
Repair Repeated Reports Within 30 Days 4 Wire

LIS Trunk Indicators
Firm Order Confirmations Within Six Days (Facilities in Place)
Average Installation Intervals Delivered (Facilities in Place) (Days and Hours)
Installation Commitments Met (Facilities in Place)
Installation Reports Within 30 Days
Out of Service Cleared in < 4 hours
Repair Repeated Reports Within 30 Days
Co-Provider-caused Trouble Reports

B. Failure to Meet the Service Standard. If during a specified review period, the performing Party fails to deliver the same level of service that it provides to itself, such Party will use its best efforts to meet the service standard for the next specified review period. If the performing Party fails to meet the service standard for two consecutive periods, the Parties agree, in good faith, to attempt to resolve such issues through negotiation or pursuant to the Dispute Resolution section of this Agreement. This paragraph shall not be construed to waive either Party's right to seek legal or regulatory intervention as provided by state or federal law.

C. The performing Party's failure to meet the service standard cannot be as a result, directly or indirectly, of a Delaying Event. A "Delaying Event" means (a) a

failure by the receiving Party to perform any of its obligations set forth in this Agreement, (b) any delay, act or failure to act by an end user, agent or subcontractor of the receiving Party or (c) any Force Majeure Event. If a Delaying Event prevents the performing Party from performing a measured activity, then such measured activity shall be excluded from the calculation of the performing Party's compliance with the service standard.

D. Records. Each Party shall maintain complete and accurate records, for the specified review period of its performance under this Agreement for each measured activity and its compliance with the service standard. Each Party shall provide to the other such records in a self-reporting format. Such records shall be in the format kept in the performing Party's ordinary course of business. The Parties agree that such records shall be deemed "Proprietary Information".

E. Cost Recovery. Each Party reserves the right to recover the costs associated with the creation of the above reports and standards through a future proceeding before a regulatory body. Such a proceeding may address a wide range of implementation costs not otherwise recovered through charges established herein.

XXXIV. CONSTRUCTION CHARGES

A. All rates, charges and initial service periods specified in this Agreement contemplate the provision of network Interconnection services and access to Network Elements to the extent existing facilities are available. Except for modifications to existing facilities necessary to accommodate Interconnection and access to Network Elements specifically provided for in this Agreement, USWC will consider requests to build additional or further facilities for network Interconnection and access to Network Elements as described in this Section.

B. Resale

Construction charges associated with the resale of services will be applied in the same manner that construction charges apply to USWC's retail end users. Contracts may be negotiated on an individual case basis when construction is required for large retail or resale customers.

C. LIS and Interoffice Transport

To the extent that USWC constructs facilities for LIS services and/or interoffice transport, Black Hills will provide USWC with a forecast of interoffice trunks and switch ports. USWC will perform a validated traffic engineering estimate based on the forecasted demand and will then negotiate an agreed upon quantity of interoffice trunks and switch ports with Black Hills before constructing facilities. If Black Hills' forecasted quantity exceeds USWC's validated traffic engineering estimate, and if USWC finds it necessary to construct added facilities, then construction charges will apply to the exceeded quantity. USWC will track utilization of trunks, and when minimum trunk utilization requirements are not

met, a recurring charge will apply for all unused trunks below the minimum utilization level.

D. Unbundled Network Elements

USWC will conduct an individual financial assessment of any request which requires construction of network capacity, facilities, or space for access to or use of unbundled Network Elements. If USWC constructs to fulfill Black Hills' request for unbundled Network Elements, USWC will bid this construction on a case-by-case basis. USWC will charge for the construction through non-recurring charges and a term agreement for the remaining recurring charge.

E. All necessary construction will be undertaken at the discretion of USWC, consistent with budgetary responsibilities, consideration for the impact on the general body of end users, and without discrimination among the various carriers.

F. A quote for Black Hills' portion of a specific job will be provided to Black Hills. The quote will be in writing and will be binding for ninety (90) days after the issue date. When accepted, Black Hills will be billed the quoted price and construction will commence after receipt of payment. If Black Hills chooses not to have USWC construct the facilities, USWC reserves the right to bill Black Hills for the expense incurred for producing the engineered job design.

G. In the event a construction charge is applicable, Black Hills' service application date will become the date upon which USWC receives the required payment.

XXXV. NOTICES

Any notices required by or concerning this Agreement shall be sent to the Parties at the addresses shown below:

USWC
Director Interconnection Services
1801 California, Suite 2340
Denver, CO 80202

Black Hills FiberCom, Inc.
2045 Samco Road
Rapid City, SD 57702

Each party shall inform the other of any changes in the above addresses

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective duly authorized representatives.

BLACK HILLS FIBERCOM, INC. *	U S WEST COMMUNICATIONS, INC. *
Gary R Fish Signature	Signature
Gary R Fish Name Printed/Typed	Kathy Fleming Name Printed/Typed
Vice President of Development Title	Executive Director-Interconnect Title
10-31-98 Date	11/06/98 Date

* This Agreement is made pursuant to Section 252 (i) of the Act and is premised upon the Interconnection Agreement between CommChoice, LLC and U S WEST Communications, Inc. (the "Underlying Agreement"). The Underlying Agreement was approved by the Commission on June 19, 1998.

With respect to this Agreement, the Parties understand and agree:

i) They shall request the Commission to expedite its review and approval of this Agreement.

ii) Notwithstanding the mutual commitments set forth herein, the Parties are entering into this Agreement without prejudice to any positions they have taken previously, or may take in the future, in any legislative, regulatory, or other public forum addressing any matters, including those relating to the types of arrangements contained in this Agreement. During the proceeding in which the Commission is to review and approve the Agreement, U S WEST may point out that it has objected, and continues to object, to the inclusion of the terms and conditions to which it objected in the proceedings involving the approval of the Underlying Agreement.

iii) This Agreement contains provisions based upon the decisions of the FCC and the Commission under and with respect to the Act. Currently, court and regulatory proceedings affecting the subject matter of this Agreement are in various stages, including the proceedings where certain of the rules and regulations of the FCC are being challenged (see, Iowa Utilities Board v. Federal Communications Commission, 120 F.3d 753 (8th Cir. 1997), et sec.) and the proceedings where the Commission's decision(s) giving rise to the Underlying Agreement are under and subject to appeal and review (the "Proceedings"). The Agreement has not been corrected to reflect the requirements, claims or outcomes of any of the Proceedings, although

the pricing does reflect the Commission's most current generic order, if any. Accordingly, when a final, decision or decisions are made in the Proceedings that automatically change and modify the Underlying Agreement, then like changes and modifications will similarly be made to this Agreement.

iv) Where the outcome or outcomes of the Proceedings do not automatically change or modify the Underlying Agreement, but the Underlying Agreement is changed to comply with such outcome or outcomes, then like changes and modifications will similarly be made to this Agreement, immediately.

v) It is possible that a settlement of some or all of the issues that are the subject of the Proceedings may be negotiated, thereby making changes or modifications to the Underlying Agreement, and such changes or modifications to the Underlying Agreement arising from such a settlement will similarly be made to this Agreement, upon the approval of the Commission (or other authorized entity) of such changes or modifications of the Underlying Agreement.

APPENDIX A

The following rates and prices are based ones developed by USWC and submitted to the Commission in proceedings with AT&T Communications of the Midwest, Inc. These rates and prices shall be the interim rates, effective between the Parties, unless and until the Commission specifically reviews, approves and establishes different interim rates and prices. And, if the Commission does review, approve and establish different interim rates and prices, in a separate proceeding or in an arbitration proceeding, then at the request of either Party, the following rates and prices will be corrected and adjusted to reflect all of the Commission approved and established interim rates and prices. Thereafter, when the Commission finally reviews, approves and establishes the final rates and prices, then this Appendix and the Agreement shall be corrected and adjusted to reflect those final rates and prices. It is expressly agreed that all of these corrections and adjustment may be effected by changing this Appendix A. The corrections and adjustments will be on a going forward basis, and no prior payments or charges will be refunded or adjusted, but only future payments and charges.

REV 9-18-97

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

INTERCONNECTION - LOCAL EXCHANGE

	Recurring	Nonrecurring
Entrance Facility		
DS1, Electrical	$82.59	$515.80
DS3, Electrical	$336.99	$611.86

	Price
Call Termination	
Average Per Minute of Use	$0.003469

	Fixed	Per Mile
Call Transport		
Direct Trunked Transport		
DS0 - 0 Miles	None	None
DS0 - Over 0 to 8	$17.14	$0.09
DS0 - Over 8 to 25	$17.12	$0.12
DS0 - Over 25 to 50	$17.13	$0.11
DS0 - Over 50	$17.14	$0.07
DS1 - 0 Miles	None	None
DS1 - Over 0 to 8	$34.75	$0.95
DS1 - Over 8 to 25	$34.76	$1.82
DS1 - Over 25 to 50	$34.76	$1.77
DS1 - Over 50	$34.75	$1.23
DS3 - 0 Miles	None	None
DS3 - Over 0 to 8	$236.22	$10.43
DS3 - Over 8 to 25	$236.53	$10.83
DS3 - Over 25 to 50	$236.71	$9.91
DS3 - Over 50	$243.94	$24.44

Tandem-Switched Transport	Price
Tandem Switching, Per Minute Of Use	$0.001748

Tandem Transmission	Fixed	Per Mile
0 Mile	None	None
Over 0 - 8 Miles	$0.000412	$0.000012
Over 8 - 25 Miles	$0.000406	$0.000014
Over 25 - 50 Miles	$0.000408	$0.000013
Over 50 Miles	$0.000410	$0.000009

Multiplexing, per arrangement	Recurring	Nonrecurring
DS3 to DS1	$191.32	$287.45
DS1 to DS0	$181.28	$280.77

COMMON CHANNEL SIGNALING ACCESS SERVICE

Entrance Facility	Recurring	Nonrecurring
DS1, Electrical	$82.59	$515.80
DS3, Electrical	$336.99	$611.86

Direct Link Transport	Fixed	Per Mile
DS0 - 0 Miles	None	None
DS0 - Over 0 to 8	$17.14	$0.09
DS0 - Over 8 to 25	$17.12	$0.12
DS0 - Over 25 to 50	$17.13	$0.11
DS0 - Over 50	$17.14	$0.07
DS1 - 0 Miles	None	None
DS1 - Over 0 to 8	$34.75	$0.95
DS1 - Over 8 to 25	$34.76	$1.82
DS1 - Over 25 to 50	$34.76	$1.77
DS1 - Over 50	$34.75	$1.23

Direct Link Transport		
DS3 - 0 Miles	None	None
DS3 - Over 0 to 8	$236.22	$10.43
DS3 - Over 8 to 25	$236.53	$10.83
DS3 - Over 25 to 50	$236.71	$9.91
DS3 - Over 50	$243.94	$24.44

	Recurring	Nonrecurring
CCS Link – First Link	To Be Negotiated	To Be Negotiated
CCS Link – Each additional Link	To Be Negotiated	To Be Negotiated
STP Port – Per Port	To Be Negotiated	To Be Negotiated

Multiplexing		
DS3 to DS1	$191.32	$287.45
DS1 to DS0	$181.28	$280.77

PHYSICAL AND VIRTUAL COLLOCATION

Common Elements	Recurring	Nonrecurring
Quote Preparation Fee	To Be Negotiated	$1,000.00

Entrance Facility - 2 fibers (Note 1)	$107.83	$1,000.00
EICT Channel Terminations		
2-wire DS0 EICT	$1.14	$274.65
4-wire DS0 EICT	$1.45	$274.65
DS1 EICT	$12.57	$311.69
DS3 EICT	$36.56	$313.28
EICT Regeneration		
DS1, Regeneration	$12.21	$311.69
DS3, Regeneration	$75.61	$313.28
Cable Splicing		
Per setup	None	$474.70
Per Fiber Spliced	None	$37.95
48 Volt Power, per ampere, per month	$15.24	None
48 Volt Power Cable		
20 Ampere Capacity - Recurring	$0.11	$70.21
40 Ampere Capacity - Recurring	$0.15	$95.20
60 Ampere Capacity - Recurring	$0.17	$107.22

	Regular Hours	After Hours
Inspector per 1/2 Hour	$27.70	$35.99

Virtual Collocation	Recurring	Nonrecurring
Equipment Bay, Per Shelf	$3.88	None

	Regular Hours	After Hours
Training per 1/2 Hour	$24.54	None
Engineering per 1/2 Hour	$23.93	$32.01
Installation per 1/2 Hour	$27.70	$35.99
Maintenance per 1/2 Hour	$24.54	$32.64

Physical Collocation	Recurring	Nonrecurring
Cage/Hard Wall Enclosure	ICB	ICB
Rent (w/ Maintenance) - per square foot, Zone 1 (Note 2)	$2.75	None
Rent (w/ Maintenance) - per square foot, Zone 2 (Note 2)	$2.26	None
Rent (w/ Maintenance) - per square foot, Zone 3 (Note 2)	$2.06	None

ANCILLARY SERVICES

	Price
Directory Assistance	
Price per Call -- Facilities-Based Providers	$0.31
Listings	
Primary Listings, Directory Assistance, White & Yellow Pages	No Charge

LEC and AECs recover costs from PSAP	No Charge

	Price
Interim Number Portability	New York Method

	Price
Assignment of Numbers	
Assignments per industry guidelines	No Charge

Busy Line Verification	
Per Call	$0.75
Busy Line Interrupt	
Per Call	$0.92

ACCESS TO UNBUNDLED ELEMENTS

	Recurring	Nonrecurring
Unbundled Loops		
2-Wire LIS-Link, Statewide	$21.09	
4-Wire LIS-Link, Statewide	$39.34	
ISDN Extension Increment, Per Loop (Note 3)	$21.49	
Basic Installation, First LIS-Link		$106.29
Basic Installation, Each Additional LIS-Link		$58.44
Installation with Conformance Testing, First LIS-Link		$170.79
Installation with Conformance Testing, Each Additional LIS-Link		$86.61
Coordinated Installation with Testing, First LIS-Link		$218.00
Coordinated Installation with Testing, Each Additional LIS-Link		$133.81
Network Interface Device (Note 4)		$58.58
Cable Unloading and Bridge Tap Removal (Note 5)		$58.50

	Recurring	Nonrecurring
Unbundled Ports		
End Office Port, Per First Port	$1.44	$98.39
End Office Port, Per Each Additional Port	$1.44	$52.96
Average Per Minute of Use, Per Port	$0.003469	

RESALE

	Nonrecurring
Customer Transfer Charge	$5.00

	Wholesale Discount Rate
USWC Resold Services (Note 6)	
Includes billing and collections, operator services, and directory assistance	15.55%
If CLEC provides its own operator services, directory	

assistance, and billing and collections	12.81%

Notes:

1 Pursuant to Order TC 96-184 the recurring rate is applicable for the first two years of the agreement. After that period, the Entrance Enclosure recurring rate is $2.83.

2 Zones per NECA 4 Tariff

3 This charge applies when a CLEC requests ISDN capability on an unbundled loop greater than 18 kft.

4 This charge applies when USWC must install a Network Interface Device for a CLEC or when USWC must connect a CLEC's loop to the USWC Network Interface Device.

5 This charge applies only when loop unloading is necessary.

6 Pursuant to Order TC 96-184 USWC is not required to make its enhanced services available for resale.

APPENDIX A

The following rates and prices are based ones developed by USWC and submitted to the Commission in proceedings with AT&T Communications of the Midwest, Inc. These rates and prices shall be the interim rates, effective between the Parties, unless and until the Commission specifically reviews, approves and establishes different interim rates and prices. And, if the Commission does review, approve and establish different interim rates and prices, in a separate proceeding or in an arbitration proceeding, then at the request of either Party, the following rates and prices will be corrected and adjusted to reflect all of the Commission approved and established interim rates and prices. Thereafter, when the Commission finally reviews, approves and establishes the final rates and prices, then this Appendix and the Agreement shall be corrected and adjusted to reflect those final rates and prices. It is expressly agreed that all of these corrections and adjustment may be effected by changing this Appendix A. The corrections and adjustments will be on a going forward basis, and no prior payments or charges will be refunded or adjusted, but only future payments and charges.

REV 6-5-2000
REV 6-16-97

APPENDIX A

U S WEST INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, ANCILLARY SERVICES, RESALE PRICE LIST

SOUTH DAKOTA

INTERCONNECTION - LOCAL EXCHANGE

	Recurring	Nonrecurring
Entrance Facility		
DS1, Electrical	$82.59	$515.80
DS3, Electrical	$336.99	$611.86

	Price
Call Termination	
Average Per Minute of Use	$0.003469

Call Transport

	Fixed	Per Mile
Direct Trunked Transport		
DS0 - 0 Miles	None	None
DS0 - Over 0 to 8	$17.14	$0.09
DS0 - Over 8 to 25	$17.12	$0.12
DS0 - Over 25 to 50	$17.13	$0.11
DS0 - Over 50	$17.14	$0.07
DS1 - 0 Miles	None	None
DS1 - Over 0 to 8	$34.75	$0.68
DS1 - Over 8 to 25	$34.76	$1.82
DS1 - Over 25 to 50	$34.76	$1.77
DS1 - Over 50	$34.75	$1.23
DS3 - 0 Miles	None	None

EXHIBIT
BS-1

DS3 - Over 0 to 8	$236.22	$10.43
DS3 - Over 8 to 25	$236.53	$10.63
DS3 - Over 25 to 50	$236.71	$9.91
DS3 - Over 50	$243.94	$24.44

Tandem-Switched Transport	Price
Tandem Switching, Per Minute Of Use	$0.001748

Tandem Transmission	Fixed	Per Mile
0 Mile	None	None
Over 0 - 8 Miles	$0.000412	$0.000012
Over 8 - 25 Miles	$0.000406	$0.000014
Over 25 - 50 Miles	$0.000408	$0.000013
Over 50 Miles	$0.000410	$0.000009

Multiplexing, per arrangement	Recurring	Nonrecurring
DS3 to DS1	$191.32	$267.45
DS1 to DS0	$181.28	$280.77

COMMON CHANNEL SIGNALING ACCESS SERVICE

Entrance Facility	Recurring	Nonrecurring
DS1, Electrical	$82.50	$515.60
DS3, Electrical	$336.99	$611.86

Direct Link Transport	Fixed	Per Mile
DS0 - 0 Miles	None	None
DS0 - Over 0 to 8	$17.14	$0.09
DS0 - Over 8 to 25	$17.12	$0.12
DS0 - Over 25 to 50	$17.13	$0.11
DS0 - Over 50	$17.14	$0.07
DS1 - 0 Miles	None	None
DS1 - Over 0 to 8	$34.75	$0.65
DS1 - Over 8 to 25	$34.76	$1.82
DS1 - Over 25 to 50	$34.76	$1.77
DS1 - Over 50	$34.75	$1.23

Direct Link Transport		
DS3 - 0 Miles	None	None
DS3 - Over 0 to 8	$236.22	$10.43
DS3 - Over 8 to 25	$236.53	$10.63
DS3 - Over 25 to 50	$236.71	$9.91
DS3 - Over 50	$243.94	$24.44

	Recurring	Nonrecurring
CCS Link – First Link	To Be Negotiated	To Be Negotiated
CCS Link – Each additional Link	To Be Negotiated	To Be Negotiated
STP Port – Per Port	To Be Negotiated	To Be Negotiated

Multiplexing		
DS3 to DS1	$191 32	$287 45
DS1 to DS0	$181 28	$280 77

PHYSICAL AND VIRTUAL COLLOCATION

	Recurring	Nonrecurring
Common Elements		
Quote Preparation Fee	To Be Negotiated	$1,000 00
Entrance Facility - 2 fibers (Note 1)	$107.83	$1,000 00
EICT Channel Terminations		
2-wire DS0 EICT	$1.14	$274 65
4-wire DS0 EICT	$1.45	$274 65
DS1 EICT	$12.57	$311.69
DS3 EICT	$36.56	$313.28
EICT Regeneration		
DS1, Regeneration	$12.21	$311.69
DS3, Regeneration	$75.61	$313.28
Cable Splicing		
Per setup	None	$474.70
Per Fiber Spliced	None	$37.95
48 Volt Power, per ampere, per month	$15.24	None
48 Volt Power Cable		
20 Ampere Capacity - Recurring	$0.11	$70.21
40 Ampere Capacity - Recurring	$0.15	$95.20
60 Ampere Capacity - Recurring	$0.17	$107.22

	Regular Hours	After Hours
Inspector per 1/2 Hour	$27.70	$35.99

	Recurring	Nonrecurring
Virtual Collocation		
Equipment Bay, Per Shelf	$3.88	None

	Regular Hours	After Hours
Training per 1/2 Hour	$24.54	None
Engineering per 1/2 Hour	$23.93	$32.01
Installation per 1/2 Hour	$27.70	$35.99
Maintenance per 1/2 Hour	$24.54	$32.64

	Recurring	Nonrecurring
Physical Collocation		
Cage/Hard Wall Enclosure	ICB	ICB
Rent (w/ Maintenance) - per square foot, Zone 1 (Note 2)	$2.75	None
Rent (w/ Maintenance) - per square foot, Zone 2 (Note 2)	$2.26	None
Rent (w/ Maintenance) - per square foot, Zone 3 (Note 2)	$2.06	None

ANCILLARY SERVICES

	Price
Directory Assistance	
Price per Call -- Facilities-Based Providers	$0 31
Listings	
Primary Listings, Directory Assistance, White & Yellow Pages	No Charge
E9-1-1	
LEC and AECs recover costs from PSAP	No Charge

	Price
Interim Number Portability	New York Method

	Price
Assignment of Numbers	
Assignments per industry guidelines	No Charge
Busy Line Verification	
Per Call	$0.75
Busy Line Interrupt	
Per Call	$0.92

ACCESS TO UNBUNDLED ELEMENTS

	Recurring	Nonrecurring
Unbundled Loops		
2-Wire LIS-Link--Statewide	~~$21.09~~	
Zone 1	$17.01*	
Zone 2	$18.54*	
Zone 3	$24.37*	
4-Wire LIS-Link--Statewide	~~$39.34~~	
Zone 1	$31.72*	
Zone 2	$34.59*	
Zone 3	$45.46*	
*Order No. TC99-106, effective May 12, 2000		
ISDN Extension Increment, Per Loop (Note 3)	$21.49	
Basic Installation, First LIS-Link		$106.29
Basic Installation, Each Additional LIS-Link		$58.44
Installation with Conformance Testing, First LIS-Link		$170.79
Installation with Conformance Testing, Each Additional LIS-Link		$86.61
Coordinated Installation with Testing, First LIS-Link		$218.00
Coordinated Installation with Testing, Each Additional LIS-Link		$133.81
Network Interface Device (Note 4)		$58.58
Cable Unloading and Bridge Tap Removal (Note 5)		$58.50

Unbundled Ports	Recurring	Nonrecurring
End Office Port, Per First Port	$1.44	$98.39
End Office Port, Per Each Additional Port	$1.44	$52.96
Average Per Minute of Use, Per Port	$0.003469	

RESALE

	Nonrecurring
Customer Transfer Charge	$5.00

	Wholesale Discount Rate
USWC Resold Services (Note 6)	
Includes billing and collections, operator services, and directory assistance	15.55%
If CLEC provides its own operator services, directory assistance, and billing and collections	12.81%

Notes

1 Pursuant to Order TC 96-184 the recurring rate is applicable for the first two years of the agreement. After that period, the Entrance Enclosure recurring rate is $2.83.

2 Zones per NECA 4 Tariff

3 This charge applies when a CLEC requests ISDN capability on an unbundled loop greater than 18 kft.

4 This charge applies when USWC must install a Network Interface Device for a CLEC or when USWC must connect a CLEC's loop to the USWC Network Interface Device.

5 This charge applies only when loop unloading is necessary.

6 Pursuant to Order TC 96-184 USWC is not required to make its enhanced services available for resale

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ESTABLISHMENT OF DIFFERENT RATES FOR INTERCONNECTION AND UNBUNDLED NETWORK ELEMENTS IN AT LEAST THREE GEOGRAPHIC AREAS FOR NONRURAL TELECOMMUNICATIONS COMPANIES	)))))	FINDINGS OF FACT AND CONCLUSIONS OF LAW; NOTICE OF ENTRY OF ORDER TC99-106

In August of 1996, the Federal Communications Commission (FCC) issued its Local Competition Order implementing section 251 of the federal Telecommunications Act of 1996. Section 51.507(f) required each state commission to establish different rates for interconnection and unbundled network elements (UNEs) in at least three geographic areas within the state to reflect geographic cost differences. The Eighth Circuit subsequently stayed and then vacated the deaveraging rule. Based on those decisions, the Public Utilities Commission (Commission) did not establish different rates for different geographic areas. However, in January of 1999, the U. S. Supreme Court reversed the Eighth Circuit's decision. On May 7, 1999, the FCC stayed the effectiveness of the rule in order to allow states additional time to comply with the rule. By order released November 2, 1999, the FCC ruled that the stay will be lifted on May 1, 2000. *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, FCC 99-306, paragraph 120 (rel. Nov. 2, 1999). The order provides that by May 1, 2000, "states are required to establish different rates for interconnection and UNEs in at least three geographic areas pursuant to section 51.507(f) of the Commission's rules." *Id.*

At its November 15, 1999, meeting, the Commission considered how to proceed in this matter. After listening to comments from interested persons, the Commission decided to request written comments on how to proceed from interested persons or entities. The Commission received comments from AT&T Communications of the Midwest, Inc. (AT&T), U S WEST Communications, Inc. (U S WEST), and the South Dakota Independent Telephone Coalition, Inc. (SDITC).

At its February 2, 2000, meeting, the Commission again considered how to proceed with this docket. The Commission decided as follows: (1) that this proceeding be limited to nonrural companies since the rural companies in South Dakota are currently exempt from 47 U.S.C. § 251(c) requirements; (2) that the Commission proceed with a contested case type proceeding as opposed to a rulemaking; and (3) that the Commission use the rates as established in the U S WEST/AT&T interconnection agreement as the bases for the setting of deaveraged rates. Although AT&T proposed, and U S WEST agreed, that geographic deaveraging need only be applied to the UNE loop at this time, the Commission left it open to the parties as to whether they will advocate that other rates be subject to geographic deaveraging as well. By Order dated February 4, 2000, the Commission set a procedural schedule and intervention deadline. By order dated March 6, 2000, intervention was granted to U S WEST, McLeodUSA Telecommunications Services, Inc., Sprint Communications Company L.P., and AT&T.

The hearing was held as scheduled on March 15, 2000, beginning at 8:30 A.M., in Room 412 of the State Capitol Building, 500 E. Capitol, Pierre, South Dakota. Additional information was requested by the Commission at the hearing. U S WEST and AT&T provided the additional information following the hearing.

At its March 28, 2000, meeting, the Commission denied AT&T's Motion to Compel Discovery which it had taken under advisement at the hearing. The Commission then asked the parties whether any party desired an additional hearing based on the information filed after the hearing. No party requested an additional hearing. The Commission set the following briefing schedule: simultaneous initial briefs to be filed with the Commission on or before April 11, 2000, and simultaneous rebuttal briefs to be filed with the Commission on or before April 18, 2000.

On April 10, 2000, the Commission received a Motion for Extension of Time to File Briefs from AT&T. AT&T requested an additional two days for all parties to file initial briefs and an additional two days for all parties to file rebuttal briefs. AT&T stated U S WEST had no objection. The Commission granted the motion and set the following revised briefing schedule: simultaneous initial briefs to be filed with the Commission on or before April 13, 2000, and simultaneous rebuttal briefs to be filed with the Commission on or before April 20, 2000.

At its April 27, 2000, meeting, the Commission voted unanimously to adopt U S WEST's proposal for deaveraged unbundled loop rates.

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. In August of 1996, the Federal Communications Commission (FCC) issued its Local Competition Order implementing section 251 of the federal Telecommunications Act of 1996. Section 51.507(f) required each state commission to establish different rates for interconnection and unbundled network elements (UNEs) in at least three geographic areas within the state to reflect geographic cost differences. 47 C.F.R. § 51.507(f). The rule further provided that the zones be cost related. *Id.* The Eighth Circuit Court of Appeals subsequently stayed and then vacated this rule. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *petitions for reconsideration vacated in part, People of the State of California v. FCC*, 124 F.3d 934 (8th Cir. 1997), *reversed AT&T Corp. v. Iowa Utilities Board*, 200 U.S. 321, 119 Sup.Ct. 721 (1999). Based on those decisions, the Commission did not establish different rates for different geographic areas. However, in January of 1999, the U. S. Supreme Court reversed the Eighth Circuit's decision. *AT&T Corp. v. Iowa Utilities Board*, 200 U.S. 321, 119 Sup.Ct. 721 (1999). On May 7, 1999, the FCC stayed the effectiveness of the rule in order to allow states additional time to comply with the rule. By order released November 2, 1999, the FCC ruled that the stay will be lifted on May 1, 2000. *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, FCC 99-306, paragraph 120 (rel. Nov. 2, 1999). The order provides that by May 1, 2000, "states are required to establish different rates for interconnection and UNEs in at least three geographic areas pursuant to section 51.507(f) of the Commission's rules." *Id.*

2. After considering written comments filed by U S WEST, AT&T, and SDITC, the Commission decided as follows: (1) that this proceeding be limited to nonrural companies since the rural companies in South Dakota are currently exempt from 47 U.S.C. § 251(c) requirements; (2) that the Commission proceed with a contested case type proceeding as opposed to a rulemaking; and (3) that the Commission use the rates as established in the U S WEST/AT&T interconnection agreement as the bases for the setting of deaveraged rates. Although AT&T proposed, and U S WEST agreed, that geographic deaveraging need only be applied to the UNE loop at this time, the Commission left it open to the parties as to whether they would advocate that other rates be subject to geographic deaveraging as well.

3 The only two parties who submitted proposals for geographic deaveraging were AT&T and U S WEST.

4 Both AT&T and U S WEST proposed that only three deaveraged zones be established at this time. Exhibit 1 at 9, Exhibit 3 at 5. AT&T stated that "[w]hile it is feasible to deaverage to virtually any conceivable level, given the state of competition in South Dakota, the inability to foresee the precise shape of competition in the near future, and the infancy of the deaveraging process at this time, three deaveraged zones is a practical place for this Commission to start." Exhibit 3 at 5.

5 Both AT&T and U S WEST proposed that only the unbundled loop be deaveraged at this time. Exhibit 1 at 3-4, Exhibit 3 at 3-5. AT&T stated that "[a]t this time, only the unbundled loop has all of the following characteristics: it is the most significant cost in providing local service, it has a high degree of cost variability between zones, and the cost is easily assigned to individual customers . . . through the use of a cost proxy model." Exhibit 3 at 4-5.

6 AT&T proposed that wire centers with similar costs be grouped together to create three zones. AT&T stated that the preferred model to determine unbundled loop costs by wire center would be U S WEST's RLCAP since that was the model used to set the unbundled loop rate in the U S WEST/AT&T arbitration proceeding. Exhibit 3 at 9. The statewide average for an unbundled loop as determined in the AT&T/U S WEST arbitration was $21.09. *Id.* at 10. However, AT&T did not use RLCAP because it does not produce costs for individual wire centers. *Id.* at 9. AT&T used the HAI Model, version 5 0a, to produce costs by wire center. Tr. at 106; Exhibit 3 at 9. AT&T also provided unbundled loop costs by wire center using the FCC's model for universal service, the Synthesis Model. *Id.*

7 After using the HAI Model to produce costs for individual wire centers, AT&T scaled the results by a factor equal to the ratio of the ordered loop rate to the cost model loop estimate to maintain a statewide average loop price of $21.09. Exhibit 3 at 10. AT&T then grouped the wire centers into three different zones. Exhibit 3, Attachment A. Zone 1 consisted of two wire centers, Sioux Falls Main and Sioux Falls Southwest for an average rate of $10.34. *Id.* Zone 2 consisted of 11 wire centers for an average rate of $15.74. *Id.* Zone 3 consisted of the remaining 30 wire centers for an average rate of $65.07. *Id.* AT&T's proposal produced costs per wire center ranging from a low of $10.25 to a high of $521.82. *Id.* The Sioux Falls Southeast wire center was included in zone 3 with an HAI scaled cost of $179.10, which was the sixth highest loop cost in the state. *Id.*

8 AT&T's proposal contained an incorrect line count for the McIntosh wire center. It showed the wire center as having only one line. Tr. at 121; Exhibit 3, Attachment A.

9 At the request of the Commission, AT&T submitted additional computations of deaveraged loop costs after the hearing. Late-filed Exhibit 10. Attachment 1 was the same as its original Attachment A presented at the hearing except for the corrected line count for the McIntosh wire center. *Id.* at Attachment 1. Attachment 2 used 1998 line counts on a pair equivalent basis as opposed to counting each channel. *Id.* at Attachment 2. Attachment 3 used 1998 line counts on a DSO equivalent basis, which counts channels. *Id.* at Attachment 3. Attachment 4 used U S WEST's RLCAP line counts. *Id.* at Attachment 4. The proposals contained in Attachments 2 through 4 did not use the HAI Model 1996 wire center estimate line counts to calculate costs. *Id.* at 1.

10 AT&T changed its recommendation from that made at the hearing and requested that the Commission adopt the deaveraged rates as shown in Attachment 2. *Id.* at 3. According to this proposal, the Sioux Falls Southeast wire center showed a scaled cost of $23.22 per unbundled loop. *Id.* at Attachment 2. AT&T then placed the Sioux Falls Southeast wire center in zone 2. *Id.*

11 U S WEST's proposal for geographic deaveraging was based on grouping communities that roughly equate to the Metropolitan Statistical Areas used by the United States Census Bureau. Exhibit 1 at 8. The result was the grouping of communities as follows: (1) Zone 1 -- Sioux Falls area, largest community; Zone 2 -- Rapid City area, medium sized community; (3) Zone 3 -- all other communities. Exhibit 1 at 9. Zone 1 contained the following wire centers: Sioux Falls Main, Sioux Falls Southeast, Sioux Falls Southwest, Tea, and Harrisburg. Tr. at 77. Zone 2 contained the following wire centers: Rapid City, Rapid Valley, Black Hawk, and Warwick. *Id.* Zone 3 contained all of the remaining wire centers. *Id.*

12 After determining these zones, U S WEST then developed the costs as follows:

> The statewide average data was segregated into separate files according to the three zones. Three separate runs of the loop model were made, one for each zone . . . . The investment components for the unbundled loop were determined for each zone separately by the loop model. The loop (feeder, distribution, and drop) investment was summed to achieve three levels of total investment, one for each zone. Each zone investment was then compared to the statewide investment data. A percentage was determined by dividing each zone investment by the statewide average investment. These percentages were multiplied by the statewide average unbundled loop price of $21.09, as established in the U S WEST/AT&T interconnection agreement, to determine the deaveraged price for each zone.

Id. at 13.

13 The investments and percentages for the three zones were as follows: Zone 1 -- $736.29, 80.6%; Zone 2 -- $802.87, 87.9%; and Zone 3 -- $1,055.17, 115.6%. Id. at 13-14. The resulting rates were: Zone 1 -- $17.01; Zone 2 -- $18.54; and Zone 3 -- $24.37. *Id.* at 14.

14 Although this proceeding is commonly referred to as geographic deaveraging of rates, both the U S WEST proposal and the AT&T proposals necessarily still result in averaged rates. Under the U S WEST proposal, the grouping of wire centers is the first step and then costs are used to determine different rates for the three zones. Under the AT&T proposals, the costs are developed for individual wire centers and then the wire centers are grouped into zones.

15 The Commission finds that it will establish three deaveraged zones at this time. Although additional zones would result in less averaging, both U S WEST and AT&T agreed that only three zones should be created at this time. The Commission notes that, if necessary, it may revisit this decision if it can be shown that additional zones are needed.

16 The Commission finds that it will require that only the unbundled loop be deaveraged at this time. The Commission finds that the purchase of an unbundled loop is the most significant cost in providing competitive local exchange service. In addition, the cost of an unbundled loop may vary significantly depending on loop distances and the density of the service area. The Commission notes that, if necessary, it may revisit this decision if it can be shown that additional UNEs should be deaveraged.

17 The Commission finds that AT&T's proposals produce some inexplicable results. For example, AT&T's original proposal resulted in Sioux Falls Southeast falling into zone 3 with an HAI scaled cost of $179.10. The Commission cannot understand how a part of Sioux Falls can have an unbundled loop cost of $179.10 while the cost for unbundled loops for the rest of Sioux Falls ranges from $10.25 to $11.25. The Commission would certainly expect that Sioux Falls should have the lowest unbundled loop costs in the state since it is the most densely populated city in the state. But it makes no sense that a part of Sioux Falls would have the sixth highest loop cost in the state.

18. It appears that part of the reason for this obviously erroneous result, is that, for some reason, the HAI Model uses an estimated line count of 31 lines for the Sioux Falls Southeast wire center to calculate costs. Tr. at 123; Exhibit 9. In addition, although AT&T then used a line count of 4,284 lines for the Sioux Falls Southeast wire center to weight the costs together, that line count number counted channels for DS1s and DS3s. Tr. at 123, 127; Exhibit 3, Attachment A; Exhibit 7. By counting channels, the total line count for South Dakota was 419,468. Exhibit 3, Attachment A. In the AT&T/U S WEST arbitration proceeding, the Commission rejected the use of an earlier version of the HAI model due to its use of line counts that included channels. Tr. at 128.

19. When, at the request of the Commission, the model was run with a line count that did not count channels and did not use the HAI Model's 1996 wire center line counts to calculate costs, the Sioux Falls Southeast wire center went from a $179.10 cost per unbundled loop to a $23.22 cost per loop. Exhibit 3, Attachment A; Late-filed Exhibit 10, Attachment 2. But even with this lower cost, the Sioux Falls Southeast wire center was still in a different zone from the rest of Sioux Falls. Late-filed Exhibit 10, Attachment 2.

20. In addition to the problems with the line counts, the Commission finds that AT&T failed to address other concerns the Commission had with an earlier version of the HAI Model used in the AT&T/U S WEST arbitration. Exhibit 2 at 8-9; *See In the Matter of the Interconnection Contract Negotiations Between AT&T Communications of the Midwest, Inc. and U S WEST Communications, Inc. Pursuant to 47 U.S.C. Section 252, Findings of Fact and Conclusions of Law; Order and Notice of Entry of Order*, Docket TC96-184, ¶¶ 94-98, at 13. It is possible that this latest version of the HAI Model addressed those concerns or those concerns were not valid in this proceeding. However, by not addressing those questions, the Commission has no idea whether its earlier misgivings about the HAI Model still exist or are relevant. Given these uncertainties and questionable data inputs, the Commission finds it must reject AT&T's proposals for deaveraged unbundled loop rates.

21. The Commission finds that it will accept U S WEST's proposal for deaveraging rates for the unbundled loop. The Commission finds that it makes sense to stay with the RLCAP Model since the Commission, at AT&T's request, decided to use the rates as established in the interconnection agreement as the bases for the setting of deaveraged rates. The Commission used the RLCAP method to establish rates in the arbitration docket involving U S WEST and AT&T.

22. The Commission further finds that the results of U S WEST's proposal are consistent with the assumption behind deaveraged rates: namely, that costs in more densely populated areas will be lower than costs in less densely populated areas. Thus, given the fact that Sioux Falls and Rapid City are South Dakota's most densely populated areas, it makes sense that there would be a zone comprising the wire centers located in and near Sioux Falls and another zone comprising the wire centers located in and near Rapid City.

23. The resulting zones and rates will be as follows: Zone 1 – $17.01 (Sioux Falls Main, Sioux Falls Southeast, Sioux Falls Southwest, Tea, and Harrisburg wire centers); Zone 2 -- $18.54 (Rapid City, Rapid Valley, Black Hawk, and Warwick wire centers); and Zone 3 -- $24.37 (all remaining wire centers).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31, specifically 49-31-3 and 49-31-81, and the Telecommunications Act of 1996, specifically 47 U S C §§ 251 and 252.

2 In August of 1996, the Federal Communications Commission (FCC) issued its Local Competition Order implementing section 251 of the federal Telecommunications Act of 1996. Section 51.507(f) required each state commission to establish different rates for interconnection and unbundled network elements (UNEs) in at least three geographic areas within the state to reflect geographic cost differences 47 C.F.R. § 51.507(f). The rule further provided that the zones be cost related *Id* The Eighth Circuit Court of Appeals subsequently stayed and then vacated this rule *Iowa Utilities Board v FCC*, 120 F.3d 753 (8th Cir. 1997), *petitions for reconsideration vacated in part, People of the State of California v FCC*, 124 F.3d 934 (8th Cir. 1997), *reversed AT&T Corp v Iowa Utilities Board*, 200 U.S. 321, 119 Sup.Ct. 721 (1999). Based on those decisions, the Commission did not establish different rates for different geographic areas. However, in January of 1999, the U S. Supreme Court reversed the Eighth Circuit's decision. *AT&T Corp. v. Iowa Utilities Board*, 200 U.S. 321, 119 Sup.Ct. 721 (1999). On May 7, 1999, the FCC stayed the effectiveness of the rule in order to allow states additional time to comply with the rule. By order released November 2, 1999, the FCC ruled that the stay will be lifted on May 1, 2000. *In the Matter of the Federal-State Joint Board on Universal Service*, CC Docket 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, FCC 99-306, paragraph 120 (rel. Nov. 2, 1999). The order provides that by May 1, 2000, "states are required to establish different rates for interconnection and UNEs in at least three geographic areas pursuant to section 51.507(f) of the Commission's rules." *Id.*

3. The Commission adopts U S WEST's proposal for deaveraging rates for its unbundled loops. The resulting zones and rates will be as follows: Zone 1 – $17.01 (Sioux Falls Main, Sioux Falls Southeast, Sioux Falls Southwest, Tea, and Harrisburg wire centers); Zone 2 -- $18.54 (Rapid City, Rapid Valley, Black Hawk, and Warwick wire centers); and Zone 3 – $24.37 (all remaining wire centers).

It is therefore

ORDERED, that U S WEST shall implement the zones and rates for unbundled loops as stated above.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 1st day of May, 2000 Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 1st day of May, 2000.

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 _____

Date _____

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

_____
JAMES A. BURG, Chairman

_____
PAM NELSON, Commissioner

_____
LASKA SCHOENFELDER, Commissioner

DIRECT TESTIMONY OF MICHELLE MERCHEN
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996
DOCKET NO. TC01-165

RECEIVED
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Q: What is your name and business address?

A: Michelle Merchen. I work for Black Hills FiberCom at 809 Deadwood Avenue in Rapid City, South Dakota

Q: What is your position with FiberCom?

A: I am a Business Service Coordinator.

Q: Please describe your educational, training and employment background.

A: In 1998 I started working for Eclipse Telecommunications in Kansas City, Kansas. In June of 1999 I started working for Black Hills FiberCom.

Q: What are your job duties as Applications Engineer?

A: My job duties include placing orders for porting numbers, handling customer's inquiries on their accounts and resolving customer service issues.

Q: On which issues are you providing testimony on behalf of Black Hills FiberCom?

A: Checklist Item No. 2 -- Operations Support Systems (OSS).

Q: What experience have you had with Qwest's OSS?

A: In the years that I have been at FiberCom, I have worked primarily in the area of procuring products and services from Qwest through the use of Qwest's many databases and interfaces made available to CLECs.

Q: Please describe your experience in working with Qwest's OSS.

A: It has been my experience that Qwest's OSS is very cumbersome and user "unfriendly" to the point that procuring new products and services from Qwest is a long, delayed process of trial and error and management by FiberCom of Qwest's personnel and processes in order to complete the provisioning of products and services.

Q: Do you have any examples of Qwest's deficient OSS?

A: Yes. For example, over the past several months, I have been involved in attempting to procure enhanced extended loops (EELs) from Qwest. When the decision to obtain EELs first arose, we approached Qwest and were informed that FiberCom would have to first accept an amendment to its Interconnection Agreement before it could order EELs from Qwest. FiberCom agreed to the Amendment and signed the Amendment on September 17, 2001. Thereafter, FiberCom was informed that EELs could not be ordered until a "billing account number" (BAN) was established for FiberCom's new EELs, and not until FiberCom completed a "New Product Questionnaire" related to the EELs. By its terms, the New Product Questionnaire indicated that the "provisioning time necessary to establish data transfers between Qwest and the customers can take up to 35 to 45 days." FiberCom received assurances from Qwest that FiberCom would be able to order EELs by mid to late November, 2001. By December 1, however, Qwest had still not established a "BAN," and so processing of EELs was delayed past the projected date. By December 5th the BAN was in place and FiberCom submitted its first Local Service Request (LSR) for an EEL. From December

5, 2001, to January 14, 2002, I tried repeatedly to submit an LSR that Qwest's OSS would accept in order to start the process of provisioning an EEL. Throughout the six-week period, I received several error messages on returned LSR submissions, despite the fact that FiberCom was in contact with Qwest on numerous occasions in attempts to get "walked through" the LSR process. At one point I was told that in order to get help with the LSR completion, it must open a "trouble ticket." When I tried to open a trouble ticket with Qwest, however, Qwest's system would not accept it because an LSR had not yet been submitted. I and my coworker on this project, Chris Veazey, found that we were constantly being bounced around from one Qwest representative to the other, many of whom could not help us, and some of whom did not know what an EEL was. Qwest referred us to several instructional websites, but these were only marginally useful in completing the EEL ordering process. Essentially, our process for submitting an LSR was trial and error. We would change certain information on the LSR pursuant to Qwest's instruction, submit the LSR, and keep our fingers cross that it would be accepted. Ultimately, on January 14, 2002, when we submitted a revised LSR, we received a firm order confirmation for our first EEL to be installed on January 21, 2002.

Q: **Is the process you have just described a common occurrence when trying to use Qwest's OSS?**

A: Yes, very common. I have found that in order to get an order through Qwest's OSS, FiberCom has to aggressively manage and shepherd the order through

Qwest's people and processes. It is not at all uncommon to open several trouble tickets on the same problem. Apparently, trouble tickets get "lost" in Qwest's system. I have been told by Qwest that once a trouble ticket is "closed," Qwest's operators cannot access it again to get a record of the problem, so a new ticket must be opened and the troubleshooting process begun over again. Very often we are made to deal with several Qwest people on the same problem, many of whom are in different cities. We are not given access to Qwest personnels' direct phone lines so it is not uncommon to get a different representative each time we call on a particular problem. This, combined with the "lost" trouble tickets, causes great confusion in Qwest as to what the problem is and how to address it.

Q: Has Qwest's OSS as you have described it caused delays in FiberCom's ability to provide services to its customers?

A: Yes, particularly with new products and services ordered from Qwest. For example, by the time FiberCom's First order for an EEL was accepted by Qwest, Fibercom had back ordered 11 other orders for EELs from its customers.

Q: Does that conclude your testimony?

A: Yes.

Being first duly sworn upon oath, 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 18 day of March, 2002.

MICHELLE MERCHEN

STATE OF SOUTH DAKOTA)

County of Pennington)

Subscribed and sworn to before me this 18 day of March, 2002.

Notary Public for South Dakota

(SEAL) My Commission Expires: 2/19/2004

Steven H. Weigler
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Law & Government Affairs

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March 18, 2002

RECEIVED
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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 the following:

Affidavit of Michael Hydock on General Terms & Conditions and SGAT Sections 11, 12, 17, 18 and Exhibit F & I

Affidavit of Kenneth L. Wilson Regarding Checklist Items 1 and 14 on Interconnection, Collocation and Resale

Affidavit of Kenneth L. Wilson Regarding Checklist Item 4 – Unbundled Loops and Checklist Item 11 – Local Number Portability

Affidavit of Kenneth L. Wilson Regarding Checklist Item 3 – Rights-of-Way and Checklist Item 7 – 911/E911

Affidavit of Kenneth L. Wilson Regarding Checklist Item 13 – Reciprocal Compensation

AT&T's Verified Comments on Disputed Issues Relating to Emerging Services

AT&T's Verified Comments Regarding Performance Data

AT&T's Verified Comments Regarding Public Interest

AT&T Witness John Finnegan's Verified Comments on Qwest's Performance Assurance Plan

AT&T's Comments on Section 272

AT&T's Verified Comments on Checklist Items 2, 5 and 6.

Also enclosed is the original Verification of Kenneth L. Wilson to his Affidavits listed above.

Transcript excerpts from other jurisdictions that have not been provided as attachments are available upon request.

Please call me if there are any questions.

Sincerely,

Steven H. Weigler

SHW/jb

Enclosures

cc: Service List

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE INVESTIGATION	)	
INTO QWEST CORPORATION'S	)	**Docket No. TC 01-165**
COMPLIANCE WITH SECTION 271(C) OF	)	
THE TELECOMMUNICATIONS ACT OF 1996	)	

VERIFICATION OF KENNETH L. WILSON

I, Kenneth L. Wilson, being duly sworn, hereby state that I am a Senior Consultant and Technical Witness with Boulder Telecommunications Consultants, LLC and have been retained by AT&T Communications of the Midwest, Inc. to provide expertise on technical matters in this proceeding. I hereby verify the factual assertions in the following Affidavits as true and correct statements to the best of my knowledge and expertise:

Affidavit of Kenneth L. Wilson Regarding Checklist Item 3 - Rights-of-Way and Checklist Item 7 - 911/E911

Affidavit of Kenneth L. Wilson Regarding Checklist Item 4 - Unbundled Loops and Checklist Item 11 - Local Number Portability

Affidavit of Kenneth L. Wilson Regarding Checklist Item 13 - Reciprocal Compensation

Affidavit of Kenneth L. Wilson Regarding Checklist Item1 – Interconnection and Collocation and Checklist Item 14 - Resale

Dated this 15th day of March 2002.

Kenneth L. Wilson

STATE OF COLORADO	)	
	)	**ss.**
CITY AND COUNTY OF BOULDER	)	

SUBSCRIBED AND SWORN TO before me this 15th day of March 2002 by Kenneth L. Wilson, who personally appeared before me and certifies that the foregoing is true and correct to the best of his knowledge and belief.

Witness my hand and official seal.

Notary Public

My commission expires: 8/30/04

RECEIVED
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March 2002, the original and 10 copies of AT&T's Affidavits and Comments in Docket No. TC01-165, were sent by overnight delivery service 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 overnight delivery and e-mail on March 18, 2002 addressed to:

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Boyce, Murphy, McDowell
& Greenfield, L.L.P.
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May Adam Gerdes & Thompson
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Janet Browne
Janet Browne

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

RECEIVED
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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

AFFIDAVIT OF MICHAEL HYDOCK ON GENERAL TERMS & CONDITIONS AND SGAT SECTIONS 11, 12, 17, 18 & EXHIBITS F & I

AT&T Communications of the Midwest, Inc. ("AT&T") hereby submits this supporting Affidavit of Michael Hydock on General Terms and Conditions ("GT&Cs") including, but not limited to, the Statement of Generally Available Terms ("SGAT") §§ 11, 12, 17, 18, Exhibit F and Exhibit I.

AFFIDAVIT

I. INTRODUCTION AND QUALIFICATIONS

My name is Michael Hydock. My business address is 1875 Lawrence Street, Denver, Colorado 80202.

I am employed by AT&T as a District Manager in the Local Services and Access Management organization. My responsibilities include a variety of local-related duties, including the negotiation of interconnection agreements and the analysis of the underlying issues in these agreements. I have also analyzed local exchange carriers' intrastate costing and pricing methodologies and studies. As an expert witness, I have submitted testimony on local issues within AT&T's Western Region. I have previously submitted testimony in regulatory or legislative hearings in Colorado, Iowa, Minnesota,

Montana, Nebraska, South Dakota, Utah, and Washington on behalf of AT&T, or my previous employer, MCI Worldcom.

I graduated from Rutgers University in 1975 with a Bachelor of Arts degree in Economics. I received a Masters of Economics from the graduate school at Georgetown University in 1977, and have completed my Ph.D. comprehensive examinations. I have also completed various training seminars offered by MCI Worldcom and AT&T in marketing, telecommunications, network, and costing methods in the telecommunications field.

I began my career with AT&T in 1981 in the Accounts and Finance department of AT&T Long Lines. During that time I spent five years doing economic forecasts to support network and business planning. From 1986 to 1990 I was employed by AT&T in its Eastern Region, working on intrastate and federal regulatory and access planning issues.

In 1990 I began working for MCI in its Federal Regulatory Department. In that group I was responsible for developing MCI regulatory policy on a variety of issues, including access and universal service. In 1994 I moved to the MCImetro start-up venture, where I performed regulatory and business analysis to support the development of MCI's local business. In 1995 I transferred to the Western Region where I managed local competition policy for MCI's Law and Public Policy group in the Western Region. During the period 1995 to 1999 I supported the negotiation and arbitration of the interconnection agreements ("ICAs") contracts that MCI was developing with Qwest. I became closely involved with a variety of costing dockets in the Western Region, and testified at a number of hearings.

In 1999 I accepted my current position as District Manager, ICA Negotiations in the Western Region of AT&T.

II. PURPOSE OF AFFIDAVIT

In the context of considering §271 compliance or lack thereof, GT&Cs are an integral part of how Qwest Communications, Inc. ("Qwest") purports to implement its specific checklist requirements. For example, if a competitive local exchange carrier ("CLEC") desires to interconnect using a particular SGAT provision, it may—under the Act—"pick and choose" such provision. With respect to GT&Cs, SGAT Section 1.8 purports to allow CLECs the "pick and choose" right as defined under the Act. The discussion that follows in this affidavit on SGAT Section 1.8, however, reveals that Qwest is not complying with its obligations under the Act and that Qwest's conduct is nothing more than an exercise in delay tactics that result in the creation of competitive barriers.

Thus, if the GT&Cs are particularly onerous or implemented such that they diminish Qwest's provision of some checklist items and, hence, its full compliance with § 271, then they create a barrier that the Commission should insist that Qwest remove. Without removal of these barriers, Qwest should not receive a finding of compliance with § 271 from this Commission.

Further, as a matter of law, to demonstrate compliance with the requirements of § 271's competitive checklist, Qwest must show that "it has 'fully implemented the competitive checklist [item]. . . .'"[1] Thus, Qwest must plead, *with appropriate supporting*

[1] *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (Rel. Dec. 22, 1999) at ¶ 44 ("***FCC BANY 271 Order***").

evidence, the facts necessary to demonstrate it has complied with the particular requirements of the checklist item under consideration.[2] This means that Qwest's QT&Cs cannot undermine compliance by creating ridiculous hurdles that the CLECs must overcome before they may enjoy the competitive rights provided under the Act. Furthermore, and as noted in the example provided above, merely offering SGAT language with little or no supporting evidence that Qwest is actually doing that which its SGAT claims, provides insufficient grounds upon which to conduct an investigation or develop any recommendation for the Federal Communications Commission ("FCC") regarding Qwest's actual compliance with § 271. As noted in AT&T this affidavits, Qwest has consistently failed to provide sufficient supporting evidence that it is doing what its SGAT claims.[3]

III. ANALYSIS

Generally, the discussion that follows is organized sequentially by SGAT section (*e.g.*, General Terms, Interpretation & Construction, Definitions, etc.) and then within those sections the disputes are discussed by SGAT section unless a general topic discussion warrants combining a group of SGAT sections to avoid redundancy.

GENERAL TERMS - SGAT § 1.0

A. SGAT § 1.7.2; Pending Commission Approval of New Rates, Terms and Conditions for New Products or Services, Qwest Should Employ Rates, Terms and Conditions that are Substantially Similar to Rates, Terms and Conditions for Comparable Products.

---

[2] *Id.* at ¶ 49.

[3] Much of Qwest's actual performance may not be determined until after the Regional Oversight Committee ("ROC") concludes its OSS and performance measurement testing. Nevertheless, ROC is not even considering some of Qwest's performance, as identified in this brief and elsewhere. In these instances Qwest must meet its burden of proof by placing evidence of compliance in this record. Vague, conclusory statements reiterating SGAT language alone, does not constitute evidence of compliance.

Potentially, Qwest may "roll-out" new products for various reasons (*e.g.*, in response to CLEC demand, because of a change in law, or, as previous workshops have revealed, because Qwest is creating more terms and conditions for service offerings already contained in the SGAT).[4] Regardless of the reason, CLECs and Qwest have agreed that Qwest will make new products available to CLECs as soon as possible and before Qwest goes through the task of amending its SGAT or any other mechanism it might employ to obtain Commission approval of such products and their associated rates.[5] This was agreed to as a way to lessen the delay and lag-time CLECs face when having to await Qwest's creation of Commission-approved terms, conditions and rates coupled with the further delay of having to amend individual interconnection agreements to accommodate the new products.[6]

During the interim period before Commission approval, AT&T requested that Qwest apply the rates, terms and conditions of its current products that most closely resembled the new product to the interim offering.[7] The SGAT language proposed by AT&T that would accomplish this goal was:

> Proposed SGAT Section 1.7.2
>
> Qwest agrees that the rates, terms and conditions applicable to new products and services that are not contained in this SGAT shall be substantially the same as the rates, terms and conditions for comparable products and services that are contained in this SGAT. Qwest shall have the burden of demonstrating that new products and services are not comparable to products and services already contained in this SGAT.[8]

---

[4] The single point of interconnection per LATA while allegedly provided in the SGAT § 7.1.2 was made into a new product through Qwest's SPOP product with terms and conditions not contained in the SGAT (and contrary to the law).

[5] 8/21/01 CO Tr. at pp. 17-27; 7/9/01 WA Tr. at pp. 3857-3866 (introduced by Qwest as exhibit 6 Qwest 83).

[6] *See generally*, 8/21/01 CO Tr. at p. 18; 7/9/01 WA Tr. at pp. 3857-3867.

[7] 8/21/01 CO Tr. at p. 19; 7/0/01 WA Tr. at pp. 3853-3858; 9/11/01 Or. Tr. at p. 253.

[8] ATT 518-C; *see also*, 9/11/01 OR Tr. at pp. 256-257; 8/21/01 CO Tr. at pp. 17-18; 7/9/01 WA Tr. at p. 3855; 9/11/01 Or. Tr. at pp. 256-257.

This language merely ensures that Qwest makes new product offerings actually accessible to the CLECs by matching them to previously approved terms and rates.[9] This is consistent and at parity with what Qwest does for its retail customers when it employees its AQCB feature to create prices for retail products not offered in its tariffs.[10] Thus, CLECs may actually compete with respect to the new product and do not suffer the illusion of timely receiving the new product while being bogged down by prohibitive pricing or by the delay inherent in negotiation with Qwest.

In fact, Qwest throughout numerous proceedings has provided no substantive reason that its rates, terms and conditions should not be fairly consistent for similar products. An example best illustrates why AT&T's position is sound. Assume, for argument's sake, that Qwest's SPOP product is—as it claims—appropriately a new product not available under the current SGAT. This new product allegedly offers CLEC's the opportunity to interconnect with Qwest at a single point of interconnection per LATA as opposed to Qwest's previous position of requiring a single point per rate center.[11] Qwest's SGAT § 7.0 already contains sufficient terms, conditions and rates that should form the basis for Qwest's SPOP offering; that is, it contains terms for interconnection via DS-1 or DS-3 facilities which would form the trunk to the SPOP from the CLEC facilities;[12] it provides that Qwest will furnish such facilities "at least equal in quality to those its provides to itself;"[13] it provides for the exchange of traffic and billing;[14] it

[9] 8/21/01 CO Tr. at p. 19; 7/9/01 WA Tr. at pp. 3866-3867

[10] By Qwest's own admission it employees the "AQCB" database to obtain prices for retail customers when they request products that are not offered in the tariffs. 6/1/01 AZ Tr. at pp. 502-504. AT&T is requesting similar treatment here.

[11] *See generally*, transcript discussions involving the SPOP issue 1/25/01 CO Tr. at pp. 32-124, 1/26/01 CO Tr. at pp. 42-49; 2/21/01 CO Tr. at pp. 7-15.

[12] SGAT § 7.1.2.

[13] *Id.* at § 7.1.1.1.

[14] *Id.* at § 7.2.1 *et seq.*

provides for the transport and termination of the traffic carried on these trunks,[15] and it provides for direct trunk transport, among other things.[16] These SGAT items, while not specifically linking to the new SPOP product, are indeed substantially similar to the terms and conditions necessary for interconnection between the CLEC's network and Qwest's network at a single point in the LATA. It would be astounding if Qwest came up with rates, terms and conditions that were substantially different than what it already offers given that SPOP is largely made up of interconnection piece parts already offered in the SGAT and SGAT/Exhibit A. Thus, AT&T's position makes interim offerings similar to current offerings available to the CLECs at rates, terms and conditions that are consistent with what Qwest has already acquired. Qwest suffers no disadvantage here and competition will benefit; therefore, AT&T requests that the Commission adopt this proposal.

B. SGAT §§ 1.8 & 1.8.1; When CLECs Exercise their Rights Under the "Pick and Choose" Provisions of the Act, Qwest's Conduct Thwarts the CLECs' Ability to Timely and Efficiently Opt Into SGAT and Interconnection Agreements in Violation of §§ 252(i) and 271.

While AT&T and Qwest have generally agreed to this SGAT language with the exception of the definition of "Legitimately Related," they have always been unable to agree that Qwest's conduct, apart from what the SGAT states, is in actual compliance with the law.[17] In order to judge Qwest's conduct, AT&T offers an examination of what the law requires and then applies that law to specific conduct that demonstrates Qwest's lack of compliance.

1. The Law Related to 47 U.S.C. § 252(i).

[15] *Id.* at § 7.2.2 *et seq.*
[16] *Id.* at § 7.3.2 *et seq.*
[17] 8/21/01 CO Tr. at pp. 140-141; 7/9/01 WA Tr. at pp. 3874-3875; 6/28/01 Multi-State Tr. at pp. 91-109

The law imposes upon ILECs, like Qwest, the duty to "negotiate in good faith" with its competitors in the creation of interconnection agreements.[18] In furtherance of that obligation, the Act instructs incumbent local exchange carriers ("ILECs") to allow for the creation or amendment of interconnection agreements through a mechanism known as "pick and choose." The Act states:

> A local exchange carrier shall make available any interconnection service, or network elements provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[19]

In addition, the *First Report & Order* states:

> We further conclude that section 252(i) entitles all parties with interconnection agreements to "most favored nation" status regardless of whether they include "most favored nation" clauses in their agreements. Congress's command under section 252(i) was that parties may utilize any individual interconnection, service, or element in publicly filed interconnection agreements and incorporate it into the terms of their interconnection agreement. This means that any requesting carrier may avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. We believe the approach we adopt will maximize competition by ensuring that carriers obtain access to terms and elements on a nondiscriminatory basis.[20]

During its consideration of § 252(i) of the Act, the FCC recognized, among other things, the incumbent-monopolist's superior bargaining position and its lack of incentive to actually cooperate with its competitors during negotiations.[21] In fact, the FCC concluded that it was vital to the growth of competition that states be ever vigilant in their

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[18] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 & 95-185, First Report and Order, FCC 96-325 (Rel. Aug. 8, 1996) at ¶¶ 138 – 171 ("***First Report and Order***").

[19] 47 U.S.C. § 252(i).

[20] *First Report and Order* at ¶ 1316.

[21] *Id.* at ¶¶ 15 & 141.

efforts to prevent incumbents from creating barriers to entry and handicaps that delay or destroy the new entrants' opportunities to meaningfully compete.[22] Thus the FCC promulgated the following rules related to "pick and choose:"

> Availability of provision of agreements to other telecommunications carriers under section 252(i) of the Act.
>
> (a) An incumbent LEC shall make available *without unreasonable delay* to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, *upon the same rates, terms, and conditions as those provided in the agreement*. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
>
> > (1) The costs of providing a particular interconnection, service, or element to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
> >
> > (2) The provision of a particular interconnection, service, or element to the requesting carrier is not technically feasible.
>
> (c) Individual interconnection, service, or network element arrangements *shall remain available* for use by telecommunications carriers pursuant to this section *for a reasonable period of time after the approved agreement is available* for public inspection under section 252(f) of the Act.[23]
>
> In evaluating this rule, the United States Supreme Court affirmed that "an incumbent LEC may require requesting carrier[s] to accept all terms that *it can prove* are 'legitimately related' to the desired term."[24]

Thus, the law is quite clear; Qwest must not act in a manner that unreasonably delays CLECs from obtaining "any" individual interconnection, service or element

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[22] *Id.* at ¶¶ 16 – 20.
[23] 47 C.F.R. § 51.809 (emphasis added).
[24] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721, 738 (1999)(emphasis added; citing FCC *First Report & Order* at ¶ 1315).

contained in "any" Qwest agreement approved by the State. When Qwest desires that the CLEC adopt terms in addition to those sought by the CLEC, Qwest must prove to the Commission that such terms are "legitimately related."

Finally, the particular provisions chosen by the CLEC should at least be made available under the "same rates, terms, and conditions as those provided in the agreement." Offering something less is not consistent with the law and enormously impractical.

2. Qwest's Conduct that is Contrary to the Above-cited Law.

Here, the records from other proceedings reflect Qwest's failure to fully and timely comply with its obligations under § 252(i). I have attached as **Exhibit A**, documents outlining three illustrative examples of AT&T's recent commercial experience with Qwest in exercising the "pick and choose" right. Briefly, they are: (a) Qwest applying termination dates different than those in the original agreements such that CLEC obtains any given provision with the remaining time the original CLEC has on its contract as opposed to the original termination date in the original agreement; (b) Qwest exaggerating and abusing the "legitimately related" requirement along with failing to provide AT&T with any proof of legitimate relation; and (c) Qwest refusing to allow AT&T to opt into approved agreements. I will examine each of these examples in turn and consider Qwest's response offered in other proceedings or lack thereof.

(a) Applying terms different than those in the original agreements.

Qwest applies to the "opting-in" CLEC, the "term" remaining for the original CLEC on a particular contract. So, where the original CLEC enjoyed all the provisions in its contract for a term of two years, Qwest is essentially denying that two year term to

the opting-in CLEC's and demanding instead that opting-in CLECs receive a lesser term based upon whatever time remains for the original CLEC.[25]

Qwest's interpretation is contrary to the law cited above. That is, Qwest must provide the opting-in CLEC with the same terms and expiration as the original CLEC enjoyed, not a lesser term or expiration date.

Nevertheless, in an attempt to support its position, Qwest argues that its interpretation is required to allow it to "sunset" certain agreements. Here too, Qwest's position is contrary to the law.[26] The FCC, as noted above in its rules, has created three alternatives for Qwest to offer terms and conditions other than what the original CLEC acquired. Those three alternatives are: (i) if Qwest can prove that the service is more costly than providing it to the original carrier; (ii) if Qwest can prove that it is technically infeasible to provide the service to the opting-in carrier; or (iii) if Qwest can demonstrate that the particular contract has been available for an unreasonable amount of time after its approval.[27] Each of these three provisions provides Qwest with ample opportunity to protect its interests while balancing the CLECs' need to opt into agreements without the unreasonable delay of having to renegotiate and re-arbitrate every provision every time they are needed.

During the many workshops, Qwest provided no legal or evidentiary support for its position to provide a lesser duration of contract provisions than the original agreement

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[25] 8/21/01 CO Tr. at p. 143; 7/9/01 WA Tr. at pp. 3882-3883 (citing to Brotherson Rebuttal Testimony containing a greater explanation of the application Qwest uses). In addition, Mr. Brotherson's testimony cites to dicta in a footnote to an FCC order that is not on point. Nevertheless, even assuming the footnote is correct, it does not support Qwest's interpretation, but rather, it confirms AT&T's position.

[26] *Id.*

[27] 47 C.F.R. § 51.809(b) & (c).

offers. Such conduct, without a showing of one of the three reasons for restricting an opt-in, fails as a matter of law and fact, and requires a finding of non-compliance.

(b) Exaggerating and abusing the "legitimately related" requirement.[28]

There are at least two recent examples of Qwest's exaggerated and abusive use of the "legitimately related" requirement. They are, (i) where AT&T sought to adopt the SGAT provision related to Qwest providing AT&T with interconnection trunk blocking reports, Qwest demanded that AT&T also adopt the wholly unrelated SGAT forecasting provisions; and (ii) where AT&T sought to adopt a single point of interconnection ("POI") per LATA, Qwest demanded that AT&T also pick and choose SGAT provisions irrelevant to a single POI.

In response to these claims in other § 271 proceedings, Qwest's lawyers summarily dismissed the problems as disputes that the Commission must resolve.[29] As in its South Dakota case, Qwest placed no evidence of its compliance or rebuttal information in any record. In contrast, AT&T revealed Qwest's actual understanding and conduct in the course of its business operations outside the scrutiny of the § 271 proceeding. For example, in relation to the blocking reports, the business records attached to this affidavit indicate that Qwest clearly understood that AT&T desired to adopt the SGAT provision related solely to blocking reports and Qwest clearly demanded that AT&T also adopt SGAT § 7.2.2.8 on forecasting. There existed no counter evidence from Qwest on this point, no proof that the provisions were technically inseparable and no proof that separation would cause an increase in the underlying costs.

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[28] AT&T objects to Qwest's attempt to re-define its obligation regarding "legitimately related" using its SGAT definitions section. Filed simultaneously herewith, AT&T is offering the definitions language that AT&T and Qwest have agreed to; the only dispute with respect to these definitions is the definition of "legitimately related."

[29] 8/21/01 CO Tr. at pp. 152-163; 7/9/01 WA Tr. at p. 3881.

Furthermore, Qwest, when asked during the many workshops, would provide nothing in the way of evidence to suggest that Qwest's exercise of the "legitimately related" requirement is anything other than a purely subjective and arbitrary decision on the part of whomever is consulted for any given provision.[30] The FCC, however, has plainly stated that "we conclude that the 'same terms and conditions' that an incumbent LEC may insist upon shall relate solely to the individual interconnection, service or element being requested under section 252(i)."[31] Moreover, the FCC has clarified that the "incumbent LECs may not require as a 'same' term ... the new entrant's agreement to terms ... relating to other interconnection, services or elements in the approved agreement."[32] Finally, the FCC mandates that "incumbent LEC efforts to restrict availability of interconnection, services, or elements under section 252(i) also must comply with the 1996 Act's general nondiscrimination provisions."[33]

The statements offered by Qwest, through outside counsel—not a witness—provided absolutely no evidence that Qwest employs any consistent criterion to ensure that it, in fact, requires the "same" terms relating solely to the provision sought or that it has any mechanism whatsoever for ensuring nondiscrimination among CLECs, itself or its affiliates. In short, the only evidence in this record or any other record clearly indicates that Qwest does not comply with its obligations under § 252(i) and hence, § 271. Absent proof that Qwest has created a mechanism that more objectively determines "legitimately related" sections and it applies such mechanism in a nondiscriminatory fashion, the Commission should not recommend a finding of compliance to the FCC.

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[30] 8/21/01 CO Tr. at pp. 152-163; 7/9/01WA Tr. at pp. 3881.
[31] *First Report and Order* at ¶ 1315.
[32] *Id.*
[33] *Id.*

On a similar note, Qwest's after-the-fact inclusion of a new definition for "legitimately related" that is neither consistent with the law or its conduct should not be considered an acceptable resolution to this issue. Late in its many § 271 proceedings Qwest introduced a definition of "legitimately related" that it apparently believed would somehow address the problem. That definition can be found in the South Dakota SGAT § 4. AT&T has shown that Qwest does not comply with the SGAT language in its business dealings and there is nothing in this record that suggests otherwise, including new definition language. Nevertheless, if Qwest wants to incorporate a definition for "legitimately related," that definition should—at a minimum—be consistent with the law. Thus, AT&T proposes modifying Qwest's proposed definition as follows:

> "Legitimately Related" terms and conditions are those rates, terms and conditions that relate solely to the individual interconnection, service or element being requested by CLEC under Section 252(i) of the Act, and not those that specifically relate to other interconnection, services or elements in the approved Interconnection Agreement. ~~These Rates, terms and conditions are those that, when taken together, are the necessary rates, terms and conditions for establishing the business relationship between the Parties as to that particular interconnection, service or element. These terms and conditions would not include General Terms and Conditions to the extent that the CLEC Interconnection Agreement already contains the requisite General Terms and Conditions~~.

The first portion of this definition is consistent with the law; the latter stricken portion is a creation of Qwest's that is neither reflective of what Qwest actually does nor consistent with the law. The South Dakota Commission should not accept the latter portion of this definition. AT&T requests that the Commission order Qwest to remove the stricken through portion of this definition, and demand further investigation to require Qwest to define its process specifically, which should include a mechanism to oversee and prohibit abuses.

(c) Failing to allow lawful requests to opt into Commission-approved agreements.

In the final example, Qwest has insisted that AT&T not opt into the agreement it designates, but rather that if the designated agreement was one that was opted into and slightly modified by another CLEC, AT&T—according to Qwest—could not opt into the agreement it selected, but rather, AT&T had to select the previous agreement that had formed the underlying basis for the designated agreement that AT&T sought. Nothing in the law supports this conclusion. Nothing in the facts in this or any record supports Qwest's conduct. Thus, Qwest was yet again, acting outside the scope of the SGAT and engaging in conduct that is contrary to the law and posed to delay CLECs' efforts to obtain agreements. In fact, it took AT&T over six months to successfully concluded what should have otherwise been a simple opt-in with minor modifications.

All three examples provided by AT&T constitutes evidence of Qwest's failure to negotiate in good faith in relation to the pick and choose obligations and all three acts create barriers to entry, while undermining Qwest's full compliance with the Act, in particular § 271. Furthermore, in AT&T's experience Qwest's process for handling "pick and choose" requests is consistent from state-to-state. Hence, regardless of the state, AT&T's experience will be largely the same because it must deal with the same people and departments at Qwest. Therefore, Qwest is not in compliance with § 271 of the Act.

INTERPRETATION & CONSTRUCTION – SGAT § 2.0

C. SGAT §§ 2.1 & 2.3; Qwest's Tariff Filings should not Automatically Amend Interconnection Agreements or the SGAT.

Tariff filings generally provide a carrier's standard offerings, with all terms, conditions and prices applicable. Commissions may proactively approve tariffs or they

may simply go into effect via the passage of time without any review. Where tariffs become effective without review, they are still subject to challenge. Generally, tariffs are subject to change at the sole discretion of the carrier.

In South Dakota, Qwest has access tariffs and state retail tariffs.[34] As with all tariffs, these tariffs contain their own terms, conditions and prices. Qwest has provided no evidence to indicate whether these tariffs contain conflicting terms, conditions or prices with those contained in its SGAT. Nor has Qwest provide any evidence regarding how or where in the SGAT such tariffs are employed, if at all. Nonetheless, Qwest seeks the right to have such tariffs unilaterally and automatically alter the terms, conditions and prices contained in the SGAT and executed interconnection agreements based thereon.

From AT&T's review, there exist in the SGAT already limited sections, such as SGAT § 6 on resale, that describe how Qwest retail tariffs may alter the SGAT and to what extent it is altered.[35] Nothing more is needed to protect Qwest's interests.

Apart from the specific tariff references already contained and dealt with in the SGAT, Qwest's request to obtain an overarching tariff-revision provision violates the fundamental requirements of the U.S. Constitutional right to contract and the carrier's right to rely on promises made.[36] Moreover, several Commissions have already approved interconnection agreements that bar Qwest from attempting to alter interconnection

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[34] *See* http://tariffs.uswest.com; *cf.* http://cei.uswest.com/ppnb.nsf, which apparently constitutes the most recent change in the URL for Qwest's tariff web site.

[35] *See e.g.*, SGAT §§ 6.2.2.7, 6.2.4, 6.2.13, 6.2.14, 6.3.1, 6.3.3, 6.3.6, 6.3.9, 6.3.10, and 6.5.1; *see also* SGAT § 7.2.1.1.

[36] *See* cites to the U.S. Constitutional ex post facto and contract rights and discussion in the section that follows.

agreements through changes in its tariff filings.[17] Nothing presented in this record or during any other workshops should change this position.

D. SGAT § 2.2; Qwest needs to Further Modify this Section Consistent with its Agreed Changes from Other States.

In the previous § 271 decisions, Qwest lost the SGAT demand that during the pendency of the parties' negotiations regarding amendments to accommodate changes in law they would enter into new interim agreements. Thus the references to the 60-day intervals limiting the period in which the old agreement was effective should be completely stricken. That is the relevant language should read as follows:

> 2.2 The provisions in this Agreement are intended to be in compliance with and based on the existing state of the law, rules, regulations and interpretations thereof, including but not limited to state rules, regulations, and laws, as of the date hereof (the Existing Rules). ... During the pendency of any negotiation for an amendment pursuant to this Section 2.2, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, for up to sixty (60) days. For purposes of this section, "legally binding" means that the legal ruling has not been stayed, no request for a stay is pending, and any deadline for requesting a stay designated by statute or regulation, has passed.

TERMS & CONDITIONS – SGAT § 5.0

E. SGAT §§ 5.8.1 *et seq.*; Qwest's Limitations of Liability are so Narrowly Drawn that They Undermine Qwest's Incentives to Perform Under Interconnection Agreements, its SGAT and the Act. The Limitations Further Create a Disincentive or Barrier to Competition for the CLECs.

How much damage may Qwest do to an individual CLEC by failing to perform under the terms of the interconnection agreement or SGAT before it is held accountable to that CLEC for such damage? This is the fundamental question that the SGAT limitation of liability provisions address.

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[17] *See* AT&T ICAs with Qwest in: Idaho, Part A § 53; Iowa, Part A, § 20; Nebraska, Part A, § 20; and Utah, Part A, § 53.

Qwest's view, as revealed by SGAT § 5.8.1 *et seq.*, is that generally it should not be liable for anything other than the cost of the service the CLEC paid or would have paid to Qwest in the year in which the nonperformance arose.[38] In fact, Qwest's view may be even more stringent than this, if its Post Entry Performance Plan ("PEPP" a/k/a "PAP")[39] is "adopted" by the CLEC.[40] Under SGAT § 5.8.3 where the CLEC "adopts" that Plan, the CLEC may suffer harm from Qwest's breach and not be compensated at all.[41] Either way, whether the CLEC "adopts" the PEPP or whether the CLEC is skewered by the SGAT limitations, it loses. It suffers harm at the hands of Qwest, its business is harmed, its customers and personnel are possibly harmed and it recovers nothing that actually resembles or comes close to the cost of the harm suffered.[42] Qwest, on the other hand, blissfully avoids any real accountability. All incentives to perform under the terms of the agreement, SGAT and Act are lost in relation to Qwest's interactions with that CLEC (and in fact with all CLECs). Thus, Qwest's promise to perform under the contract becomes illusory at best because it suffers no real threat of

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[38] *See generally* SGAT §§ 5.8.1, 5.8.2 and 5.8.4 (excluding willful misconduct from the limitation) for greater detail on the further limitation of the costs that Qwest will repay.

[39] When used herein and in the SGATs, the parties have employed the terms PEPP or PAP synonymously.

[40] 8/22/01 CO Tr. at pp. 17-18; 7/10/01 WA Tr. at pp. 3992-3993; SGAT §§ 5.8.3 (CLEC may "adopt" PAP). During the Multi-State workshop, Qwest's counsel noted that "the PAP has limitations that basically say if a CLEC accepts this, they're voluntarily agreeing that the PEPP is a liquidated damages plan . . . and it becomes ... virtually an exclusive remedy to CLECs in terms of recovering money . . . in the event Qwest fails to perform." 6/25/01 Multi-State Tr. at 72(introduced as 6 Qwest 82). The issue of whether Qwest has the authority to not comply with the PEPP in relation to individual CLEC's and whether it can make such Plan an exclusive remedy are issues largely within the FCC's control, and in any event, are more properly considered in relation to the PAP/PEPP consideration itself. Nevertheless, no State in this proceeding should allow Qwest the opportunity to avoid compliance with a performance assurance plan if a CLEC refuses to "adopt" it and forego any recovery for Qwest's breaches. Furthermore, the FCC confirms that it does not consider the PEPP/PAP an exclusive remedy. *SWBT Texas 271 Order* at ¶ 421.

[41] Qwest Revised 5-30-01 PAP creates a tiered system for CLEC recovery related to only certain performance measurements that have been missed in an aggregate threshold amount to qualify for recovery.

[42] 8/22/01 CO Tr. at p. 18; 7/10/01 WA Tr. at pp. 3992-3994.

liability should it fail to perform while the CLEC essentially loses the benefit of the bargain and potentially suffers even greater damage.[43]

By and large the proposed limitations protect Qwest, not CLECs, even though the provisions are reciprocal. Qwest is the primary supplier of services and access to the local market, and the CLECs pay Qwest for such services and access to customers. If CLECs don't pay, Qwest obtains its money and remedy as spelled out in the SGAT under sections unencumbered by these limitations.[44] CLECs, however, are hugely dependent upon Qwest's services to compete in the local market. Considering the resources necessary to enter a local market, it is doubtful that a CLEC would enter under conditions where Qwest, its primary supplier and monopoly bottleneck to customers, could fail to perform under the terms of an interconnection agreement or SGAT and be essentially insolated from any accountability for the harm actually caused to the CLEC. It is also doubtful that, as a matter of law, the courts would find such an agreement met with the fundamental principles of contract formation. That is, the parties to a contract must be mutually bound to honor their performance promises (*e.g.*, consideration must exist on both sides of the deal).[45] If Qwest can simply not perform and not face any real liability for its breach, there exists a failure to create the contract required under the Act. In essence, Qwest has avoided full compliance with 47 U.S.C. §§ 251, 252 and 271.[46]

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[43] E. Allan Farnsworth, *Contracts* § 2.13 (3d ed. 1999)(noting that illusory promises constitute a failure of consideration).
[44] SGAT § 5.8.5.
[45] John D. Calamari & Joseph M. Perillo, *Contracts* 228 (3d ed. Hornbook Series 1987).
[46] *Cf. FCC BANY 271 Order* at ¶ 436 (recognizing that a relatively low potential liability would be unlikely to provide meaningful incentives).

In an attempt to level the playing field and provide all parties to the interconnection agreements and/or SGATs with the proper incentive to perform, AT&T proposes revising Qwest's limitations sections as follows:

> 5.8.1 ~~Except for losses relating to or arising out of any act or omission in its performance of services or functions provided under this Agreement~~ eEach Party shall be liable to the other for direct damages for any loss defect or equipment failure including without limitation any penalty reparation or liquidated damages assessed by the Commission or under a Commission-ordered agreement (including without limitation penalties or liquidated damages assessed as a result of cable cuts), resulting from the causing Party's conduct or the conduct of its agents or contractors.
>
> 5.8.2 Neither Party shall be liable to the other for indirect, incidental consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty strict liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result. For purposes of this Section 5.8.2, amounts due and owing to CLEC, or CLECs as a group, pursuant to any backsliding plan applicable to this Agreement shall not be considered to be indirect, incidental, consequential, or special damages.
>
> 5.8.3 ~~Except for indemnity obligations, or as otherwise set forth in this Section, each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance of services or functions provided under this Agreement, whether in contract or in tort shall be limited to the total amount that is or would have been charged to the other Party by such breaching Party for the service(s) or function(s) not performed or improperly performed, including without limitation direct damages for loss of or damaged to CLEC's collocated equipment located within the Collocation space.~~
>
> 5.8.4 Nothing contained in this Section shall limit either Party's liability to the other for (i) willful or intentional misconduct (including gross negligence) or (ii) bodily injury, death or damage to tangible real or tangible personal property proximately caused by such Party's negligent act or omission or that of their respective agents, subcontractors or employees.
>
> 5.8.5 Nothing contained in this Section 5.8 shall limit either Party's obligations of indemnification specified in Section 5.9 of this Agreement, nor shall this Section 5.8 limit a Party's liability for failing to make any payment due under this Agreement.
>
> 5.8.6 CLEC is liable for all fraud associated with service to its end-users and accounts. Qwest takes no responsibility, will not investigate, and will

> make no adjustments to CLEC's account in cases of fraud unless Qwest is responsible for such fraud, whether is the result of any intentional act of Qwest, or gross negligence of Qwest, or otherwise. Notwithstanding the above, if Qwest becomes aware of potential fraud with respect to CLEC's accounts, Qwest will promptly inform CLEC and, at the direction of CLEC, take reasonable action to mitigate the fraud where such action is possible.

Qwest announced during the Multi-State workshops that the PAP/PEPP was an exclusive remedy for the CLEC if adopted. The notion that Qwest may avoid compliance with the PEPP/PAP in relation to a CLEC that opts for the limitation section of the SGAT, rather than the PEPP/PAP, is astounding. The FCC has made the existence and compliance with such plans probative evidence of an RBOC's meeting its § 271 obligations.[47] Furthermore, the FCC has made clear that the PAP/PEPP-type plans are not the sole method for ensuring the BOC's performance; rather, the FCC looks to an array of damage recovery mechanisms, including damages under PAP/PEPPs, damages under interconnection agreements and damages under state commission service quality rules.[48] Qwest should not be allowed to opt out of its backsliding measures and utterly eliminate a CLEC's right of recovery for breach of contract in its SGAT limitations. The Commission should ensure fundamental fairness by rejecting Qwest's SGAT limitations and adopting AT&T's proposals.[49]

F. SGAT §§ 5.9 *et seq.*; As with Limitations of Liability, Qwest's Indemnity Provisions are so Narrowly Drawn that They Undermine Qwest's Incentives to Perform Under Interconnection Agreements, its SGAT and the Act. The Indemnities Further Create a Disincentive or Barrier to Competition for the CLECs.

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[47] *FCC BANY 271 Order* at ¶¶ 433 & 436 (noting that a Plan with low liability would likely provide no meaningful incentive to maintain performance).

[48] *SWBT Texas 271 Order* at ¶ 421.

[49] There exists substantial confusion as to the interplay between Qwest's PEPP/PAP, the SGAT indemnity provisions and the post merger agreements on service quality. At this point it is difficult to entirely resolve this issue without the benefit of a complete record on such interplay. Nevertheless, the CLECs – as a matter of contract law—deserve to have their contracts with Qwest be enforceable real agreements that provide each party the incentive to perform.

The indemnity provisions of the SGAT must work hand-in-hand with the limitations of liability and the PEPP/PAP plans to create sufficient incentives for monopolists to "play fair" and not engage in anti-competitive and discriminatory conduct. The FCC, in its § 271 orders, relies upon several avenues of enforcement and recourse for RBOCs, not the least of which are "private causes of action" against RBOCs if they fail to perform.[50] Qwest, on the other hand, wants to limit its liability and refuses to adequately indemnify CLECs such that where Qwest causes CLEC's harm and causes CLECs to become the subject of end-user or personal injury claims, Qwest enjoys a "home-free" card because it escapes liability for its conduct, while CLEC is stuck defending itself and Qwest.

In a competitive market, a willing seller and a willing buyer would approach the issue on level ground, and they would create more balanced indemnity provisions much like those the Commissions have approved in the AT&T/US WEST interconnection agreements.[51] Here, however, the SGAT bill slants dramatically in favor of Qwest. Under the SGAT, Qwest will indemnify CLECs narrowly, by – among other things – excluding from indemnity, claims brought against CLECs by end-users and injured parties, and by limiting monetary recovery under the indemnity provisions to "the total amount that is or would have been charged for services not performed or improperly performed."[52]

During the many previous workshops, Qwest suggested that its indemnity provisions to CLECs should mirror its retail tariff indemnity provisions for its mass-

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[50] *SWBT Texas 271 Order* at ¶ 421

[51] *See also*, Schneider WA Direct Testimony at p. 19 and his oral comments at 7/10/01 WA Tr. at pp. 4003-4009.

[52] 6/20/01 CO Tr. at pp. 82-83; 7/10/01 WA Tr. at pp. 4007-4008; 9/11/01 OR Tr. at pp. 383-389.

marketed services to end-users.[53] Unlike mass-marketed products, however, Qwest is entering into far fewer individual interconnection agreements in an effort to open its monopoly markets to competition under the Act. Moreover, both parties to the SGAT would benefit from each other's indemnity provisions as between themselves and the end-users. These indemnities simply limit some lawsuits and allow carriers to offer basic services under regulatory price caps, among other things. They have no application as between carriers, especially where CLECs are paying large sums to Qwest for service, and where CLECs are heavily reliant upon Qwest to provide service to customers. Here, the indemnity provisions as between carriers should more closely mirror those found in competitive markets between willing buyers and sellers. Here too, many Commissions have previously approved such indemnity provisions in interconnection agreements between U S WEST/Qwest and AT&T.

Therefore, the Commission's goal ought to be the creation of a market environment that replicates and eventually becomes competitive. To do this, AT&T offers the modifications contained in **Exhibit B** of this affidavit, which alter Qwest's indemnity language. These modifications bring Qwest's SGAT provisions more in line with indemnity provisions that willing parties create in a competitive market and that Commissions have previously approved in interconnection agreements between AT&T and U S WEST (a/k/a Qwest).

G. SGAT § 5.12.2; Detrimentally Impacts the Public Policy Protections for End-Users, Harms CLECs' Contract Rights and Avoids Qwest's Obligations Under the Act in the Case of Sale of Exchanges.

[53] 6/20/01 CO Tr. at pp. 82-83; 7/10/01 WA Tr. at pp. 4007-4008.

This section deals with the sale of exchanges.[54] The parties are generally at impasse insofar as Qwest's sale of exchanges has an impact upon Qwest's contract or SGAT obligations with CLECs. The impasse issues are more precisely set out by examining AT&T's proposed language. It states:

> 5.12.2 Transfer of all or Part of Qwest Telephone Operations. If Qwest directly or indirectly (including without limitation through a transfer of control or by operation of law) sells, exchanges, swaps, assigns, or transfers ownership or control of all or any portion of Qwest's telephone operations (any such transaction, a "Transfer") to any purchaser, operator or other transferee (a "Transferee"), Qwest must:
>
> a. obtain a written agreement from the Transferee, prior to the Transfer (in form and substance reasonably satisfactory to AT&T), that Transferee agrees to be bound by the interconnection and intercarrier compensation obligations set forth in this Agreement with respect to the portion of Qwest's telephone operations so transferred, until an interconnection agreement between CLEC and the Transferee becomes effective;
>
> b. provide CLEC with prompt written notice of any agreement or understanding relating to any proposed Transfer, and in any event at least one hundred eighty (180) days prior written notice of the completion of such Transfer;
>
> c. use its best efforts to facilitate discussions between CLEC and the Transferee with respect to Transferee's assumption of Qwest's obligations pursuant to the terms of this Agreement;
>
> d. serve CLEC with a copy of any Transfer application or other related regulatory documents associated with the Transfer when filed with the Commission or the FCC;
>
> e. not oppose CLEC's intervention in any proceeding relating to the Transfer; and not challenge the Commission's authority in any proceeding relating to the Transfer to hear the issue of whether the Transferee should be required to adopt any or all of the terms of this Agreement.

The purpose of this language is to require Qwest to consider its contract obligations with the CLECs when it sells its exchanges. The language is not intended to prevent Qwest from selling, but rather, it creates some consistency and transition related to the buyer.

[54] 8/22/01CO tr. at p. 118; 7/10/01 WA Tr. at p. 4025.

Qwest and the CLEC.[55] As a matter of public policy alone, carriers should work together to implement transparent transitions for end-users when the underlying providers of service change. AT&T's language expressly requires such cooperation.

Contrary to Qwest's unsupported assertions in other proceedings, AT&T's proposal does not "lock in" rates that the buyer could not at some point change.[56] All AT&T's proposal does is ensure that carriers work together for a smooth transition and that Qwest treat its wholesale customers as though it was concerned about performing under their contracts as well.

With respect to AT&T's proffered language, Qwest has dismissed it out of hand stating that the general Commission-approval process for an incumbent's sale of exchanges was sufficient.[57] Qwest's cavalier attitude reveals that it is more interested in selling its rural exchanges than it is in ensuring that its wholesale customers and competitors or their customers are taken care of. And as to Qwest's performance under the contract with the CLECs, from Qwest's perspective this appears to be wholly optional when Qwest wants to cease performance and sell exchanges.

Under contract law, federal law and public policy, Qwest's position should be rejected. Thus, AT&T requests that the South Dakota Commission adopt the proposed SGAT language, above.

H. SGAT § 5.16; Qwest Defies its Confidentiality Responsibilities in this SGAT, the Act and ICAs and it Misuses CLEC Confidential Information For its Retail Marketing Advantage.

SGAT § 5.16 indicates that all information furnished by one party to another, including but not limited to end-user specific information—other than end-user

[55] 8/22/01 CO Tr. at pp. 128-129; 7/10/01 WA Tr. at pp. 4023-4024
[56] 7/10/01 WA Tr. at p. 4026.
[57] 8/22/01 CO Tr. at pp. 118-119; 7/10/01 WA Tr. at pp. 4025-4027

information necessary for providing directory listings —constitutes confidential and proprietary information as designated by the owner of such information. The provision goes on to state "[e]ach Party shall keep all of the other Party's Proprietary Information confidential and shall use the other Party's Proprietary Information only in connection with this agreement." AT&T's interconnection agreements with Qwest contain similar requirements. The SGAT provisions are consistent with 47 U.S.C. § 222, which states in regard to carriers sharing information:

> (a) In General—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers and customers, including telecommunications carriers reselling telecommunications services provided by a telecommunications carrier.
>
> (b) Confidentiality of Carrier Information—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing a telecommunications service shall use such information only for such purpose, *and shall not use such information for its own marketing efforts.*[58]

AT&T concurs in some of the language of SGAT § 5 (e). AT&T does not, however, concur that Qwest's conduct meets this standard or the Act's § 222. In fact, Qwest's conduct violates this standard as demonstrated in **Exhibit C**, attached hereto. This Exhibit reveals that Qwest is able to and does engage in "win-back" marketing efforts of future AT&T customers before the customer has even switched carriers. In the case of a new AT&T Broadband customer, such as Mr. Tate, the only way Qwest gets access to the customer switch request is by receipt of AT&T's local service request ("LSR").[59] The LSR is sent to Qwest from AT&T seeking a scheduled cut-over.[60] The information on AT&T's LSRs is confidential information that should not be flowing to

[58] 47 U.S.C. § 222 (a) & (b) (emphasis added)
[59] 8/22/01 CO Tr. at pp. 266-271.
[60] 6/27/01 Multi-state Tr. at pp. 133-135.

Qwest's retail marketing arm such that it can solicit those customers before they've even left Qwest. Most customers don't understand that Qwest should not be soliciting them at this point, so the problem can easily go undetected.

Moreover, the fact that the Exhibit explains an occurrence in Minnesota does not diminish its probative value here. Qwest's LNP process is provided region-wide to CLECs.[61] Likewise, Qwest's OSS system is provided region-wide to CLECs for ordering, pre-ordering, maintenance and repair.[62] According to Qwest its own service representatives across the region employ the same OSS systems.[63] Thus, if Qwest can engage in such conduct in Minnesota, it can do so in other states as well.

Furthermore, CLECs discovered that Qwest, at least at one time, was providing confidential CLEC information to the Qwest sales and service representatives directly through the representatives' access generally to the end-user customers' account information and history. As it turned out, the CLECs' inquiries regarding customer service and information obtained through the OSS interface was being collected and recorded for the Qwest representatives to see and use.[64] It would appear from Qwest's win-back efforts that a similar or the same capability still exists within its customer records.

AT&T requests that the South Dakota Commission find Qwest in non-compliance with its § 271 obligations, until it explains how the information from AT&T's pending LSR orders related to Mr. Tade's service ended up in the hands of Qwest sales personnel

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[61] 8/22/01 CO Tr. at pp. 266-271; *see generally*, 6/27/01 Multi-state Tr. at pp. 115-127, *see also*, SGAT § 12.0 and Direct Testimony of Margaret Baumgartner Re: Checklist Item No. 11 at p. 13 *et seq.* & Rebuttal Testimony of Margaret Baumgartner Re: Checklist Item Nos. 1 and 11 at p. 94 *et seq.*

[62] SGAT § 12.0.

[63] 6/27/01 Multi-state Tr. at p.138-139; *see also* SGAT §§ 12.1.1 & 12.1.2.

[64] CO 6 ATT 84 at pp. 89-91.

and Qwest demonstrates that it has corrected every mechanism through which Qwest's retail marketing people gain access to CLEC service order information.

I. SGAT §§ 5.16.9 & 5.16.9.1.1; Contrary to Qwest's Previous Statements During Various Workshops, Qwest intends to Misuse CLEC Forecasts in Violation of its SGAT, 47 U.S.C. § 222 and its Obligations Under § 271.

In previous workshops, Qwest had agreed to abide by the confidentiality provisions proposed in SGAT §§ 7 and 8 regarding CLEC forecasts.[65] Later, Qwest rejected those provisions and offered new less restrictive nondisclosure provisions to govern CLEC forecasts.[66] Basically the new language allowed a far wider, ill-defined group of Qwest personnel to see the forecasts[67] and it allowed, at least under Qwest's interpretation, Qwest unfettered authority to use the information from the forecasts in any way it wanted, as long as it aggregated that information in some fashion.[68] The South Dakota SGAT retains some remnants of that aggregation concept by suggesting in § 5.16.9.1 that only CLEC "individual" forecasts shall be protected in accordance within the strictures of § 5.16.9. Qwest's position with respect to aggregation of forecast information in South Dakota is unclear, but for argument's sake, I must assume it maintains the same stance it took, and incidentally lost, in other states.

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[65] *See agreed to* SGAT §§ 7.2.2.8.12 (interconnection trunk forecasts) and 8.4.1.4.1 (collocation forecasts).

[66] A condition precedent to AT&T agreeing to the SGAT forecasting requirements in the first instance was that Qwest agreed to provide the protection of those forecasts noted in the SGAT sections on interconnection and collocation. Apparently Qwest has *carte blanche* to revise its positions throughout these workshops and the CLECs and Commissions must simply adjust. AT&T will ask the FCC and the Commissions to reconsider whether forecasts should be required if Qwest goes back on its word regarding their protection.

[67] 7/10/01 WA Tr. pp. 4039-4041; Oral Testimony of Larry Christensen of Qwest noting product managers, process, network, costing etc. teams want access to forecasts, and that product teams want access including those that may cross over between Qwest marketing, etc. 6/20/01 Colo. Tr. at 192-220.

[68] 6/20/01 CO Tr. at p. 223; 7/10/01 WA Tr. at p. 4041; 6/28/01 Multi-state Tr. at p. 56; 9/11/01 Or. Tr. at pp. 261- 262.

During the interconnection and collocation workshops in other states, Qwest claimed it needed CLEC forecasts to ensure it could meet CLEC demand for trunks and collocation space. Other than CLECs providing these forecasts to Qwest it would not have access to such information.

South Dakota is among the many states that have adopted the Uniform Trade Secrets Act.[69] These acts generally define trade secrets as information, including a formula, pattern compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from being secret; and (b) the subject of reasonable efforts to maintain its secrecy.[70] "A purpose of trade secrets law is to maintain and promote standards of commercial ethics and fair dealing in protecting those secrets."[71] Furthermore, the "necessary element of secrecy is not lost ... if the holder of the trade secret reveals the trade secret to another in confidence ... ."[72] Thus, the secret may not be disclosed in any form other than that authorized by the owner.[73]

Trade secrets in the form of forecasts are the property of the CLEC, not Qwest, and Qwest's SGAT §§ 5.10.1 and 5.16.1 confirms this position. The South Dakota Commission should afford competitors the same protections the South Dakota courts would.

In addition to state law, federal law also confirms the confidentiality of such forecasts. As cited above, 47 U.S.C. § 222(b), instructs that telecommunications carriers

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[69] Unif. Trade Secrets Act, 14 U.L.A. 152 (1985 & Supp. 1989); *see also*, SDCL 37-29-1 *et seq*

[70] *See generally*, definitions sections; specifically *see* SDCL 37-29-1(4).

[71] *Ed Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936, 942 (Wash. 1999)(discussing the purpose of the Uniform Trade Secrets Act).

[72] *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879, (1974); *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 676 (Wash. 1987).

[73] *Kewannee Oil*, 416 U.S. 470, 94 S.Ct. at 1883.

that receive "proprietary information from another carrier for purposes of providing a telecommunications service shall use such information *only* for such purpose . . ."[74]

In light of the law, how Qwest can conclude that it may take confidential carrier information and combine it with other confidential carrier information and thereby disclose such information for its own regulatory or other purposes is beyond reason. Furthermore, during the workshop Qwest went on to state "aggregate forecasts, . . . we do not believe are confidential."[75] Under the law and Qwest's own SGAT, trade secrets do not lose their secrecy or become the property of another simply because the recipient combines them with others or wants to create a larger list of combined information.[76] No property right is transferred to Qwest in the trade secret, Qwest obtains merely a license to use the information for the purpose intended (*e.g.*, meet CLEC customer demand for interconnection trunks and collocation space).[77] Qwest may not as a matter of state contract law, trade secret law or federal law divulge such secrets in any form according to its own discretion.

While Qwest may cite in its briefs and elsewhere 47 U.S.C. § 222(c) as support for its aggregation theory, such reference would be stretching the law beyond its express application. This particular section applies to end-user customer proprietary information, not the carrier-to-carrier information at issue here. Simply put, if Qwest intends—as it has confessed in other states—to disclose CLEC forecasts in aggregate or any other form, it is in direct violation of state and federal law and its own SGAT.

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[74] 47 U.S.C. § 222(b)(emphasis added).
[75] 7/10/01 WA Tr. at pp. 4041-4042; 6/28/01 Multi-state Tr. at p. 56.
[76] SGAT § 5.16.1; *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 2872 (1984)(where exists a property right in trade secret).
[77] *Kewanee Oil*, 470 U.S. 470, 94 S.Ct. 1879, 1883.

Nor should Qwest be allowed to argue that aggregation is the key to allowing those Qwest personnel that need to see the forecasts an opportunity to see them. The SGAT as previously agreed upon made clear that the individuals that needed to see forecasts to accomplish the goals for which the forecasts were intended. These individuals could combine the information and use it to accomplish their goal of meeting CLEC customer wholesale demand (and truth be told, meeting Qwest PID measurements). These individuals may not, however, destroy the secrecy required to maintain the trade secrets by creating combinations of the forecasts and disclosing them at will.

ACCESS TO OPERATIONAL SUPPORT SYSTEMS (OSS) – SGAT § 12

J. SGAT § 12.2.6; Contrary to Full Compliance with Its § 271 Obligations, Qwest's Current Change Management Process Fails to Comply with the FCC's Requirements.

The Change Management Process or "CMP" is a part of SGAT § 12.2.6. With respect to change management processes, the FCC's § 271 orders consistently require that "the evidence demonstrate" the existence of the following five factors for adequacy:

> (1) that information relating to the change management process is clearly organized and readily accessible to competing carriers; (2) that competing carriers had substantial input in the design and continued operation of the change management process; (3) that the change management plan defines a procedure for the timely resolution of change management disputes; (4) the availability of a stable testing environment that mirrors production; and (5) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway.[78]

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[78] *In the Matter of 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* Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238 (Rel. June 30, 2000) at ¶ 108 (hereinafter "***SWBT Texas 271 Order***").

The record evidence from other workshops shows that Qwest's current CMP fails to meet these standards.[79] Thus, in all other states, Qwest suspended consideration of that CMP process to redesign it in the CMP process itself. While AT&T supported the revision of a failed process, it is important to bear in mind that the FCC mandates:

> in order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior. Thus, we must be able to make a determination based on the evidence in the record that a BOC has actually demonstrated compliance with the requirement of section 271.[80]

Presently, Qwest cannot be found to be in compliance with its obligations under § 271, and this status must remain so until Qwest adequately demonstrates its actual compliance through evidence of actual implementation of the revised CMP for the consideration of this tribunal. Thus, the South Dakota Commission should not even endeavor to make an FCC recommendation on the CMP process until Qwest has completed its redesign.

In addition to the redesign project, Qwest—in the other states considering § 271 compliance using the SGAT—promised to update its technical publications and its wholesale manual for competitors (a/k/a "PCAT") to ensure that these documents were consistent with the SGAT. AT&T and other CLECs in the previous proceedings complained that Qwest's SGAT was not consistent with what its field personnel and the CLEC field personnel use (namely, the technical publications and the PCAT). As a result, the people actually doing the work were not operating consistently with what the

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[79] ATT 514 (Qwest's discovery responses providing business records demonstrating the ineffective, untimely and poor process); *see also*, Exhibit 512, Supporting Affidavit of John F. Finnegan Regarding Section 12 at pp. 15-25 and Exhibits attached thereto as Exhibits A & B; 8/23/01 CO Tr. at pp. 191-249; 6/25/01 Multi-State Tr. at pp. 71-98; 6/27/01 Multi-State Tr. 112-254; 6/28/01 Multi-State Tr. at pp. 5-139 (with each successive discussion of CICMP, Qwest alters its plan for presenting CICMP to this forum)

[80] FCC *BANY 271 Order* at ¶ 37.

SGAT said they were doing and Qwest couldn't possibly prove that it complied with the SGAT if its people weren't in compliance.

Qwest agreed to up date these documents and notify the CLEC's of such updates. That process has not been very effective to date. In short, the South Dakota Commission should order Qwest to prove that at a minimum the following technical publications, and the entire PCAT, are consistent with the SGAT:

Publication	Description	Specification
77350	Installation Guidelines	K
77383	Dark Fiber	F
77384	UNE Loop	I
77386	Collo/Interconnection	F
77389	UNE Transport	E
77391	UNE Switching	C
77398	LIS Interconnection	D
77403	EEL	B
77405	Sub-Loop	B
77406	Shared Loop	B
77408	Packet Switching	B

The CMP redesign process should complete, with KMPG's total approval, and then Qwest should prove its technical publications and its PCAT have gone through the CMP process to make them consistent with the SGAT or it should offer up the technical publications and prove they are consistent with the SGAT, and finally Qwest should run a major OSS change through the redesigned CMP process to ensure that it is actually functioning in the manner it is supposed to.

BONA FIDE REQUEST PROCESS – SGAT § 17.0

K. SGAT § 17.1; Qwest's Evidence Fails to Demonstrate that It Actually Treats CLECs in a Non-Discriminatory Manner When Employing the BFR Process.

According to Qwest's witnesses in other proceedings, Qwest employs the bona fide request ("BFR") process when a CLEC requests "something that's not contained in the SGAT."[81] In fact, the BFR process is called for in a number of circumstances in the SGAT where differing types of or deviations from the standard offerings are requested (*e.g.*, SGAT § 8.2.4.1 requiring BFR for microwave and wireless entrance facilities; SGAT § 9.14.2.1 for all AIN customized service; SGAT § 9.11.1.1.2.9 deviations from virtual access to GR-303, etc.). Like Qwest's tariffs, when a service is requested that deviates from the standard offering, Qwest requires the service be specially requested, whether the request flows through a process called BFR or a process called special assembly or special service arrangements.[82]

The Act imposes upon Qwest the duty to treat CLECs in a nondiscriminatory manner. Qwest's SGAT acknowledges that duty by repeating it throughout the document, and in fact, Qwest claims to do just that in relation to its BFR process. SGAT § 17.1 states in pertinent part: "Qwest will administer the BFR process in a nondiscriminatory manner." The nondiscrimination standards are not merely Qwest treating all CLECs equally although that is a part of the equation. Nondiscrimination also requires that Qwest treat itself, its affiliates and its end-users substantially the same as it treats CLECs. When asked during the workshops just how Qwest ensures non-discrimination in this context, Qwest's witnesses gave explanations that changed over time and contradicted responses provided under oath on different records. For example, in Arizona[83] at the first workshop on these issues, Qwest's witness Mr. Brotherson

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[81] 6/22/01 CO Tr. at p. 4; 7/10/01 WA Tr. at p. 4109; 6/25/01 Multi-state Tr. at p. 100

[82] *See* http://tariffs.uswest.com; *cf.* http://cei.uswest.com/ppnb.nsf (which appears to be the new URL for this web site).

[83] 6/22/01 CO Tr. at pp. 28-39; 7/10/01 WA tr. at pp. 4093-4095; 6/25/01 Multi-State Tr. at p. 113

responded that Qwest employed a process known as "AQCB" for both wholesale and retail customers seeking services not offered in tariffs.[84] Allegedly, Qwest ran all BFRs and special retail orders through the AQCB process that ensured that similar services were supplied at similar prices.[85] During the Arizona follow-up workshop, however, Qwest brought the required documentation to the workshop and at that point revealed that the AQCB process was not in fact employed for CLECs' orders.[86] Qwest then changed its position to state that there existed no corollary between the BFR process and what Qwest does for its own customers because the BFR concept was unique to CLECs.[87] Examination of Qwest's tariffs, however, reveals that Qwest does employ ICB processes, special assembly and special request processes for its retail and access customers.[88] These processes form the basis for an investigation into Qwest's alleged non-discrimination, but Qwest failed to provide any evidence.

Rather, the latest version of how Qwest purportedly ensures nondiscrimination allegedly involves a single non-technical person that reviews all BFR requests across the region and informs the CLECs whether, based upon the BFR "wording," other substantially similar BFRs exist.[89] Just how long Qwest maintains files of previous BFRs or how close the "wording" must be is unknown. Given that the only comparison made is allegedly between BFRs and not between similar Qwest retail customer requests or affiliate requests, it is hard to imagine that CLECs receive anything remotely resembling

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[84] 5/31/01 AZ Tr. at pp. 388-390 (introduced as 6 Qwest 81).
[85] *Id; see also,* 6/13/01 AZ Tr. at pp. 725-726.
[86] 6/15/01 AZ Tr. at pp. 1108-1111.
[87] 7/10/01 WA Tr. at pp. 4083-4084.
[88] *See also,* 6/25/01 Multi-State Tr. at pp. 108-110.
[89] 6/25/01 Multi-State Tr. at p.128. In Colorado, Qwest noted that the standard was "identical" and now has been changed to "substantially similar," but the witness was unable to clearly define substantially similar other than to speculate that "to the extent that the interface, the network functionality that's being requested is the same—nearly the same, it would be considered to be substantially similar." 8/21/01 CO Tr. at p. 57-58.

parity, and Qwest has failed to prove it provides parity. Therefore, Qwest has failed in its case to prove compliance; in particular compliance with any mandatory BFR requests related to checklist items.

L. SGAT § 17.12; Qwest's BFR Process Fails to Provide CLECs Parity Because it Offers No Notice of Previously Approved, Similar BFR Requests, and it Fails to Provide a Consistent Practice of Developing Products From BFR Requests.

Similar to not providing parity treatment within the proper scope of comparison, Qwest also creates the untenable demand that CLECs rely exclusively on it for information regarding whether Qwest has granted or denied a substantially similar BFR.[90] Setting aside for the moment that retail-customers obtaining, for example, special assembly private line service might be a good comparison for CLEC interconnection service that deviates from the standard, multiple CLECs seeking—for example—interconnection that deviates from Qwest's standard offerings have no way of knowing: (1) whether Qwest has provided such interconnection before; or (2) whether they must pay for and go through the same BFR process again until after they have already created the same BFR and paid for its consideration by Qwest. There exists no objective, efficient mechanism for determining non-discrimination even among CLECs seeking similar BFRs.

As requested by AT&T and other CLECs, Qwest could provide notice to CLECs of BFR requests such that the notice does not reveal the name of the CLEC or the location of the service.[91] This notice would allow CLECs to avoid needless preparation of BFRs and payment therefore along with saving them time and providing an objective measure of non-discrimination at least among CLECs. But alas, Qwest refused on the

[90] 8/21/01 CO Tr. at pp. 54-55; 9/11/01 Or. Tr. at pp. 309-310.
[91] 8/21/01 CO Tr. at pp. 59-64; Or. Tr. at p. 312.

claim of BFR confidentiality.[92] Qwest's witnesses claimed Qwest wouldn't provide notice because one CLEC considered the BFRs confidential in another proceeding.[93] That CLEC was New Edge and the proceeding was the Multi-State. Ms. Bewick from New Edge clarified her position in Colorado, and she agreed with AT&T and the other CLECs that notice of BFRs that excluded the name of the CLEC and location of the service would be appropriate.[94] It is hard to imagine that Qwest can provide service to one CLEC and call the service itself secret such that the service could not be revealed in provisioning and such that Qwest would not have to make such service available on a nondiscriminatory basis to other CLECs.

Moreover, Qwest has no process for determining when it should create a product offering of substantially similar BFRs or when and if it will ever submit its terms, conditions and prices for any given BFR to any Commission for approval. In short, to acquire service that deviates from the Qwest standard offerings, CLECs must engage in a cloak-and-dagger, subjective process with Qwest. This is not the process Qwest's end-user customers must endure. Rather, Qwest's end-user customers seeking services that deviate from tariff offerings obtain their price quotes from a database (the AQCB, database listed above) and customers seeking special assemblies obtain their quotes in an undisclosed interval and through a process that—in all likelihood is much more user friendly than Qwest's cloak-and-dagger process for CLECs.

In any event, the burden of proof is on Qwest to prove parity, and it has failed to do so. The evidence here and elsewhere simply does not provide sufficient proof that

[92] 8/21/01 CO Tr. at p. 54.
[93] 8/21/01 CO Tr. at p. 54; Or. Tr. at p. 313.
[94] 8/21/01 CO Tr. at p. 71.

CONTINUATION

[redacted]6

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Qwest is not discriminating against CLECs in the use of its BFR process and its creation of products there from.

AUDIT PROCESS – SGAT § 18.0

M. SGAT § 18.1.1; the Scope of Qwest's Audit Provisions are too Narrowly Drawn because they Do not Allow the Parties to Confirm that Each Other is Protecting Information Or Abiding By other Provisions of the SGAT or Agreements.

The issue with respect to audit authority is the scope of such authority.[95] Qwest essentially believes that audit authority should be granted only so it can audit CLECs' billing practices and payments. CLECs believe the audit authority should be expanded to include the right to examine services performed under the agreement (*e.g.*, confirm that Qwest is maintaining CLEC forecasts in the manner prescribed by the law). Such audit authority is routinely granted under technology contracts where parties exchange intellectual property. These interconnection agreements and SGAT are no different.

It is important to note that this audit authority is reciprocal. Both parties should have an opportunity to monitor billing and the safe keeping of their confidential information, among other things. AT&T proposed these modifications to Section 18 to broaden its scope:

> 18.1.2 "Examination" shall mean an inquiry into a specific element or process related to the ~~above~~ services performed under this Agreement Commencing on the Effective Date of this Agreement, either Party may perform Examinations as either Party deems necessary.

WorldCom too supported broader audit authority and pointed out that such authority is standard in interconnection agreements it has with Qwest.[96] The audit authority sought

[95] 8/22/01 CO Tr. at p. 208; 7/10/01 WA Tr. at pp. 4121-4124.
[96] 7/10/01 WA Tr. at p. 4123.

by the CLEC's assists all parties in ensuring that each is complying with the requirements of the Agreement; the Commission should therefore adopt it.

SPECIAL REQUEST PROCESS – SGAT EXHIBIT F

N. SGAT Exhibit F, ¶ 1; Qwest's Application of its SRP Process is too Narrow in Scope Creating a Disparity of Treatment Among Service Types that is Unjustified and Inefficient for CLECs.

Originally, Qwest developed its SRP process to accommodate CLEC requests for UNE combinations that deviated from the standard offering, but required no technical feasibility test.[97] AT&T requested that Qwest enlarge the scope of the SRP process to encompass similar interconnection and collocation requests that likewise would require no technical feasibility test.[98] Qwest refused. Its logic for such refusal is unclear.

Creating a streamline process for CLECs to obtain services that deviate slightly from the standard offerings and do not require Qwest to engage in an entire BFR process are ripe for inclusion in the SRP process. Requiring CLECs to endure the more extended BFR process for every request, except the few listed in Exhibit F that deviates only slightly from a standard offering is to no one's advantage and actually harms CLECs by unnecessarily delaying access to the interconnection or collocation requested. This is consistent with the Act's goal and the FCC's efforts to open the local markets to CLECs in the most efficient manner possible.

O. Exhibit F; Qwest Failed to Establish a Mechanism for Treating CLECs at Parity in Relation to SRP.

Rather than repeating arguments here, I incorporate by reference my discussion of the issues associated with non-discrimination and productization discussed in regard to SGAT § 17, above.

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[97] 6/22/01 CO Tr. at p. 5; 7/10/01 WA Tr. at p. 4109; 6/25/01 Multi-State Tr. at p. 149.
[98] 6/21/01 CO Tr. at pp. 89-90; 6/25/01 Multi-State Tr. at p. 149.

INDIVIDUAL CASE BASIS PROCESS – SGAT EXHIBIT I

P. Exhibit I; Qwest Failed to Establish a Mechanism for Treating CLECs at Parity in Relation to ICB.

ICB is generally used to establish prices. Rather than repeating arguments here, I incorporate by reference my discussion of the issues associated with non-discrimination discussed in regard to SGAT § 17, above. Importantly, there exists even less evidence in relation to ICB and Qwest's process for CLECs than the BFR process. In addition, ICB creates a similar "productizing" problem, but in relation to pricing. In summary, there is insufficient evidence in this record upon which the Commission could base a recommendation that Qwest complies with its parity requirements. Qwest has failed to meet its burden of proof. As the FCC has noted, the "ultimate burden of proof that its application satisfies all the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement[,]" rests upon Qwest.[99]

IV. CONCLUSION

This concludes my affidavit.

[99] *FCC BANY 271 Order* at ¶ 47.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION	)	
INTO QWEST CORPORATION'S	)	**Docket No. TC 01-165**
COMPLIANCE WITH SECTION 271(C) OF	)	
THE TELECOMMUNICATIONS ACT OF 1996	)	

VERIFICATION OF MICHAEL HYDOCK

I, Michael Hydock, being duly sworn, hereby state that I am District Manager in the Local Services and Access Management organization of AT&T. By this verification, I hereby affirm the factual assertions of my Affidavit on General Terms & Conditions and SGAT Sections 11, 12, 17, 18 & Exhibits F & I as true and correct statements to the best of my knowledge and expertise.

Dated this 18th day of March 2002.

Michael Hydock

STATE OF COLORADO)
) **ss**
CITY AND COUNTY OF DENVER)

SUBSCRIBED AND SWORN TO before me this 18th day of March 2002 by Michael Hydock, who certifies that the foregoing is true and correct to best of his knowledge and belief.

Witness my hand and official seal.

Notary Public

My commission expires: 1/22/06

NOTARY PUBLIC
ADAM W. WALCZAK
STATE OF COLORADO

My Commission Expires 1/22/06

State of South Dakota

MICROFILM

CERTIFICATE OF AUTHENTICITY

This is to certify that the microphotograhic images appearing on the this roll of microfilm

Starting with: TC01 - 165

Ending with: _____

are accurate reproduction of the records of

Agency: LABOR/P.U.C./P.U.C./FIX UTIL

Record Title: DOCKETS, FORMAL AND INFORMAL

Contents: 4-30-01 To

(Inclusive Dates/Alphabetic number)

And were microfilmed in the regular course of business according to the provisions of SDCL 1-27-4

It is further certified that the photographic process used for microfilming of the above records was in a manner and on microfilm which meets the recommended requirements of ADMIN. 10:04:01 and 10:04:03 for microphotographic reproductions.

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Disposal Date: 10 YEARS

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Date Microfilmed

Roll Number: 166

Reduction Ratio: 40:1

Exposures: _____

Penny Corey

Camera Operator Signature

Voice Message left for Tim Boykin, AT&T, by Scott Schipper, Qwest, April 30, 2001:

Hi Tim. This is Scott Schipper and I wanted to touch base with you on the blocking report behind the tandem. I'm waiting to get this in writing Tim, but here is what I understand. In order for AT&T to receive the detailed report by end office on trunk groups that home on the tandem you need to amend your interconnection agreements and adopt the SGAT language in Section 7.2.2.8 and upon adoption of that in your contract, you will then begin receiving the report and the network people I have talked to are firm on that, that is the way we are doing it with all CLECs and it keeps it consistent. I am not sure whether you have heard this or not before but I want to share it with you and then we can go from there but that is what I am being told and I should have it in writing this afternoon and certainly I will forward that to you upon receipt of it. Thanks Tim. Any questions, (612) 663-3026. My understanding also is that AT&T agreed to that in the workshops so I am not a part of those, I don't know if you are. When people say these things, I am repeating them back to you not because I have first hand knowledge but because I have been told that. So that is what I understand. I will also make a quick call Greg Terry and let him know that that is where we are at right now.

-----Original Message-----
From: Chuck Ploughman [mailto:cplough@uswest.com]
Sent: Friday, April 06, 2001 3:19 PM
To: Schwartz, Christine, NCAM
Cc: Ford, Laura
Subject: Re: State of Wyoming Opt In

Christine,

This e-mail is in response to your e-mail to me dated March 30, 2001 regarding a new Wyoming Interconnection Agreement. You have requested to opt into the Interconnection Agreement between U S WEST Communications, Inc. (now Qwest Corporation) and New Edge Network, Inc. dba New Edge Networks dated August 18, 1999. Since New Edge Networks opted into the Covad agreement it is not available for adoption. However, you can opt into the underlying agreement with Covad.

We note that the Covad contract provides that negotiations for a new contract should begin on November 1, 2001. We are currently operating under the terms of Jeff Lord's letter to Dominick Sekich dated June 19, 2000 and Dom's letter to Jeff dated July 10, 2000 regarding the extension of the current Interconnection Agreements. For purposes of this new Wyoming Interconnection Agreement, Qwest reserves the right to request negotiations of a subsequent Wyoming Interconnection Agreement pursuant to these terms.

Since you have suggested various changes to the Agreement, we need to set a time to negotiate this new agreement. The Wyoming Covad Agreement does not contain the Line Sharing amendments so opting into that Agreement should somewhat simplify the discussions. Also, although the Wyoming SGAT does not contain the SGAT opt in language and the standard agreed to language contemplates an amendment to an existing agreement, Qwest will proceed under the spirit of the workshop discussions in these negotiations and discuss your opting into portions of the Wyoming SGAT. We will, of course need to discuss whether there are any legitimately related terms.

I would also appreciate if you would send the Multi-state SGAT Sections 7.1 thru 7.1.2.5 and 10.2 thru 10.2.9 referenced in your email. This language will be very helpful as we negotiate this new agreement.

Similar to your disclaimer, Qwest's agreement to proceed in this manner, as described in this letter, is without prejudice to any positions Qwest has taken previously or may take in the future in any legislative, regulatory or other forum addressing any matters, including those relating to the types of arrangements contained in the ultimate Wyoming Interconnection Agreement.

Thank you,
Chuck Ploughman
Lead Negotiator

1801 California Street
Room 2440
Denver, CO 80202
October 8, 1999

INTERCONNECT NOTIFICATION - ATX

John Blaszczyk
AT&T
1875 Lawrence St.
10th Floor
Denver, CO 80202

Dear John:

As you are probably aware, U S WEST recently reached an agreement with Citizens Utilities Company to sell certain exchanges in **Wyoming**. The exchanges being sold are **displayed on Attachment 1**. U S WEST and Citizens anticipate closing this transaction later this year or early in 2000.

Our records show you either currently have an interconnection agreement with U S WEST for some or all of these exchanges, or are in the process of negotiating an interconnection agreement with U S WEST for some or all of these exchanges. This letter addresses the impact of this sale upon your interconnection agreement with U S WEST.

With regard to the exchanges that are being sold to Citizens, your interconnection agreement with U S WEST will terminate on the date of closing because U S WEST will no longer be providing service in those exchanges. Your interconnection agreement with U S WEST will remain in effect for all exchanges in **Wyoming** covered by your agreement which are not being sold to Citizens, for the full term of the agreement.

While your agreement with U S WEST will terminate as to the sold exchanges upon closing, both U S WEST and Citizens recognize the importance of minimizing any disruption to your interconnection arrangements in those exchanges.

Therefore, during the period prior to closing, if U S WEST is providing interconnection services to you in any of the exchanges being sold, Citizens intends to initiate informal negotiations with you to establish a new interconnection agreement for those exchanges. Citizens would like to make this transition as seamless as possible, and would expect to enter into interconnection agreements for these exchanges effective on the date of closing, subject to any required governmental approvals. In the unlikely event that you cannot reach an agreement with Citizens prior to the closing of this transaction, Citizens will continue to provide interconnection services to you, under the same terms and conditions set forth in your agreement with U S WEST, to ensure that there is no disruption to you or your customers. Citizens will provide such transition interconnection services until such time as that agreement terminates, or you and Citizens establish a new, approved interconnection agreement for these exchanges.

If you currently receive any interconnection services in any of the sale exchanges, Citizens will contact you shortly to informally begin the process of establishing an interconnection agreement. We anticipate that you and Citizens should be able to agree on interconnection terms and conditions for the affected exchanges well in advance of the closing of this transaction. Citizens is committed to working with you in that regard. Questions concerning this process may be directed to Lawrence W. Wetzel at (214) 365-3343, email at lwetzel@czn.com.

While you will be working most closely with Citizens in arriving at interconnection agreements for the sale exchanges, please do not hesitate to contact me if you have any questions or concerns regarding this process.

Sincerely,

Patty Hahn, Account Manager

Attachment – Wyoming List of Exchanges Being Sold to Citizens

Attachment 1

	STATE	EXCHANGE	CLLI	NPA	NXX
1.	WY	AFTON	AFTNWYMA	208(307)	225
2.	WY	AFTON	AFTNWYMA	208(307)	884
3.	WY	AFTON	AFTNWYMA	307	886
4.	WY	LAKE	LAKEWYMA	307	242
5.	WY	LUSK	LUSKWYMA	307	334
6.	WY	MAMMOTH	MMTHWYMA	307	344
7.	WY	OLD FAITHFUL	OLFTWYMA	307	545

AT&T's proposed changes to Section 5.9.

5.9.1 ~~The Parties agree that unless otherwise specifically set forth in this Agreement the following constitute the sole indemnification obligations between and among the Parties:~~

5.9.1.1 Except as otherwise provided in Section 5.10, each of the Parties agrees to release, indemnify, defend and hold harmless the other Party and each of its officers, directors, employees and agents (each an "Indemnitee") from and against and in respect of any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, reasonable costs and expenses (including attorneys' fees, accounting fees, or other fees) whether suffered, made, instituted, or asserted by any other Party or person, for (i) invasion of privacy, (ii) personal injury to or death of any person or persons, or for loss, damage to, or destruction of property or the environment, whether or not owned by others, resulting from the indemnifying Party's performance, breach of applicable law, or status of its employees, agents and subcontractors,~~;~~ ~~or~~ (iii) for breach of or failure to perform under this Agreement, regardless of the form of action, or (iv) for actual or alleged infringement of any patent, copyright, trademark, service mark, trade name, trade dress, trade secret or any other intellectual property right, now known or later developed, to the extent that such claim or action arises from CLEC or CLEC's customer's use of the services provided under this Agreement.

~~5.9.1.2 Where the third party claim is made by (or through) an end user of one Party against the other Party, which claim is based on defective or faulty services provided by the other Party to the one Party, then there shall be no obligation of indemnity unless the act or omission giving rise to the defective or faulty services is shown to be intentional and malicious misconduct of the other Party.~~

5.9.1.3 Reserved for Future Use.

~~5.9.1.4 For purposes of Section 5.9.1.2, where the Parties have agreed to provision line sharing using a POTS Splitter: "end user" means the DSL provider's end user for claims relating to DSL and the voice service provider's end user for claims relating to voice service.~~

5.9.2 The indemnification provided herein shall be conditioned upon:

5.9.2.1 The indemnified Party shall promptly notify the indemnifying Party of any action taken against the indemnified Party relating to the indemnification. Failure to so notify the indemnifying Party shall not relieve the indemnifying Party of any liability that the indemnifying Party might have, except to the extent that such failure prejudices the indemnifying Party's ability to defend such claim.

5.9.2.2 If the indemnifying Party wishes to defend against such action, it shall give written notice to the indemnified party of acceptance of the defense of such action. In such event, the indemnifying Party shall have sole authority to defend any such action, including the selection of legal counsel, and the indemnified Party may engage separate legal counsel only at its sole cost and expense. In the event that the indemnifying Party does not accept the defense of an action, the indemnified Party shall have the right to employ counsel for such defense at the expense of the indemnifying Party. Each Party agrees to cooperate and to cause its employees and agents to cooperate with the other Party in the defense of any such action and the relevant records of each Party shall be available to the other Party with respect to any such defense.

5.9.2.3 In no event shall the indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the indemnified Party. In the event the indemnified Party withholds consent, the indemnified Party may, at its cost, take over such defense, provided that, in such event, the indemnifying Party shall not be responsible for, nor shall it be obligated to indemnify the relevant indemnified party against, any cost or liability in excess of such refused compromise or settlement.

STATE OF MINNESOTA)
)
BROOKLYN CENTER, HENNEPIN COUNTY)

AFFIDAVIT OF JAMES W. TADE

I, James W. Tade, being first duly sworn upon oath, depose and state:

1. I make this affidavit of my personal knowledge and free will.

2. I am employed by AT&T Broadband in Saint Paul, Minnesota, which is an affiliate of the parent company of AT&T Corp. (collectively "AT&T"). I began my employment by AT&T in October, 1990.

3. Prior to June 1, I was a local telephone customer of Qwest Communications, Inc. for my local residential telecommunications service.

4. On or about May 18, 2001, I subscribed to AT&T local telephony service offered by AT&T Broadband; that is, I requested that AT&T switch my residential local telephone service away from Qwest to AT&T.

5. AT&T scheduled installation of its local service at my residence on June 1, 2001.

6. The week prior to the installation, Qwest sales people called me at my home four times. They called twice on or about May 28 and once on or about May 30. Qwest sales representatives called a fourth time the morning of the AT&T installation on June 1, 2001.

7. In each of the telephone solicitations, Qwest representatives indicated their desire to have me switch back to Qwest because they knew I had selected another carrier.

8. The first two times that Qwest representatives phoned me, I informed them that I was not interested in switching back to Qwest and then I hung up. The third time a Qwest representative phoned me, I told that person that I was not interested in returning to Qwest and asked them to not call again.

9. On the morning of the AT&T installation, I received the fourth solicitation call from Qwest. As in the previous conversations, the Qwest representative requested that I return to Qwest for my local residential telephone service. Not only had Qwest failed to honor my "do not call" request, but the sales representatives were extremely persistent in their efforts to win back my business before I even had an opportunity to switch my service.

Further the Affiant sayeth naught.

DATED this 21 day of June, 2001.

James W. Tade

Subscribed and sworn to before me this 21 day of June, 2001, by James W. Tade.

{Seal}

Notary Public

DEBRA KAY HOGEN
NOTARY PUBLIC-MINNESOTA
MY COMMISSION EXPIRES 1-31-2005

RECEIVED

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

AT&T'S VERIFIED COMMENTS

REGARDING PUBLIC INTEREST

MARCH 18, 2002

A. Introduction

The public interest inquiry represents, *inter alia*, an opportunity for this Commission "to ensure that no other relevant factors exist that would frustrate the Congressional intent that markets be open."[1] This language reflects the broad purposes of any public interest inquiry, and AT&T sees this public interest inquiry as being by nature necessarily open-ended. In this context, Qwest's attempts to limit this inquiry should be ignored.

The public interest inquiry is not only separate and apart from checklist compliance, it is also the last item mentioned in the Telecommunications Act as being a prerequisite for a grant of 271 authority. Under 47 U.S.C. 271(d)(3)(A) through (C), it is apparent that a BOC applicant such as Qwest must first show compliance under either Track A or Track B, followed by either checklist compliance (under Track A) or SGAT compliance (under Track B), followed by compliance with section 272 (the separate affiliate requirements), and then, lastly, the public interest requirement.[2] These requirements are set forth in logical and sequential order, and to take them out of order would be improper and counter-productive.

AT&T therefore recommends that the Commission reserve any decision on public interest at least until such time as all of the following have occurred: first, that Qwest has demonstrated that it has fulfilled its Track A obligations; second, that all checklist items

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[1] *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, CC Docket No. 01-9, (rel. April 16, 2001) at para. 233 (hereafter the "Verizon Massachusetts 271 Order).

[2] The development and implementation of the Qwest Performance Assurance Plan or "QPAP" has also generally been viewed as integral to the public interest inquiry. In view of the fact that QPAP issues are being examined by this Commission separately, AT&T believes that the establishment and implementation of a proper QPAP should also be a prerequisite to the public interest inquiry.

have been resolved such that Qwest has been determined to be in compliance (including the results of the ROC OSS testing); third, that there has been a showing that Qwest is in compliance with 47 U.S.C. 272; and fourth, that a sufficiently detailed, effective performance assurance plan is in place with sufficient assurance it will remain in place for a reasonable period of time.

Furthermore, if any one of these building blocks is found by the Commission to be absent or inadequate, then approval of Qwest's 271 application should—indeed must—be withheld until such time as Qwest has corrected the shortcoming, or group of shortcomings.

B. The Standard for the Public Interest Inquiry

As previously indicated, AT&T believes that the public interest inquiry under section 271 is necessarily open-ended. Ultimately, the public interest standard involves the question of whether the public as a whole (including competitors and competition) will be harmed by Qwest's entry into the long distance market. In order to approach this question, the FCC starts with other, preliminary questions such as whether the local market is indeed open, and if so to what extent, and for how long. However, these are not all-inclusive questions, and should not be viewed as limiting the scope of this Commission's inquiry. The language of the *Verizon Massachusetts 271 Order*, *supra*, confirms this. The public interest inquiry is intended to "ensure that no other relevant factors exist that would frustrate the Congressional intent that markets be open." The FCC goes on to say that "among other things" it may review both local and long distance markets, checking for "unusual circumstances" that may make entry contrary to the public interest. In addition, the FCC has stated that "another factor that could be

relevant" would involve the question of "whether we have sufficient assurance that markets will remain open after grant of the application." See *Verizon Massachusetts 271 Order*, at para. 233.

Nowhere, however, has the FCC's public interest inquiry been circumscribed or limited to just these few questions. AT&T maintains that the PUC's public interest inquiry is similarly unencumbered.

In this context, there are some specific issues which AT&T would like to bring to the Commission's attention, by way of inclusion, and not by way of limitation. First, AT&T remains concerned over the current high level of UNE prices. AT&T here presents a thumb-nail comparison of these rates to Qwest's retail rates, revealing that the current wholesale pricing makes it impossible for new entrants to compete using UNEs. Second, the current high levels of intrastate access charges will have a similar anticompetitive effect on both local and long distance markets, post-271. Third, AT&T believes that the threat of a price squeeze is very real, and in fact has occurred subsequent to issuance of the FCC order which Qwest has elsewhere asserted "fully resolved" the price squeeze issue. Fourth, the ongoing, unabated anticompetitive behavior of Qwest must be addressed by this Commission in advance of any grant of 271 authority.

In addition, one fundamental problem with Qwest's presentation on the issue of public interest is that it improperly downplays, and in some instances completely ignores, the real and substantial market power which Qwest has, and its ability and incentive to use that market power to exclude competitors from the local exchange marketplace.

The plain and simple fact is that Qwest cannot presently satisfy its burden to show that its interLATA authorization would be "consistent with the public interest,

convenience, and necessity." 47 U.S.C. 271(d)(3)(C). Qwest has not demonstrated compliance with the 14 point check list. But even more importantly, checklist compliance alone is not sufficient to satisfy the public interest requirement:

> In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of section 271, basic principles of statutory construction, and sound public policy....[3]

As the FCC has repeatedly confirmed, "the public interest requirement is independent of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."[4] It requires the Commission "to review the circumstances presented by the applications to ensure that no other *relevant factors* exist that would frustrate the congressional intent that markets be open."[5] In short, the essence of the public interest inquiry is for the Commission to determine whether, notwithstanding checklist compliance, the BOC applicant's local markets are irreversibly open to competition.

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[3] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd 20543 (1997), at para. 389.

[4] See, for example, *In the Matter of the 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*, 2001 FCC LEXIS 1202, (2001) at para. 267; *In the Matter of the 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 (2000), at para. 417; and *In the Matter of the Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, 15 FCC Rcd 3953 (1999), at para. 423.

[5] E.g., the *Kansas-Oklahoma 271 Order* at para. 267 (emphasis supplied); *New York 271 Order* at para. 423.

As shown below, numerous "relevant factors" confirm that local markets in South Dakota are not by any means open to competition today, and—absent significant steps on the part of Qwest—will not be open to competition in the near future.

To begin with, there is virtually no UNE-based competition for residential customers today, and no genuine prospect for increased UNE-based residential competition in the near future. Contrary to the letter and spirit of the federal Telecommunications Act of 1996, Qwest has blocked competitive entry using UNEs and UNE-P, and is forcing competitors to resort to the construction of separate facilities in order to enter the local market.

C. Qwest Maintains Monopoly Power over Residential Service.

There is no meaningful UNE-based competition for residential customers in South Dakota today. This lack of competition is a factor directly relevant to whether the local market is open. To be sure, the FCC has repeatedly declined to identify a minimum market share that CLECs must capture before the commission will declare a market to be open. But this Commission need not impose a minimum market share in order to take into account the fact that *no* CLECs today are able to mount any kind of meaningful UNE-based competitive threat whatsoever to Qwest's monopoly control over residential local service in the state.

By its own admission, Qwest is providing only 17,803 unbundled loops in the entire state of South Dakota.[6] Qwest has not provided any break down of this total between business and residential, and apparently would concede that all unbundled loops

[6] Exhibit DLT-6, page 1, line 1, accompanying the Affidavit of David L. Teitzel.

are used by CLECs to provision business services.[7] Thus, it is clear that UNE and UNE-P competition in the residential local exchange market in South Dakota has been stymied and is simply non-existent.

When attention is turned to the resale market for residential service, the situation is very similar. Qwest's records demonstrate that there are only 5,648 resold residential lines in the state, accounting for only three percent of the overall residential lines in service.

The fact is that two of the three available avenues to competitive entry in the residential market---resale and UNE provisioning—are effectively blocked. Furthermore, these are the two avenues that most require Qwest's affirmative cooperation to implement (the third being to build separate facilities, an extremely expensive, capital-intensive market entry approach).

[7] The total number of unbundled loops in service, on the first line of Exhibit DLT-6, does not enter the calculation of CLEC residential lines found on the ninth and sixteenth line of that exhibit. In order to arrive at that figure, Qwest adds resold residential access lines to its own estimate of CLEC-owned facilities providing residential service. As a result, Qwest has conceded that UNEs are not being used to provide residential service in South Dakota. In view of the pricing disparity detailed in section D of the Public Interest portion of these comments, *infra*, this is certainly a reasonable conclusion.

D. The Evidence of Insufficient Margins Demonstrates that Qwest's Local Residential Markets are Closed to Competition.

Another relevant factor is whether, under prevailing UNE rates, competitive entry is economically viable. As the FCC acknowledged in its *Ameritech Michigan 271 Order*, *supra*, "efficient competitive entry into the local market is vitally dependent upon appropriate pricing of the checklist items," (*id.*, at para. 281), and so competitive pricing is obviously "a relevant concern in [the FCC's] public interest inquiry under section 271(d)(3)(C)." *Id.*, at para. 288. That remains true whether or not a state commission has made a finding that UNE rates comply with TELRIC, because the FCC has made it clear that it is prepared to find that a wide range of rates can satisfy TELRIC. Accordingly, where the evidence indicates that UNE rates, set at the upper boundary of TELRIC, preclude competitors from profitably using UNEs to enter the local market, that fact is clearly relevant to whether the local market is open. In those circumstances, the fact that UNE-based entry is unprofitable need not necessarily entail a review of the applicant's retail rates, for it would also be open to the BOC and the state commission to set new TELRIC rates at the lower, rather than the upper, reaches of what the FCC's rules permit.

In the instant case, however, this analysis is simplified by the fact that, here in South Dakota, Qwest's Commission-ordered UNEs are not currently priced according to TELRIC principles. Instead, UNEs are priced considerably above cost. The pricing of UNEs in excess of economic cost creates a clear barrier for CLEC entry into Qwest's local residential market in South Dakota. Although Qwest may assert otherwise, the fact is that Qwest's pricing is far from cost-based, and has been a primary factor in keeping its local, residential markets closed to competition.

As demonstrated below, UNE rates are so high, in comparison to retail rates, that CLECs cannot compete with Qwest for residential customers using the UNE-Platform ("UNE-P"):[8]

Monthly Recurring Charges ("MRCs")		Non-Recurring Charges ("NRCs")	
UNE-P with features[9]	1FR	UNE-P	1FR
$22.16 to $29.52 depending on wire center	$12.00 to $18.75 depending on wire center	$271.94	$25.00

In other words, Qwest's monthly recurring charges ("MRCs") on the wholesale side are anywhere from 118 to 246 percent of Qwest's own retail rates for residential lines; and the wholesale non-recurring charges which CLECs must pay Qwest for UNE-P are *more than 10 times* the non-recurring charges Qwest's retail customers pay.

Although Qwest may argue that competitors "have not availed themselves" of the opportunity to compete in South Dakota using the UNE-Platform, the fact of the matter is that UNE-P pricing stands as an insurmountable barrier to such entry.[10] Moreover, the FCC has made it clear that one important aspect of any public interest analysis is the question of whether and to what extent *all* statutory paths to competition are open:

> [A]s we noted at the outset of this Order, it is essential to local competition that the various methods of entry contemplated by the 1996 Act be truly available. The most probative evidence that all entry

[8] The AT&T analysis uses current Commission ordered pricing instead of Qwest's proposed SGAT pricing. The purpose of the comparison of 1FR prices to UNE-P prices is to identify the retail/wholesale pricing relationship as a public interest issue.

[9] All UNE-P MRCs include analog loop, analog port, 750 minutes of local usage, and 400 minutes of shared transport.

[10] Qwest may attempt to argue—as it has elsewhere—that other sources of revenue should be included in this analysis. However, such a response is tantamount to insisting that new entrants provide a cross-subsidized pricing structure for their services in advance of entering the market, and is merely another way to create a barrier to entry.

> strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).[11]

In the instant case, it is abundantly clear that the UNE path to residential competition is blocked as a result of the pricing disparity outlined above.

The fact that local entry is unprofitable at prevailing UNE rates is, on its face, precisely the sort of "relevant factor" that "would frustrate the congressional intent that markets be open" before interLATA entry is approved, *Bell Atlantic New York 271 Order*, para. 423, particularly because it is obvious that local entry "is vitally dependent on appropriate pricing" of UNEs. *Ameritech Michigan 271 Order*, para. 281. Put simply, regardless of a BOC's checklist compliance (which has not been even remotely demonstrated here by Qwest), if CLECs cannot profitably enter local telephone markets, then those markets, as a practical matter, are not open to competition. Because the fundamental purpose of section 271 is to bar BOC entry until such time as local markets are open to competition, the profitability of entry is necessarily relevant to the public interest analysis.[12]

The Circuit Court of Appeals for the District of Columbia largely supports AT&T's position on this issue. Holding that the FCC should have given more thorough consideration to this very issue, Judge Williams wrote:

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[11] *Ameritech Michigan 271 Order*, para. 391.

[12] The profitability of entry is also relevant to the competitive checklist because the inability of competitors to enter profitably is a strong indication that UNE prices exceed the incumbent's costs, and thus violate the Act and the FCC's pricing rules. While not conclusive proof of a checklist violation, such evidence is grounds for each individual state commission to conduct a more rigorous determination as to whether the applicant's UNE prices are cost-based.

> In fact, the Commission gave appellants' claim rather a brush-off. First the Commission said that under its reading of the Act, the "profitability" considerations raised by appellants were "irrelevant" because the Act directed it to assure that the rates were cost-based, "not [to determine] whether a competitor can make a profit by entering the market." [Citation omitted.] This, of course, is unresponsive. The issue is not guarantees of profitability, but whether the UNE pricing selected here *doomed* competitors to failure.
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> *Sprint Communications Co., L.P. v. FCC*, 274 F.3d 549, 554, 2001 WL 1657297 (D.C. Cir.) [Emphasis in original.]

Qwest may attempt to argue that AT&T's UNE argument has been thoroughly considered, and rejected, by the facilitator in the multi-state proceedings. AT&T would respond to this, first, by noting that the multi-state proceedings are in no way binding upon this Commission. Secondly, the facilitator's analysis, relying as it does on cross-subsidization of services, is entirely contrary to the letter and spirit of the 1996 federal Act, as well as South Dakota law.[13] AT&T's analysis, on the other hand, seeks to examine whether UNE pricing would allow retail competition to occur on a stand-alone basis. The AT&T approach is not only consistent with the federal Act and state law, it is also entirely consistent with Qwest's own previous analytical approach in other jurisdictions. For example, Qwest has maintained before the Utah PSC that the only revenues that should be considered when implementing Utah's price index and price floor legislation with respect to residential service are the revenues associated with basic service. According to the Utah Commission, "Qwest has always argued that each

[13] See, e.g., 47 U.S.C. 254(e), requiring universal service support to be explicit rather than implicit. See also SDCL section 49-31: "No telecommunications company may use the revenues from emerging competitive services to subsidize fully competitive services or revenues from noncompetitive services to subsidize emerging competitive services or fully competitive services."

element and service must be self-supporting, or it must not be subject to the price index."[14]

AT&T's UNE pricing argument is presented here not as it would be in a full-blown cost case, but rather as a policy argument. To the extent wholesale components of a retail service are priced in excess of that retail service, the result is contrary to public policy and the public interest. Thus, for Qwest to criticize AT&T for not putting on a full-blown cost case either here or in the workshops is to ignore completely the procedural context and substantive scope of these proceedings, and of those 271 workshops. The fact is that the facilitator in the multi-state proceedings would not have permitted that kind of in-depth examination of the UNE pricing issue.

Qwest may attempt to argue here, as it has argued elsewhere, that AT&T's UNE pricing argument is on the one hand "simplistic," while on the other hand asserting that the issue surrounding UNE pricing has been "fully litigated." That's just not true, and the facilitator's so-called "analysis" of the issue in the multi-state proceedings has not done it justice. In fact, the facilitator's approach is just as much of a brush-off as the D.C. Circuit found in the FCC's approach to this issue. See *Sprint Communications Co., L.P. v. FCC*, supra.

The record in these proceedings demonstrates unequivocally that, at present, even a perfectly efficient CLEC could not profitably compete to provide local residential service here in South Dakota using a UNE or UNE-P entry strategy. AT&T's analysis confirms not only that unduly high UNE rates are helping keep CLECs out of the

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[14] See Report on the Public Interest, *In the Matter of the Application of Qwest Corporation, f/k/a U S WEST Communications, Inc., for Approval of Compliance with 47 U.S.C. §271(d)(2)(B)*, Before the Public Service Commission of Utah, Docket No. 00-049-08, attached here as Exhibit A, pages 7-8.

residential market, but that the local residential market will remain closed to competition at least until such time as those rates are substantially reduced.

E. Prospects for Facilities-Based and UNE-Based Residential Competition are Poor.

The obstacles to UNE-based residential competition are particularly important because neither resale nor facilities-based competition is likely to provide a significant, viable source of competition for Qwest during any foreseeable timeframe. Resale is an inherently limited competitive vehicle, because the competitor cannot alter the nature of the service it is reselling, and thus cannot provide competitors with innovative or improved service. And in any case, resale is priced in a manner that precludes its use in all but the most selectively chosen circumstances.[15]

The prospects for facilities-based competition are not brighter. In stark contrast to Qwest's dominant position, the CLEC industry now faces significant obstacles in raising the capital necessary to compete broadly with Qwest and the other BOCs. Competitive LECs have become "marginalized" because they do not "own the strategic assets" necessary to compete but must "rely on the ubiquitous Bell network," a network that remains largely closed to new entrants.[16] Qwest's anti-competitive actions, coupled with adverse market conditions, have now threatened the minute level of CLEC market penetration that existed in the local market. Despite five years and millions of dollars of investment, CLECs and Data Local Exchange Carriers ("DLECs") have been kept at bay

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[15] The avoided cost discount has proven inadequate to provide CLECs a basis for profitable entry for most consumers. For example, as monopolists, the incumbents do not face (and therefore do not "avoid") the huge customer acquisition costs that CLECs confront, nor do they face the lack of economies of scale that a new entrant must address. For all of these reasons, CLECs seeking—over the long term—to provide a broad-based, significant competitive alternative to the incumbents' local residential monopoly cannot do so through the resale of local service.

[16] See J. Whitman, *New Entrants: Battling the Bells*, Wall Street Journal, at R17 (Sept. 18, 2000).

by Qwest's anti-competitive actions, and have been unable to make any significant inroads into Qwest's local markets.[17] These same CLECs and DLECs are now suffering from the drought in the capital funding market and have either succumbed or are clinging precariously to life support. ICG Communications, Convergent Communications, Jato Communications, GST Telecommunications, eSpire, Pathnet, NorthPoint, PSINet, 360Networks, Inc., Winstar Communications, Inc., Teligent, REAnet, Rhythms NetConnections, Inc., and Covad Communications are all examples of CLECs and DLECs that have filed for bankruptcy in the last two years or less. And the list continues to grow.

Even SBC Communications, *itself a BOC*, has found it impossible to break into Qwest's monopoly local markets. Under the terms of its acquisition of Ameritech, two years ago, SBC had agreed to enter thirty new markets throughout the United States. It has now closed most of its newly-opened regional sales offices, including (in the Qwest service territory) Denver, Minneapolis, and Seattle.

Qwest might attempt to argue that some of these CLECs' and DLECs' problems stem from poor management, under-financing, or other sources. However, the point that cannot be ignored is that there is a trilogy of factors common to all of these carriers: their dependence on Qwest for interconnection, Qwest's poor level of wholesale service quality, and the excessive prices which Qwest charges for that interconnection.

At the same time that Qwest was successfully driving its DSL competitors out of the market, it ran full-page ads in local newspapers capitalizing on consumer's fears

[17] One important factor in the demise of these DLECs has been the thin margins to which these carriers have been subject. Clearly it is within Qwest's control, and it is in Qwest's interests, to keep those margins razor-thin.

regarding the reliability of DSL providers, touting its own DSL service, and mocking the demise of the DSL providers. See Exhibit B, attached hereto. Qwest also sent an e-mail with a similar message to its customers after Jato Communications folded its operations. See Exhibit C, attached hereto. And more recently, Qwest's advertising campaign has included a message warning customers that changing to a CLEC "might not be worth the headaches." See Exhibit D, attached hereto. This message is particularly troublesome in view of the fact that Qwest's own anticompetitive behavior has been a significant factor in creating the very headaches it warns against.

Qwest is now dancing on the graves of its would-be competitors. In an e-mail distributed to approximately 190 Qwest employees following the bankruptcy of Covad, Qwest characterized the situation as "Third batter down. End of the national DLEC game." Covad's management, according to Qwest's e-mail is "delusional," as the result of "too much Kool-Aid." See Exhibit E, attached hereto.[18] Such exuberance reflects more than just glee at the failure of Qwest's former rival: it also reveals the existence—indeed the success—of a deliberate strategy, implemented by a large number of employees. The length of the distribution list here alone demonstrates a pervasive, thorough participation in that strategy within Qwest's organization.[19]

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[18] This same e-mail was included in Covad's closing brief of August 22, 2001, in Colorado Docket No 981-178T. It was also discussed by representatives of Covad and Qwest before the Arizona Corporation Commission in a Special Open Meeting on August 23, 2001. A transcript of the pertinent portions of that Special Open Meeting has been provided here as Exhibit F, attached to this brief.

[19] Mr. Steven Davis has apologized on behalf of Qwest, and has indicated that the author of this e-mail has been disciplined. See Exhibit F, *supra*, attached hereto, Transcript, Special Open Meeting, Arizona Corporation Commission, August 23, 2001, pp. 248-249. Nevertheless, the fact remains that, when this e-mail is viewed in the context of Qwest's other, more public statements, the company's goal—elimination of new entrants—becomes clear.

As a result of this strategy, Qwest now leads the market in DSL penetration and plans to double its DSL customer base in 2001.[20] Meanwhile, its competitors are in shambles. Moreover, Qwest's anticompetitive behavior does not stop with its pricing and advertising practices, but extends much further. Many of the specifics of Qwest's anti-competitive behavior are being addressed in the Commission's consideration of specific checklist items. Still, it is instructive, and relevant from a public interest perspective, to outline at least some of the more blatant abuses which competitors have suffered at the hands of Qwest. See Section G, *infra*.

In the face of all this, Qwest also maintains a "Competitive Response Program" which provides incentives to former customers who have left Qwest for a local exchange competitor to consider returning once again to Qwest. In other words, new entrants are not just competing against Qwest's existing prices and service quality, they must also compete against additional marketing efforts launched by Qwest when their customer first begins using their service. In this context, the sharing of information between wholesale and retail arms of Qwest is certainly a major concern. In addition, however, the timing of Qwest's marketing efforts is problematic for any new entrant, and the question must be raised as to what kinds of incentives Qwest will be allowed to present to a customer immediately upon receiving word of a disconnection. While the nature and extent of these incentives is unclear, the entire issue must be faced in any examination of the public interest.

This is especially true where, as here, new entrants are completely dependent upon Qwest for their success. The very process of "cutting over" a customer to a new entrant requires the full cooperation of Qwest, and any difficulties that the customer

[20] See Qwest's annual report for the year 2000, an excerpt is attached here as Exhibit G.

experiences in the course of that cutover will reflect not on Qwest, but on the new entrant. Furthermore, these potential difficulties can occur in a variety of ways, from glitches in number portability, to the timing of service activation and disconnection, to delays in order processing. Qwest, in short, has innumerable opportunities—intentionally or not—to make a new entrant look bad in the eyes of the customer.

In this context, Qwest's Competitive Response Program calls into question the incentives which Qwest may have, now and in the future, to make the cutover process seamless to customers and competitors. Also, when viewed in light of Qwest's various advertising programs, *supra*, the Competitive Response Program begs the question of whether Qwest is in fact bringing to bear the necessary and appropriate resources to open its local markets, in a manner consistent with the letter and spirit of the federal Telecommunications Act of 1996.

The critical element relating to the prospects for competition is that Qwest does not provide the same level of service to its wholesale customers that it provides to its retail customers. The net effect of that anti-competitive and discriminatory behavior is that the prospects for facilities-based and UNE-based competition are poor. Moreover, this situation is aggravated by the current well-publicized drought in available capital. For now, and in the immediate future, progress toward a competitive local exchange market is stalled, and customers and competitors are unable to reap the benefits of competition envisioned by Congress and the states. The local exchange market is not open, and it would therefore be premature and contrary to the public interest to allow Qwest into the interLATA market.

F. Qwest's Proposed InterLATA Market Entry Will Not Make that Market More Competitive.

Qwest argues that it should be allowed into the interLATA market in order to provide a "one-stop shopping" alternative to customers in geographic areas which CLECs may not have "targeted" at this time. Teitzel Affidavit at 39 and 43. Qwest also complains it is the only local exchange carrier not allowed to compete for intrastate, interLATA business. Teitzel Affidavit at 39.[21]

The fact is that Qwest's entry into the long distance market is inconsistent with the public interest because Qwest's exorbitant intrastate access rates, priced significantly above cost, provide it with a source to subsidize its other products and services. These access rates may be summarized, and put into context, in the following table:

Qwest Access Rates

	Intrastate			Interstate		
State	Originating Call	Terminating Call	Two-sided Call	Originating Call	Terminating Call	Two-sided Call
AZ	$0.0340	$0.0467	$0.0807	$0.0055	$0.0055	$0.011
CO	$0.0300	$0.0440	$0.0740	$0.0055	$0.0055	$0.011
ID	$0.0381	$0.0446	$0.0827	$0.0055	$0.0055	$0.011
IA	$0.0165	$0.0165	$0.0329	$0.0055	$0.0055	$0.011
MN	$0.0122	$0.0227	$0.0349	$0.0055	$0.0055	$0.011
MT	$0.0367	$0.0366	$0.0733	$0.0055	$0.0055	$0.011
NE	$0.0172	$0.0172	$0.0345	$0.0055	$0.0055	$0.011
NM	$0.0467	$0.0467	$0.0934	$0.0055	$0.0055	$0.011

[21] The prohibition on Qwest's entry into the interLATA marketplace is firmly grounded in law, and in a recognition of the RBOCs' ability (including Qwest's) to abuse competitors by means of their control over bottleneck local exchange facilities. Initially, the prohibition was put into force and effect by the U.S. District Court as a result of the largest and most extensive antitrust litigation in history. See *United States v American Tel. and Tel. Co.*, 552 F.Supp. 131 (1982). Subsequently, the prohibition became part of the Telecommunications Act of 1996, P.L. 104-104, codified at 47 U.S.C. 271(a) and 271(b). The legislative history of the federal Act reveals that Qwest's predecessor, U S WEST, supported passage of the federal Act, including the prohibition mentioned. The fact that Qwest now complains about this prohibition demonstrates its continuing efforts to downplay—or, as here, its hope and expectation that others will completely ignore—the substantial market power which it wields.

ND	$0.0423	$0.0423	$0.0845	$0.0055	$0.0055	$0.011
OR	$0.0078	$0.0117	$0.0195	$0.0055	$0.0055	$0.011
SD	$0.0555	$0.0555	$0.1110	$0.0055	$0.0055	$0.011
UT	$0.0229	$0.0229	$0.0458	$0.0055	$0.0055	$0.011
WA	$0.0218	$0.0235	$0.0453	$0.0055	$0.0055	$0.011
WY	$0.0112	$0.0112	$0.0224	$0.0055	$0.0055	$0.011

With originating and terminating intrastate access each set at more than five cents per minute, South Dakota currently has by far the highest access charges of any of the Qwest states. The FCC, on the other hand, has established an interstate access target rate for BOCs of $0.0055 per access minute, or slightly more than one-half cent per access minute.[22] This means that not only does South Dakota have the highest access charges of any of the Qwest states, its intrastate access is set at approximately *10 times the interstate rate*. Yet there is little if any difference in the underlying costs of providing interstate and intrastate access. Both services utilize the same underlying facilities, and therefore the costs of providing interstate access are approximately the same as the costs of providing intrastate access. Moreover, the FCC target rate is based on a variety of cost studies, and is therefore a proper surrogate for the cost of intrastate switched access, at least until Qwest's forward-looking economic costs for intrastate access have been expressly determined. So there is little justification for the exorbitant price difference currently existing between the two.

For toll calls that originate and terminate in South Dakota (*i.e.*, a two-sided call, which is also termed a "conversation minute"), using the interstate target rate as a cost

[22] *In the Matter of Access Charge Reform*, CC Docket No. 96-262, FCC No. 00-193, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45 (released May 31, 2000), §61.3(qq), p. B-21.

surrogate, it is conservative to estimate that Qwest's intrastate access rates are approximately ten times its costs.[23]

So, for example, with Qwest's intrastate access charges set at current levels, Qwest's competitors will be required to pay more than eleven cents per minute for access. This means that, for an IXC to make money on that call, it must charge its own end user a minimum of 11.1 cents per minute, plus the IXC's own costs, including network costs, call set-up, and other costs and overhead. Essentially, however, 11.1 cents per minute (plus its own costs) represents a floor below which the IXC cannot price that call. Of course, the closer the price gets to 11.1 cents, the thinner the IXC's margin.

On the other hand, Qwest's *cost* of providing *itself* access—as opposed to its *price* for providing access to IXCs—is only about one cent per conversation minute (using the FCC target rate as a surrogate for cost). Clearly, then, Qwest can price its own retail long distance service close to, or even below, eleven cents per minute and still make a very healthy margin.

At the present time, most states have "imputation" requirements, which means that Qwest must "impute" within its own retail rates the access rates it charges other carriers. And on the face of things, this might appear to be an equitable arrangement: after all, so long as imputation requirements are in place, Qwest is unable to undercut its competitors prices. However, the problem is that ultimately, when companies are

[23] An "access" minute is either the originating or terminating end of a call. A "conversation" minute combines both the originating and terminating ends of a call. Carriers are billed for access on both ends of a call, or "per conversation minute." However, an IXC might be billed by one ILEC for both originating and terminating access, or it might be billed by one ILEC for "originating" access on a call, and another ILEC for "terminating" access, depending on where the call begins and where the call ends. Thus, if access charges are quoted at a rate of $0.0555 per "originating" access minute, and $0.0555 per "terminating" access minute, the charges for access paid by the IXC will ultimately be $0.111 per "conversation" minute.

competing head to head, the question becomes, "Which company has the stronger margins?" That company will ultimately be the winner.

Competition within the interLATA market is strong today because incumbent monopoly local exchange carriers, including Qwest, have been excluded from that market. The excessive margins they have derived from access are not a factor in the interLATA market because these ILECs are not able to compete head to head in that market. But were Qwest to enter the interLATA long distance market without first moving its access charges close to cost, it would be able to bundle its local service with a long distance offering, set its interLATA rates close to its price for switched access, and literally squeeze competitors out of *both* the local and long distance markets. This can be done without violating imputation rules. Rather than being a boon to consumers, as Qwest has portrayed it, the notion that Qwest might provide "one stop shopping" where others cannot will actually sound a death knell for competition in those markets. The result, rather than fostering and encouraging competition, will be the remonopolization of the local and long distance markets.

This is not just theory; it is real and it is happening in Texas. Upon being granted 271 authority, SBC entered the interLATA market with an advertised consumer long distance price for both intrastate and interstate service of $0.09 per minute. However, it also promoted a one-stop shopping "package" including a monthly fee for local service and vertical features that priced intrastate and interstate long distance service at a mere $0.06 per minute. At the time, SBC's switched access charges were set at approximately $0.058 per minute. Then, six months after its initial interLATA offer, SBC raised its non-packaged rate from $0.09 to $0.10, and its packaged rate from $0.06 to $0.08 per

deficient, in that they rely upon undocumented and nonreproducible econometric models that exclude highly relevant explanatory variables, make highly selective and obviously results-driven 'comparisons' with non-entry states, select an unrepresentative time period in which to perform their 'comparisons,' and inexplicably exclude certain source data without any justification or basis." See Lee L. Selwyn, PhD., *BOC Long Distance Entry Does Not Benefit Consumers*, March, 2002, attached here as Exhibit I.

Dr. Selwyn concludes, *inter alia*, that "the *single most important source* of the enormous drop in long distance prices is the succession of FCC-required decreases in 'access charges.'" While those access charge reductions have led to a real, inflation-adjusted price decrease of nearly 80 percent for competitive long distance rates, the inflation-adjusted prices of monopoly local phone service have "remained largely unchanged over that same period." Exhibit I, at page 3. Emphasis in original.

In other words, the Hausman study is not only flawed in its methodology, but it ignores the plain and simple truth that competition has already provided clear and substantial benefits to long distance users. And, as Dr. Selwyn puts it:

> These enormous consumer benefits have been achieved not only without BOC entry into the long distance market, but *because* the BOCs were placed in the position where they had no incentive to discriminate in favor of or against any long distance carrier. BOC long distance entry reinstates those incentives [to discriminate], and portends a diminution of competition and a potentially serious loss—certainly not a gain—in consumer welfare.
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> Exhibit I, at p. 2. Emphasis in original.

In short, the notion that Qwest's entry into the long distance market would benefit consumers has been easily and thoroughly discredited. Instead, it is far more likely that Qwest's entry into the long distance market, under current prevailing conditions, will

serve to benefit Qwest's shareholders, and not consumers, through the remonopolization of both the local and long distance markets.

G. Qwest has Exhibited a Constant and Continuing Pattern of Anti-Competitive Behavior.

Another relevant factor which the FCC takes into account when examining whether a 271 application is in the public interest is whether the BOC has cooperated in opening its local market to competition, or whether it has engaged in tactics to stall or frustrate market entry. 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.[25]

Thus, evidence that a BOC has either (1) disobeyed federal or state telecommunications regulations or (2) engaged in a pattern of anticompetitive conduct, is sufficient to demonstrate that the BOC has not cooperated in opening its local market to competition. The evidence that Qwest has not cooperated in opening its local market to competition is particularly compelling because the evidence consists of *both* types of behavior.

There is no question that Qwest (and its predecessor USWest) has routinely disobeyed federal telecommunications regulations. Indeed, the company now known as Qwest violated section 271 as early as April, 1997, when the federal Act was little more

[25] *Ameritech Michigan 271 Order*, para. 397.

than one year old. Without opening its local markets to competition and without even seeking FCC approval, Qwest entered the long distance market in violation of the statutory framework involved in these multi-state proceedings. The FCC ruled, three and a half years after the complaint was filed, that:

> In sum, USWest's participation in the long distance market through its 1-800-4USWEST Service enables it to obtain significant competitive advantages...The Service allows USWest to build goodwill with its local-service customers, depicting itself as a full-service provider prior to receiving section 271 approval. Indeed, the full-service, or one-stop shopping, advantages provided by the Service appear to have been USWest's primary objective in implementing the Service in the first place. As the Commission held in the *1-800-AMERITECH Order*, these competitive advantages could reduce USWest's incentive to open its local market to competition and, thus, run counter to Congress's intent in enacting section 271.[26]

Similarly, in another proceeding, the FCC found that the former USWest's "provision of nonlocal directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service as defined in section 271(a) of the Act."[27] So, once again, Qwest provided in-region, interLATA service without first demonstrating that its local markets were open to competition, without FCC approval, and in violation of Section 271.

In yet a third proceeding, the FCC addressed USWest's pre-merger business arrangement with Qwest, and Ameritech's similar arrangement with Qwest.[28] Under the business arrangement, USWest and Ameritech provided their local customers with a

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[26] *In the Matter of AT&T Corporation v. U S WEST Communications, Inc., In the Matter of MCI Telecommunications Corporation, Inc. v. U S WEST Communications, Inc.*, Memorandum Opinion and Order, Adopted February 14, 2001, Released February 16, 2001, DA 01-418, para. 19. Footnotes omitted.

[27] *See Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of U S WEST Communications, Inc.* for Forbearance, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (rel. Sept. 27, 1999), paras. 2, 63.

[28] *AT&T Corporation, et. al. v. U S West Communications, Inc., and Qwest Corporation*, file No. E-98-42 (consolidated with File Nos. E-98-41 and E-98-43), FCC 98-242, Memorandum Opinion And Order (rel. to the public October 7, 1998) para. 52.

"one-stop shopping" opportunity that included interLATA services, without first opening their local markets to competition, without FCC approval, and in violation of Section 271.[29] With the local market not open to competition, the results of offering local customers one-stop shopping were astoundingly anti-competitive. By leveraging its dominance in the local market to gain long distance customers, USWest persuaded 138,000 of its local customers to purchase Qwest's long distance service in just four weeks of marketing the one-stop shopping program.[30] Consequently, if Qwest is granted 271 relief before its local markets are open to competition, the same anti-competitive results will occur. Qwest will be able to leverage its dominance in the local market and extend it into the long distance market.

Qwest's violations of Section 271 are ongoing. Through review of Qwest's April 16, 2001 Auditor's Report and the accompanying certification submitted to the FCC as required in the FCC's approval of the Qwest-USWest merger, AT&T discovered Qwest's further violations of Section 271. The Auditor's Report finds that in-region interLATA private line services for 266 large business customers were "billed and branded as Qwest services" and that revenues associated with these services from July 2000 through March 2001 exceeded $2.2 million. Through its branding of in-region interLATA transport services as its own, Qwest has once again violated Section 271, and there is no knowing when Qwest will stop doing so.

AT&T has requested that the FCC take action against Qwest for its continuing violations of Section 271.[31] Good grounds exist to believe that Qwest is further violating

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[29] *Id.*, para. 44

[30] *Id.*

[31] See Letter of Aryeh S. Friedman to Dorothy Attwood and David Solomon, May 1, 2001, attached here as Exhibit J

section 271 by reason of its teaming arrangements with long distance carriers to provide long distance services to federal agencies located within Qwest's local region.

Most recently, Touch America, Inc., has filed complaints in federal court and at the FCC against Qwest asserting *inter alia* that, contrary to its obligations under both section 271 and the USWest merger agreement, Qwest continues to market and provide in-region interLATA services through its "Q-Wave" service, which provides interLATA capable dark fiber facilities. See *Touch America, Inc. v. Qwest Communications International, Inc.*, Cause No. CV 01 148 M-DWM, U.S. District Court, District of Montana, Missoula Division (J. Molloy), filed August 22, 2001. A copy of Touch America's FCC complaint can be found at the following website: http://filings.tamerica.com/qwest/documents/TA-FCC%20Complaint01.pdf.

Also related to Qwest's outright violations of section 271 are Qwest's efforts in Arizona and other states to make an end run around the law and provide long distance service without opening its local market to competition and without FCC approval. Qwest sought to remove the LATA boundary within Arizona by asking the Commission there to abolish the boundary. Qwest's plan was that once the LATA boundary was gone, Qwest could provide long distance service throughout the state because such service could not be characterized as "interLATA service" within the prohibitions of section 271. The FCC responded by threatening to initiate charges against USWest (now Qwest) if it were to proceed with its plan.[32]

Most recently the anticompetitive behavior of Qwest was the subject of a complaint filed by AT&T in Minnesota. During the course of proceedings there, AT&T presented evidence of a continuing pattern of anticompetitive behavior on the part of

Qwest, including violations of the interconnection agreement between the parties, and a failure by Qwest to provide adequate systems testing in accordance with the terms and conditions of that interconnection agreement. On February 22, 2002, Administrative Law Judge Mihalchick handed down his recommended decision, containing a detailed discussion of the facts of the case, and concluding that:

> 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. State. §237.462, subd. 1, (1) and (3).
>
> 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.

[32] See Exhibit K, attached hereto.

> 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).
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> See Findings of Fact, Conclusions of Law, and Recommendation, *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc., Against Qwest Corporation*, Office of Administrative Hearings for the Minnesota Public Utilities Commission, OAH Docket No. 12-2500-14262-2, MPUC Docket No. P-421/C-01-391, issued February 22, 2002, at p. 33 (paragraphs 13 and 14 of Conclusions of Law section), attached here as Exhibit L.

The recommended decision goes on to emphasize that Qwest's violations were continuous and on-going. The ALJ also found that the violations were knowing and intentional, and are characterized as "a continuing pattern of conduct." See Exhibit L, at page 34.

AT&T would note that Qwest commonly uses the strategy of engaging its competitors in "long and unnecessarily difficult negotiations." That pattern of behavior shows up as a common element of many of the other examples of anticompetitive conduct by Qwest which AT&T has previously cited in its testimony and briefs.

Beyond this, however, the ALJ also found that, during the course of the proceedings on the complaint, Qwest *deliberately fabricated evidence* in an attempt to assert that AT&T did not intend to enter the local exchange market in Minnesota. See Exhibit L, at page 30.

These findings not only demonstrate an on-going pattern of anticompetitive behavior on the part of Qwest, they also show a willingness and ability on Qwest's part to prevaricate *at the highest levels of the company*, and thereby to subvert the ability of a regulatory body to determine the true facts at hand. Qwest's behavior here has been *shown to be deceitful*, and it demonstrates a complete lack of respect for regulatory

authority. AT&T submits that this showing is *predictive of future behavior*, and that current safeguards do not protect competitors or the public from this course of behavior.

Qwest has nowhere denied any of the factual conclusions set forth in the recommended decision. Nor can it, because those conclusions are all true.

Qwest may attempt to argue that the underlying complaint in Minnesota has been resolved by putting language in its SGAT. The problem with that argument, however, is that similar language was first placed *in statute* in Minnesota, and it was that *statutory* language which Qwest violated.

Qwest might also attempt to argue that it has completed the tests which AT&T requested and found nothing that wasn't revealed in the ROC OSS testing. In this regard, AT&T challenges Qwest's assertion that these tests were duplicative of the ROC tests. The decision itself makes it clear that these tests were first designed for use with other RBOC's, and there is *nothing in the decision* to indicate that the tests were in any manner duplicative.

But more importantly, the *results* of the tests are not the point. The point is that Qwest did not negotiate in good faith, and that is a pattern of behavior that has been Qwest's hallmark since the passage of the federal act. We've seen it present in negotiations between Qwest and its competitors in a variety of contexts, from interconnection agreements to the payment of reciprocal compensation, to the illegal provisioning of interLATA IRUs, to the newly revealed secret agreements which Qwest has apparently entered into in Minnesota in order to silence its smaller competitors.

And it is this pattern of behavior that caused the Minnesota ALJ to recommend imposing a fine of nearly $1.2 million against Qwest here.

Qwest's past actions, delineated by the Minnesota ALJ in the recommended decision, are quite clearly "predictive" of future actions by Qwest. The recommended decision encapsulates Qwest's on-going strategy for dealing with its competitors. The Minnesota ALJ is a witness to that strategy, and it is becoming increasingly apparent that the more a regulatory body—any regulatory body—looks at Qwest's behavior, the more questionable actions it seems to find.

Although Qwest may claim to welcome competition with open arms, its actions demonstrate that it actually seeks entrance into the long distance market without fulfilling its obligation to let other carriers into its local markets. Qwest has a long history of maintaining its firm grip on its local markets through the use of anti-competitive behavior. Other examples include:

- Qwest's refusal to provide access to NIDs and inside wiring at multi-tenant dwellings in the state of Washington. Qwest's behavior reached a new level of outrageousness here, and included ripping out wiring installed by AT&T technicians, and padlocking control panels to exclude competitors. Then, after the fact, Qwest attempted to put forward the absurd argument that its actions were taken "in good faith."

- Qwest's failure and refusal to convert SunWest Communications' customers from resale lines to UNEs in Colorado. In addition, Qwest has deliberately failed to provide interconnection to SunWest customers, depriving them of telephone service entirely.

- Qwest's apparently deliberate delay in providing interconnection to MCI Metro in the state of Washington, which recently caused WUTC Chair Levinson to write: "This is a consistent pattern of behaviors that all operated to USWest's advantage, gave it undue preferences, and subjected MCI to an undue competitive disadvantage and improper discrimination."

- Qwest's refusal to provide Rhythms, and other competitors, with ADSL- capable loops and ISDN-capable loops in Colorado and throughout the 14 Qwest states.

Although these examples are state-specific, Qwest's operating systems, processes and training are region-wide. Thus, it is reasonable to conclude that this same anti-

competitive behavior by Qwest is not restricted by state boundary. These examples make it clear that Qwest continues to have no intention of opening its local market.

Qwest's numerous past and ongoing violations of section 271, coupled with its continuing efforts to avoid compliance, should cause this Commission to conclude that Qwest has truly failed and refused to open its local markets in compliance with section 271. The Commission should also lack confidence that Qwest will comply with section 271 in the future.[33]

H. Qwest has not Provided Adequate Assurances that its Local Markets, Once Opened to Competition, Will Remain So.

Another factor the FCC considers under the public interest requirement is whether the BOC has provided adequate assurance that its local markets will remain open to competition if the FCC grants 271 relief and allows the BOC to enter the interLATA market in its service region.[34] Mr. Teitzel's affidavit indicates that Qwest will rely on a Performance Assurance Plan ("QPAP") to demonstrate such assurance.[35] However, because Mr. Teitzel does not present a version of the QPAP for consideration, it is impossible to find in his testimony any assurance whatsoever of future market openness.

At this point, it is certainly premature to characterize the QPAP as providing any assurances that Qwest's markets, once open, will remain so. The resolution of QPAP-related issues in South Dakota is clearly a work in progress at this time.

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[33] *See Ameritech Michigan 271 Order*, para. 399. "[W]e need to be confident that we can rely on the petitioning BOC to continue to comply with the requirements of section 271 after receiving authority to enter into the long distance market." It is difficult to have such confidence with Qwest, given its history of noncompliance with Section 271.

[34] *SBC Texas 271 Order*, para. 420; *SBC Kansas/Oklahoma 271 Order*, para. 269.

[35] *See* Teitzel Affidavit, p.36.

Thus, even assuming that at some time in the future Qwest's local markets will be open to competition (a point which AT&T does not concede), Qwest has not yet provided any genuine assurances that its local markets will remain open to competition.

Furthermore, Qwest has consistently and vigorously resisted any and all attempts to establish backsliding penalties in the various states. For example, Qwest's opposition to Iowa House Study Bill ("HSB") 158 throughout the 2001 legislative session is another strong indicator of its true intention regarding any accountability once it has received 271 relief. HSB 158 had sought to (1) establish continuing standards for the provision of interconnection by ILECs to competitors; (2) allow competitors to pursue private rights of action in order to enforce those continuing standards: and (3) allow for the recovery of actual and punitive damages by competitors harmed by any failure on the part of ILECs to meet those continuing standards. Rather than conceding that safeguards such as these are necessary from a CLEC's perspective, Qwest used its considerable lobbying force to kill the bill entirely.

Qwest has made a shell game of the question of state and federal authority over any QPAP, claiming to state authorities that jurisdiction resides with the FCC, and claiming in front of the FCC that such authority resides with the states. Before the New Mexico Public Regulation Commission, Qwest argued:

> The aforementioned subsections of proposed Rule 17.11.18 address quality of service standards, performance measures, minimum performance standards and financial incentives relating to the failure to achieve minimum performance standards. These proposed rules are unnecessary and conflict with the federal rules; therefore they should not be adopted by the Commission.[36]

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[36] Before the New Mexico Public Regulation Commission, *In the Matter of the Adoption of a Rule Ensuring the Accessibility of Interconnection by Competitive Local Exchange Carriers in Both Urban and*

In Minnesota, Qwest again challenged the State Commission's authority to establish wholesale quality service standards. Qwest argued federal preemption over quality of service standards proposed by the MPUC.[37]

However, at the FCC, Qwest argued:

> **States do not need guidance with respect to implementation of Sections 251 and 252.** They have primary jurisdiction over privately-negotiated contracts under those sections, and have been exercising such authority through legislatively-endorsed mediation and arbitration authority unencumbered by federal rules regarding performance measurements for quite some time...There are considerable jurisdictional questions around the establishment of federal performance measurements under Sections 251 and 252.[38]

Furthermore, Qwest has resisted any efforts to make such a plan mandatory anywhere in its region. Qwest informed the Executive Committee for the Regional Oversight Committee ("ROC") for the Operational Support Systems ("OSS") test effort currently underway for many states in Qwest's local service territory, that "[A] performance assurance plan is not a 271 requirement, nor is it designed to prove 271 compliance. Instead, it is a voluntary undertaking, which creates future obligations with significant corresponding penalties. Qwest cannot allow a voluntary undertaking of this magnitude to be subject to modification through an informal ROC governance process

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Rural Areas of New Mexico Pursuant to House Bill 400, Utility Case No. 3439, Qwest's Comments to the Proposed Rules for Interconnection and Unbundled Network Elements, p. 19.

[37] Before the Minnesota Public Utilities Commission, *In the Matter of Qwest Wholesale Service Quality Standards*, MPUC Docket No. P421/AM-00-849, Qwest Corporation's Reply Comments Regarding the Joint Proposal for Qwest Wholesale Service Quality Standards, January 25, 2001.

[38] Before the Federal Communications Commission; *In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56; RM-9101, Comments of U S WEST Communications, Inc.; June 2, 1998, p. 15 (bolded text included in the original U S WEST filing, footnote omitted) and p. 20 (footnote omitted).

where the lines are not clearly drawn between negotiations participants and decision makers."[39]

Such actions cast considerable doubt on the effectiveness of a QPAP, and on Qwest's sincerity with respect to the "adequate assurances" it purports to have provided here. AT&T believes that "adequate assurances" that markets will remain open after a grant of 271 authority should not begin and end with a QPAP. Instead, the Commission should look to a combination of potential rights and remedies, including:

- Automatic and self-executing penalties imposed by a QPAP;
- Private rights of action for violation of interconnection agreements, wholesale service quality standards, state rules and regulations, and federal law;
- A wide spectrum of potential remedies, including fines payable to the state general fund, penalties payable directly to a CLEC's end user customers, recovery of actual and punitive damages; and imposition of other penalties and assessments.

Consideration should also be given to the structural separation of Qwest's wholesale and retail operations. There is a clear, fundamental conflict of interest between Qwest's relationship with its retail customers, on the one hand, and its relationship with its wholesale customers on the other. Since the passage of the federal Act, Qwest and its predecessor USWest have failed and refused to recognize any of their obligations to wholesale customers. The only way to remedy this situation is to require the structural separation of Qwest's retail group from its wholesale operations, and require the retail group to buy from Qwest's wholesale group in the same way that CLECs do.

[39] Letter from R. Steven Davis, Qwest, Senior Vice President, Policy and Law, to Bob Rowe, Allan Thoms, Marilyn Showalter, Stephen F. Mecham, Anne Boyle, Ray Gifford, and Ed Garvey, December 15, 2000, p. 2, (emphasis added).

Until a comprehensive approach is taken to eliminate Qwest's anti-competitive behavior, with proper safeguards in place to curb Qwest's discriminatory treatment of CLECs, it is premature for the Commission to determine whether the public interest would be served by Qwest's entry into the long distance market. The clear danger here is that, absent such an approach, the result will be a remonopolization of the local and long distance markets in South Dakota.

G. Conclusion

Qwest retains an obvious stranglehold on the local exchange market, and especially the residential market, in South Dakota. Moreover, the prospects for the development of competition in those markets are, at present, extremely poor.

In addition, the record shows that Qwest's proposed entry into the interLATA market will not make that market more competitive; in fact, quite the contrary. Qwest's proposed entry, without a prior adjustment to access charge rates and pricing structure, will result in one player having substantially greater margins on its own long distance services, and having the unique ability to profit from calls placed over its competitors' facilities.

Qwest's continued pattern of anti-competitive behavior, and violation of state and federal law, present additional impediments to its 271 application, especially in the context of a public interest analysis. The public interest will not be served by rewarding this constant and prolonged behavior through a grant of 271 authority.

Lastly in this regard, the record here shows a complete lack of appropriate, adequate assurances that Qwest will keep its local exchange markets open, once they are

made open to competitors. The QPAP upon which Qwest relies here is at best a work in progress, lacking in finality, and flawed in its current iteration.

Pure and simple, it is not presently in the public interest for Qwest to be granted authority to provide in-region long distance service on an interLATA basis. The Commission should deny Qwest's application for that authority until such time as the numerous public interest issues have been properly resolved.

Respectfully submitted this 18th day of March, 2002.

AT&T COMMUNICATIONS
OF THE MIDWEST, INC.

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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**

VERIFICATION OF DIANE F. ROTH

I, Diane F. Roth, being duly sworn, state that I am an Assistant Vice President for AT&T Corp. I hereby verify the factual assertions in AT&T's Verified Comments Regarding Public Interest as true and correct statements to the best of my knowledge and expertise.

Dated this 18th day of March 2002.

Diane F. Roth

STATE OF COLORADO)
) **ss**
CITY AND COUNTY OF DENVER)

SUBSCRIBED AND SWORN TO before me on this 18th day of March 2002 by Diane F. Roth, who certifies that the foregoing is true and correct to the best of her knowledge and belief.

Witness my hand and official seal.

Notary Public

My commission expires: 1/22/06

NOTARY PUBLIC
ADAM W. WALCZAK
STATE OF COLORADO

My Commission Expires 1/22/06

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of QWEST CORPORATION, fka US WEST Communications, Inc., for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)	))))	DOCKET NO. 00-049-08 REPORT ON THE PUBLIC INTEREST

ISSUED: February 20, 2002

By The Commission

INTRODUCTION

The Public Service Commission of Utah ("Commission") is participating in a multistate collaborative section 271 proceeding ("Multistate Proceeding") with the state commissions of Idaho, Iowa, Montana, New Mexico, North Dakota, and Wyoming. The purpose of the Multistate Proceeding is to develop a record that the Commission can use to make a recommendation to the Federal Communications Commission ("FCC") regarding the compliance of Qwest Corporation ("Qwest") with the requirements of 47 U.S.C. § 271. As a precondition to providing in-region InterLATA service in Utah, Qwest must demonstrate that approval of its section 271 application is "consistent with the public interest, convenience, and necessity," as required by 47 U.S.C. § 271(d)(3)(C) (known as the "public interest requirement"). Now at issue before this Commission is whether to recommend to the FCC that approval of Qwest's section 271 application is consistent with the public interest, convenience, and necessity.

Sessions 7 and 8 of Technical Workshop 3 on June 6, 7, and 28, 2001, addressed Qwest's satisfaction of the public interest standard. Qwest submitted direct and rebuttal

testimony, as well as opening and reply briefs, to state its case that its entry into the InterLATA market in Utah would be consistent with the public interest, convenience, and necessity. Among the other parties participating in this Multistate Proceeding, AT&T, Sprint, e.spire, the Iowa Office of Consumer Advocate ("Iowa OCA"), the New Mexico Regulation Commission Advocacy Staff ("New Mexico Staff"), the Wyoming Consumer Advocate Staff ("Wyoming CAS"), and the Association of Communications Enterprises ("ASCENT") directly addressed the public interest test.[1]

The Commission issues this report not to suggest that the process of reviewing the merits of Qwest 271 entry has reached a conclusion, but rather as a response to the Staff Report concerning the Workshops focused on this issue. Having reviewed the Staff's Report, the Staff's Erratum Comments to the Report, the comments of the parties in response to the Staff's Report, and the record of the public interest portion of Workshop 3, the Commission now makes the following specific findings of fact and conclusions.

FINDINGS OF FACT

A. The FCC's Public Interest Analysis

Under the Telecommunications Act of 1996 (the "Act"), a Regional Bell Operating Company ("RBOC") applying for section 271 authority must demonstrate that "the requested authorization is consistent with the public interest, convenience,

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[1] AT&T addressed the public interest in the affidavit of Mary Jane Rasher and in its opening and reply briefs; the Iowa OCA submitted the filed testimony of Dr. David S. Habr, as well as opening and reply briefs, e.spire filed the affidavit of David M. Kaufman; and Sprint, the New Mexico Staff, the Wyoming CAS, and ASCENT all filed opening briefs concerning the public interest.

and necessity."[2] Congress has assigned the FCC the responsibility of defining this standard and determining whether it has been satisfied.[3]

The FCC has established that the public interest inquiry has three basic parts. First, the FCC determines whether granting the RBOC's application "is consistent with promoting competition in the local and long distance telecommunications markets."[4] In so doing, the FCC has in the past given substantial weight to Congress's presumption that if the RBOC has fully complied with the 14 point competitive checklist established by the 1996 Federal Act, then the local market is open to competition. If the local market is viewed to be competitive then long distance entry should benefit consumers.[5] Second, there must be some tangible evidence that the RBOC will not take actions that would close the market after section 271 authority is granted. Hence the need for a post-entry performance assurance plan (PPAP), or some other enforcement tools to be certain the RBOC will "continue to satisfy the requirements

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2 47 U.S.C. § 271(d)(3)(C).

3 *See* 47 U.S.C. § 271(d)(3); *See* Memorandum Opinion and Order, *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 ¶ 383 (1997) ("*Ameritech Michigan Order*") (while the FCC will consider the Department of Justice's proposed public interest standard, "section 271 ultimately obligates *the Commission* [the FCC] to decide which factors are relevant to our public interest inquiry, how to balance these factors, and whether BOC entry into a particular in-region, InterLATA market is consistent with the public interest") (emphasis added).

4 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 ¶ 268 (2001) ("*SBC Kansas/Oklahoma Order*").

5 *Id.* (reaffirming that "BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist").

of section 271 after entering the long distance market."[6] Third, if these two elements (the checklist and the PPAP) have been satisfied, the FCC then considers whether there are any remaining "*unusual circumstances* that would make the proposed entry contrary to the public interest".[7]

B. The Multistate Proceeding and the Staff's General Findings

Qwest's testimony for the most part assumed checklist compliance and that its proposed post-entry performance assurance plan would be approved. Therefore Qwest primarily focused on trying to show that there were no "unusual circumstances" in the participating states that would overcome the "strong indica[tion]" that entry would be in the public interest if checklist compliance is shown, and that the "probative evidence" is that these markets will stay open after entry if Qwest submits an acceptable PPAP.[8]

Many of the CLECs and other parties to this proceeding suggested other issues (i.e., unusual circumstances) in addition to the two key issues (checklist compliance and an acceptable PPAP) listed above to the Commission for its use in deciding the public interest standard. To the extent that these issues are present in Utah and they remain either un-addressed or unresolved through the workshop process we encourage the parties to bring them before the Commission in State-specific hearings to evaluate their merit in the context of Utah's markets.

We note that many parties in effect advocated a market share test. There is no obvious conflict between a market share test and Congress's explicit Track A and Track B

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6 *Id.* at ¶ 269.

7 *Id.* at ¶ 267 (emphasis added); *see also id.* At ¶¶ 281-82

approaches to showing that an RBOC has opened its markets to competition. Since the dual Track A and Track B approaches explicitly allow for entry when no competition is present it is difficult to see how a market share test can be reconciled with the 1996 Act. The analogy used in the Staff Report (and elsewhere) is that the door only has to be unlocked, not that CLEC's must be in the room.[9] While that sentiment may be consistent with some narrow interpretation of the law, it is also clear that the intent of the Federal Act, and the relevant State law, is that competition should actually develop. Therefore, a more accurate analogy ought to be that the door is wide open. So while we recognize that the "Track A and B concepts established by the Congress clearly implies that the more precisely defined requirements of section 271 can be met in an empty room. . . ."[10], we also recognize that if markets are actually open then some specific policy, practice or activity must be functioning as a barrier-to-entry if significant competition is not present. To the extent that the policy, practice or activity that may be stifling competition is not within Qwest's control then no significance should be attached to the fact that competition has not developed to the extent contemplated by Congress and the State legislature. Given the lack of Utah specific evidence we cannot at this time make a finding as to whether or not such factors are or are not within Qwest's control. Further, Qwest has not yet demonstrated that it meets the 14 point checklist. We also point out that an acceptable PPAP has not been adopted in Utah. Hence the idea that satisfying the 14 point checklist and proposing a sufficient PPAP would substantially meet the public interest standard is currently only of theoretical interest.

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8 *Bell Atlantic New York Order* at ¶¶ 423, 429

9 *Id.*

The Staff correctly stated that parties asserting that unusual circumstances exist bear the burden of proof:

> Given the FCC's conclusion that checklist compliance is a strong indicator of the satisfaction of the public interest test . . . it is appropriate to ask those who make public interest assertions to demonstrate the existence of the facts necessary to support their claimed reasons why the public interest would not be served by granting Qwest 271 authority. If nothing else, a simple reliance on the need for order compels the conclusion that those who make specific allegations should be required to prove them.
>
> Thus, while Qwest must bear the burden of proving checklist compliance and the satisfaction of Track A and B requirements generally, we would not accept a rule that upon allegations by a third party Qwest must bear the burden of disproving them in order to demonstrate that the public interest would be served by granting it 271 authority.[11]

We disagree with AT&T's charge that asking the opposing parties to prove the existence of unusual circumstances — as opposed to forcing Qwest to prove their nonexistence — in any way "read[s] the public interest requirement out of the statute."[12] To the contrary, placing this burden of proof on the opposing parties clearly acknowledges the additional inquiry required under the public interest test.

C. Specific Issues Raised by the Parties

We address in turn each of the public interest arguments raised by the CLECs and state commissions' staffs:

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10 *Id.*

11 *Id.* at 2.

12 Comments of AT&T in Response to the Facilitator's Report on Public Interest (Nov. 1, 2001) at 2 ("AT&T Comments").

1. UNE Prices

AT&T (joined by Sprint and ASCENT) argued that Qwest's wholesale UNE prices do not allow competitors to make enough of a profit in the residential market, thereby precluding a finding that Qwest's retail markets are open to competition and that its entry into the InterLATA market would be consistent with the public interest.[13]

The Staff Report concluded that AT&T's analysis — a comparison of basic IPP rates and UNE-Platform prices — was of inconsequential value in assessing the state of local markets in Qwest's local exchange service areas."[14] The Staff observed four shortcomings in AT&T's evidence:

> First, it did not recognize that local rates consist of much more than the basic monthly charge for service. Vertical features and intrastate toll revenues must be considered. . . . Second, AT&T's analysis did not consider the existence of resale as an option for certain service classes that do not lend themselves to economical competition through the use of UNEs. Third, AT&T did not provide any evidence of business rates; it did not even provide its simple comparison of basic rates for such service. Fourth, AT&T did not address the issue of what "subsidies" might be available to it in the event that it should serve qualifying residential lines through facilities-based competition.[15]

However, Utah's Price Index and Price Floor legislation raise troubling questions with respect to Qwest's and Staff's arguments. Qwest has maintained before this Commission that the only revenues that should be considered when implementing Utah's price index and price floor

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13 *Id.* at 3-6; AT&T Br. at 6-7; Sprint Communications Company L.P.'s Brief Regarding Track A and Public Interest (July 25, 2001) at 4 ("Sprint Br."); Comments of the Association of Communications Enterprises Regarding Qwest Corporation Compliance with the Public Interest Requirements of Section 271 of the Telecommunications Act (July 25, 2001) at 21 ("ASCENT Comments").

14 Staff's Report at 5-6.

15 *Id.*

legislation with respect to residential service are the revenues associated with basic service. Qwest has always argued that each element and service must be self-supporting, or it must not be subject to the price index.

The issue of what constitutes proper UNE prices is currently before the Commission in Docket Numbers 00-049-105 and 01-049-85. While the Commission understands the arguments of the parties, we anticipate setting cost-based prices based on the records available in these dockets. We anticipate that this will be an on-going process. Therefore the arguments on the appropriateness of any given UNE price should be addressed in the relevant (pricing) docket.

Further, the issue of what the actual prices are should be settled before the Commission can determine the merits of the general allegation that the prices preclude the development of competition. We anticipate issuing another Order with respect to UNE prices in the near future, and have recently issued an Order with respect to collocation prices. When these Orders are final and implemented (i.e., no longer being contested) the Commission will be able to evaluate the merits of the arguments raised in conjunction with these prices.

2. Intrastate Access Charges

AT&T alleged at the workshops that Qwest's intrastate access charges "provide it with a source to subsidize its other products and services" to the detriment of its competitors.[16] AT&T's argument was directed primarily to the question of competition in the *long-distance*

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[16] AT&T Br. at 12.

market.[17] AT&T suggested that these access charges would enable a post-271 Qwest to charge lower *long-distance* prices than its interexchange-carrier competitors. Qwest maintained that section 272(e)(3) of the Telecommunications Act, which requires Qwest to charge its own long-distance affiliate "an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service . . . ."[18] showed that the argument was unimportant. However, given that Qwest is paying itself when it charges an affiliate it is reasonable to assume that strategic pricing could have an effect on the developing marketplace. Again we must find the record insufficient on this point and direct the parties to prepare to present Utah specific evidence before the Commission.

Congress's attempted solution to the possibility of improper cross-subsidization from above-cost access charges was not, as AT&T suggests, to deny the possibility of section 271 relief. Instead, the FCC has acknowledged that "Congress . . . enacted Section 272, which requires an RBOC competing in the in-region long-distance market to create a separate long-distance affiliate and to recover access charges from that affiliate on the same basis on which it recovers such charges from unaffiliated carriers."[19]

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[17] *See* AT&T Br. at 13 (asserting that Qwest's access charges established "ten cents per minute (plus [the IXC's] own costs)" as "a floor below which the IXC cannot price" its long distance calls, while "Qwest can price its own retail long distance service well below ten cents per minute and still make money"); AT&T Reply Br. at 12 (describing the problem as "Qwest's margins from its intrastate long distance business will be substantially greater than those of its competitors"); Rasher Affidavit at 13 ("If Qwest were to enter the InterLATA market, there would be nothing to keep Qwest from pricing its InterLATA long distance service at 10¢ a minute for its retail customers. . . . Since IXCs would have to pay Qwest 9.8¢ per minute for access, it [*sic*] would not be able to price compete with Qwest. Thus, without intrastate access reform, Qwest's entrance into the InterLATA log distance market would afford Qwest a huge anti-competitive price advantage.").

[18] 47 U.S.C. § 272(e)(3).

[19] *Id.*

Given that one of the items examined in this proceeding is the adequacy of the affiliate Qwest has set up, and that this issue has been raised in multiple Dockets before this Commission, we express the general opinion that the affiliate route is sufficient, but that we also require sufficient proof at this point in the process to determine if the affiliate can function as required by law.

3. Post-Entry Performance Assurance Plan

A number of parties expressed concerns in their public interest arguments regarding the need for a sound post-entry performance assurance plan (PPAP). Currently parties are attempting to negotiate a mutually acceptable PPAP. A viable PPAP must be in place to satisfy the public interest requirement.

4. Level of Competition

A number of parties to this proceeding argued that Qwest must demonstrate a particular level of competition in a given state in order to prove that its entry into the InterLATA market is consistent with the public interest. As examples, the Utah Staff cited the New Mexico Staff's demand for evidence of "sizeable amounts" of competition,[21] and the Iowa OCA's insistence on proof of "greater and 'sustainable' entry by CLECs."[22] AT&T likewise argued at the workshop that CLEC residential market shares in the seven states were too low.[23]

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[21] *Id.* (citing the New Mexico Advocacy Staff Initial Public Interest Br. at 6).

[22] *Id.* (referring to the Iowa OCA Br.)

[23] AT&T Br. at 3.

The FCC has held that a specific market share test is generally not part of the public interest inquiry. Moreover, to the extent CLEC market share is relevant the Commission's recent Fourth Annual Report to the Governor, Legislature, the Public Utilities and Technology Interim Committee, and the Information Technology Commission (the Commission's Report) concluded that CLECs serve approximately 32 percent of the business lines and 6 percent of the residential lines in Qwest's service territory, for an overall market share of just under 16 percent. Therefore Utah has more competition than some other states that have been approved by the FCC. For example, the market share calculations for Oklahoma were estimated at 5.5 to 9.0 percent, and for Kansas they were 9.0 to 12.6 percent when SBC's application was granted.[24] In order for this argument against entry to carry the day, opponents must make a showing as to what special circumstances exist that would suggest that a 16 percent market share is insufficient.

5. Prior Qwest Conduct

AT&T asserted that a "pattern of past and continuing Qwest conduct" violated both pre-application limits on Qwest's provision of in-region, InterLATA services and Qwest's section 251 and 252 obligations to provide wholesale services to CLECs.[25] The Staff (in their Report) asserts that they "[did] not believe that the nature of those violations should be predictive

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[24] *See SBC Kansas/Oklahoma Order* at ¶¶ 4-5.

[25] AT&T Comments at 10-14.

of Qwest conduct after 271 approval may be granted."[26] However, as AT&T points out Qwest has maintained that it was always in compliance; therefore, Qwest's past behavior may well be indicative of its future behavior. What the record lacks is any Utah specific evidence or any aggregate level evidence. Therefore parties wishing to pursue this argument must present Utah specific evidence before the Commission.

Similarly, the Commission requires Utah specific examples or evidence with respect to Qwest's behavior regarding wholesale services to CLECs. Specifically, we agree with the Staff's conclusions: (1) that AT&T's allegations of interconnection and testing violations by Qwest in Minnesota "remain[] the subject of a good-faith dispute in [the] workshops," as well as a recommendation from the Staff meant to prevent such disputes in the future;[27] (2) that AT&T's claim that Qwest has refused access to NIDs and inside wiring in multi-tenant buildings in Washington is a sub-loop issue already resolved in the Staff's earlier Report on Emerging Services;[28] and (3) that AT&T's charges regarding Sun West (in Colorado), MCI Metro (Washington), and Rhythms (specifically, in Colorado) provide interesting but insufficient evidence for the Utah Docket.[29]

6. Structural Separation

AT&T and Sprint suggested that the participating state commissions should take the public interest inquiry as an opportunity to divide Qwest into structurally separate wholesale

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[26] *Id.*

[27] *Id.*

[28] *Id.* (citing Staff's Report on Emerging Services, at 30).

[29] *Id.*

and retail companies."[9] First, it is clear that the question at hand is not simply, as AT&T asserts, whether structural separation is permissible or a good idea; rather, "the question is whether, in the absence of structural separation, Qwest's 271 approval would meet the public interest test."[10]

The FCC has now approved section 271 applications for several different states. To date the FCC has not yet required the applicant to undergo the corporate restructuring that AT&T and Sprint are proposing as a condition for InterLATA entry. The issue of structural separation is one that Congress and the Utah Legislature could address.

3 Sustained Checklist Compliance

ASCENT argued in its comments that Qwest must demonstrate "a record of sustained compliance" with its market-opening obligations in order to satisfy the public interest standard.[11] First, as explained above, Qwest has *a priori* no obligation to demonstrate a specific minimum level of competition in the local market to receive section 271 authorization; and second, the FCC has not yet required a minimum period of time across which Qwest should have to demonstrate checklist compliance. ASCENT's proposal neglects the potential role of an adequate post-entry performance assurance plan (PPAP) to provide both an incentive for, and a measurement of, Qwest's compliance with its market opening obligations: It is likely that a sound PPAP, as opposed to a history of compliance, will result in continued future compliance.

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[9] See, e.g., AT&T Comments at 14-17.

[10] Staff's Report at 10.

[11] ASCENT Comments at 4-5.

• Inducing Competition

AT&T argued that allowing Qwest to enter the InterLATA market would stifle competition in the local market.[11] The Commission disagrees. If entry is preceded by full checklist compliance, and if an acceptable PPAP is in place, opening the in-region, InterLATA market to Qwest may have the effect of inducing other carriers in that market to accelerate their efforts to enter the local exchange market. Absent either of these pre-conditions we find that the likely outcome of "premature" entry would be an increase in the expected market share and market power of Qwest. Hence the vital need to facilitate full checklist compliance, and develop an acceptable and adequate PPAP.

We also reject the suggestion that only CLECs should have the ability to bundle different types of services.[12] The parties are correct that granting Qwest's application will allow it to offer bundles of long distance and local service to consumers, but that "is the evident result that the Act itself anticipates."[13]

• Other Issues

The Staff properly declined to discuss a number of miscellaneous issues raised by the intervenors, including the OSS test, DSL and advanced services, and change management, all

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[11] See Iowa CCA Br. at 22, AT&T Comments at 16-17.

[12] See Iowa CCA Br. at 22, AT&T Comments at 16-17 (suggesting that "one-stop shopping" offered by SBC in Texas has harmed the local services market).

[13] Staff's Report at 12.

of which are being addressed in other workshops and other Commission orders. We agree with the Staff that we should avoid imposing a duplicative level of review within the public interest realm.

CONCLUSIONS

1. As explained above we find the record insufficient to support a finding that Qwest's entry into the InterLATA market in Utah passes the public interest test. Specifically we conclude that we need further evidence with respect to:

   A. Whether there are any specific Qwest practices, policies, or activities that are artificially restricting the growth of competition within the Utah telecommunication marketplace.

   B. Whether the current level of intrastate access charges in Utah contributes to a situation that allows cross subsidization within Qwest's corporate framework.

2. The Commission also concludes that Unbundled Network Element and Collocation prices should be final and implemented before the Commission determines whether Qwest's entry into the InterLATA meets the public interest test.

REQUIRED ACTIONS

1. An acceptable PPAP must be in place to fulfill the public interest requirement.

2. Qwest and other parties to this Docket should prepare to address the points noted above before the Utah Commission.

SUMMARY

We find that approval of Qwest's section 271 application, at the current time, would not be consistent with the public interest, convenience, and necessity, as required by 47 U.S.C. § 271(d)(3)(C). Qwest has yet to demonstrate compliance with the 14 point checklist, and an acceptable PAP has not been adopted in Utah. Further, questions have been raised by some of the parties to this Docket that may require further evidence.

DATED at Salt Lake City, Utah this 20th day of February 2002.

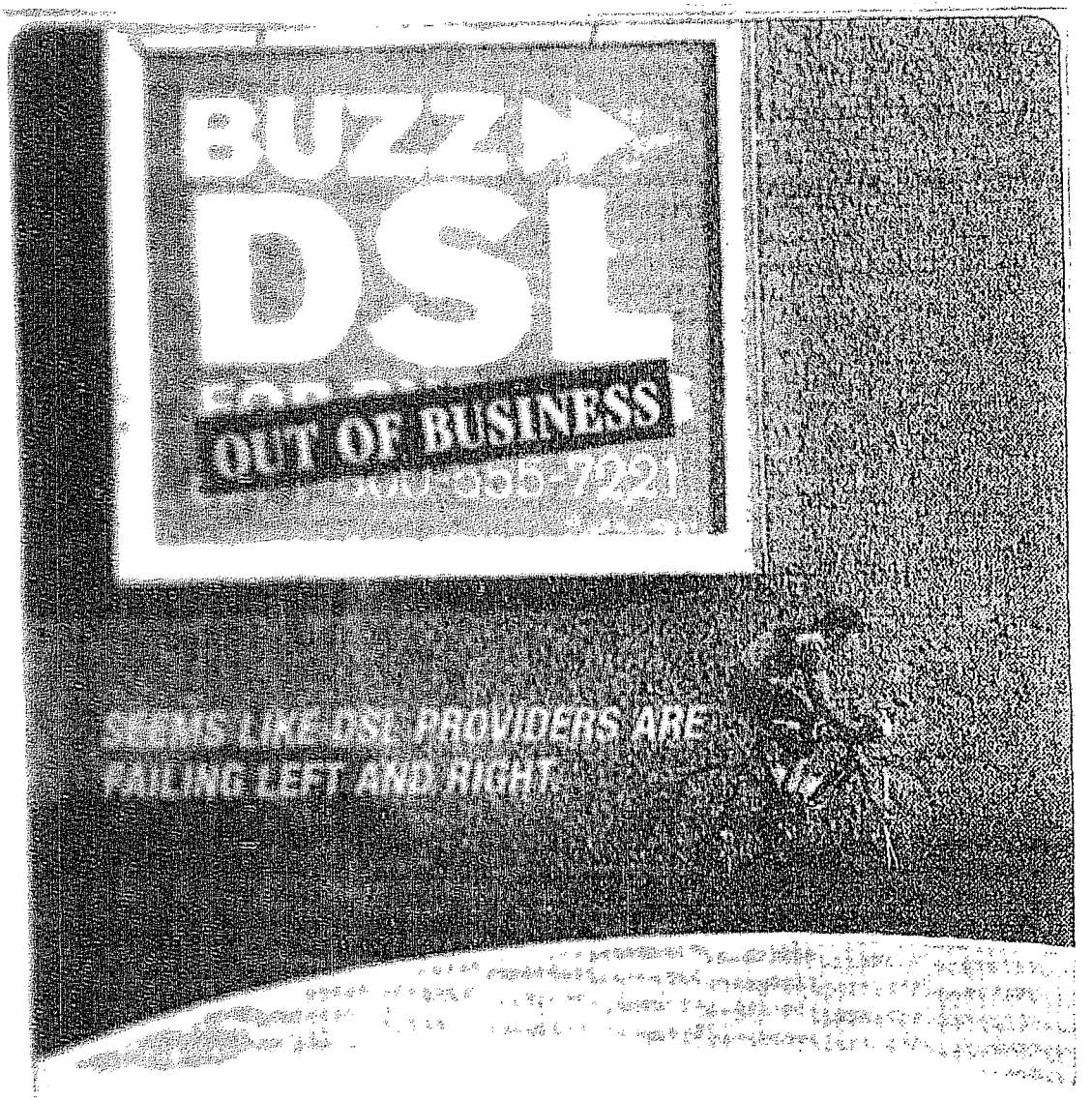
/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary



MAKE SURE YOURS ISN'T ONE OF THEM.

Don't take chances with your business DSL. Choose a provider that's here to stay. Qwest™ never was a disappearing act. We're a national leader in broadband technology, serving small businesses and Fortune 50 companies alike. We give small businesses the proven technology they need to stay competitive now

- speeds ranging from 640Kbps to 7Mbps
- dedicated technical support by specially trained technicians

So you'll be the last person you won't have to worry about your DSL provider going from overnight success to an overnight failure.

ride the light

Qwest.

Exhibit C

Have you heard the news about the DSL changing marketplace?

Subject: Have you heard the news about the DSL changing marketplace?
Date: Wed, 10 Jan 2001 17:44:08 -0600 (CST)
From: partner@uswest.com
To: salax@nm.net

Dear Qwest DSL Host

As recent events in the DSL industry show, DSL technology and providers are rapidly changing. For example, the DSL provider Jato has suddenly announced they are no longer serving customers, yet their current DSL customers have a proven need for speed. (Source: 12/30/00, The Denver Post)

This is an opportune time to transition customers who may be looking for a DSL provider with stability and a proven track record.

Qwest® has a proven track record for stability, depth of financial commitment and sustainability. We believe we will hit our projected DSL subscriber volume and deployment objectives. We are eager to serve all customers with a need for high-speed access to the Internet or to a corporate LAN.

To help make it easier for end users to get the speed they want and need, Qwest offers highly competitive pricing and attractive promotions.

From January 3, 2001 to February 3, 2001, Qwest is waiving the DSL service activation charge (a $69 value). We are also waiving customers' first month of service and are giving customers an internal DSL modem for Windows® desktop users at no charge. For customers with a Macintosh®, UNIX® or laptop computer or for those needing a LAN connection, we are offering a promotional price of $150 for a Cisco external modem (a $295 value) during the same period. All of our Qwest DSL Pro customers receive a Qwest technician installation AT NO CHARGE. .

Qwest offers some of the most aggressive pricing in the DSL industry.* For example, we offer Qwest DSL Pro services for Business customers for as little as $50 per month. Our Qwest DSL Pro service offering includes a special 1-800 number for responsive technical support as well as service level assurances and a technician installation AT NO CHARGE.

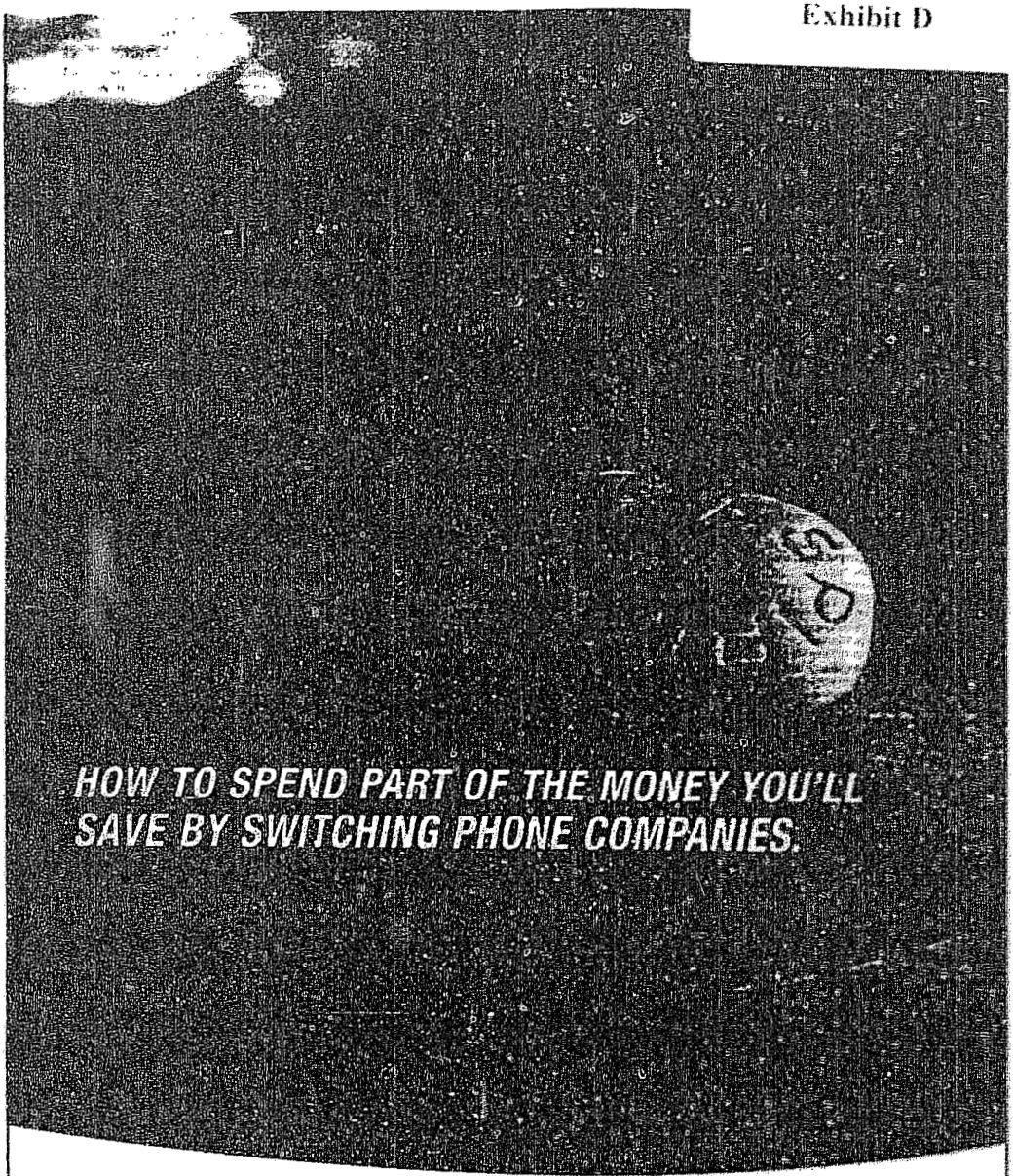
For extra savings, unlike competitors, Qwest's DSL service rides on a customer's existing voice line, so they can avoid the cost of an additional line.

* Please see https://www.extranet.interprise.com/megahost/msprice.htm for current Qwest DSL subscriber pricing.

Thank you for your time.

Sincerely,
The Qwest DSL Marketing team

Exhibit D



HOW TO SPEND PART OF THE MONEY YOU'LL SAVE BY SWITCHING PHONE COMPANIES.

Thinking of switching your local phone service? The savings might not be worth the headaches. Because you won't find the broad choice of features you've come to expect. And you may start getting a handful of invoices instead of one easy, consolidated bill. Call us at 1-888-561-7691 for more information. And stay connected with Qwest.® It's not just smarter. It's painless.

"My experience has been that all of the rigmarole and the offers of saving money and this type of thing, I'm better off if I stick with who I know."

– Dick Dahlgard
Returned Qwest Customer

ride the light

Qwest.

Broadband Internet Voice Data Wireless

©2001 Qwest Communications International Inc.

> From: Broberg, Li (Linda)
> Sent: Tuesday, August 07, 2001 1:46 PM
> To: Akagi, Kenichi; Amicucci, Marie; Amini, Mujda; Arreola, Ruben;
> Ashley, Gregory; Aune, Dan; Bahl, Kristin; Bartholet, Steve; Beck, Linda;
> Bell, Roxanne; Belzer, Thomas; Blythe, Jim; Bodin, Brad; Bothun, Kim;
> Boyd, Victoria; Burke, Tim; Canavan, Larry; Cao, Tim; Carlson, Cameron;
> Caulson, James; Chin, James; Chlebecek, Kathy; Clark, Greg; Clemen, Molly;
> Cornelius, Pam; Cruciotti, Augie M.; Crum, Dale; Culver, Karen; Dahlin,
> Jan; Daly, Gordon; Day, Kevin; Dequiroz, Ray; Eakin, Mark; Eberle, Sinjin;
> Evans, Mark; Fleming, Catherine; Foster, Gary L.; Frazier, Robbin;
> Garramone, Tina; Geneser, Todd; Gerken, Kris; Gilmore, Shaun; Gonner, Jr.,
> John; Good, Ken; Green, Art; Greene, Mack; Griego, Sue; Hajela, Priya;
> Hand, Judith; Harvey, Brandon; Hendricks, Fritz; Herzog, Dick; Hilton,
> Jeff; Jacobs, Craig; Jones, Tad; Kane, Nancy; Karsten, Cathy; Kaspszak,
> Jill; Keator, Paul; Kelley, Barb; Kelly, Ann; Kole, Jay; Kriha, Cynthia;
> Kruzitski, James; LaFave, Mary; LaMoine, Shirley; Lane, Steve; Lemelin,
> Dave; Lewis, Pat; Logsdon, Mark; Manica, Dave; Mason, Dave; Mason, Sue;
> Mattioli, Keith; McFetridge, Mary; Meissner, Randy; Meschke, Marci;
> Miller, Ali; Milnor, Jim; Miracle, Diane; Newton, Barb; Nicklaus, Deb;
> O'Grady, Ken; Orenstein, Cindy; Osborne, Wade; Pagel, Gordon; Paschke,
> Sue; Peketz, John; Perricone, Mario; Porter, Ron; Portwood, Susan;
> Puffett, Karen; Pugaczewski, Jack; Real, Jennifer; Rogers, Tad; Ross, Deb;
> Schmiedlin, Joan; Schultz, Steve; Sellman, Collin; Serafin, Elizabeth;
> Shaheen, Bob; Sigmundik, Rob; Skeels Harford, Denise; Smaby, Sara; Smith,
> Murray; Spaulding, Paula; Spence, Lynne; Stewart, Pharr; Szyfer, John;
> Taylor, Cal; Taylor, Teresa; Thiel, Larry; Walker, Darren; Walker,
> Michelle; Wallace, Estelle; Weiner, Mike; Wenker, Joe; Werner, Amy Jo;
> Werth, David; Wickhem, Dave; Wigert, Dennis; Worth, Gary, Zych, Gregory;
> Abel, Philippe; Cathey, Hugh; Drach, Terry; Duvall, Matt; Filip, Dana;
> Floyd, Tim; Gilbert, Dave; Gordon, Lisa; Gugel, Matt; Haggerty, Steve;
> Hannum, Glenn; Hanson, Todd; Hatch, Dan; Hebdon, Cheryl; Knight, Ned;
> Koeppl, Kristin; Lindsay, John; Lopez, Bob; Manzanares, Ted; Mendelson
> Ware, Debora; Moon, Amy; Moreland, Susan; Murphy, Sarah; Ott, Shawn;
> Pluchinsky, Bruce; Schnellmann, Sue; Tiller, Frank; Turturro, Augie;
> Wills, Joan; Mather, Connie R; Werner, Tony; Ansley, Meng; Dravage-Bush,
> Jennifer; Gale, Don; Galvin Jr., Charlie; Garcia, Veronica; Groh, Marti;
> Hargis, Dave; Hornecker, Don; Hunt, Angela; Robison, Julie; Schroeder,
> Petra; Shelton, Jana; Singer, Colette; Smith, Lois; Syrios, James; Tran,
> Dan; Van Horn, Laurie; Waldman, Jason; Waltz, Sheila; Weaver, Steve;
> Easters, Martin; Hardegger, Jeff; Hudgings, Elizabeth; Hughes, Brad;
> Karson, Renee; Morris, Marlon; Odins, Juris; Parker, Thomas; Reese, Kathy;
> Rodney, Marcy; Harm, Jeff; Kennedy, Jamie; Schoder, John; Taylor, Tammy;
> Constant, Peter; Ferguson, Allardice; Garrett, Jeffrey; Leinweber, John;
> Lundgren, Shawn; Martinez, Olivia; Miller, Steve
> Cc: Rotter, Matt
> Subject: Covad Ch 11

> Importance: High
>
> Third batter down. End of the national DLEC game.
>
> It would seem that financial-management-by-committee did the job rather
> quickly.
>
> Covad has announced they will file Chapter 11 bankruptcy in the middle of
> August. Reading between the lines, it appears bondholders have forced
> Covad to bankruptcy while there is still money left to pay them something.
> There's an pre-Ch 11- negotiated agreement that Covad will pay bondholders
> $0.19 on the dollar invested, which is a lot more than what the stock has
> been going for in recent weeks. So the bondholders got what they wanted.
> I've never seen this done before, so if it works, it sets a precedent.
>
> Covad seems to think "this is a good thing" to quote Martha Stewart. It
> will help them get rid of $1.4B in debt and they can resume operations
> with a clean slate. They also believe their bankruptcy status will affect
> neither customers nor operations. They are delusional. Too much Kool-Aid.
> It's quite likely a judge will say they have no chance to succeed and
> force them to immediate Ch 7 liquidation.
>
> Li Broberg
> Product Market Intelligence
> <<COVD Ch 11.doc>>
>
>
>

BEFORE THE ARIZONA CORPORATION COMMISSION

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
	)	SPECIAL OPEN MEETING
	)	STATUS OF QWEST'S
	)	271 APPLICATION

REPORTERS' TRANSCRIPT OF PROCEEDINGS

Phoenix, Arizona
August 23, 2001

Prepared for:

ARIZONA REPORTING SERVICE, INC.
Court Reporting
Suite Three
2627 North Third Street
Phoenix, Arizona 85004-1181

By: CAROLYN T. SULLIVAN, RPR
CCR No. 50439

CECELIA BROOKBANK, RPR
CCR No. 50194

COM. IRVIN: I just wanted to throw an acronyms for fun.

MR. ZULEVIC: The third element I'd like to discuss is the performance assurance plan. And it's Covad's understanding that the PAP is strictly a voluntary undertaking by Qwest. Therefore, according to Qwest, no changes may be made to the PAP's terms and conditions, PIDs or associated penalty regime even by the Commission without Qwest's approval. Secondly, most emerging service PIDs such as line-shared loops and sub loops are deemed diagnostic and therefore not included.

MR. KEMPLEY: Mr. Chairman, I understand that Covad has comments that they'd like to make about the performance assurance plan, but we're kind of getting to specifics and these are --

CHMN. MUNDELL: Are those some disputed issues?

MR. KEMPLEY: These are disputed issues in the 271 proceeding at this time, and I believe that's the appropriate place to deal with these issues.

COM. IRVIN: Actually, Mr. Kempley, if you look, do you have a copy of his prepared remarks?

MR. KEMPLEY: I don't have a copy of his prepared remarks.

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MR. KEMPLEY: I don't have a copy of his prepared remarks.

COM. IRVIN: He's got what he's saying right here, and it's pretty general. I'm not seeing --

MR. KEMPLEY: Mr. Chairman, Commissioner Irvin, unfortunately, the specific comments that he's making already have gone into issues that are disputed in the proceeding. If you want to talk about the general nature of a performance assurance plan that Covad would think is appropriate, I don't think that would be a problem, but the specifics that he's talked about are disputed in the proceeding. I guess I'll leave it at that.

CHMN. MUNDELL: Let me ask this, Mr. Kempley: Is the issue of whether or not the performance assurance plan is voluntary, is that an issue of dispute? Because it's not clear in the legislation, and Qwest has taken one position and other people have taken another position.

MR. KEMPLEY: I think you could tell from Mr. Rowell's presentation that if you simply say that the performance assurance plan is voluntary, you stated a fact. But what Covad is talking about is issues that are in dispute about what the consequences are of the voluntary nature of the performance assurance plan, and I believe at that point you're starting to get into discussions that are ongoing and

in dispute in the proceeding.

COM. IRVIN: Mr. Chairman, it's on Page 8 of the prepared remarks, and I think that as you can see, I would agree, Mr. Kempley, they do get specific on here.

CHMN. MUNDELL: Try to keep it, as I said, at 30,000 feet so that we can --

COM. IRVIN: And that raised another issue. We've been handed these things. I already read them. They were handed out, they were made public record. MCI pulled their stuff back. I don't want to get in trouble.

CHMN. MUNDELL: We'll unring the bell and disregard it.

MR. KEMPLEY: I think at this point I would disregard it. I'm not concerned about the handout. All of these items will be pursued through the 271 process, and brought to you in some guise after they've had the opportunity to be fully explored through that process. And that's really the reason I think that we're trying to exclude disputed issues today, is because those issues haven't had the benefit of the full process, and that process should be allowed to play itself out.

CHMN. MUNDELL: It was difficult trying to

talk about this issue and also deal with Staff's items, and I understand that. And at the time we set this, it was a few months ago when we decided to do this, and it's moved through the process, so you're going to get your day in court, just so everyone is clear about that.

And I think as Commissioner Spitzer said earlier, we know what the issues are, this has been educational and informative, and when we get into the decision we'll make decisions based on the records, not press releases. That's what I said before when we took a recess an hour ago. Make your points without getting into they said this, we said, that kind of scenario. That will be helpful for today.

COM. SPITZER: Mr. Chairman, I might add that just looking at Page 10, where the statement is made, as a result Covad has committed to vigorously oppose Qwest's application to the FCC. It sounds like the gentleman will have two days in two courts.

CHMN. MUNDELL: More than two days I think with two courts.

COM. SPITZER: Correct.

CHMN. MUNDELL: Go ahead, sir, if you can do that, and summarize.

MR. ZULEVIC: I think I've had enough days

and too many courts at this point, and I apologize, we have not had the resources to be actively involved in the PAP recently, so I'm not aware which issues are at official dispute.

But just at a very high level, in general, as was discussed earlier today, emerging services are just that, they are emerging, and there needs to be some accountability for making sure that we are able to successfully compete in the area of emerging services in the State of Arizona. And the PAP seems to be what we're going to have to rely upon.

CHMN. MUNDELL: Thank you, sir.

Any questions?

COM. IRVIN: No.

CHMN. MUNDELL: Anything else? I mean I don't want to cut you off because I sort of cut you off midstream in your thought process, if you've got something you want to...

MR. ZULEVIC: Let me get back on track if I could, Mr. Chairman.

CHMN. MUNDELL: Sure.

MR. ZULEVIC: Mr. Chairman, just briefly, I know it's getting late and I'll try to move through this as quickly as I can.

Qwest's conduct outside of 271 proceedings

reveals its desire to eliminate its competitors, in Covad's opinion. Qwest states in its 271 proceedings that it's permitted competition in the region. Qwest tells Covad that it's one of its most valuable customers. After Covad announced it voluntarily pre-negotiated a Chapter 11 filing, a Qwest employee e-mailed over 100 other Qwest employees briefly describing Covad's restructuring effort as, quote, the third batter down, probably a reference to Rhythms' and North Point's problems, and the, quote, end of the national DLEC game, end quote.

And they referred to Covad's announcement of continued operations as, quote, delusional, end quote. And the result of, quote, drinking too much Kool-Aid, end quote. This particular Qwest employee predicts that, quote, it's quite likely the judge will say they have no chance to succeed and force them to immediate Chapter 7 liquidation, end quote.

Covad faces this kind of open anticompetitive conduct by Qwest on a regular basis. Qwest employees have told Covad's end-user customers that Covad is notorious for stealing copper pairs; that they have disconnected Covad DSL service over the objection of the end-user. Qwest technicians have stolen valuable network monitoring equipment out of Covad's

collocation space, and just last week solicited a Covad end-user customer when the Qwest employee, acting on behalf of Covad, went to the end-user's premises to correct the trouble on a line.

The substantive issues taken in tandem with Qwest's anticompetitive attitude demonstrated Qwest's 271 relief in the State of Arizona is not in the public interest.

Also, I'd like to express some concerns about the overall 271 proceeding that I've been an active participant in the workshops here in Arizona, as well as the workshops in Colorado and Washington. I feel that resource and timing constraints on the ACC makes it difficult if not impossible for a complete and thorough evaluation and resolution of all issues, including emerging services issues.

Resource and timing constraints on ACC makes it difficult if not impossible for the ACC to fulfill the obligations the FCC expects the ACC to satisfy.

Initially, Covad made the decision, a business decision to participate in the 271 process only in Colorado and Washington, given the limited resources that we have available. We were asked a number of times by a number of parties to please come down and participate in Arizona, that our input as a

DLEC would be very valuable.

As a result of the resolution of several key emerging services issues, as well as the logistical and scheduling difficulty Covad has faced in attempting to participate in these proceedings, Covad believes it was requested to participate not to ensure that all CLEC concerns will be addressed and the steps necessary to open and keep open Arizona local markets, but simply to complete the proceeding with the inclusion of at least one DLEC.

As a result Covad is committed to vigorously opposing Qwest's application.

Thank you very much. That concludes my comments.

CHMN. MUNDELL: Thank you, sir.

Any questions?

COM. IRVIN: Based on your previous statements, this alleged conduct of the Qwest employee, did that activity occur in Arizona or did that activity occur elsewhere?

MR. ZULEVIC: I'm sorry?

COM. IRVIN: The alleged activity of the Qwest, that you allude to of the filing of Chapter 11.

CHMN. MUNDELL: The e-mail that you talked about.

MR. ZULEVIC: I do have copies of that if the Commission would like to see them. I'm not sure where.

COM. IRVIN: I'm not sure if you want to provide that. My question is did that occur in Arizona or did that occur in another state, the e-mail, where did it occur from?

MR. ZULEVIC: I can't really tell from the e-mail as to what state it originated in, but it was distributed to 190 Qwest employees. I don't really know what state. I'm sure it was multiple states.

COM. IRVIN: So it is your conclusion that despite what you've heard today that our process is an incomplete process, yet I don't see anything in here that you offer valuable -- you've agreed and even your comments, even though you don't, the issues that the Staff and that the groups are addressing are key concerns of yours, and yet you go on to say that you're going to oppose it, which is your prerogative, which is fine, and that you think our process is not, will not be complete and in essence is unfair.

I fail to see how you can draw that conclusion. I understand that you might be a little upset with Qwest if indeed that e-mail took place and those things happened.

MR. ZULEVIC: Well, it isn't that I feel that there was a lack of interest in really doing the process well. What I would say is that from the experience that I had in the workshops in other states, there were some key things that were missing here that I think would have lent themselves well to providing additional information for the Commission to make its decisions.

CHMN. MUNDELL: Are those unresolved issues? We haven't made a decision yet on what the ultimate -- we're ultimately going to decide, so that's what I'm asking. Are there issues that you believe still need to be addressed and you don't have an opportunity to do that? I think that's what Commissioner Irvin is trying to get at.

MR. ZULEVIC: I feel like we were definitely given an opportunity to express our concerns, definitely. From that perspective there was due process.

The thing that I had a concern about -- and to be a little more specific, is that I tend to deal primarily with engineering and technical issues. The 271 workshops that were held in Colorado and Washington always had someone with technical experience, if not a telecommunications engineer,

either as an active participant or available on a moment's notice to consult and to help bring some of these issues more to light and create more of an understanding. And I don't feel that that happened here. I don't feel -- I don't know that there was ever a Staff person available or at any of the proceedings that had an engineering for telecom technical background.

COM. IRVIN: Having heard that and knowing that the people involved and the consultants that we hired, I think they had access to those people. The issue was raised, and in order -- I mean I'm guessing, and you heard this morning's presentation, certainly it would appear to me there was plenty of technical expertise available. And I know in fact AT&T has participated vigorously and provided technical expertise on behalf of the whole process, and I'm sure MCI has done the same thing. It's just not a bunch of lawyers and a bunch of lobbyists sitting in a room, they have to get their information from someplace, as well as our own Staff has experts, so I would take exception.

I think your impression is a wrong one. And it wasn't one workshop that was concluded at the end. It was, as I understand it, more than one workshop,

and the issues were addressed and were raised more than once and then gone back and resolved. Hopefully satisfactorily.

Obviously the Commissioner, as the Chairman alluded to, there still are some issues still in dispute which we're trying to work out on. We can carry this on for 15 years, we're obviously not going to keep everybody happy. But I don't know what more you want and I hope it's important, if the Commission finds everything is improper, and hopefully you will submit your comments at least in writing if you can't be in person, and those workshops can address these concerns.

MR. ZULEVIC: I totally agree that there was ample technical involvement by the other CLEC participants in the proceeding. The thing that again I saw that was missing was not having the interaction of a party, engineer someone with a technical background that could assist in working through the issues, and definitely --

CHMN. MUNDELL: I think what would be helpful is to sort of do what Mr. Beach did and give us, not today, but you could put it in writing, concrete engineering examples that you believe still need to be addressed in the appropriate docket. Why don't we

agree that what you submit is one thing, but again, if you have issues that you think need to be addressed, then again, it would give us concrete examples so that we can read your filings and then deal with them appropriately and accordingly.

COM. SPITZER: Mr. Chairman, if I may, and I guess again I draw a comparison to the testimony of Mr. Beach, or the statements of Mr. Beach. I am interested in doing it right, and I've always believed, as an elected official, and as well in my professional career as an attorney, it's more important to do it right than to do it fast. And I think the Staff shares our view and has been willing to solicit input. And we are in the midst of a proceeding here. There are several items that have been agreed to. There are items that are in dispute.

The pricing docket, as we've heard, has been the subject of a voluminous, vigorously contested, litigated process before the administrative law judge, and an order will be ultimately forthcoming for the consideration of this Commission. We are again in the process of achieving the same result in this proceeding here on the OSS, and that's an additional step that was taken I think by the Staff in holding this meeting today so that complaints or constructive

criticism could be aired.

And in distinction to the comments of Mr. Beach, what I see in this paper that was submitted, which I frankly find extraordinary, are some factual assertions unsupported, ending with a conclusion that you're going to oppose Qwest's application at the FCC in advance of the conclusion of this proceeding, in advance of the Staff report, in advance of any decision rendered by any administrative law judge, and in advance of any determination by this Commission. So it would appear that, and again, I have some unsupported anecdotal gibberish leading to a conclusion that you're prepared to oppose the result. The conclusion we don't know enough today.

And I guess what is disturbing, and I would echo both my colleagues' comments, constructive criticism is always welcome, and anything that will assist this Commission in reaching a proper adjudication of the 271 process, however it turns out, and I have no idea how it will turn out, in compliance with the 1996 federal statute and in the best interests of the people of Arizona is always welcome. But again, a statement that you're prepared to vigorously contest this regardless of the outcome, not even knowing what that outcome is, is curious.

MR. ZULEVIC: Yes, Mr. Commissioner, that is probably somewhat premature to make that kind of a statement, I would agree. And what it's based upon is a rather frustrating experience in working through a lot of these issues in the workshops. And I don't want to imply at all that there were issues that were not able to be brought up during the 271 process. That is absolutely not the case. We were given every opportunity to bring forth every issue that we had.

Again, the only criticism, whether it be considered constructive or not, is that from my perspective it would have been helpful to have that mutual Commission Staff engineering expertise during those proceedings.

CHMN. MUNDELL: Thank you.

Commissioner Irvin.

COM. IRVIN: No. Do we have anybody else?

CHMN. MUNDELL: We do. I don't see them at the table, I don't know if they wanted to speak or not. I've got on my list RUCO. Come on up. You're on my agenda, I'll have to swear you in like I've done everybody else separately, I guess.

MR. KEMPLEY: Mr. Chairman, before RUCO speaks, Mr. Rowell indicated that at the pleasure of the Commission, we would like to address briefly

Covad's comments specifically, the very last statement about engineering expertise.

CHMN. MUNDELL: I'll go ahead and let him, but I don't want to have point counterpoint. We can be here till 11:00 this evening.

MR. KEMPLEY: I believe this particular issue is unique with regard to the comments that have been made, and we have avoided making any responses to other comments that other parties made.

COM. SPITZER: Mr. Chairman, I would like to know if Covad filed comments at the end of the workshops.

CHMN. MUNDELL: Based, Mr. Kempley, on your statement is sort of like trying to make a decision on what a witness is going to testify to without knowing what the witness is going to say, I will take it on your avowal that this needs to be done from your perspective. So go ahead, state your name and tell us what you want.

MR. ROWELL: This is Matt Rowell, Commission Staff. Just for the record I'd like to state that at almost all the workshops and the TAG meetings that we did have, Mr. Hagood Bellinger was present. And Mr. Bellinger is with DCI, which is Staff's consultant, and we rely on DCI extensively.

Mr. Bellinger is an engineer with extensive telecom experience. That's really all I had to say.

COM. IRVIN: He is a mutual third party.

CHMN. MUNDELL: Thank you. We're not going to go point counterpoint. You can file written documents if you'd like.

Go ahead and raise your right hand.

(Daniel Pozefsky was duly sworn.)

CHMN. MUNDELL: State your name for the record, tell us who you represent.

MR. POZEFSKY: Good afternoon, Chairman, Commissioner Irvin, Commissioner Spitzer. Dan Pozefsky. I'm here on behalf of RUCO.

I'd like to address the Commission from the standpoint of an individual that has not nearly the experience of these fine gentlemen sitting here at this table doing the area of telecom. I say that because over the past year I've sat through a couple workshops, not as many as I would have liked to, but some of the ones that we viewed I wouldn't say more important, but we wanted to concentrate on, such as the sub loops and the public interest and the number portability workshops.

And I have to tell you that the majority of the material utterly confused me. It's taken just a

ton of time to really get a handle on it, and I can't say I have a total handle on it, but I do have a handle on some things, and there were a few observations that I've made and I'd like to pass them on to the Commission.

I think that there are a couple areas of performance that I know RUCO would like to see addressed and followed. And before Qwest is ultimately given 271 RUCO would like to see some sort of resolution on these things.

There are a number of areas, I picked out four that I went through my notes and looked at. Some of these we've already addressed, and I don't want to get too far into the substance of them because I think they're disputed.

But I would pick out the firm order confirmations, which is one area; the disparity in the number portability issue. Setting up service in new subdivisions seems to be an area of concern, and that one is of particular interest because that sort of behavior, at least the way it's been described by CLECs and brought up in the --

MR. KEMPLEY: Mr. Chairman, we're back now, and I guess I was prepared to just sit and let him identify the issues that he thought we need to be

resolved, but if we're going to talk about the specifics of what's the issue is on disputed issues, I think the ongoing proceeding is the place to deal with that.

CHMN. MUNDELL: As I said earlier, it's difficult to address these issues and try to keep it at a certain level, so if you can just tell us what the issues are.

COM. IRVIN: Mr. Chairman, if he would stick to his written comments. It says RUCO understands and notices these issues are not the subject before the special open meeting, and intend to address them before the Commission when it is appropriate. What you filed is proper. Identify them, and when we get up there we'll take care of it.

MR. POZEFSKY: I'll try to keep to that thousand degree level.

COM. IRVIN: The Chairman set the level at 30,000 feet. He said a thousand, so he needs to rise.

MR. POZEFSKY: The fourth one that I thought was something that we need to, I know RUCO would like to find out where this goes, is the policy changes, the internal policy changes that happened within Qwest and how they're related to the CLECs, in fact some information sort of issues, but we would like to make

sure that there's a total information parity, if you will, and that there's no issue on that.

All this kind of leads me also to one other quandary that I've been listening to the comments that were said today. Commissioner Spitzer very fairly brought up the Qwest market share, and the issue of market share, of course, was an issue that's in dispute in the public interest sector.

But my question is, I guess I'm addressing this question to the Commission because we still are dealing with the issue of market share, and I know that the way the FCC has looked at it, at least from the New York case and all the cases is as far as market share is concerned, market share itself will not undermine the openness of the market, and that if in fact market share was relevant for that particular purpose Congress would have decided to a definitive market share percentage which in fact it never did.

The market share issue has been raised by CLECs in most of these proceedings, and I know the FCC has kind of looked at it like to the extent that the CLEC doesn't come into the market as a result of a business decision, and the ILEC, that shouldn't be held against the ILEC as far as their application is concerned. So given that, I think market share, to

the extent that the CLECs are being discriminated against and that's the reason they're being kept out of the market, market share itself is a very important issue.

I only bring that up because I noticed how important it is as part of the conversation where I want to go with the public interest workshop, I don't know, but I'm just trying to figure out what the Commission's thoughts and where they are on that as far as the importance of that for this Commission.

MR. KEMPLEY: Mr. Chairman, that's specifically posing to you one of the disputed issues in the case and --

CHMN. MUNDELL: We're not going to answer it. I'm not here to answer questions of the parties.

COM. SPITZER: We ask the -- he can ask the questions.

CHMN. MUNDELL: He can.

MR. POZEFSKY: I wasn't being smart.

CHMN. MUNDELL: We appreciate the issue. I don't think Mr. Kempley wants to worry about us answering it.

MR. POZEFSKY: That's all I have.

CHMN. MUNDELL: According to my agenda, we have time for rebuttal from Qwest if necessary.

MR. DAVIS: Thank you, Your Honor. Recognizing the time, I'll keep this to the point. My name is Steve Davis, and I'm the senior vice-president for Qwest for policy and law.

We also filed comments in advance which seem to be a little bit outside the scope of this proceeding as has been defined today, so we would like to withdraw those comments if that's permissible with all the parties, or the Commission, the other parties can live with it as we will.

CHMN. MUNDELL: We'll give them to Mr. Kempley.

MR. DAVIS: Your Honor, I've been with Qwest some 19 months, with AT&T some 19 years before that. One of the things I would like to take exception to this afternoon is the characterization of Qwest as a company from Covad.

I never would have come to Qwest if Qwest was going to be a company that's similar to the other BOCs that impedes competition, that tries to keep markets closed, and that doesn't look at the country as a whole and try to compete in the entirety of the market.

Before I came here I received assurances from Joe Nacchio and Mr. Mohebbi, who you heard today, as

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Before I came here I received assurances from Joe Nacchio and Mr. Mohebbi, who you heard today, as

well as the Qwest business plan, that that's not the case. We are unique. We look at the country as being 100 percent, and 90 percent of it is outside of our territory, when you're talking about the business opportunity and the market opportunity. We were about opening market to competition both in our region and outside our region. You will never see us take a position in Arizona that is not exactly the same as the position we take at Dallas or Miami or St. Louis or Los Angeles.

We want to meet the 271 requirements as soon as possible, there's no secret about that. We have a large hole in our network. The 14 states, whether it's serving multinational companies, locations in this region or serving consumers within this region, we have a large homeowner product offering, and we would like to fix that.

We have done everything we could over the last 15 months or so since this merger to achieve that, and quite frankly I would state that it occurred long before that as the mergers proceeding we saw much greater emphasis by the companies in opening markets and meeting the 271 requirements. I am sorry about the e-mail that was sent by the Qwest employee. That employee has been disciplined and that doesn't reflect

CONTINUATION

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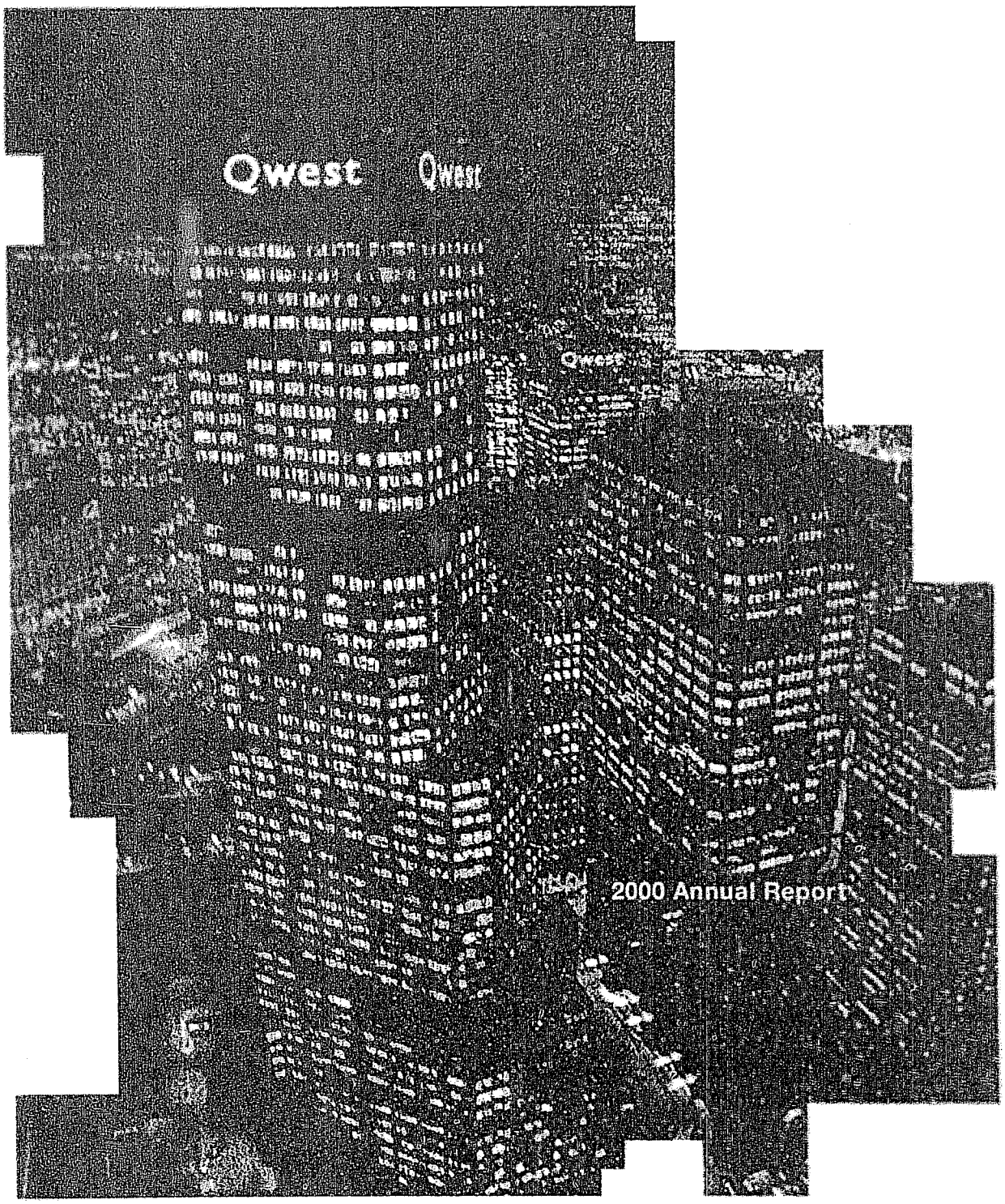
the position of Qwest, and that's been taken care of, and I believe we've apologized to Covad, letting them know.

An awful lot of what AT&T and MCI, and quite frankly a lot of what Covad said I agree with. This process is about testing Qwest's systems to see if we have done the things required by the act to meet the 14-point checklist which would then enable us to enter into market. Systems are critical.

The whole purpose of this OSS test, this third-party test that you have conducted for the last eight months, nine, seven, eight months is to make sure those systems work, those systems give a parity, quality performance to a CLEC that buys our services as it does to a retail customer that buys those systems from Qwest. It's just an ugly test. It takes forever, it costs a lot of money, it is extraordinarily detailed. I commend the Commission for conducting it and the Staff for going through this inordinate process. It's a lot for us to go through, and we really see a benefit at the end of the day.

But that is the purpose of the test. The systems have to work, and this test should prove that, and when that test is finished, it should be finished.

Our performance is critical. We have to


Qwest
Qwest
Qwest
2000 Annual Report

Leslie Petrovski
Freelance Writer

"I can't imagine working now without my DSL line. With Qwest's packaged services, I get high-speed internet access and save money too."

Leslie Petrovski's relationship began simply enough – the Denver-based writer and her husband had local telephone service, of course. But as her business grew, she found she wanted more. A second home phone line. Voice messaging. Call forwarding. Three-way calling. Caller ID. Call Waiting Deluxe (to show her who's trying to get through while she's on another call). An Internet Service Provider. Broadband internet access. And wireless.

She found all of those things in one company – Qwest.

Qwest offers a variety of bundles of services that allow small business and residential customers to buy exactly what they need. Beyond saving consumers money, these packages provide more opportunities for Qwest to serve its existing customers (and more incentives to attract new ones).



DSL – Digital Subscriber Line – an access technology that uses ordinary copper telephone wires into access paths for high-speed data communications. DSL can transmit data speeds 100 times faster than a 56.6K modem and [illegible]

» connecting with the right products and services for every customer «

customers, Qwest exceeded its year 2000 goal for wireless customers; plans call for double that number by the end of 2001. Qwest got off to a promising start in 2001 by adding New Mexico to its wireless service region and plans to continue to expand its wireless services.

Qwest already leads the market in DSL penetration and plans to double its DSL customer base during 2001. By offering an easy, self-installation option, a substantial number of customers install the service themselves, with no technician required, which reduces our cost and frees technicians to deal with repairs and other new service installations.

Not coincidentally, our service levels in our local service area are now the best they've been for several years, with 98 percent of installation orders and 95 percent of repair service orders executed on time. Qwest ended 2000 with only 850 delayed local service orders, the lowest level in six years – and more than 80 percent of service outages were repaired in under 24 hours (up from 60 percent a year earlier), the best customer service results since 1995. And a new two-year contract extension to 2003 that Qwest signed with union employees is

Friday, February 02, 2001
The Dallas Morning News
By *Vikas Bajaj*

SBC RAISES NON LOCAL CALL RATES
COMPANY SAYS PRICES BETTER REFLECT COSTS

SBC Communications Inc. raised its consumer long-distance rates 1 to 2 cents a minute Thursday, saying the new promotions will better reflect the cost of providing the service.

The changes, which include slightly lower long-distance rates for businesses, came on the same day that SBC, the San Antonio-based parent of Southwestern Bell, increased the price for its much sought-after digital subscriber line service by $10 a month.

SBC's long-distance service will now cost 10 cents a minute, up from 9 cents. The discounted rate for customers who buy other services from Southwestern Bell is now 8 cents, up from 6 cents. A new package allows customers who pay a $4.95 monthly fee to get long-distance calls for 7 cents a minute.

Existing customers keep the old rates until they change addresses.

Southwestern Bell started selling long distance in July after persuading the Texas Public Utility Commission and the Federal Communications Commission that the local phone service market in Texas was open to competition. (The firm recently won approval to sell the service in Kansas and Oklahoma starting March 7.)

In Texas, SBC had 1.4 million long-distance customers at the end of 2000. The service is an important part of its strategy to sell consumers a broad array of telephony and data products.

The rate increase "highlights the fact that SBC feels like they are in control and they can set the price," said Gary Jacobi, an analyst with Deutsche Banc Alex.Brown. "You start to do a billion minutes, and you pick up an extra 2 cents a minute, that's a lot."

SBC said the increase still leaves it with some of the lowest-priced packages. "We have made changes that reflect the cost of providing service," said Shawn Ramsey, a Southwestern Bell spokeswoman. "Basically, we are new to the long-distance business, and we have learned a lot of things about what we offer and how much we charge."

AT&T's best long-distance-only offer costs $4.95 a month and charges consumers 7 cents a minute for interstate calls and 9 cents for calls within Texas. The firm also sells several local/long-distance packages, one of which costs $25.95 for unlimited local calling, 7 cents a minute for long distance and three premium features such as caller ID.

"There is no doubt they [SBC] have taken some of our long-distance customers, but we have taken 326,000 of their local service customers," said Kerry Hibbs, an AT&T Corp. spokesman. "We think we are doing pretty well."

The new rates drew criticism from consumer advocates who said the increases prove that despite deregulation Southwestern Bell has no credible competitive threat in its consumer business.

"The theory is that competition is supposed to bring prices down and provide a lot of different offerings for consumers," said Janee Briesemeister, an analyst with Consumers Union in Austin. "And what we are seeing instead is prices getting higher and higher."

Thursday, February 01, 2001
The Dallas Morning News
By Vikas Bajaj

SBC BUMPS UP THE PRICE OF DSL

Want high-speed Internet access without a long-term contract? That will be $10 more a month.

SBC Communications Inc. said Wednesday that it was raising the price of its digital subscriber line service to $49.95, but not tying new customers to contracts that span a year or more. Modems will cost $99. The new prices go into effect Thursday.

SBC will honor the contracts of customers who are paying $39.95 a month for DSL.

SBC, the San Antonio-based parent of Southwestern Bell, also announced a new arrangement with Compaq Computer Corp. that allows customers to choose from three computers pre-configured for DSL. That's an improvement over a previous offering that featured just one computer model and a 28-month contract.

"What is paramount, is ... [consumers] want choice, they want flexibility," said Kevin Bogusz, an SBC spokesman. "Demand for the services is going to remain strong, and we think that can support a higher price point."

The price announcement signals a change in the high-speed Internet market. Prices had been coming down for DSL and cable modem services during the last year.

"The fact is, at some point you need to make money," said Marbel Dolinov, a senior analyst at Forrester Research in Cambridge, Mass.

Phone and cable companies have been spending billions of dollars to upgrade their networks for high-speed Internet services.

Companies have kept the price at affordable levels to build a customer base.

SBC is spending up to $6 billion in its Project Pronto network upgrade. The initiative, which brings high-speed fiber-optic cabling into neighborhoods, will bring DSL to about 80 percent of its customers.

SBC had 767,000 DSL subscribers at the end of 2000, the most of any American phone company.

DSL is a data compression technology that allows faster connections on traditional copper phone wires.

Higher prices may also be influenced by the demise of many competitive providers of high-speed services, Ms. Dolinov said. A number of newer companies that sold DSL service over phone lines leased from companies such as Verizon Communications Inc. and SBC are struggling to stay solvent. Some have declared bankruptcy.

"They are taking a chance," Ms. Dolinov said. "They are saying, 'If there is no other competition in the DSL space and I have got it, I can charge $50 a month.' But it's still relatively competitive."

SBC's DSL service also competes with cable modems, a high-speed Internet service provided over cable TV networks by companies such as AT&T Broadband.

But many consumers can't get either service because networks haven't been upgraded around their homes.

"I don't think we have evolved to the stage where we have enough sophistication and where users

have a lot of choices," said Kathie Hackler, an analyst at the research firm Dataquest in San Jose, Calif.

Verizon Online said it's considering new service packages but is keeping its basic DSL offer at $39.95 with a one-year contract. AT&T Corp.'s Digital Broadband service in Dallas retails at $49.90 which includes a local phone line.

Friday, February 02, 2001
Ft. Worth Star-Telegram
By Barry Shlachter

SW Bell raises interstate rate; current subscribers unaffected; PUC approval not needed

Southwestern Bell announced it was raising the interstate rate on its flagship plan from 9 cents a minute to 10 cents a minute for new customers seven months after entering the long-distance market in Texas.

Current subscribers will see no change in their domestic U.S. calling charges, said Shawn Ramsey, a San Antonio-based spokeswoman for Southwestern Bell, a unit of SBC Communications.

Ramsey defended the increase, which doesn't require approval by the state's Public Utility Commission, by saying the plan is superior to many offered by the major long-distance services.

"We beat the pants off of them," she said. "We've got great rates any way you slice or dice it."

Asked if the higher rate reflects a need to boost profits, she said: "We've been in the market about eight months now. We've learned a lot and made a number of changes that reflect what we've seen. And we've changed our plan accordingly."

Jeffrey Kagan, a telecommunications industry analyst in Atlanta, sees the increase as a move to help the Baby Bell's bottom line.

"This is a short-term fix to make SBC's long-distance business more profitable," he said. "If customers aren't willing to pay it, I'm sure SBC will reconsider."

Southwestern Bell is also offering an anytime "Domestic Saver" rate of 7 cents a minute for interstate and intrastate calls with a $4.95-per-month fee, matching AT&T's "One Rate" 7-cent plan.

Ramsey said 1.4 million Texans signed on with its long-distance service between July 16 and Dec. 31.

Southwestern Bell also raised its monthly rate for a digital subscriber line, or DSL, from $39.95 to $49.95. Ramsey described this as a preferable deal for many because unlike the earlier plan, it does not carry a one-year contract.

The long-distance rate increase unsettled the Texas office of the Consumers Union.

"I think these price increases show there's no effective competition in the marketplace," said Janee Briesemeister, the group's senior policy analyst in Austin, noting that only two states so far have allowed Baby Bells back into the long-distance market. "You can't raise prices if you have competitors breathing down your throat.

"There's the potential of re-creating the old AT&T but without the regulation," Briesemeister said. "There's not a company out there able to compete with Southwestern Bell in Texas."

Chris Talley, a Southwestern Bell spokesman, dismissed that contention, saying, "What we see is a competitive market with more choice than ever before."

Staff writer Andrea Ahles contributed to this report.

Retired

BOC LONG DISTANCE ENTRY DOES NOT BENEFIT CONSUMERS

Lee L. Selwyn*

March 2002

Introduction

Section 271(d(3)(C) of the federal *Telecommunications Act of 1996* specifies that the FCC may not approve a Bell Operating Company ("BOC") application for Section 271 authority to provide in-region interLATA service unless the Commission finds that "the requested authorization is consistent with the public interest, convenience, and necessity." As part of the BOCs' ongoing efforts to advance such a showing, BOC's support Professor Jerry A. Hausman of MIT and the Lexecon consulting firm to produce a study purporting to show that consumers have benefitted from BOC long distance entry in New York and Texas, the first two states in which Section 271 authority was granted. In this paper, I demonstrate that the various research methods and analyses techniques that were utilized by Hausman et al are fatally deficient, in that they rely upon unsubstantiated and unsupportable assumptions.

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* The author is President of Economics and Technology, Inc., Boston, Massachusetts 02108. This paper was prepared at the request of AT&T. The opinions and conclusions set forth herein are solely those of the author.

1. Jerry A. Hausman, Gregory K. Leonard and J. Gregory Sidak, "The Consumer-Welfare Benefits from Bell Company Entry into Long-Distance Telecommunications: Empirical Evidence from New York and Texas" ("Hausman/Lexecon Study" or "HLS"), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=280625.

models that exclude highly relevant explanatory variables, make highly selective and obviously results-driven "comparisons" with non-entry states, select an unrepresentative time period in which to perform their "comparisons," and inexplicably exclude certain states data without any justification or basis.

There has been and continues to be robust *competition* in the long distance market since the 1984 break-up of the former Bell System. That competition, together with the FCC's ongoing policy of moving switched access charges toward cost, has brought down the inflation-adjusted retail price of long distance calling by nearly 50% since 1983, just before the Bell divestiture. These enormous consumer benefits have been achieved not only without BOC entry into the long distance market, but *because* the BOCs were placed in the position where they had no incentive to discriminate in favor of or against any long distance carrier. BOC long distance entry reinstates those incentives, and portends a diminution of competition and a potentially serious loss — certainly not a gain — in consumer welfare.

The succession of price decreases of residential long distance service are in sense the result of or caused be BOC entry into the long distance business.

The dramatic drop in long distance prices that has occurred over the past two decades provides compelling evidence of the extraordinary success of several key FCC policies — the development of competition in telecommunications markets, and the rebalancing of rates to be more reflective of the structure of costs. That downward trend in long distance prices has been underway for nearly twenty years, and began and persisted long before the entry of

BOCs into the in-region long distance market in a handful of states starting a little more than two years ago.

The *single most important source* of the enormous drop in long distance prices is the succession of FCC-required decreases in "access charges," the fees that long distance companies pay to local phone companies to connect their long distance networks to the phone companies' local subscribers. Access charges have been dropping steadily following their introduction in 1984, shortly after the break-up of the former Bell System.[2] That, along with unprecedented technological innovation in telephone switching and long-haul transmission technologies and the growth of an intensely competitive long distance market, has pushed down the *real* (inflation-adjusted) price of long distance service by *nearly 50% since 1983* — the last year before the 1984 Bell System break-up and the introduction of access charges — *without BOC entry into the long distance business*. By contrast, and as graphically demonstrated in Figure 1, the inflation-adjusted prices of *monopoly* local phone service have remained largely unchanged over that same period.

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2. *See generally* MTS and WATS Market Structure, CC Docket No. 78-72, *Notice of Inquiry and Proposed Rulemaking*, 67 FCC 2nd 757 (1978). *Supplemental Order (Phase I)*, 94 FCC 2nd 852 (1983). *Phase I Order Modified on Reconsideration*, 97 FCC 2nd 682 (1983). *Phase I Order Modified on Further Reconsideration*, 97 FCC 2nd 834 (1984). Phase I Orders Affirmed in Part, *Remanded in Party sub nom. National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). *Cert. denied*, 469 U.S. 1227 (1985). *Report and Order (Phase III)*, 100 FCC 2nd 860 (1985). *Phase I Order Modified on Second Further Reconsideration*, 101 FCC 2nd 1222 (1985). *Aff'd sub nom. American Telephone & Telegraph Co. v. FCC*, 832 F.2d 1285 (D.C. Cir. 1987).

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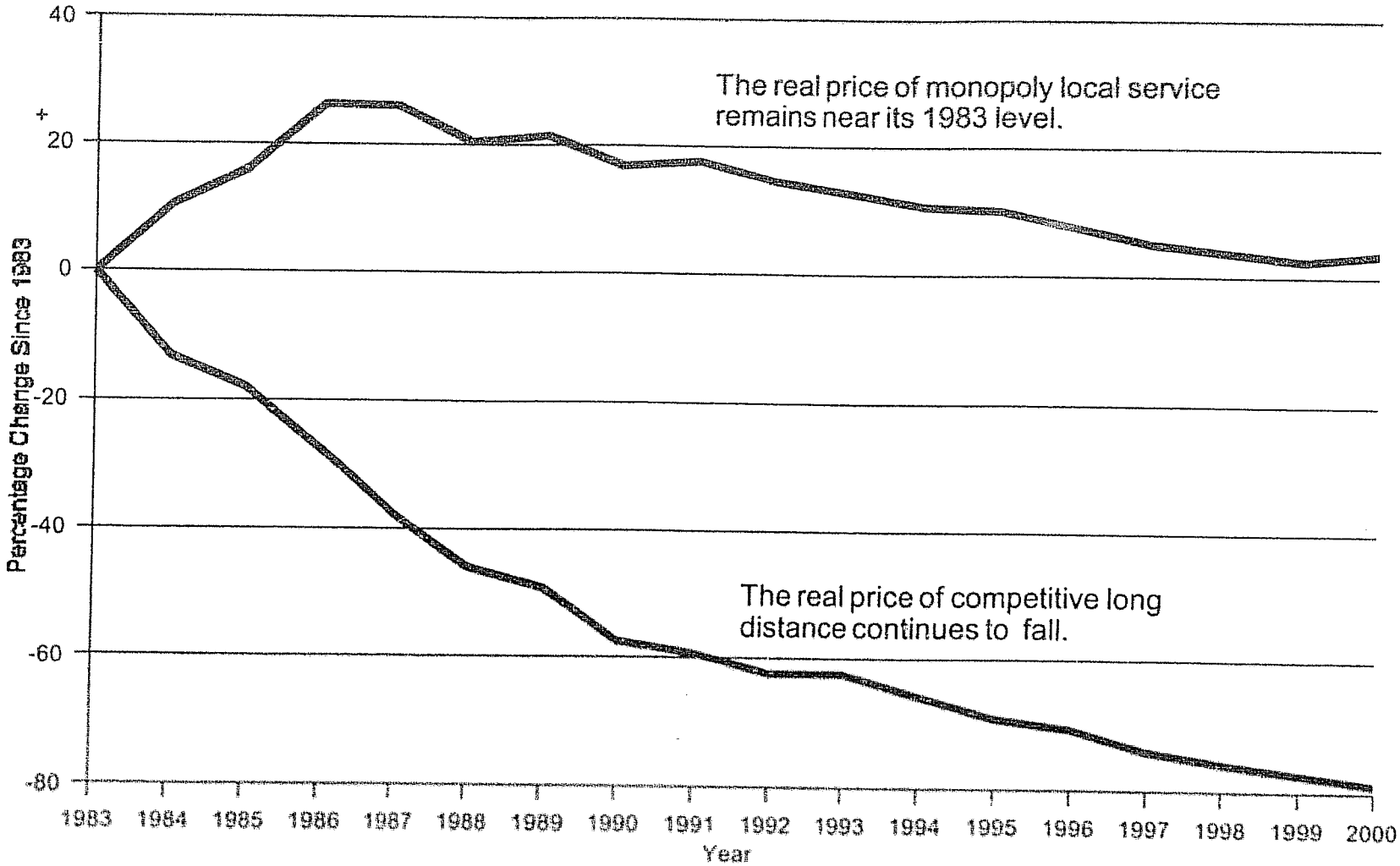


Figure 1: Adjusted for inflation, long distance rates have fallen by nearly 80% since 1983, the last year before the Bell System break-up. By contrast, ILEC local rates have remained essentially unchanged over that same period.

Source: FCC, *Trends in Telephone Service*, Table 14.3; FCC, *Statistics of Communications Common Carriers*, 1995/1996 Edition, Table 8.4 and 2001 Edition, Table 5.6; Bureau of Labor Statistics, Inflation Calculator at http://www.bls.gov/cpi/. Long distance rate for 2000 is an estimate.

The RBOC-commissioned Hausman *et al* "study" purporting to estimate the "consumer welfare benefits" of BOC long distance entry is based upon an undocumented and nonreproducible "econometric model" that excludes important sources of long distance price decreases and thereby mis-attributes some recent long distance price drops to BOC entry rather than to the development of intense competition and the succession of reductions in switched access charges.

In their unpublished "study" apparently commissioned by one or more RBOCs and recently released by Jerry A. Hausman, Gregory K. Leonard and J. Gregory Sidak, the authors claim to have made "empirical findings that BOC entry has produced substantial consumer-welfare benefits in New York and Texas in the form of lower prices for long-distance service" and claim to have found "statistically significant evidence that BOC entry enabled the average consumer to reap a 9-percent savings on her monthly interLATA bill in New York and a 23-percent savings in Texas."[3] Based upon these findings, the authors go on to "predict that, when the BOCs receive section 271 approvals in other states, a similar significant decrease in long-distance prices will occur that leads to consumer benefits."[4] In offering these "empirical" results, Hausman/Leonard/Sidak fail to provide the actual data set that they utilized in their regression analysis; hence, their model results cannot be reproduced, nor can alternative specifications be examined. Significantly, in their paper the authors provide *no source for the data* that was used for the "empirical evidence" upon which their "conclusion" is founded! It is likely, however, that this data was acquired from the so-called "bill harvesting" study regularly collected and published by TNS Telecoms. In another paper by Hausman and Sidak in which the TNS data is utilized, the authors offer the following

3. Hausman/Leonard/Sidak, at 3.

4. *Id.*, at 13.

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description: "Each quarter, TNS Telecoms surveys roughly 30,000 consumers as to their telecommunications expenditures. Of all the customers polled in its general survey, approximately 3,000 customers provide TNS Telecoms with their actual long-distance bills."[5]

In using the TNS data, HLS inexplicably "eliminated households with more than one telephone line and households that switched service providers during the billing cycle" but provide no justification or rationale for deliberately selecting-out such customers.[6]

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5. Jerry A. Hausman and J. Gregory Sidak, "Do Long Distance Carriers Price Discriminate Against the Poor and the Less-Educated?," unpublished, January 2002 ("Hausman/Sidak"), at 13; available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=296368

6. Hausman/Leonard/Sidak eliminated households with more than one long distance bill during a billing period, apparently *assuming* that this will "eliminate households with more than one telephone line and households that switched service providers during the billing cycle." Hausman/Leonard/Sidak, at 6. This statement is not true, since (a) multiple-line households can in fact have a single long distance bill — either because the second line has no PIC at all, or because the IXC combines calls for the several working telephone numbers on a single bill. Also, there are many explanations for why a customer would have more than one bill. For example, a customer would receive "multiple" long distance bills if he places some but less than all calls on a 1+ basis using the PIC'ed carrier, and uses one or more "dial around" ("101-XXXX") services for the remaining calls. Even where both the PIC'ed IXC and the 101-XXXX usage is billed through the local phone company, TNS will nonetheless identify the customer has having received two "separate" long distance bills. Thus, if the customer uses AT&T (for example) as the PIC but also uses 1010-220 (Telecom USA), the TNS customer record will show two separate bills, and thus would have been omitted from the Hausman/Sidak dataset. In addition, characteristics of customers with a "single bill" may differ from state to state, rendering incorrect the comparisons of these unique sub-groups across several states. It is also unclear as to how Hausman/Sidak treated so-called "threshold billed" customers, low-volume users who do not receive a long distance bill every month, but are billed once every 2-3 months or when their accumulated bill reaches a "threshold" level, e.g., $30, whichever comes first. Depending upon whether a particular customer happened to be billed in a particular month, some of these customers will have no long distance bill in the TNS data, while others will have a bill that reflects several months' usage. Hausman/Sidak (continued...)

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Customers who switch carriers or who have two phone lines are likely to be above-average users who are also more aware of the various pricing options, and are thus most likely to have been paying lower rates to begin with; thus, eliminating these customers likely creates a systematic upward bias in the resulting average prices.

The "methodology" utilized by HLS involved the development of comparisons between the first two states in which BOCs had received Section 271 authority (New York and Texas) with two "control" states — Pennsylvania for New York, and California for Texas — that they selected. The authors' claims of "9-percent savings ... in New York and a 23-percent savings in Texas" were developed on the basis of comparing New York vs. Pennsylvania and Texas vs. California average bill changes between the second half of 1999 ("2H99") and the second half of 2000 ("2H00"). In making these comparisons, HLS used the New York 2H00 usage characteristics to develop the average bill for both time periods *and for both states* (New York and Pennsylvania); similarly, the 2H00 Texas usage characteristics was used to develop the average bill for both time periods and for both Texas and California. While there might be some justification for holding usage constant *within the same state* for the two different time periods so as to accurately measure the effects of price changes *in each jurisdiction*,[7] the use of New York and Texas usage for Pennsylvania and California,

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6. (...continued)
may have excluded these customers altogether as not meeting the criteria of "... having only a single long distance bill during the billing cycle," or they could have misinterpreted the usage threshold billing level as representative of the customer's usage *in the billing month*.

7. Even so, using 2H00 minutes for both 1999 and 2000 may produce distorted results, if the price changes occurring between the two time periods are such as to affect consumer (continued...)

respectively, serves only to distort local usage patterns, which are heavily influenced by such state-specific attributes as geography, number of LATAs, and the relationship between customers' communities of interest and their local calling areas.

The TNS Telecoms "bill harvesting" survey is also a source of the type of data that could be used to draw comparisons between "Section 271 states" and those in which BOC long distance entry is still barred. AT&T subscribes to the TNS Telecoms data, and at my request prepared summary results in the same format and for the same two time periods as those selected by HLS for the four states whose results are provided by HLS as well as for several other non-271 states in which the average long distance bill decreased by *considerably more* than in either New York or Texas. These results are reproduced in Tables 1 and 2 below. For the sake of comparison (and because we were not able to replicate the precise HLS summary data either because they had obtained it from a source other than TNS Telecoms and/or because they may have processed the individual billing data differently[8]), I also

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7. (...continued)
behavior either in terms of total consumption or the mix of peak and off-peak calling. New calling plans that either eliminate peak/off-peak price distinctions or that modify the peak/off-peak price relationships, or the introduction of "block-of-time" plans, could materially impact calling volumes. For example, under a block-of-time plan (e.g., SBC's 300 minutes for $18 offering), a customer who might ordinarily use only 200 minutes would view the additional 100 minutes as "free," and might well increase total usage considerably to the extent that such an increase does not result in a higher total bill. Holding calling volumes constant over the two time periods used in the HLS "analysis" ignores this important effect.

8. The TNS Telecoms Bill Harvesting data contains virtually all information from customer bills along with both "state weights" and "national weights." Due to the literally hundreds of carriers, types of calling plans, etc., the resulting database is extremely complex. The user of the data must make many decisions about what records to include or exclude, the

(continued...)

requested that AT&T provide results for the four states used by HLS using the same methodology as was used for the four additional states, except that for each state, I asked that that state's usage characteristics be utilized instead of the New York and Texas usage levels that HLS had incorrectly used for their "control" state calculations.

When the results for the two HLS "control states" (Pennsylvania and California) are recalculated using the usage characteristics *of those states* rather than those of New York for Pennsylvania and Texas for California, the price decreases in the two HLS "control states" turn out to have been significantly larger than those reported by the authors -- a 10.52% decrease for Pennsylvania rather than the 1.89% calculated by HLS based upon New York usage characteristics, and an 11.93% decrease for California rather than the 0.77% increase that HLS had calculated using *Texas* usage levels.

8. (...continued)
appropriate weights to use, etc. Because it is unclear whether in fact the TNS data was the data source and, in any event, none of the details as to how the data was processed and utilized are documented in the Hausman/Sidak paper, there is no way to determine whether the data was used correctly and consistently.

Table 1

Savings on InterLata Bills for the Average Customer
New York and Pennsylvania

	Avg Mins (NY 2H00)	Avg Price NY 2H99	Avg Price NY 2H00	Avg Mins PA 2H00	Avg Price PA 2H99	Avg Price PA 2H00
Peak (7am - 7pm weekdays)	32	$0.17	$0.13	23	$0.17	$0.14
Off Peak (7pm - 7am weekdays & Sat.)	48	$0.12	$0.09	28	$0.14	$0.11
Off Peak (Sunday)	20	$0.09	$0.08	13	$0.09	$0.09
Fee (MRC)		$1.17	$1.66		$1.19	$1.61
Total Bill *		$14.19	$11.80		$10.19	$9.14
Total Savings			$2.39			$0.96
Savings as Percentage of Total Bill			20.26%			10.52%
Incremental Savings in Entry State			$1.43			
Incremental Savings as Percentage of Total Bill			9.74%			

Texas and California

	Avg Mins TX 2H00	Avg Price TX 2H99	Avg Price TX 2H00	Ave Mins CA 2H00	Avg Price CA 2H99	Avg Price CA 2H00
Peak (7am - 7pm weekdays)	31	$0.15	$0.12	38	$0.16	$0.12
Off Peak (7pm - 7am weekdays & Sat.)	42	$0.13	$0.11	34	$0.12	$0.10
Off Peak (Sunday)	16	$0.10	$0.09	21	$0.09	$0.08
Fee (MRC)		$1.85	$1.68		$1.43	$1.87
Total Bill *		$13.64	$11.56		$12.94	$11.54
Total Savings			$2.08			$1.39
Savings as Percentage of Total Bill			17.96%			11.93%
Incremental Savings in Entry State			$0.70			
Incremental Savings as Percentage of Total Bill			6.03%			

ECONOMICS AND TECHNOLOGY, INC.

Notes to Tables 1 and 2: To attempt to match HLS methodology, only households with one Long Distance Bill were included in the sample. Threshold billed households (i.e., consumers billed only once every "x" months or when a certain spending level is reached) were also excluded. Average Minutes and Price was calculated for interLATA domestic dial-1 calls only; international calls were excluded. Minutes without associated charges (i.e., such as calls made with "block-of-time" plans) were included in average price per minute calculations since the corresponding charges are reflected in the monthly recurring charges (MRC). Source: TNS Telecoms ReQuest Bill Harvesting Study, National Weight used. (TNS advises use of national weights when two or more states are being compared.)

The specific choice of "control states" and the two time periods was entirely arbitrary. Because we do not know exactly what data sources were used or whether alternate "control states" or alternate time periods were examined, there is no basis to conclude that the particular *entirely non-random* selections of Pennsylvania and California that were made by HLS are in any way representative of actual conditions. During the 2H99 through 2H00 time frame, of the 48 jurisdictions (47 states plus the District of Columbia) in which Bell operating companies provide local telephone service, 46 had not as of that time frame received Section 271 authority. Thus, HLS had a wide range of choices for their "control states." Had they selected different "control" states, their "comparisons" might well have yielded dramatically different results. For example, if Florida, Wisconsin, Missouri or Kentucky were used instead of Pennsylvania and California as the "control states" for New York and Texas, then rather than indicating "consumer-welfare benefits" of BOC entry, one would instead conclude *precisely the opposite* — that BOC entry had *harmed* consumers — since the price decreases in these *non-271 states* was significantly greater than for either New York or Texas.

Table 2

Savings on InterLATA Bills for the Average Customer
in Alternate "Control" States

Kentucky and Florida

	Avg Mins KY 2H00	Avg Price KY 2H99	Avg Price KY 2H00	Avg Mins FL 2H00	Avg Price FL 2H99	Avg Price FL 2H00
Peak (7am-7pm wkdys)	41	$0.22	$0.10	46	$0.20	$0.11
Off Peak (7pm-7am weekdays & Sat.)	39	$0.17	$0.07	59	$0.14	$0.09
Off Peak (Sunday)	17	$0.14	$0.06	29	$0.12	$0.08
Fee (MRC)		$1.06	$3.43		$0.99	$2.10
Total Bill		$19.33	$11.24		$21.76	$14.92
Total Savings			$8.09			$6.84
Savings as Pct of Total			72.03%			45.88%
NY Savings ($)			$2.39			$2.39
NY Savings (%)			20.26%			20.26%
TX Savings ($)			$2.08			$2.08
TX Savings (%)			17.96%			17.96%

Missouri and Wisconsin

	Avg Mins MO 2H00	Avg Price MO 2H99	Avg Price MO 2H00	Avg Mins WI 2H00	Avg Price WI 2H99	Avg Price WI 2H00
Peak (7am-7pm wkdys)	24	$0.23	$0.10	46	$0.23	$0.10
Off Peak (7pm-7am weekdays & Sat.)	30	$0.16	$0.08	75	$0.16	$0.08
Off Peak (Sunday)	13	$0.11	$0.10	25	$0.11	$0.10
Fee (MRC)		$2.14	$2.59		$2.02	$2.75
Total Bill		$14.12	$8.92		$27.71	$16.33
Total Savings			$5.19			$11.39
Savings as Pct of Total			58.19%			69.73%
NY Savings ($)			$2.39			$2.39
NY Savings (%)			20.26%			20.26%
TX Savings ($)			$2.08			$2.08
TX Savings (%)			17.96%			17.96%

From my inspection of the TNS bill harvesting data for all states that was provided to me by AT&T, it is clear that there is *enormous variation* from state-to-state in the percentage and absolute dollar change in average rate per minute between the 2H99 and 2H00 rate periods. There are a number of reasons why this variation is present, reasons that have nothing to do with BOC entry or lack thereof. One particularly important source of difference results from the *timing* of access charge reductions in each state. For example, California intrastate access charges were subject to substantial decreases as a result of two CPUC rate rebalancing decisions that took effect in 1995 and 1998, respectively.[9] The corresponding decrease in Texas access charges did not occur until the 1999-2000 time frame, following an act of the Texas legislature requiring the reductions and flow-through in retail intrastate long distance rates.[10] On August 9, 1999, the Texas PUC voted (in Dockets 18515 and 18516) to reduce intrastate access charges for all ILECs by a weighted average of approximately $0.05 per minute (both ends). As shown on Figure 2, for the first nine months of 1999, the combined Southwestern Bell originating and terminating switched access rate was 11.89 cents. Following several reductions, by July of 2000, the beginning of the "post-entry" 2H00 period presented in the HLS study, those rates had dropped to 5.66 cents. Verizon's rates over that same period went from 12.72 cents down to 3.25 cents.[11]

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9. California PUC, I.87-11-033, *Alternative Regulatory Frameworks for Local Exchange Carriers*, Implementation and Rate Design phase, Decision (D.)94-09-065, 56 CPUC 2d 117 (1994); *Re: Pacific Bell*, A.97-03-004, D.98.07-033, 187 PUR 4th 120 (1998).

10. Texas Sen. Bill 560 (1999).

11. Texas Public Utilities Commission, *Report on Switched Access Charges*, December 29, 2000, Chapter 1, "Recent Changes in Access Charges."

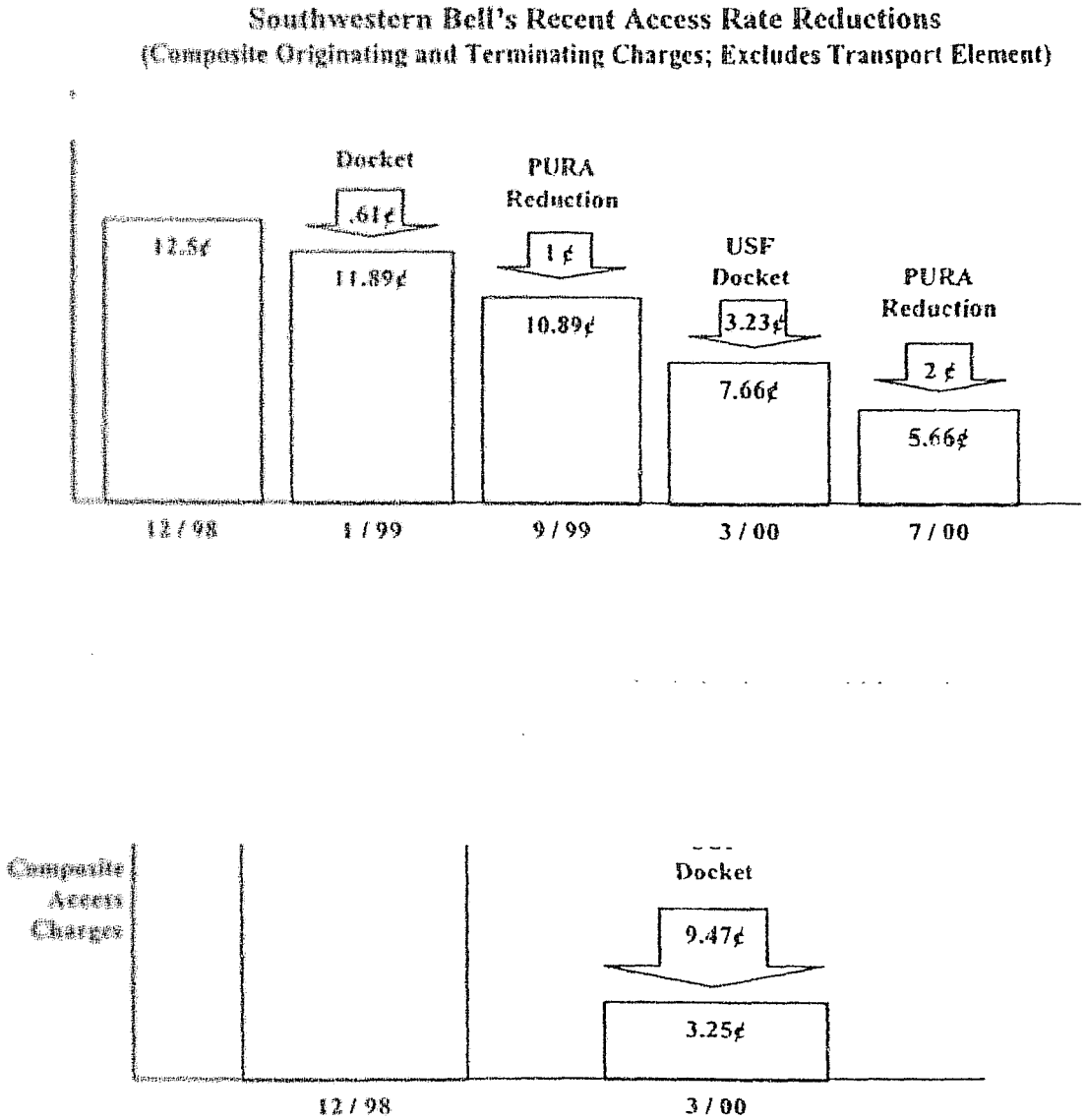


Figure 2. Recent reductions in Texas intrastate switched access charges. Source: Texas Public Utilities Commission, *Report on Switched Access Charges*, December 29, 2000, Chapter 1, "Recent Changes in Access Charges."

There is also considerable variation in access charge rate level, and hence retail toll rate levels, from state to state. For example, according to HLS' Table 4, peak period rates in Texas decreased from 19.3 cents to 14.4 cents between 2H99 and 2H00. But that same table also indicates that peak rates in California *started out* in 2H99 at only 14.9 cents, dropping to 11.3 cents a year later. Obviously, Texas had much further to go than California, so it's hardly surprising that the percentage and dollar reductions were greater. Yet another factor influencing the average interLATA rate is the relative mix of intraLATA vs. interLATA and intrastate vs. interstate calling. The size of the local calling areas, and the number and geography of LATAs is also a key factor. New York has much larger local calling areas than Pennsylvania, whereas calling to northern New Jersey, which represents a substantial portion of the New York City metropolitan area, is interstate interLATA. Texas has large flat-rate local calling areas covering, in each case, entire metropolitan areas. By contrast, California, whose metropolitan areas are far more expansive than those in Texas, limits flat-rate local calling to a 13-mile band. All of these factors have a material impact upon price level and the nature of price changes, *yet HLS did not control for even a single one of them in their model.*

As I have previously noted, while the reductions in access charges at both the interstate and intrastate levels have been and continue to be the largest single factor in driving down long distance prices, there is no "access charge" explanatory variable in the HLS model. The omission of this critically important variable renders all other model results entirely spurious.

[illegible] elsewhere in the "discrimination" model the authors admit to an R^2 of 1.4%,[12] in their "consumer-welfare benefits" model they do not even disclose the R^2 at all, suggesting that it is probably even lower than 1.4%!

For example, the roughly 3-cent drop in the average price of long distance calling in Texas between 1999 and 2000 that HLS report and that they seek to ascribe to SBC's entry into the long distance market is *entirely attributable* to an average decrease of slightly *more than* 3 cents in intrastate and interstate access charges that occurred in Texas in that same time frame.[13]

HLS's choice of time periods — which ended as of the second half of 2000 — is particularly noteworthy in light of the fact that, in February 2001 – *immediately following the*

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13 Hausman/Sidak, at 16.

12 SWBT's access charges decreased by approximately $0.035 per minute; Verizon (GTE) by about $0.096 (terminating by $0.067). From 2H99 to 2H00, interstate switched access charges dropped by about $0.01, for a weighted average decrease (for intrastate calls originated on SWBT phones) of approximately $0.031 per minute. HIS identify average billings per Texas customer as $3.04 with average usage of 97 minutes, representing an average price decrease per minute of $0.0313, *almost exactly the same as the decrease in access charges*. Hence, essentially *all* of the price decrease that authors ascribe to "BOC entry" in Texas is entirely attributable to reduced access charges, *which the authors chose to exclude from their model and causality analysis*. With respect to the "control" state for Texas — California — the authors identify virtually no price change for California between 2H99 and 2H00 (the total LD bill is shown as decreases by $0.098 for the same 97 minutes of usage, or about $0.001 per minute. California *intrastate* access charges were reduced in 1995 and again in 1998, but during the 2H99-2H00 period remained essentially unchanged, and interstate access charges decreases by about $0.01, for a weighted average decrease of around $0.01.

end of the HLS "study period." SBC increased its Texas long distance rates by between 1 *and 2 cents a minute – erasing* nearly half of the access charge driven rate decreases that had *occurred in the previous year.*[14] By limiting their "study" to 1999 and 2000, HLS conveniently *leave out* that large rate increase that SBC had put through following its long distance *entry.* The HLS *study also* conveniently omits any mention of the increases in *local* rates that *occurred* in Texas once SBC started selling long distance service. For example, Southwestern Bell *increased monthly rates for popular features like Caller ID from $4.95 to $7.00 between January 1, 2000 and January 1, 2002.*[15] During that same period, SBC's Texas rates for Call Forwarding and Three-way Calling went from $2.10 each to $5.00 each, and SBC increased its local directory assistance rate from $0.30 to $1.25.[16]

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14. "SW Bell raises interstate rate; current subscribers unaffected; PUC approval not *needed*," *Ft. Worth Star-Telegram*, February 2, 2001:

> Southwestern Bell announced it was raising the interstate rate on its flagship plan from 9 cents a minute to 10 cents a minute for new customers seven months after entering the long-distance market in Texas. Current subscribers will see no change in their domestic U.S. calling charges, said Shawn Ramsey, a San Antonio-based spokeswoman for Southwestern Bell, a unit of SBC Communications.
>
> Ramsey defended the increase, which doesn't require approval by the state's Public Utility Commission, by saying the plan is superior to many offered by the major long-distance services. "We beat the pants off of them," she said. "We've got great rates any way you slice or dice it." Asked if the higher rate reflects a need to boost profits, she said: "We've been in the market about eight months now. We've learned a lot and made a number of changes that reflect what we've seen. And we've changed our plan accordingly."

15. SWBT-Texas General Exchange Tariff, Sec. 10, Sheet 9, Revision 3, Eff. August 26, 1999, Revision 7, Eff. January 17, 2002.

16. *Id.*

Conclusion

Hausman-Leonard-Sidak provide no credible support for the purported "consumer-welfare benefits" they seek to ascribe to BOC entry into the in-region interLATA long distance markets in New York and Texas. The "econometric model" omitted access charges — the single most important explanatory variable affecting the price of long distance service — as well as other potential sources of differences in individual state pricing and usage attributes. The selection of "control states" against which to "compare" outcomes for New York and Texas was arbitrary and entirely results-driven, inasmuch as decidedly opposite conclusions regarding consumer-welfare benefits would have been obtain had HLS selected Florida, Vermont, Illinois or Kentucky – or possibly others — as their "control states." Calculations of rate changes for the "control states" that were selected by the authors — Pennsylvania and California — incorrectly utilized New York and Texas usage characteristics rather than usage attributes for the "control states" themselves. No sources were provided for the data upon which the HLS "model" was based, and customers with more than one telephone line or who changed long distance companies during the billing month used for the sample were inexplicably — and improperly — eliminated from the sample data. It is not clear whether the HLS dataset includes or excludes international usage, nor is there any indication as to how the monthly fee was handled if the particular calling plan to which the customer subscribed also included discounted international calling.

There is simply no valid scientific basis for HLS's attempt to ascribe the lower long distance rates that existed in 2000 vs. 1999 to BOC long distance entry, and their convoluted

effort to advance such a theory is devoid of credibility and fails entirely to demonstrate that BOC entry into the in-region long distance market is in the public interest.

Bullet points re Hausman/Leonard/Sidak "Benefits of BOC Entry" paper

- The *single most important source* of the decreases in long distance prices is the FCC-requires decreases in "access chargesm" the fees that long distance companies pay to local phone companies to connect their long distance networks to the phone companies' local subscribers.
  - For example, the roughly 3-cent drop in the average price of long distance calling in Texas that Hausman *et al* claim to have taken place between 1999 and 2000 is *entirely attributable* to an average decrease of slightly more than 3 cents in intrastate and interstate access charges that occurred in Texas in that same time frame.
  - Access charges have been dropping steadily since the break-up of the former Bell System in 1984. That, along with unprecedented technological innovation in telephone switching and long-haul transmission technologies and the growth of an intensely competitive long distance market, has pushed down the *real* (inflation-adjusted) price of long distance service by *more than 80%* since 1984 *without BOC entry into the long distance business*. By contrast, the inflation-adjusted prices of *monopoly* local phone service have remained largely unchanged over that same period.
  - Incredibly, despite the *central role* that access charge reductions have played in bringing down the price of long distance service, the Hausman *et al* "study" omits entirely this critically important explanatory variable from its economic analysis.
- Hausman's selection of so-called "control states" (Pennsylvania for New York; California for Texas) and his choice of the 1999-2000 time frame are entirely arbitrary and self-serving.
  - During the 1999-2000 time frame, there were *forty-five states* in which the Bell Operating Company (BOC) was still prohibited from entering the long distance business. Hausman offers no particular basis for his selection of Pennsylvania and California as "control states" to be used as a basis for comparison with the "Section 271 states" of New York and Texas.
  - For example, there were large long distance rate reductions – due primarily to lower access charges – in **LIST STATES** during that same time frame.
  - On January 1, 2001 – *immediately following the end of the Hausman et al "study period"* – SBC *increased* its Texas long distance rates by between 1 and 2 cents a minute – erasing nearly half of the access charge driven rate decreases that had occurred in the previous year. By limiting his "study" to 1999 and 2000, Hausman conveniently *leaves out* that large rate increase that SBC had put through following its long distance entry.
  - The Hausman study also conveniently omits any mention of the increases in *local* rates that occurred in Texas since SBC started seeling long distance service. For example, Southwestern Bell increased monthly rates

for popular features like Caller ID Name & Number from $6.50 to $9.50 between Jan. 1, 2000 and Jan 1, 2002. During that same period, SBC's Texas rates for Call Forwarding and Three-way Calling went from $2.10 each to $5.00 each, and SBC increased its local directory assistance rate from $0.30 to $1.25.

- There is no way to verify the accuracy of the results that Hausman *et al* report.
  - No source is identified for the "billing data" that the authors claim to have studied in reaching their conclusion.
  - The source data itself has not been provided.
  - Important statistical test results, such as the "coefficient of determination" that indicates the overall explanatory power of the Hausman analysis, has not been provided. In another Hausman study of long distance pricing that was published in January, the value for this statistic is given as 1.4% — which means that fully *98.6 percent* of the variation in the dependent variable in that model is *unexplained*. Since no corresponding value was provided in the present study at all, one can reasonably *assume* that it is even lower than 1.4%!
  - The authors inexplicably "eliminated households with more than one telephone line and households that switched service providers during the billing cycle" but provide no justification or rationale for deliberately selecting-out such customers. Customers who switch carriers or who have two phone lines may be above-average users who are also more aware of the various pricing options, and are the most likely to have been on a discount plan to begin with.
- There is no valid scientific basis for Hausman's attempt to ascribe the lower long distance rates that existed in 2000 vs. 1999 to BOC long distance entry.
  - The study ignored the *real cause of the lower rates* – lower access charges.
  - The authors' choice of time frame and "control" states was not representative and produced highly selective and distorted results.
  - The exclusion of certain more price-sensitive customers from the sample had no basis, and introduced a bias in the data that tended to exaggerate the apparent differences between 1999 and 2000.
  - The authors misrepresent the change in *local* rates between 1999 and 2000 by conveniently omitting certain rates that were increased by the BOCs during that same period.

Exhibit J

Joan Marsh
Director, Federal Government Affairs

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202/457-3120
FAX 202/263-2716

May 1, 2001

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room Number TWB-204
445 12th Street, S.W.
Washington, DC. 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc. and U S West Inc., Docket CC-99-272

Dear Ms. Salas:

On behalf of AT&T Corp., the attached letter addressed to Dorothy Attwood and David Solomon was hand-delivered to all addressees today. Please direct any questions to the undersigned.

Respectfully submitted,

Joan Marsh

Aryeh S. Friedman
Senior Attorney

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Fax: 908 221-4490
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May 1, 2001

VIA HAND DELIVERY

Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

David Solomon
Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc. and U S West Inc., CC Docket No. 99-272

Dear Ms. Attwood and Mr. Solomon:

AT&T Corp. ("AT&T") has reviewed the April 16, 2001 Report of Independent Public Accountants ("Auditor's Report") prepared by Arthur Anderson LLP and the April 16, 2001 certification by Qwest ("Qwest Certification") submitted pursuant to the Commission's orders conditionally approving the Qwest–US WEST merger.[1] Although the Auditor's Report asserts that Qwest has fully complied with

[1] Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a*

(footnote continued on following page)

the divestiture requirements specified in those Commission orders, the report actually confirms that Qwest has been "providing" in-region, interLATA services in violation of section 271 of the Communications Act, 47 U.S.C. § 271. In addition, the Auditor's Report is incomplete because certain contracts – including Qwest's teaming agreements with other carriers under which Qwest provides nationwide long distance services to federal agencies – have not been made available to the auditors.[2] In these circumstances, and as described more fully below, the Commission should act promptly to impose appropriate sanctions on Qwest for conduct that demonstrably violates the merger obligations; and should require that Qwest and its auditors withdraw the purported conclusions of compliance recited in their certification and report, respectively, and conduct a more complete audit.

The Auditor's Report Establishes That Qwest Has Violated Section 271. Section 271 prohibits Qwest from "providing" in-region, interLATA services before it opens its local markets to competition. Qwest has not received authority to provide in-region long distance services in any state.

As the Commission has held, the term "providing" in section 271 is not limited to the physical transport of electrons across LATA boundaries. *See, e.g., AT&T Corp. v. Ameritech Corp.* 13 FCC Rcd. 21438, ¶ 34 (1998) ("*Qwest Teaming Order*") ("Congress understood the prohibition [in Section 271] to be broader in scope than mere transmission"). Rather, a BOC "provides" interLATA service when it effectively holds itself out to the public as a provider of long distance service. *Id.* ¶¶ 45, 50. Thus, the Commission has held that a BOC may not "brand" in-region

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(footnote continued from previous page)

Submarine Cable Landing License, 15 FCC Rcd. 5376, ¶¶ 27, 70, 71 (March 10, 2000) ("*March 10 Merger Order*"); Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 11909, ¶ 42 (June 26, 2000) ("*June 26 Merger Order*").

[2] See Auditor's Report at 2.

long distance services as its own prior to obtaining full section 271 authorization, even if another entity undertakes the actual transport of the interLATA traffic. *Id.* ¶¶ 34, 45, 50.

Here, the Auditor's Report and Qwest's Certification each confirm that Qwest has violated these standards. The Auditor's Report finds that in-region private line services for 266 customers were "billed and *branded* as Qwest services." Auditor's Report, Att. 1, at 1 (emphasis added). The auditors note that the revenues associated with these unlawful transactions from July 2000 through March 2001 were in excess of $2.2 million. *Id.*

The Qwest Certification concedes that these services were billed and branded as Qwest services. Qwest's primary defense is that it did not actually transport any of this private line traffic. Qwest Certification ¶ 11. But, as noted above, the Commission has rejected that defense: a BOC "provides" long distance services when, as Qwest did, it brands transport services provided by a third party as its own. No other construction of Section 271 is possible, because the statutory prohibition does not distinguish between facilities-based and resold interLATA services. For that reason, the Qwest divestiture plan expressly required that, with respect to private line and data services, "Qwest will perform [only] a very limited set of support services (with the retail service *always branded* as Touch America) for a limited group of in-region customers." *June 26 Merger Order* ¶ 14 (emphasis added). *See also id.* ¶ 28, n.81 (discussing limited dual branding during the transition period).

Qwest suggests in the alternative that the Commission can overlook these violations of section 271 because the amounts are *de minimis*. Qwest Certification ¶ 10. There is, of course, no multi-million dollar, several hundred customer, *de minimis* exception to section 271. Furthermore, the anticompetitive effects of the conceded misbranding go well beyond the specific number of customers or dollars for which a violation is established, because such misbranding affects the perceptions of Qwest's most significant customers. As Qwest itself repeatedly emphasized throughout the

merger proceeding, the "branding issue" in this case at all times involved primarily this small but important segment of large business customers.[3]

Recognizing as much, Qwest also suggests that its violation was inadvertent, and that the "error" occurred because all of these private line customers entered into contracts at the time the order entry system went off line between June 26 and June 30, 2000. Qwest Certification ¶ 7. That excuse is irrelevant under section 271, which prohibits all unauthorized interLATA service, and under the merger conditions which demand strict compliance.[4]

In sum, the Qwest Certification is flawed insofar as Qwest incorrectly states therein that it "has operated its business in accordance with the Final Divestiture Plan and the FCC's Orders in Docket No. 99-272" (Qwest Certification at 1, ¶2).[5] Indeed, the Auditor's Report shows on its face that Qwest's conduct has plainly violated those Orders and Section 271.[6]

The Auditors Have Failed To Investigate Whether Qwest Is Engaging In An Impermissible Teaming Agreement With Touch America And Is Providing In-Region,

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[3] *See e.g.*, Qwest's Reply to AT&T's Comments on the Divestiture Compliance Report, at 6-8 (identifying the branding issues as applying to "[o]nly a limited category of limited customers") and Qwest's Point By Point Response to AT&T's Comments on the Qwest Divestiture Compliance Report, appended thereto at 5-6 and 8.

[4] It is also not clear that this excuse is consistent with the explanation Qwest apparently provided to the auditors. *See* Auditor's Report Att. 1, at 1 (According to the Auditor's Report, "Qwest is reviewing the detail of these 266 customer accounts to identify potential exempt services which may be included in the above estimates").

[5] Qwest's certification, which qualifies this statement with "in all material respects" is in fact non-compliant with the Commission's orders (*see*, paragraph 46 of the June 26 Merger Order and paragraph 70 of the March 10 Merger Order) not only because there is no provision in those orders for a "materiality" qualification, but also because Qwest failed to certify that "that it continues to comply with section 271." In fact, its activities are clearly not in compliance with Section 271.

InterLATA Services To The Federal Government The auditors also failed to undertake an investigation into Qwest's provision of in-region interLATA calling to the federal government. In a recent filing made to the GAO protesting its exclusion from bidding on a contract to provide telecommunications services to multiple federal offices, Qwest stated that it "is *currently* performing a number of nationwide contracts with various federal agencies, including Treasury, in conjunction with Touch America."[6] Although these contracts raise obvious and significant section 271 concerns, there is no mention of them in the Auditor's Report.

The Commission's orders place strict limits on the ability of Qwest to "team" with long distance providers to offer a bundled package of services. As the Commission stated in the *June 26 Merger Order* with respect to the issue of joint provisioning of long distance services, "Qwest's representation that there will be no such coordination for delivery of products or services [with Touch America] is one of the factors central to our finding that the divestiture agreement does not violate section 271." *Id.* ¶ 32 & n.90. Similarly, in rejecting Qwest and U S WEST's argument that their purported teaming arrangement complied with section 271 because it constituted "mere marketing," the Commission made clear that the scope of permissible joint marketing between a BOC and a long distance provider to in-region customers was limited to instances where the BOC "makes *no* representation that [any in-region long distance service] is associated with its name or services." *Qwest Teaming Order* ¶ 50 (emphasis added). The Commission held where the BOC "perform[s] various customer care functions in connection with the [in-region] long distances services," the BOC is "providing" long distance services in violation of section 271. *Id.*

(footnote continued from previous page)

[6] Indeed the Auditor's Report, which contains a similar assertion of compliance must also be rejected in light of the showing, in the very same Report, that Qwest is not in compliance.

Qwest's advocacy in the GAO proceeding raises substantial concern that Qwest has once again crossed the line and is impermissibly participating in another carrier's provision of in-region long distance services to the federal government. In an ongoing proceeding before the GAO, Qwest has protested the fact that it had been denied a federal telecommunications contract on the ground that section 271 legally prevents Qwest from offering "ubiquitous nationwide telecommunications services" to federal offices. Qwest Protest at 1. Qwest argued that it could do so by teaming with another carrier (such as Intermedia) who would serve federal offices in Qwest's 14-state region and that Qwest had undertaken such teaming arrangements to serve other federal agencies. *Id.* at 6. According to Qwest, these teaming arrangements satisfy section 271 because "Qwest and its teaming partner would be providing only long distance services . . . not a combined package of local and long distance services," and because Qwest had disclosed to the government that it was teaming with another provider. *Id.* at 11-12.

However, the details of Qwest's teaming arrangements paint a different picture. According to a contract that Qwest provided to the GAO as representative of its teaming agreements with other carriers: "Qwest is the single point of contact with Customer for ordering, billing, Service inquiry, Service Assurance and trouble reporting for the Service." Qwest Protest, Exhibit 4. If Qwest were free to ignore Section 271, Qwest's apparent practice of entering into such contractual arrangements to win contracts to serve multi-location federal offices would be unsurprising, because many federal agencies are understandably interested in obtaining a sole supplier with a single point of contact for all their telecommunications needs rather than connecting their various offices using multiple carriers.

Given the uncertainty as to the terms of these teaming arrangements, and inference of broader Qwest involvement in light of its GAO protest submission, it is,

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[7] Protest of Qwest Communications International, Inc., B-287495 Opposition to

(footnote continued on following page)

at the very least, incumbent on Qwest to justify, and the auditors to verify, that these teaming arrangements comport with Section 271.

The Commission has set forth in the Qwest merger orders the ground rules for such arrangements. Even before Qwest selected Touch America as the purchaser of its in-region assets in order that its merger with U S WEST would comply with Section 271, the Commission warned Qwest that the provision of anything beyond billing and collection services to Touch America (*i.e.*, the entity that ultimately purchased Qwest's in-region long distance service) increased the likelihood of a section 271 violation. *March 10 Merger Order* ¶ 19. Indeed, the *June 26 Merger Order* found that Qwest's plan to sell its in-region long distance facilities to Touch America satisfied section 271 only after Qwest represented to the Commission that it would not provide any customer care for Touch America's long distance customers other than those services allowed for a very limited transitional period. *Id.* ¶ 32. Qwest's assertion that Section 271 is only implicated when a BOC and its teaming partner offer "a combined package of local and long distance services," Qwest Protest at 11, flies in the face of the Commission's holding in paragraph 50 of the *Qwest Teaming Order* that associating the BOC's brand with the in-region long distance service is what makes the teaming arrangement impermissible, not its bundling with the local service.

Thus, Qwest cannot be deemed to be in compliance with the Commission's merger orders or Section 271 until the teaming contracts with other carriers to offer long distance service to federal agencies with offices in its in-region states and the federal contracts themselves have been made available for review to the auditors to determine whether Qwest in engaging in teaming agreements that violate section 271 and, if violations are established, appropriate remedial action is taken.[8]

(footnote continued from previous page)

Motion for Summary Judgment at 7 (emphasis in the original) ("Qwest Protest").

[8] AT&T cannot comment at this time on the volume discount issue, because insufficient information has been provided. Despite the fact that an extension

(footnote continued on following page)

* * *

In summary, in light of the deficiencies in the audit report and evidence of Section 271 violations, AT&T recommends that the Commission: (1) mandate a detailed analysis of the 266 accounts to determine when they were acquired, whether (and when) the revenue associated with those accounts has been handed over to Touch America, and whether customers have been notified of the violation; (2) levy a fine against Qwest at least equal to the amount of revenue it received from prohibited activities; and (3) mandate a detailed audit report of all Qwest teaming arrangements to ensure that they comply with prior Commission Orders.

Thank you for your attention to this matter. Please direct any questions to the undersigned.

Respectfully submitted,

Aryeh S. Friedman

cc: Carol Mattey
Anthony Dale

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was granted to Qwest for the filing of the auditor's report due to this very issue, the auditor reported that: "all contracts requested for our review are *not yet available* and consequently, *we were unable to complete our procedures with respect to this requirement*." Auditor's Report at 2 (emphasis added). March 1, 2001 Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau, to Mr. Peter Rohrbach, counsel for Qwest, at 1-2. The Qwest Certification explains that the issue of compliance with the volume discount obligation related to only two contracts, and to service bureau tapes for 47 customers and that they "fully expect that they will not show prohibited cross-discounting." *Id.* ¶ 12. Obviously, a contrary finding would establish clear violations of the *June 26 Merger Order*, in which the Commission held that such cross-discounting "appears tantamount to *joint marketing* of in-region interLATA service and out-of-region service" and "foster[s] the impression that Qwest can offer a "package" of in-region and out-of-region interLATA service." *Id.* ¶ 19.

Radhika Karmarkar

Exhibit K

Federal Communications Commission
Washington, D.C. 20554

June 1, 1999

Mr. Bruce K. Posey
Senior Vice President
Federal Relations and Regulatory Law
U S WEST, Inc.
1099 19th Street, N.W., Suite 700
Washington, D.C. 20036

Dear Mr. Posey:

We have been following with concern events subsequent to U S WEST's filing of its February 22, 1999 Petition before the Arizona Corporation Commission (ACC) in Arizona Docket No. RT-00000J-99-0095, and that Commission's Decision No. 61696 dated May 18, 1999. We are particularly troubled by the view, expressed by some U S WEST representatives, that the Federal Communications Commission may lack authority over the determination of in-state Local Access and Transport Area (LATA) boundaries and that U S WEST is free to provide telecommunications services across current LATA boundaries in Arizona without first applying to, and receiving approval from, the Federal Communications Commission for LATA boundary modifications.

As the Common Carrier Bureau stated explicitly in the 1997 *LATA Boundaries Order*, 12 FCC Rcd 4738, the Telecommunications Act of 1996 gives unambiguous, explicit, and sole authority over LATA boundaries to the Federal Communications Commission. Should U S WEST begin to offer service across currently recognized LATA boundaries without first receiving authority from the FCC, U S WEST will become subject to charges that it has committed a willful and knowing violation of the Act and this Commission's rules. We, thus, request your written commitment that U S WEST will not begin to offer any telecommunication services across current LATA boundaries prior to receiving authority to do so from the FCC. Please respond within ten business days.

Sincerely,

Lawrence E. Strickling

Lawrence E. Strickling
Chief
Common Carrier Bureau

cc: Carl J. Kunasek, Commissioner-Chairman, ACC
Tony West, Commissioner, ACC
James R. Irvin, Commissioner, ACC

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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.

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[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-

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[23] Tr 723-725
[24] Tr 738-742
[25] Tr 732, 734, 777
[26] Ex 20 at 2
[27] Tr 306-08

production environment test on a more limited but sufficient volume than being requested in the AT&T trial proposal."[28]

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.[29]

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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[28] Ex. 20 at 4
[29] *Id.* And, see Ex. 21
[30] Tr. 295, 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. 783-84, 1160-61.
[41] Tr. 1219.
[42] Tr. 500.
[43] Tr. 492.
[44] Tr. 253.

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 [illegible] 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 at 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. 2088 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. 983.
[55] Ex. 46 (Gibbs Deposition), 56-59.
[56] Tr. 796.
[57] Ex. 1; Tr. 30-32.
[58] Tr. 989-991.

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. 1036, 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. 1002-05.
[69] Tr. 1004-05.
[70] Ex. 5; Tr. 41-42, 1005-06
[71] Ex. 5; Tr. 1008-09.
[72] Ex. 1037; 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. 46-47, 541-42, 1019-20, 1027.
[75] Ex. 7.
[76] Ex. 8; Tr. 50, 1021.
[77] Exs. 11 and 1039; Tr. 1025-26
[78] Tr. 413.
[79] Tr. 299, 885.

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 ROC 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. 196-98.
[84] Tr. 221, 224. Ward, like Davis, had also been with AT&T. Pelto had been his supervisor.
[85] Tr. 221.
[86] Tr. 221-22, 264.
[87] Tr. 229, 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

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[88] Tr. 268.
[89] Ex. 1042.
[90] Ex. 1042; Tr 1032-33.
[91] Tr. 1032.
[92] Ex. 1043; Tr. 1034-35.
[93] Tr. 1302-03.
[94] Ex. 1045

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 Hofstetter 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. 1040
[96] Tr. 61
[97] Ex. 1046
[98] Tr. 1046-47
[99] Ex. 13; Tr. 1045
[100] Ex. 1047
[101] Ex. 14
[102] Tr. 202-03.

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 Schipper.[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 vulgarity 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. 1222
[106] Ex. 1016
[107] Exs. 1048-1051; Tr. 1048-52, 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 depo.) at 154-156
[108] Ex. 1018.
[109] Tr. 1056-57

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. 16, 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. 1055.
[115] Tr. 1227-29.
[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 not 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. 26 (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. Notarianni, 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

...by misrepresenting the reasons for ... that it was willing to offer AT&T the 1-2-3 ... other CLECs and, if discovery established to Qwest's ... had legitimate business plans to provide UNE-P that requires ... the 1-2-3 test offered, then Qwest would agree to negotiate a test ...[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.

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

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.[138] 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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[138] *First Pre-hearing Order*, dated June 6, 2001, at 3.
[139] Transcript of May 1, 2001 Pre-Hearing Conference, at 94.
[140] Ex. 46.
[141] *First Prehearing Order* ¶¶ 10-14.
[142] *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* dated June 28, 2001.

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

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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

AT&T'S COMMENTS ON

SECTION 272

March 18, 2002

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III. CONCLUSION 24

AT&T Communications of the Midwest, Inc. ("AT&T"), provides the following comments on the disputed issues concerning Qwest's compliance with § 272 of the Telecommunications Act of 1996 ("Act").

I. INTRODUCTION

Section 272 of the Telecommunications Act of 1996 ("Act") requires that interLATA long distance services provided by a Bell operating company ("BOC") such as Qwest Corporation ("QC" or "the BOC"), within the region in which it is the incumbent local exchange carrier ("ILEC") must be provided through a separate affiliate. The requirements of § 272 tend to be obscured by the inquiry under § 271, which establishes the obligations a BOC must satisfy to obtain authority from the Federal Communications Commission ("FCC") to provide in-region interLATA services. Compliance with § 272, however, is not an afterthought but is vitally important to ensuring the viability of effective competition in both the local exchange and interLATA long distance markets. Indeed, the FCC has made it clear that, based on § 217(d)(3)(B), a finding that a BOC fails to comply with § 272 constitutes an independent ground for denying relief under § 271.[1]

> Congress required us to find that a § 271 applicant has demonstrated that it will carry out the requested authorization in accordance with the requirements of § 272. We view this requirement to be of crucial importance, because the structural and nondiscrimination safeguards of § 272 seek to ensure that competitors of the BOCs will have

[1] Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (rel. Oct. 13, 1998), ¶ 322 ("BellSouth Louisiana II Order"); Application of Ameritech Michigan Pursuant to § 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 342 (rel. Aug. 19, 1997) ("Ameritech Michigan Order"). See 47 U.S.C. §271(d)(3)(B) The FCC shall not approve a § 271 application unless it finds that "the requested authorization will be carried out in accordance with the requirements of § 272."

nondiscriminatory access to essential inputs on terms that do not favor the BOC's affiliate. These safeguards further discourage, and facilitate detection of, improper cost allocation and cross-subsidization between the BOC and its § 272 affiliate. These safeguards, therefore, are designed to promote competition in all telecommunications markets, thereby fulfilling Congress' fundamental objective in the 1996 Act.[2]

The FCC bears ultimate responsibility to determine whether a BOC will comply with § 272, which the FCC makes based on its "predictive judgment regarding the future behavior of the BOC."[3] In making such a determination, the FCC will "look to past and present behavior of the BOC applicant as the best indicator of whether it will carry out the requested authorization in compliance with the requirements of § 272,"[4] and "mere paper promises to comply are insufficient."[5] The FCC, however, places substantial weight on the factual record compiled by the state commissions, as well as those state commission recommendations, in determining whether a BOC has satisfied, or likely will satisfy, its obligations under sections 271 and 272.[6]

Qwest pays lip service to the requirements in § 272 and related FCC orders, but Qwest's interpretation of those requirements bears little resemblance to the safeguards envisioned by Congress or the FCC. Qwest's view of its obligations can be charitably characterized as narrow, legalistic, and technical. Rather than accepting the need to maintain a completely separate affiliate with which it deals at arms-length and without discriminating against competing long distance carriers, Qwest has maintained an integrated corporate structure designed to benefit the BOC and its § 272 affiliate at the expense of both companies' competitors. In some cases, Qwest has simply failed to

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[2] Ameritech Michigan Order ¶ 346. See BellSouth Louisiana II Order ¶ 320.
[3] Ameritech Michigan Order ¶ 347.
[4] *Id.*
[5] BellSouth Louisiana II Order ¶ 339. Ameritech Michigan Order ¶ 55.
[6] E.g., Ameritech Michigan Order ¶ 30.

comply or even attempt to comply with applicable statutory and FCC requirements while unabashedly claiming that it has been in compliance with § 272 since passage of the Act.

The Commission should refuse to accept Qwest's promises of future performance when Qwest's past and present is littered with attempts to manipulate the facts and the law to its advantage and has exhibited consistent failures to comply with both the letter and the spirit of its legal obligations. The minimal compliance Qwest has demonstrated has largely been the result of scrutiny of Qwest's documents and procedures by AT&T and accounting consultants that Qwest grudgingly retained at the insistence of the facilitator in the multistate proceedings. Despite repeated observations and findings of noncompliance with § 272 based on this scrutiny, however, Qwest refuses to acknowledge any noncompliance, even as Qwest revised its transactions and procedures to address those findings. Qwest's recalcitrance and its continuing denial of other past and current instances of noncompliance discussed below demonstrate that Qwest is not complying, and likely will not comply in the future, with § 272.[7]

II. DISCUSSION

Section 272 includes several specific requirements in addition to the general obligation in § 272(a) that the BOC use a separate affiliate to provide originating in-region interLATA services. Sections 272(b) and (c), respectively, impose structural and transactional safeguards, and nondiscrimination safeguards. Section 272(d) and (e),

[7] The ALJ in Minnesota has recommended to the Commission that it find that Qwest has failed to meet the requirements of § 272. A copy of his Findings of Fact, Conclusions of Law and Recommendations is attached as Exhibit A.

respectively, impose a biennial audit requirement and an obligation on the BOC and § 272 affiliates to fulfill requests from unaffiliated entities or third parties, while § 272(g) imposes certain marketing restrictions on the BOC. The FCC has promulgated a number of rules to implement the requirements of § 272.[8] The *Accounting Safeguards Order*, in relevant part, generally addresses sections 272(b)(2)(5), 272(c)(2) and 272(d).[9] The *Non-Accounting Safeguards Order*, in relevant part, generally addresses the remainder of the requirements of § 272(a), (b), (c), (e) and (g). The FCC has determined that the BOC must comply with the Act since the date of its enactment and must comply with the *Accounting Safeguards Order* since the effective date of the order.[10]

The following discussion addresses each of the provisions of § 272 and related FCC orders in which AT&T takes issue with Qwest's current and future compliance in the order in which those provisions appear in the statute.

A. Section 272(a) – Separate Affiliate

Section 272(a) states that a BOC may not originate in-region, interLATA services unless it provides that service through an affiliate that is separate from the BOC and meets the requirements of § 272(b).[11] Qwest acknowledges this requirement, but contends that § 272(a) is satisfied once Qwest has demonstrated compliance with § 272(b). Qwest's (and its predecessor U S WEST's) past repeated failure to

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[8] Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Report and Order, FCC 96-490 (rel. Dec. 24, 1996) ("Accounting Safeguards Order"); Implementation of the Non-Accounting Safeguards of § 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order, FCC 96-489 (rel. Dec. 24, 1996) ("Non-Accounting Safeguards Order").
[9] Accounting Safeguards Order, ¶¶ 110-205.
[10] Ameritech Michigan Order ¶ 371.
[11] 47 U.S.C. § 272(a).

comply with § 272(a) and § 271, however, colors Qwest's current view of § 272 as a whole. Further, such history should demonstrate to the Commission that without additional scrutiny and safeguards, Qwest is unlikely to adhere to the requirements of § 272 once Qwest is granted in-region interLATA authority.

On September 27, 1999, the FCC found that "U S WEST's provision of non-local directory assistance service to its in-region subscribers constitutes the provision of in-region, interLATA service," and "the nationwide component of U S WEST's non-local directory assistance service was unlawfully configured."[12]

On September 28, 1998, the FCC concluded that U S WEST Communications, Inc., the BOC, through its marketing arrangement with pre-merger Qwest, was "providing in-region, interLATA service without authorization, in violation of § 271 of the Act."[13]

On February 16, 2001, the FCC concluded that Qwest, through its 1-800-4US-WEST calling card service, was providing in-region, interLATA service in violation of § 271.[14]

In each of these cases, the BOC was providing in-region, interLATA service, which was a violation not only of § 271 but also of the requirement in § 272(a) that such services be provided only by a separate affiliate. Qwest characterizes these violations as good faith disputes over the proper interpretation of § 271 and contends that they are irrelevant to Qwest's compliance with § 272. The fact that Qwest has had not one or two

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[12] *Petition for U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, Memorandum Opinion and Order, FCC 99-133 (rel. Sept. 27, 1999), ¶¶ 2 and 63. *See* Ex. AT&T 22 (Skluzak Affidavit), ¶¶ 162 - 165.

[13] *AT&T Corp. et al., v. U S WEST Communications, Inc.*, File No. E-99-42, Memorandum Opinion and Order, FCC 98-242 (rel. Oct. 7, 1998), ¶¶ 1, 38 and 52. *See* Ex. AT&T 22, ¶¶ 166 - 168.

[14] *AT&T Corp v. U S WEST Communications, Inc.*, File No. E-99-28, Memorandum Opinion and Order, DA01-418 (rel. Feb. 16, 2001). *See* Ex. AT&T 22, ¶¶ 169 - 171.

has been "good faith disputes" over its obligations under the Act, however, shows that Qwest repeatedly has tested (and crossed) the boundaries of permissible conduct in an attempt to evade statutory limitations on its operations. The Commission should expect Qwest to be no less willing to explore ways to avoid compliance with the requirements of § 272 and applicable FCC orders.

The Commission's review of Qwest's compliance with § 272 necessarily requires the Commission to exercise predictive judgment based on past events. Qwest's history demonstrates that Qwest interprets its legal obligations narrowly to the point of violating these obligations. The Commission, therefore, should carefully scrutinize all of Qwest's claims that it is – and always has been – in compliance with § 272 to ensure not only that such claims are valid (which many are not) but that proper procedures and safeguards are in place to minimize Qwest's ability to avoid compliance with § 272 in the future.

B. Section 272(b)(2) – Separate Accounting

Section 272(b)(2) states that the § 272 affiliate "shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records and accounts maintained by the Bell operating company of which is an affiliate."[14] The FCC has stated that § 272(b)(2) requires the BOC's § 272 affiliate to maintain its books, records and accounts pursuant to Generally Accepted Accounting

[14] Section 272(b)(2) addresses the § 272 affiliate's compliance. Qwest, however, testifies how § 272(b)(2) applies to the BOC. *See* Schwartz Minnesota Rebuttal Affidavit at 8. Such an interpretation is clearly incorrect.

Principles ("GAAP"),[16] principles that include timeliness and accruals, and maintain the records separate from the BOC.[17] AT&T's review of Qwest's records found numerous instances of the failure to follow accrual accounting and to timely book billable transactions.[18] Most notably, the BOC and its current § 272 affiliate, Qwest Communications Corporation ("QCC" or "the § 272 affiliate") failed to book *any* transactions between July 2000 and April 2001 because the BOC failed to bill any of these transactions.[19] QCC's representative elliptically refers to the fact that the GAAP principle of timeliness was not always followed and that "the preparation, posting, billing, and payment of transactions between Qwest Long Distance, QCC and the BOC" were impacted.[20] These instances of failure to timely accrue, timely bill for services and meet the terms of the intercompany agreements not only conflict with GAAP but also demonstrate a lack of sufficient internal controls to prevent such failures in the future.[21]

The FCC also looks for a regular audit program for the affiliate that ensures GAAP compliance.[22] In addition to reviewing the sufficiency of the Internet postings, the FCC looks to see if the BOC maintains an audit trail of past Internet postings.

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[16] BellSouth Louisiana II Order, ¶ 328.
[17] Id.; Accounting Safeguards Order, ¶ 170.
[18] Skluzak Minnesota Affidavit ¶¶ 37(a); 38; 67(c), (d), and (h); 78; 79 (a – c); 104(a – f) and 107.
[19] Skluzak Minnesota Affidavit ¶ 38; 92; 97; and 129. Qwest has argued that QCC did not become a § 272 affiliate until March 26, 2001. AT&T maintains that Qwest's own records demonstrate that QCC was representing that QCC was a § 272 affiliate as of January 1, 2001; however, regardless of the date QCC became the § 272 affiliate, it was required to follow GAAP. Failure to follow GAAP, moreover, is not limited to QCC. The Skluzak Minnesota Affidavit details several instances where U S WEST Long Distance and Qwest LD failed to comply with GAAP. *Id.* ¶¶ 67(c, d and h); ¶ 78 and 79 (a – c).
[20] Brunsting Minnesota Rebuttal Affidavit at 4 and 13 ("There was difficulty identifying QCC affiliate transactions in 2000 due to the merger transition.") These transactions did not get booked (or accounted for) until an outside consultant became involved. *Id.*at 16.
[21] In response to AT&T's criticisms, Qwest acknowledged during the multistate workshops in June 2001 that it had "discovered" that the master service agreement between the BOC and the 272 affiliate "mistakenly" did not include a requirement to pay interest on past due amounts. Qwest claims now to have corrected this "error," but the error was discovered through AT&T's review of Qwest's documentation, not as a result of any Qwest internal accounting controls. Multistate Transcript for June 8, 2001 at 66.
[22] BellSouth Louisiana II Order, ¶ 328.

including publicly available accounting and financial data, as well as confidential data.[23] Qwest has failed to comply with these requirements. Qwest formerly disclosed agreements, work orders and task orders, and the details of individual transactions pursuant to the agreements and orders. As of January 1, 2000, however, Qwest only posts agreements, work orders and task orders – Qwest no longer posts individual transactions pursuant to the work orders and task orders. Such postings are insufficient to provide an adequate audit trail, and AT&T's reviews of accounting records and the Internet postings further demonstrate a failure to maintain an audit trail for many transactions.[24]

Qwest attempts to dismiss these deficiencies as one-time occurrences that resulted from the transition from Qwest LD to QCC as the § 272 affiliate and have since been corrected. The Commission should be as concerned with this explanation as with the accounting safeguard deficiencies themselves. Qwest has longstanding state and federal obligations to account for transactions between the BOC and its affiliates. Qwest, by its own admission, undertook enormous efforts to account for the transactions between the BOC and QCC when Qwest decided to make QCC the § 272 affiliate – including retaining outside personnel to account for (and in some cases create documents

[23] Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to § 272 of the Telecommunications Act of 1996 To Provide In-Region InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (rel. June 30, 2000), ¶¶ 404-05 ("*SBC Texas Order*").

[24] Skluzak Minnesota Affidavit ¶¶ 66, 67(a), (b) [which is a summary of numerous transactions and in violation of the FCC's rulings that there be no summaries], 67 (m)-(p), 80, 88 (a), (c), (h) [sic], 97, 106(c), and 105. As noted in this affidavit, none of the transactions between QCC and Qwest for the period July 2000 to March 2001 were billed until April 2001. This results in a total lack of an audit trail. Furthermore, until the *SBC Texas Order* came out, even *Qwest* believed it had to post individual transactions pursuant to the work orders and task orders. The extensive problems documented in the affidavit reinforce the conclusion that Qwest had poor internal controls and inadequate training.

memorializing) affiliate transactions.[25] Such efforts demonstrate that Qwest does not properly account for affiliate transactions involving the BOC, and only the designation of QCC as the § 272 affiliate resulted in many, if not most, of the transactions between it and the BOC coming to light. Again, the evidence demonstrates that Qwest's history of taking its reporting obligations lightly will be repeated in the absence of rigorous oversight and appropriate safeguards.

Qwest also observes that it files annual reports via the FCC's Automatic Reporting and Management Information Systems ("ARMIS") that are accompanied by the report of independent accountants, Arthur Andersen LLP, which concludes that Qwest Communications International ("QCI," the ultimate parent corporation) and subsidiaries were complying with GAAP.[26] This report proves nothing. The auditor only reviewed a sample of items to reach its conclusion, and there is no indication how many – if any – transactions between the BOC and the § 272 affiliate were included.[27] Indeed, the audit was for the BOC and QCI, and even Qwest concedes that none of the transactions between the BOC and QCC, the current § 272 affiliate, could have been included.[28] The FCC looks to a regular audit program for the *272 affiliate* for evidence of compliance with § 272(b)(2), not solely the BOC or its parent corporation.

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[25] Qwest also contends that it accomplished this transition of § 272 affiliates within three months, far less time than permitted under § 272(h) for BOCs to bring their operations into compliance with § 272. Section 272(h), however, is inapplicable to these circumstances. That section provides a BOC with one year to bring any activity in which a BOC is engaged on the date of the enactment of the Act into compliance with § 272. Qwest and U S WEST were entirely separate companies on February 8, 1996, and the transition from Qwest LD to QCC as the § 272 affiliate occurred several years after that date. Nothing in § 272, or the Act as a whole, authorizes Qwest to take one year to bring its § 272 affiliate into compliance with § 272 more than four years after the Act was enacted.

[26] Schwartz Minnesota Direct Affidavit at 28 & Exhibit MES 272.5.

[27] Minnesota Hearing Transcript at 139-40 (Qwest Schwartz).

[28] *Id.* at 141-42. *See also* Schwartz Minnesota Direct Affidavit at 28 for further examples of Qwest's qualifications of this audit: ("While this audit, known as the Joint Cost Audit, does not focus specifically on the relationship between the BOC and the 272 Affiliate ....", and "... the statement of compliance rendered by Arthur Andersen as part of that audit is general in nature ...."

Qwest also relies on the review undertaken by KPMG pursuant to the recommendation made by John Antonuk, the multistate facilitator, in his report to the participating state commissions. The KPMG Report was limited in scope and demonstrates only that Qwest was not in compliance with § 272 during the test period of April through August 2001.[29] While Qwest claims to have instituted reforms to address these deficiencies, those reforms have not been tested to determine whether they will, in fact, prevent recurrences of those deficiencies. Indeed, Qwest does not even concede that the KPMG Report found specific instances in which Qwest was not in compliance with § 272, much less acknowledge that its own accounting consultant, as well as AT&T, disagrees with Qwest's claims to have complied with § 272(b)(2) since the passage of the Act. Without additional testing, the Commission should place no reliance on Qwest's paper promises of compliance with § 272(b)(2), regardless of whether a Qwest consultant has verified the existence of those paper promises.[30]

C. Section 272(b)(3) – Separate Employees

Qwest's § 272 affiliate "shall have separate officers, directors and employees from the [BOC] of which it is an affiliate."[31] Consistent with its interpretation of other provisions of § 272, Qwest's view of this requirement exalts narrow, legalistic, and technical form over substance. There has been a revolving door atmosphere among Qwest's affiliates, with employees going back and forth between the BOC and § 272

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[29] AT&T Minnesota Comments on KPMG Report; *see* KPMG Report.

[30] In addition to the KPMG Report, Qwest also obtained the declaration of Philip Jacobsen, a partner with KPMG, who stated that Qwest had adopted measures in response to the KPMG Report. Schwartz Minnesota Rebuttal Affidavit at Ex. MES 272.20. Mr. Jacobsen, however, verified only the existence, and selected employees' awareness, of these measures, not whether those measures have been, or will be, effective in preventing a recurrence of the deficiencies found in the KPMG Report.

[31] 47 U.S.C. § 272(b)(3).

affiliates.[32] There has also been widespread employee sharing, and many BOC employees have spent 100% of their time working for the § 272 affiliate.[33] The free flow of employees back and forth between the BOC and its § 272 affiliate facilitates the sharing of information between companies – including confidential information which employees necessarily bring as part of their experience from one company to another. The wholesale transfer of employees among affiliates and extensive employee sharing thus subverts the purpose of § 272(b)(3) by fostering an integrated corporate culture while maintaining only a minimal appearance of separate companies.

Qwest counters that a transfer of employees between affiliated companies is only to be expected and that Qwest currently does not have any employees who are loaned by one affiliate to another. Specifically with respect to the sharing of confidential information, Qwest also claims that it has instituted sufficient safeguards to ensure that no confidential information is disclosed between the BOC and its § 272 affiliate. Whether or not interaffiliate employee transfers or loans are common or currently occurring, the procedures and policies that Qwest allegedly has adopted do not, and will not, prevent improper sharing of company control or confidential information through the exchange of employees.

Qwest offers as evidence of those procedures and policies its employee "code of conduct" and procedures for interaffiliate employee transfers that are comparable to termination at one company and rehiring at the other.[34] Such procedures fail to address the problems. The transferred employees, like a new employee, must sign a letter

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[32] Skluzak Minnesota Affidavit ¶ 48(c)-(g).
[33] *Id.* ¶¶ 52-54.
[34] Schwartz Minnesota Direct Affidavit at 17.

agreeing to protect confidential information, but the employees are bound only to protect that information from third parties – nothing in the letter requires the employees to protect the confidential information of one Qwest affiliate from disclosure to another Qwest affiliate.[35] Qwest's "code of conduct" does not even address this issue. The documents that Qwest produced thus provide no evidence of any restrictions on the sharing of confidential information between affiliates.

Qwest, moreover, concedes that it places no restrictions on the jobs or positions that a former employee of one affiliate can hold with another affiliate.[36] As a result, nothing prevents an employee with knowledge of confidential information gained at one Qwest Company from transferring to a position with an affiliate where the employee can use that knowledge to the benefit of the affiliate. A BOC employee that is a wholesale account representative for long distance carriers, for example, would have corresponding, competitively sensitive knowledge of both the BOC's network and the services (including type, amount, and location) ordered by its carrier customers. Yet, that employee could transfer to a position with the 272 affiliate in which the employee could make use of his or her knowledge to the § 272 affiliate's competitive advantage.

Qwest also claims to have adopted policies on loaned employees, but those policies have yet to be developed beyond a nebulous concept.[37] Such policies cannot be considered as a viable or effective constraint on the ability of the BOC and its § 272

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[35] Minnesota Hearing Transcript at 218-21 (Qwest Brunsting); *see* Brunsting Minnesota Direct Affidavit at Ex. JLB 272.9.
[36] Minnesota Hearing Transcript at 125 (Qwest Schwartz); *see* Schwartz Minnesota Direct Affidavit at Ex. MES 272.15.
[37] Minnesota Hearing Transcript at 128-31 (Qwest Schwartz).

affiliate to share control and confidential information through employees "loaned" from one to the other.[38]

Qwest's past transfer and sharing of employees demonstrates that the employees of the BOC and § 272 affiliate are not truly independent. Qwest's policies and procedures with respect to current and future interaffiliate employee transfers and loans further demonstrate that Qwest does not have sufficient safeguards in place to ensure that confidential information and company control are not shared between the BOC and the § 272 affiliate. Accordingly, the Commission should conclude that Qwest has failed to demonstrate compliance or likelihood of compliance with § 272(b)(3).

D. Section 272(b)(5) – Arm's Length Transactions

Section 272(b)(5) states that the § 272 affiliate "shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection."[39] The FCC, in its *Accounting Safeguards Order*[40] and *Non-Accounting Safeguards Order*,[41] has promulgated rules and requirements that must be followed to demonstrate compliance with § 272(b)(5), including the requirement that all transactions be posted to the Internet within 10 days of the transaction on the company's home page. "[T]he description of the asset or service and the terms and conditions of the transactions should be sufficiently

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[38] For example, Qwest's "loan policy" would still allow for the loaning of an employee who works less than 100% of the time for the 272 affiliate, as well as other methods to circumvent the confines of its own policy. *See* Skluzak Minnesota Affidavit ¶ 54 (i - j).

[39] 47 U.S.C. § 272(b)(5).

[40] *Accounting Safeguards Order*, ¶¶ 112-166. The relevant paragraph regarding posting of transactions is paragraph 122. AT&T generally has not contested the prices paid for services, except to note that they appear excessive to the point that no non-affiliated third party would avail themselves of the agreements between the BOC and § 272 affiliate. Instead of allowing subsidization by below-cost pricing, it appears that one company is effectively being subsidized by above market cost pricing. *See* Skluzak Minnesota Affidavit ¶ 109(a) and (b); 120; 47 U.S.C. § 254(k).

[41] Non-Accounting Safeguards Order, ¶¶ 191-194.

detailed to allow [the FCC] to evaluate any compliance with our accounting rules."[42] The FCC has further observed that failure to totally disclose the details of the transactions between a BOC and its § 272 affiliate "deprives unaffiliated parties of the information necessary to take advantage of the same rates, terms and conditions enjoyed by the BOC's § 272 affiliate."[43] The FCC has further enhanced its disclosure requirements in subsequent orders evaluating BOC applications.[44]

As an initial matter, Qwest has been under an obligation to disclose transactions since February 8, 1996, and post transactions since August 12, 1997.[45] Qwest did not activate its website until September 28, 1998.[46] Therefore, Qwest waited over a year to post any transactions to the 272 website, although it knew of its obligations since the release of the order.[47] Qwest has not rebutted such evidence. Thus, there is a clear violation of the § 272(b)(5) requirements and contrary evidence to Qwest's oft-repeated claims of an unblemished record of § 272 compliance since the passage of the Act.

Cory Skluzak on behalf of AT&T has described Qwest's failure to disclose sufficient information in its postings after January 1, 2000, and has itemized a significant number of instances of Qwest's failure to engage in "arm's length" transactions and to post transactions within 10 days of the transaction.[48] Qwest nevertheless claims that its pricing and posting methodology is consistent with FCC precedent, specifically the

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[42] Accounting Safeguards Order, ¶ 122.
[43] BellSouth Louisiana II Order, ¶ 335.
[44] Ameritech Michigan Order, ¶¶ 367-369; BellSouth Louisiana II Order, ¶¶ 335-37.
[45] Skluzak Minnesota Affidavit ¶¶ 57 (n. 64)-58.
[46] *Id.*
[47] Multistate Transcript for June 8, 2001 at 46.
[48] Skluzak Minnesota Affidavit ¶¶ 66 (d-e), 67 (containing an exhaustive list). After January 1, 2000, specific "billed amounts" were no longer posted to the website. *Id.* ¶ 72. AT&T thus was unable to determine if Qwest was in compliance with the FCC's accounting rules without viewing information Qwest now considered confidential and available for inspection only on-site and after executing a protective agreement.

FCC's approval of postings by Southwestern Bell Telephone Company ("SBC") in the SBC Texas 271 proceeding. Qwest dismisses its failure to timely post transactions as predating its designation of QCC as its § 272 affiliate in March 2001, and contends that its decision to minimize posting detail after January 1, 2000, is expressly sanctioned by the FCC in the SBC Texas 271 order. Once again, Qwest's narrow and formalistic interpretation of its legal obligations demonstrates its fundamental unwillingness to comply with those obligations.

AT&T and Qwest disagree on the date when QCC became Qwest's § 272 affiliate. AT&T's position is that QCC took on that role with the merger of U S WEST and Qwest (or, at the latest, on January 1, 2001, if not in September 2000),[49] while Qwest maintains that QCC replaced Qwest LD on March 26, 2001. Qwest maintains this stance despite unrebutted evidence to the contrary from one of its own attorneys.[50] The date is critical to a determination of whether Qwest was in compliance with § 272(b)(5) during the last half of 2000 and the first quarter of 2001,[51] but the dispute threatens to overshadow the larger issue of *how* Qwest proposes to demonstrate compliance with § 272. Qwest purports to have designated QCC as the § 272 affiliate only *after* Qwest has retroactively documented affiliate transactions and posted those transactions to a new website. Qwest thus seeks to manipulate its legal obligations to fit the facts it has created. Similarly, Qwest apparently breaks down a single agreement into multiple transactions, as a means of avoiding pricing requirements that otherwise would have

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[49] Skluzak Minnesota Affidavit ¶¶ 110-11.

[50] *Id.* at 112. On September 15, 2000, a Qwest attorney wrote, "Qwest is in the process of developing a transition plan for another subsidiary to become § 272 compliant."

[51] Qwest does not dispute that QCC did not post *any* transactions for the period July 2000-April 2001 or that not one work order for services provided by QC to QCC was posted to the Internet prior to March 27, 2001. Regardless of § 272 requirements, Qwest had an existing obligation to comply with the FCC's accounting rules.

applied.[52] Far from demonstrating Qwest's adherence to § 272(b)(5), such legerdemain shows only the lengths to which Qwest will go to claim, while effectively evading, compliance with its legal obligations.

The sufficiency of Qwest's transaction postings is yet another example of this approach. Prior to January 1, 2000, Qwest and its § 272 affiliate posted not only agreements, task orders, and work orders but the detail of services or items purchased under the work orders or task orders, but Qwest no longer posts such invoice-level detail and claims that such information is confidential.[53] Master agreements, work orders and task orders are no more than an offer to provide services or items at specific rates, terms and conditions. Without posting the detail of the actual transaction, the detail of the actual service or items purchased and the amount actually paid for the service or item actually received, no company can evaluate properly whether it would want the same service performed for it or purchase the same item. Nor can a company that nevertheless elects to take the same arrangement determine if it is receiving the same rates, terms and conditions without the detail, because the detail reflects what was actually received and paid for, not what was offered. The detail, therefore, also permits detection of the failure to follow accounting rules and provides a means to detect discrimination. Qwest's refusal to post this detail thus undermines and thwarts the goals of the posting requirement.

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[52] *See* Selwyn Minnesota Affidavit ¶¶ 39-41.

[53] Skluzak Minnesota Affidavit ¶¶ 63 (the procedure prior to 2000), 70, 72. Qwest and Qwest LD appeared to have at least attempted to comply with the filing requirement during this period, although there were several instances where transactions were not posted timely.

Qwest purports to rely on the *Bell Atlantic New York Order*[54] and the *SBC Texas Order*[55] to justify its insufficient posting. Neither order is susceptible to Qwest's crabbed interpretation. The *Bell Atlantic New York Order* does not state that the BOC need not provide detail or volumes, but provides only that:

> Bell Atlantic discloses "the number and type of personnel assigned to the project, the level of expertise of such personnel, any special equipment used to provide the service, and the length of time required to complete the project."[56]

The FCC in this paragraph was talking about the descriptions on the website. This quote cannot be considered words of limitation because it does not speak of the obligation to post rates,[57] which even Qwest does not contest is an obligation.

The *SBC Texas Order* similarly does not state that the BOC need not post the detail or volume of transactions. The FCC merely stated that it found that the postings, on the whole, were sufficiently detailed."[58] This language alone cannot be used to justify not posting the detail of transactions under the work orders or task orders. Qwest's alleged confidentiality concerns also lack merit, particularly in light of Qwest's past practice of having posted this information publicly and the recent FCC order requiring

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[54] Application of Bell Atlantic New York for Provision of In-Region, InterLATA Services in New York State, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999), ¶ 413; ("Bell Atlantic New York Order").

[55] Application of SBC Communications, Inc., et al. for Provision of In-Region, InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (rel. June 30, 2000), ¶ 403; ("SBC Texas Order").

[56] Bell Atlantic New York Order, ¶ 413, quoting the Bell South Louisiana II Order, ¶ 337.

[57] See Ameritech Michigan Order, ¶¶ 368-69.

[58] SBC Texas Order, ¶ 405.

public disclosure of such information as part of the biennial audit conducted pursuant to § 272(d).[59]

Qwest must timely post transactions between the BOC and the § 272 affiliate to the web site in the same level of detail as Qwest formerly posted such transactions before January 1, 2000, to comply with § 272(b)(5) and FCC orders. Qwest currently refuses to do so. Qwest has also failed to make timely postings in the past and has devoted its efforts to avoiding, rather than complying with, applicable requirements that the BOC and the § 272 affiliate deal with each other at "arm's length." Under these circumstances, the Commission should conclude that Qwest has failed to demonstrate compliance or the likelihood of compliance with § 272(b)(5).

E. Section 272(c)(1) -- Nondiscrimination

Section 272(c)(1) provides that a BOC when dealing with its § 272 affiliate, "may not discriminate between that . . . affiliate and any other entity in the provision or procurement of goods, services, and information, or in the establishment of standards."[60] The FCC has concluded that "the protection of § 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its § 272 affiliate."[61] More specifically, the FCC "construe[s] the term 'services' to encompass any service the BOC provides to its § 272 affiliate, including the development of new service offerings."[62]

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[59] Accounting Safeguards Under the Telecommunications Act of 1996; § 272(d) Biennial Audit Procedures, CC Docket No. 96-150, *Memorandum Opinion and Order*, FCC 01-1 (rel. January 10, 2002) (*Verizon 272 Confidentiality Order*); 47 U.S.C. § 272(d). This recent FCC order addresses Verizon Communications, Inc.'s request to keep certain information contained in its initial § 272(d) biennial audit report confidential and unavailable to third parties.

[60] 47 U.S.C. § 272(c)(1).

[61] Non-Accounting Safeguards Order ¶ 218.

[62] *Id.* ¶ 217.

Qwest's own evidence demonstrates that Qwest is not in compliance with these requirements. Qwest's witnesses have testified that the "BOC is committed to providing its services to all of its IXC customers, including the 272 affiliate, on a nondiscriminatory basis,"[63] but the evidence provided in support of that statement demonstrates just the opposite. When the 272 affiliate requests a service that the BOC has not previously provided, the BOC undertakes a business case analysis to determine whether to provide that service.[64] When an unaffiliated IXC requests such a service, however, the BOC performs no business case analysis but provides the requested service only if the service is currently being provided to the 272 affiliate.[65] Qwest thus will develop new service offerings in conjunction with its 272 affiliate but will not do so in conjunction with unaffiliated IXCs. Such discriminatory service development is a *prima facie* violation of § 272(c)(1) and the FCC's *Non-Accounting Safeguards Order*.

In addition, Qwest fails even to address several undertakings that the FCC has reviewed in considering a BOC's compliance with § 272(c)(1).[66] Cory Skluzak also has detailed several transactions in which the BOC has provided more favorable treatment to its affiliates than to nonaffiliated carriers, including a lack of timely billing and payments and the failure to charge interest on late payments.[67]

Particularly troubling is Qwest's use (or potential use) of affiliates to avoid the BOC's legal obligations. The BOC, for example, has been circumventing the non-discrimination safeguards by using a non-272 affiliate to develop improvements to the

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[63] Schwartz Minnesota Direct Affidavit at 26.
[64] *Id.* Exhibit MES 272.17 at 4-6; Minnesota Hearing Transcript at 134-35 (Qwest Schwartz).
[65] Schwartz Minnesota Direct Affidavit, Exhibit MES 272.17 at 7-8; Minnesota Hearing Transcript at 135-38 (Qwest Schwartz).
[66] Skluzak Minnesota Affidavit ¶ 140.
[67] *Id.* ¶¶ 130-39 & 41.

BOC's services provided to the 272 affiliate.[69] The BOC also leases dark fiber and transport services from QCC, but because QCC (not the BOC) owns those facilities, other carriers cannot obtain those same services at the same rates, terms, and conditions.[70] The BOC, moreover, has not represented that it will make the facilities it leases from its affiliate available to other carriers.[71] If the BOC does not make those facilities available to other carriers, the BOC could deny competitors' requests for unbundled network elements or other local exchange services that the BOC must provide under § 251 based on lack of facilities *owned by the BOC*, even though the BOC has access to facilities leased from its affiliate. Qwest thus is vesting ownership of network facilities in an affiliate with no obligations under § 251 to make them available to other carriers, at least in part to enable the BOC to avoid its obligation to make its network facilities available to competitors.

By shifting services and facilities among affiliates, the BOC and the § 272 affiliate can participate in joint planning, design and development and provide local exchange services free of the strictures of the nondiscrimination safeguards in sections 251 and 272.[71] Such manipulation is emblematic of Qwest's approach to § 272 – to circumvent legal requirements where possible and to undertake the bare minimum Qwest believes necessary to comply with the narrowest, most formalistic interpretation of the requirements that Qwest cannot avoid. Such an approach, as well as Qwest's failure to

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[69] *Id.* ¶ 133.
[70] Minnesota Hearing Transcript at 119-20 (Qwest Schwartz); *Id.* at 215-16 (Qwest Brunsting).
[71] *Id.* at 120-21 (Qwest Schwartz).
[71] Note that Qwest also shifts services up to Qwest Services Corporation, which is actually the parent of both Qwest and QCC, circumventing § 272 requirements. *See* Brunsting Minnesota Rebuttal Affidavit at 28; Sklarak Minnesota Affidavit ¶ 131, n. 127, and ¶ 156 wherein AT&T discusses Qwest's joint marketing of QCC's interLATA long-distance.

CONTINUATION

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comply even with that approach, demonstrates that Qwest has failed to prove that it complies, or is likely to comply, with § 272(c)(1).

F. Section 272(c)(2) – Compliance With Accounting Principles

Section 272(c)(2) requires the BOC to account for all transactions with the § 272 affiliate in accordance with accounting principles "designated or approved" by the FCC.[72] The FCC has held that the BOC must comply with the Part 32 affiliate transaction rules to satisfy § 272(c).[73] "GAAP is incorporated into the Commission's Uniform System of Accounts [Part 32] to the extent that regulatory considerations allow."[74] Furthermore, Part 32 states that the BOC's financial records shall be kept in accordance with GAAP to the extent permitted by Part 32.[75]

As was discussed above in the context of § 272(b)(2), Qwest has failed to follow the FCC's accounting rules and thus has failed to demonstrate compliance, or likelihood of compliance, with § 272(c)(2).

G. Section 272(d) – Biennial Audit

Section 272(d) establishes and governs the biennial audit that is conducted to determine compliance with § 272 after the FCC grants § 271 authority. Qwest asks the Commission to put substantial faith in this audit process as a means of ensuring that Qwest complies with § 272. The first biennial audit, however, will not be conducted until one year after Qwest has been granted § 271 authority. The earliest that Qwest could even apply for such authority in South Dakota would be some time this summer, and the earliest the FCC would grant such authority would be 90 days later. The initial audit thus

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[72] 47 U.S.C. § 272(c)(2).
[73] *Bell Atlantic New York Order* ¶ 415. 47 C.F.R. § 32.27.
[74] *BellSouth Louisiana II Order* ¶ 328, n. 1026 (citing 47 C.F.R. § 32.1); 47 C.F.R. § 32.12.
[75] 47 C.F.R. § 32.12.

will not be conducted before the fourth quarter of 2003, and the audit report likely would not be available for three to six months after the audit is conducted. The earliest that Qwest would file the results of the first biennial audit, therefore, would be some time in the first quarter of 2004 – over two years from now.[76]

The Commission and affected parties cannot hope to have an effective remedy for Qwest's noncompliance with § 272 if such noncompliance is not discovered until two years, or more, after it occurs. The biennial audit thus is not a substitute for ensuring that Qwest currently complies and likely will continue to comply with its obligations under § 272.

H. Section 272(e)(1) – Nondiscriminatory Access Services

Section 272 provides that a BOC "shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates."[77] The FCC has concluded that such a request "includes, but is not limited to, initial installation requests, subsequent requests for improvement, upgrades or modifications of service, or repair and maintenance of these services."[78] The FCC "also conclude[d] that the BOCs must make available to unaffiliated entitiesinformation regarding the service intervals in which the BOCs provide service to themselves or their affiliates."[79] In addition, "regardless of the procedures that a BOC

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[76] *See* Minnesota Hearing Transcript at 142-44 (Qwest Schwartz); *Id.* at 278-79 (AT&T Skluzak). Indeed, given the precedent of the filing of the first § 272(d) biennial audit report (that of Verizon – New York), even an estimate of the first quarter of 2004 for Qwest may be optimistic. Verizon began offering in-region, interLATA telecommunications services on or about January 1, 2000, but significant portions of its biennial audit still have not been released as of the end of January 2002. *See, Verizon 272 Confidentiality Order*, CC Docket No. 96-150, ¶ 4.

[77] 47 U.S.C. § 272(e)(1).

[78] Non-Accounting Safeguards Order ¶ 239.

[79] *Id.* ¶ 242.

employs to process service orders from unaffiliated entities, it must be able to demonstrate that those procedures meet the statutory standard."[80]

Qwest has not even attempted to provide the information required by the Act and the FCC to demonstrate that the BOC is providing, and will continue to provide, nondiscriminatory telephone exchange access to its 272 affiliate and unaffiliated long distance carriers. QCC, as the fourth largest long distance carrier in the country, currently obtains access services from the BOC, but Qwest has not offered any evidence to demonstrate that the BOC provides those services to the § 272 affiliate within a period no longer than the period that the BOC provides the same or comparable services to unaffiliated carriers.[81] Nor has Qwest provided any evidence on the procedures that the BOC will use to process orders from its 272 affiliate and unaffiliated carriers other than the otherwise unsupported statement that "[t]he BOC's sales representatives will process orders in a nondiscriminatory manner."[82]

Qwest is the sole source of this information. As the FCC has observed, "[t]he statute imposes a specific performance standard on the BOCs in § 272(e)(1), and we conclude that, absent Commission action, the information necessary to detect violations of this requirement will be unavailable to unaffiliated entities."[83] Qwest has also acknowledged that, as the applicant in this Commission process, Qwest bears the burden to prove that it is complying, and will comply, with § 272 and applicable FCC orders.[84]

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[80] *Id.* ¶ 241.
[81] Minnesota Hearing Transcript at 133-34 (Qwest Schwartz); *Id.* at 223-25 (Qwest Brunsting).
[82] Schwartz Minnesota Affidavit at 31-32.
[83] *Non-Accounting Safeguards Order* ¶ 242. *Also see, Verizon 272 Confidentiality Order*, CC Docket No. 96-150, ¶ 8, n. 23 ("Evaluating compliance with the § 272(e) nondiscrimination safeguards requires, however, a comparison of the results for unaffiliated carriers with the results for Verizon's own operations. Without knowing the results for Verizon's own operations, parties simply cannot make a useful comparison.")
[84] *See* Minnesota Hearing Transcript at 393-94 (Qwest Munn).

Qwest has produced no evidence, much less sufficient evidence, to carry its burden with respect to compliance with § 272(e)(1). Accordingly, the Commission should find that Qwest is not in compliance with this statutory requirement.

III. CONCLUSION

Section 272 is not an insignificant or meaningless obstacle to Qwest's ability to provide interLATA services. Section 272 represents Congress' effort to ensure that Qwest does not leverage its local exchange market power in the long distance market. Qwest disagrees and asks the Commission to endorse Qwest's approach of minimizing, manipulating, and if necessary ignoring, the requirements of § 272. The Commission should refuse to do so if the Commission is committed to continuing to foster the development of local exchange competition and to preserve the existing competitiveness of the long distance market in South Dakota.

The Commission, therefore, should conclude that Qwest has failed to demonstrate that it is, or likely will be, in compliance with § 272.

The Commission should further conclude that Qwest cannot satisfy its burden of proof on compliance with § 272 until an independent third party has verified that sufficient and effective accounting and non-accounting safeguards are in place and functioning and Qwest has adequately addressed the nondiscrimination and other issues discussed above. [85]

[85] See *id.* at 280-281 & 283-285 (AT&T Skluzak) for a more detailed presentation of this request.

Respectfully submitted this 18th day of March 2002.

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Exhibit A

OAH Docket No. 7-2500-14487-2
PUC Docket No. P-421/CI-01-1372

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of a Commission Investigation Into Qwest's Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272)

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND RECOMMENDATIONS

The above-entitled matter came before Administrative Law Judge (ALJ) Richard C. Luis for evidentiary hearing on January 7, 2002 and January 8, 2002, in the Small Hearing Room of the Minnesota Public Utilities Commission (MPUC), Suite 350, Metro Square, 121 Seventh Place East, St. Paul, Minnesota.

John Munn, Attorney at Law, Qwest Corporation (QC or Qwest BOC), 1801 California Street, Suite 3800, Denver, Colorado, 80202; and Jason Topp, Attorney at Law, Qwest Corporation, 200 South Fifth Street, Room 395, Minneapolis, Minnesota, 55402, appeared on behalf of Qwest Corporation and Qwest Communications Corporation (QCC or the 272 Affiliate).

Priti R. Patel, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103-2106, appeared on behalf of the Minnesota Department of Commerce.

Greg Kopta, Attorney at Law, Davis, Wright, Tremaine, L.L.P., 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington, 98101, appeared on behalf of ATT.

Mary Crowson, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Residential Utilities Division of the Office of Attorney General.

Karen Hammel, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, and John Lindell, Public Utilities Analyst, Suite 350 Metro Square, 121 Seventh Place East, St. Paul, Minnesota 55101, appeared in a neutral capacity on behalf of the staff of the Minnesota Public Utilities Commission.

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 or replies 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 ALJ's recommendation who request such argument. Such request must accompany the filed exceptions or replies, 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 or replies, 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, reject or modify the Administrative Law Judge's recommendations and that said recommendations have no legal effect unless expressly adopted by the Commission as a final order.

STATEMENT OF ISSUES

The issues in this matter concern whether Qwest has demonstrated by a preponderance of the evidence that QCC (the 272 Affiliate) meets the requirements of Section 272 to enable Qwest Corporation to meet the requirement of Section 271(d)(3)(B) as part of QC's 271 application. Specifically, the issues are whether QCC has shown that it will operate independently from the Qwest BOC, in accordance with Section 272(b)(1); whether it will maintain books, records, and accounts separate from those maintained by the Qwest BOC, in accordance with Section 272(b)(2); that it will have separate officers, directors, and employees from the Qwest BOC, in accordance with Section 272(b)(3); that it will not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Qwest BOC, in accordance with Section 272(b)(4); that it will conduct all transactions with the Qwest BOC of which it is an affiliate on an arm's length basis, with any such transactions reduced to writing and available for public inspection, in accordance with Section 272(b)(5); that it and the Qwest BOC will comply with the joint marketing requirements set forth in the FCC's 1996 *Non-Accounting Safeguards Order* and Section 272(g); and that the Qwest BOC will not discriminate between the 272 Affiliate and any other entity

in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards, in accordance with Section 272(c).

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. PROCEDURAL BACKGROUND

1. On September 11, 2001, the Minnesota Public Utilities Commission (Minnesota PUC) issued a Notice and Order for Hearing in In the Matter of an Investigation Regarding Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 with Respect to the Provision of InterLATA Services Originating in Minnesota, docket no. P-421/CI-96-1114.

2. In the Notice and Order for Hearing, the Minnesota PUC stated that a thorough and orderly development of certain factual matters will be required in the above-mentioned docket and therefore, referred the matter to the Office of Administrative Hearing (OAH) for contested case proceedings.

3. In the Notice and Order for Hearing, the Minnesota PUC indicated that it seeks a Report from the OAH making proposed findings and recommendations on issues relevant to Qwest's compliance with Section 271 of the Telecommunications Act of 1996 (Act), one of which is Qwest's compliance with Section 272 of the Act.[1]

4. This matter was divided into six individual dockets involving issues arising from different aspects of the Act's standards for 271 approval. This docket addresses compliance with Section 272.

II. STATUTORY FRAMEWORK -- JURISDICTION AND AUTHORITY

5. The Telecommunications Act of 1996 conditions entry by a Bell Operating Company (BOC) into the provision of in-region interLATA ("long distance") services on compliance with certain provisions of section 271.[2] BOCs must apply to the Federal Communications Commission (FCC) for authorization to provide interLATA services originating in any in-region state.[3] The FCC must issue a written determination on each application no later than 90 days after receiving such application.[4]

6. Section 271 requires the FCC to make various findings before approving BOC entry. In order for the FCC to approve a BOC's application to provide in-region,

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[1] As used in this Report, "Qwest" refers to the overall corporate enterprise of Qwest Communications International, Inc. Where affiliated companies are mentioned, each affiliate will be individually identified.
[2] 47 U.S.C. §271.
[3] *Id.* at § 271(d)(1).
[4] *Id.* at § 271(d)(3).

interLATA services, a BOC must first demonstrate, with respect to each state for which it seeks authorization, that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[5] In order to obtain authorization under section 271, the BOC must also show that: (1) it has "fully implemented the competitive checklist" contained in section 271(c)(2)(B);[6] (2) the requested authorization will be carried out in accordance with the requirements of section 272;[7] and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."[8] The statute specifies that, unless the FCC finds that these criteria have been satisfied, the FCC "shall not approve" the requested authorization.[9]

7. The FCC set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order.*[10] Together, these safeguards discourage and facilitate the detection of improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.[11] In addition, the safeguards are designed to ensure that BOCs do not discriminate in favor of their section 272 affiliates.[12]

8. The FCC must consult with the MPUC to verify whether Qwest has opened its local markets in Minnesota to competition in compliance with the requirements of Section 271(c).[13]

9. The Minnesota PUC has responsibility under Section 271(d)(2)(B) of the Act to advise the FCC whether to grant or deny Qwest's request to provide interLATA service within Minnesota.[14]

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[5] *Id.* at § 271(d)(3)(A).
[6] *Id.* at §§ 271(c)(2)(B), 271(d)(3)(A)(i).
[7] 47 U.S.C. § 272. *See Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), petition for review pending sub nom. SBC Communications v. FCC, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*).
[8] 47 U.S.C. § 271(d)(3)(C).
[9] *Id.* § 271(d)(3); *see SBC Communications, Inc. v. FCC*, 138 F.3d 410, 413, 416 (D.C. Cir. 1998).
[10] *See Accounting Safeguards Order* and *Non-Accounting Safeguards Order, supra.*
[11] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914; *Accounting Safeguards Order*, 11 FCC Rcd at 17550; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20725 (1997) (*Ameritech Michigan Order*).
[12] *Non-Accounting Safeguards Order*, at paras. 15-16; *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346.
[13] 47 U.S.C. § 271(d)(2)(B).
[14] *Id.*

10. The FCC has defined a state commission's primary goal as development of "a comprehensive factual record concerning BOC compliance with the requirements of section 271 and the status of local competition. . ."[15] In prior orders, the FCC has stated that it will "consider carefully state determinations of fact that are supported by a detailed and extensive record."[16]

III. BACKGROUND

11. In early October 2001, Qwest Corporation (the Qwest BOC) filed its petition with the Minnesota PUC seeking a finding of compliance with Section 272 of the Act. In its petition, the Qwest BOC identified Qwest Communications Corporation (QCC or the 272 Affiliate) as the Qwest entity that will provide in-region interLATA services if Qwest is given Section 271 authority by the FCC.

12. In support of its petition, Qwest filed the Affidavits of Judith Brunsting and Marie Schwartz.[17] Ms. Brunsting is the Senior Director of 272 Business Development in the 272 Affiliate.[18] The purpose of Ms. Brunsting's testimony is to provide the Minnesota PUC with information relating to the progress the 272 Affiliate has made with regard to Section 272 compliance and to demonstrate that upon Qwest's receipt of in-region, interLATA authority in Minnesota, the 272 Affiliate will comply with Section 272.[19]

13. Ms. Schwartz is a Director in FCC Regulatory Accounting at the Qwest BOC and is responsible for ensuring that the Qwest BOC's regulatory accounting practices comply with Section 272.[20] The purpose of her testimony is to demonstrate that the Qwest BOC is prepared to satisfy all of the relevant requirements of Section 272 of the Act, and related FCC rules, following the receipt of in-region interLATA authority in Minnesota by the BOC's 272 Affiliate.[21]

14. The Department of Commerce responded to Qwest's petition and other filings through the testimony of Dr. Lee L. Selwyn.[22] Dr. Selwyn is President of Economics and Technology, Inc. (ETI), a research and consulting firm specializing in telecommunications and public utility regulation and public policy, and Dr. Selwyn has presented testimony before the Minnesota PUC on a number of occasions dating back

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[15] *Ameritech Michigan Order*, at para. 30.
[16] *Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana* Memorandum Opinion and Order, 13 FCC Rcd 20599, para. 18 (1998) (*BellSouth Louisiana II Order*)
[17] Exs. 1-4 (Public and non-public versions of Schwartz Affidavit; Schwartz Rebuttal Affidavit and Schwartz Errata); 12-16 (Public and non-public versions of Brunsting Affidavit; Brunsting Rebuttal, Brunsting Errata).
[18] Ex. 13, p. 1.
[19] *Id.*
[20] Ex. 2, p. 1
[21] *Id.*
[22] Exs. 35 and 36 (Public and non-public versions of Selwyn Affidavit).

to the mid-1970s.[23]

15. ATT responded to Qwest's petition and other filings through the testimony of Cory Skluzak.[24] Mr. Skluzak is employed by ATT as a policy analyst in the Access Management Group.[25]

16. In response to the filings by the Department of Commerce and ATT, Qwest filed additional affidavits of Ms. Brunsting and Ms. Schwartz and introduced the testimony of Dr. William Taylor.[26] Dr. Taylor is the Senior Vice President of National Economics Research Associates, Inc. (NERA). Dr. Taylor's testimony disputed economic and policy issues raised by Dr. Selwyn.[27]

17. Qwest, the Department and ATT participated in the hearing. Witnesses for the various parties were allowed to present short summaries of their testimony. Counsel for parties were given opportunity to cross-examine the witnesses. Counsel for parties were given the opportunity to conduct redirect of their respective witnesses, if necessary.

18. During the hearing, Dr. Selwyn was given an opportunity to respond orally to the written testimony of Dr. Taylor.[28] Qwest was provided an opportunity to file surrebuttal reply testimony by Dr. Taylor after the hearing. That surrebuttal reply testimony of Dr. Taylor was submitted on January 16, 2002.[29] Dr. Taylor's surrebuttal reply testimony is admitted to the record as Exhibit 39.

IV. QWEST'S "FAMILY OF COMPANIES."

19. Qwest consists of parent and subsidiary corporations, dividing areas of business or corporate functions among them.[30] Qwest Communications International, Inc. (QCI), is the ultimate parent corporation. One of QCI's wholly-owned subsidiaries is the Qwest Services Corporation (QSC). Two of QSC's wholly-owned subsidiaries are the Qwest Corporation (QC or the Qwest BOC) and Qwest Communications Corporation (QCC or the 272 Affiliate). The Qwest BOC provides local telephone service across a 14-state region as a Regional Bell Operating Company (RBOC). QCC is a facilities-based provider of interLATA services (long distance). It currently provides long distance services outside the RBOC's 14-state region.

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[23] Ex. 35, Attachment 1
[24] Exs. 22 and 23 (Public and non-public versions of Skluzak Affidavit).
[25] Ex. 22, p. 1.
[26] Exs. 3, 14, 15 and 21.
[27] Ex. 21, p. 2 (Affidavit of Taylor).
[28] Hearing Transcript, Vol. 2, pp. 350-400.
[29] Ex. 39 (Reply Affidavit of Taylor).
[30] Where reference is made to the overall corporate organization of parents and subsidiaries in this Report, the expression "family of companies" or "Qwest" will be used.

V. APPLICATION OF SECTION 272.

20. Since Qwest owns an RBOC, Qwest can only originate interLATA telecommunications services in the RBOC's region through a separate affiliate that meets the standards set out in Section 272.[31] The separate affiliate requirement is incorporated into the Section 271 application process.[32] The FCC states that "compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field."[33] Failure to comply with the Section 272 requirements is an independent ground for denial of a Section 271 application.[34] While the obligation to comply with Section 272 does not start before the FCC grants interLATA authority in the RBOC's region, Qwest asserts that its 272 Affiliate currently meets the applicable standards.

21. Circumstances under which a separate affiliate is required are set out in subdivision (a) of Section 272. The specific requirements that the affiliate must meet are set out in subdivisions (b) through (g). Broadly speaking, the requirements set out a framework for permissible contacts and conduct between the BOC and an affiliated company that will provide interLATA telecommunications services in the same region where the BOC is the incumbent local exchange carrier.

22. Structural and transactional requirements are set out in subdivision (b) of Section 272. Nondiscrimination safeguards are set out in subdivision (c). The standards to be met in a biennial audit are set out in subdivision (d). Prohibitions against discrimination in the fulfillment of certain requests made by unaffiliated providers are set out in subdivision (e). Subdivision (f) has a sunset provision that is inapplicable here. The standards to be met when joint marketing is conducted between the BOC and its 272 affiliate are set out in subdivision (g). Subdivision (h) provided a one-year transition period from February 8, 1996, for any BOC to cease offering existing services that had become prohibited by the Act. Each of the Section 272 standards at issue in this matter will be discussed individually.

VI. SECTION 272(B)(1) -- THE "OPERATE INDEPENDENTLY" REQUIREMENT.

23. Section 272(b)(1) requires that the separate affiliate "shall operate independently from the Bell operating company." In its *Non-Accounting Safeguards Order*, the FCC indicated that "operating independently" does not have a common

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[31] 47 U.S.C. §272(a)(2)(B).
[32] 47 U.S.C. §271(d)(3)(B).
[33] *Application by SBC Communications Inc., Southwestern Bell Tel. Co., 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*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18374, para. 395 (2000) (*SWBT Texas Order*) (citing *Ameritech Michigan Order*, 12 FCC Rcd at 20725; *Bell Atlantic New York Order*, 15 FCC Rcd at 4153, para. 402).
[34] Id., citing *Ameritech Michigan Order*.

sense meaning when used in this context.[35] The FCC indicated that the restriction meant that there could be:

> (1) no joint BOC-affiliate ownership of switching and transmission facilities;
>
> (2) no joint ownership of the land and buildings on which such facilities are located;
>
> (3) no provision by the BOC (or other non-section 272 affiliate) of operation, installation, or maintenance services with respect to the 272 affiliate's facilities; and
>
> (4) no provision by the section 272 affiliate of operation, installation or maintenance services with respect to the BOC's facilities.[36]

24. When rules implementing the statute were adopted, the FCC was urged to adopt a wider interpretation of the requirement for the BOC and 272 affiliate to operate independently. The FCC responded:

> We decline to read the "operate independently" requirement to impose a blanket prohibition on joint ownership of property by a BOC and a section 272 affiliate. Rather, we limit the restriction to joint ownership of transmission and switching facilities and the land and buildings where those facilities are located. We conclude that the prohibition we have adopted should ensure that the section 272 affiliate's competitors gain nondiscriminatory access to those transmission and switching facilities that both section 272 affiliates and their competitors may be unable to obtain from other sources.[37]

25. In addition to requiring that a BOC and its Section 272 affiliate do not share ownership of switching and transmission facilities, the BOC and 272 affiliate are also prohibited from contracting with each other for one entity to provide operating, installation, or maintenance services with respect to the other's facilities. The FCC has stated:

> As stated above, we believe that a prohibition on joint ownership of transmission and switching facilities is necessary to ensure that a BOC complies with the nondiscrimination requirements of section 272. Consistent with that approach, we further interpret the term "operate independently" to bar a BOC from contracting with a section 272 affiliate to obtain operating, installation, or maintenance functions associated with the

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[35] *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *Third Order on Reconsideration*, released October 1, 1999, 14 FCC Rcd. 16299, 16305 ("*Third Order on Reconsideration*").
[36] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21981-21982.
[37] *Id.* at 21983.

BOC's facilities. Allowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors.[38]

26. Qwest represents that section 272(b) of the Act prohibits a 272 affiliate from jointly owning telecommunications, transmissions and switching facilities or the land or the building on which the facilities are located and states that the 272 Affiliate "will not jointly own any transmission and switching facilities in the future."[39]

27. Qwest had planned to propose Qwest Long Distance (QLD, formerly known as US West Long Distance) to be its 272 Affiliate.[40] QLD was a long distance reseller, not a facilities-based carrier.[41] In January 2001, Qwest decided that its existing, out-of-region interLATA carrier, QCC, would be its 272 Affiliate for in-region interLATA services.[42] QCC currently owns some network facilities and the Qwest BOC will be transferring other facilities to QCC. Such facilities transfers are being monitored on a quarterly basis.[43]

28. The Department of Commerce requested specific information as to what transmission and switching facilities will be used by QCC to provide interLATA long distance services and who owns those facilities. Information regarding the terms of use, routing of Minnesota interLATA calls, nature of the traffic routed by those facilities, and documentation of collocation for switching facilities was also requested.[44]

29. Qwest states that it is "still in the process of completing its network strategy."[45] Qwest has not provided documentary evidence that supports its assertion that the Qwest BOC and the 272 Affiliate will not jointly own transmission and switching facilities in the future. Qwest asserts that no such documentation exists.[46] There has been no description of Qwest's asset deployment plan within its network strategy.[47] Qwest has stated that the Qwest BOC and the 272 Affiliate "will not jointly own any network facilities or share OI&M functions."[48]

30. Qwest has not met its burden of proof that the Qwest BOC and 272 Affiliate will "operate independently" because Qwest has not demonstrated by a preponderance of the evidence that the entities will not jointly own any transmission and switching facilities or the land and buildings where those facilities are located if and

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[38] *Non-Accounting Safeguards Order*, para. 163.
[39] Hearing Transcript Vol. 1, p. 204; Ex. 12, pp. 8-9.
[40] Ex. 1, p. 6; Hearing Transcript Vol. 1, p. 18.
[41] Ex. 1, p. 6.
[42] *Id.*
[43] Ex. 1, p. 12.
[44] Ex. 19 (Department IR No.15010 to Qwest).
[45] *Id.*
[46] Ex. 12, p. 207.
[47] *Id.*
[48] Ex. 12, pp. 8-9; Ex. 1, pp. 10-11, Ex. 3, pp. 6-7.

when granted authority to re-enter the interLATA market.

31. Qwest can meet its burden of proof that its 272 Affiliate will "operate independently" by completing an asset deployment inventory that shows Qwest BOC and the 272 Affiliate do not jointly own any transmission and switching facilities and the land and buildings where those facilities are located at the time when QCC is authorized to enter the interLATA market in the Qwest BOC service region.

VII. SECTION 272(B)(2) -- THE SEPARATE "BOOKS, RECORDS, AND ACCOUNTS" REQUIREMENT.

32. Section 272(b)(2) sets out the requirement that a separate affiliate:

> shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate ....

33. In the *Accounting Safeguards Order*, the FCC determined that Section 272 affiliates must maintain their books, records, and accounts in accordance with Generally Accepted Accounting Principles ("GAAP").[49]

34. Qwest has indicated that both the Qwest BOC and the 272 Affiliate follow GAAP, as adopted by the FCC in Docket 96-150; maintain separate charts of accounts; maintain separate sets of financial statements; maintain expenditure controls; maintain separate ledger systems; maintain separate software systems on hardware located at separate facilities; have separate federal tax identification numbers; pay taxes and fees to various taxing and regulatory agencies separate from one another; and separately report to state and federal regulatory agencies.[50]

35. QCC's general ledger software is the PeopleSoft FRED system and that software is operated on computers located in Arlington, Virginia.[51] The Qwest BOC's general ledger software is the PeopleSoft PROFIT system and that software is operated on computers located in Denver, Colorado.[52]

36. The Qwest BOC has commissioned a report by Arthur Andersen, L.L.P., that found "no material departures from GAAP."[53] The Qwest BOC files biennial reports with the FCC using the Automated Reporting Management Information System (ARMIS).[54] Qwest failed to account properly for transactions occurring in 2000.[55] ATT maintains that this failure constitutes a basis for denying Qwest's application under Section 271. This failure was attributed to the merger transition between US West and

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[49] *Accounting Safeguards Order*, 11 FCC Rcd. at 17617-17618.
[50] Ex. 12, pp. 10-13; Ex. 1, pp. 12-15.
[51] Ex. 12, p. 12.
[52] *Id.*
[53] Ex. 1, p. 14.
[54] *Id.*
[55] *Id.*, p. 15.

Qwest.[56] Transactions from 2000 were identified between the Qwest BOC and QCC in a special accounting process conducted in 2001 and those transactions were billed with interest.[57]

37. The FCC requires providers to account for transactions using GAAP. In 271 applications, the past failure of a provider to comply with GAAP is not conclusive of future noncompliance.[58] Qwest is not obligated to meet the requirements of Section 272 before the grant of interLATA authority. Qwest must show that it will comply once that authority has been granted. Qwest has described controls to assure ongoing compliance with GAAP for future transactions. Qwest has demonstrated by a preponderance of the evidence that the Qwest BOC and the 272 Affiliate will comply with Section 272(b)(2).

VIII. SECTION 272(B)(3) -- THE "SEPARATE EMPLOYEES" REQUIREMENT.

38. Section 272(b)(3) sets forth the third structural and transactional requirement that :

> The separate affiliate required by this section--
>
> . . .
>
> (3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;[59]

39. Qwest indicated that the Qwest BOC and the 272 Affiliate each do not have any officers or directors who are officers, directors or employees of the other entity.[60] There are individuals who share officer and director functions between the 272 Affiliate and other non-Qwest BOC entities. For example, Joseph P. Nacchio is identified as the Chairman, Chief Executive Officer, and President of QCC.[61] Mr. Nacchio is CEO of Qwest Communications International (QCI), the parent company for the entire Qwest family of companies. The relationship between the officers, directors, and employees of the Qwest BOC and the 272 Affiliate includes:

(a) The Qwest BOC has employees, officers and directors on a payroll that is separate from the payroll for 272 Affiliate's employees, officers and directors.

(b) No director of the 272 Affiliate will also act as a director of the BOC as long as Section 272 remains in force.

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[56] *Id.*
[57] *Id.*
[58] *SWBT Texas Order*, para. 401.
[59] 47 U.S.C. §272(b)(3).
[60] Ex. 1, p. 16; Ex. 12, pp. 13-14.
[61] Ex. 12, JLB 272.7.

(c) Employees for the Qwest BOC, the 272 Affiliate and the Qwest Services Corporation (QSC) will wear different colored dots on their badges to identify their payroll employer.[62] The Qwest BOC employees wear blue dots, QCC employees wear red dots, and QSC employees wear yellow dots.[63] QSC provides legal services, public policy advice, and other services on a contract basis to both the Qwest BOC and the 272 Affiliate.

(d) The Qwest BOC and 272 Affiliate employees may occupy the same Qwest buildings and in some cases will be located on the same floors, but employees for the Qwest BOC, the 272 Affiliate and QSC will have nameplates with a color identifying their payroll employer.[64]

(e) While employees of the Qwest BOC and the 272 Affiliate will be on only one affiliate's payroll,[65] any employee of either of the two affiliates may be "loaned" to the other for up to four (4) months in a 12-month period.[66] Loaned employees would work full-time for the borrowing entity. Loaned employees will be under the supervision and authority of the borrowing entity, not the company issuing the employee's paycheck.[67] Loaned employees will continue to wear a badge with a color designating each employee's payroll employer.[68] While not currently occurring, such employee loans would be priced, identified, and made available to competing interexchange carriers (IXCs).[69]

(f) Employees of the Qwest BOC or the 272 Affilate may be assigned to perform "services" on behalf of the other entity under an affiliate agreement entered into between the two entities without those employees being considered to have been "loaned" to the other entity.

(g) Administrative services such as payroll,[70] human resources,[71] accounting and financial functions,[72] and computer systems[73] will be provided by the Qwest BOC or QSC to the 272 Affiliate. The Qwest BOC operates the internal computer system (Qwestnet) that provides access to shared corporate information and email.[74] The description of Qwestnet indicates that the 272 Affiliate's access to underlying data is restricted. There is no reciprocal

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[62] Ex. 12, p. 14; Ex. 1, p. 17.
[63] Transcript, Volume 1, p. 81.
[64] Ex. 35, Att. 2.3.
[65] Ex. 1, p. 16.
[66] Ex. 12, p.15.
[67] Ex. 35, Att. 2.14.
[68] Hearing Transcript Vol. 1, p. 95.
[69] Ex. 1, p. 82.
[70] Ex. 17 (Summary of Affiliate Transactions).
[71] Ex. 35, Att. 3.14.
[72] Ex. 12, p. 12.
[73] Ex. 35, Att. 3.15.
[74] *Id.*

statement indicating that employees from the Qwest BOC are restricted from accessing proprietary data of the 272 Affiliate.[75]

(h) Persons to be hired by Qwest are presented with an offer letter and attachment identifying terms of the employment relationship.[76] The offer letter contains a blank for filling in the particular entity to be the payroll employer.[77] The letter characterizes "Qwest" as the employer. The attachment describes the duties of the employee as running to "Qwest." Confidential information is described as information held by "Qwest" and not generally known to third parties.[78] There is no description of any obligation to maintain information confidential from any affiliate in the Qwest "family of companies."

(i) The Qwest BOC will provide billing and collection services on behalf of the 272 Affiliate,[79] and Qwest BOC customer service representatives will provide billing inquiry services for and on behalf of the 272 Affiliate.[80]

(k) Qwest has established policies for employees to follow when an employee terminates employment with one Qwest company and accepts employment with another Qwest company.[81]

(l) Employees of Qwest must review a Code of Conduct manual and sign a nondisclosure statement agreeing not to share nonpublic information with third parties.[82] The Code of Conduct manual states that confidential information can be used "for Qwest business only."[83] The Code of Conduct manual does not expressly state that information must be maintained as confidential between entities in the Qwest "family of companies." In its section entitled "Government Relations," the Code of Conduct states that:

> State and federal regulatory requirements govern the relationship and business transactions between the various affiliates of Qwest. These requirements cover:
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> * * *
>
> Information flow between entities ....[84]

No other portion of the Code of Conduct describes this "information flow." Employees are directed to contact Legal Affairs or Regulatory Accounting for

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[75] *Id.*
[76] Ex. 12, JLB 272.9.
[77] *Id.*
[78] Ex. 12, JLB 272.9, Attachment.
[79] Ex. 35, at Att. 2.2; see also *id.* at Att. 3.16.
[80] *Id.* at Att. 3.16.
[81] Ex. 12, p. 15.
[82] *Id.* JLB 272.9.
[83] Ex. 1, MES 272.14, p. 14.
[84] Ex. 1, MES 272.14, p. 21.

further information.[85] Legal Affairs, as Qwest is currently structured, is provided as a service to the Qwest BOC and QCC by QSC. Regulatory Accounting is part of the Qwest BOC.

40. Qwest's policy of contracting services between entities can result in a Qwest BOC employee working 50% of the day performing services for the Qwest BOC and the remaining 50% of the day performing services for the 272 Affiliate (QCC).[86] Similarly, a QCC employee could provide services to the Qwest BOC in the same manner. Contracting services does not change the formal employer of the employee and does not change the supervisory relationship governing the employee.

41. Qwest's contracting of services between the Qwest BOC and QCC is governed by Article 4 of the Master Services Agreement between these entities, which states:

> Qwest Corp [the BOC] hereby declares and agrees that it has engaged in an independent business and will perform its obligations under this Agreement as an independent contractor and not as the agent or employee of QCC [the 272 affiliate]; that Qwest Corp does not have the authority to act for QCC or to bind QCC in any respect whatsoever, or to incur any debts or liabilities in the name of or on behalf of QCC; that any persons provided by Qwest Corp shall solely be the employees or agents of Qwest Corp under its sole and exclusive direction and control. Qwest Corp and its employees or agents are not entitled to QCC's unemployment benefits as a result of performing under this Agreement . . . Qwest Corp shall indemnify and hold QCC harmless for any causes of action arising out of Qwest Corp's liability to its employees or agents.[87]

42. Qwest asserts that its Code of Conduct governs "information flow between entities" and that this ensures that confidential information is not shared.[88] The portion of the Code of Conduct cited merely states that, "The rules are often complex and may create special requirements for record keeping, reporting and regulatory approvals."[89] Employees are directed to "[c]ontact Legal Affairs or Regulatory Accounting for questions regarding the relationships or business dealings between Qwest affiliates."[90] This language is inadequate to inform any employee of QC or QCC what information is confidential and that such confidential information must not be shared across the BOC/272 Affiliate boundary.

43. Qwest has no policy (beyond the vague statement in the Code of

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[85] *Id.*
[86] *Id.* at 89.
[87] Ex. 18, Article 4.
[88] Exhibit 2, MES 272.15, at 21.
[89] *Id.*
[90] *Id.*

Conduct) to restrict the sharing of confidential information transmitted by e-mail. Qwest has not identified any process by which employees of Qwest can be accurately and immediately identified, including in the e-mail system, as to which employees work for which entity in the Qwest "family of companies."

44. Qwest has indicated that the sharing of confidential information between employees of the Qwest BOC and QCC would only be appropriate where that information was, "reduced to writing, priced according to the rules, the information was paid for, and it was provided to third parties."[91] Qwest intends to rely on the separation of employees to prevent sharing of confidential information rather than offer confidential information to third parties.

45. Qwest has proposed a color identifying system designed to indicate whether an employee is accessing information appropriately. But a "blue dot" employee (of the Qwest BOC) may be working in a "red" area (of QCC) by contract. That blue dot employee may be on loan to QCC. Or that blue dot employee may be in the red area improperly. Conversely, a "red dot" employee could be in the blue dot area under the same variety of circumstances. The colored dot on the employee's badge does nothing to clarify whether that employee's presence is appropriate since Qwest has proposed so many ways in which these employees will be working together. Similarly, Qwest has proposed situations where supervisory staff could be loaned or contracted for among the affiliates.

46. The mechanisms proposed by Qwest are inadequate to distinguish among employees of Qwest BOC, QCC, and QSC. The mechanisms go only so far as identify each individual employee as separate (based on payroll employer) from other employees. But the actual supervision of employees and handling of confidential information is proposed to be independent of the actual payroll employer of each employee. Qwest's proposal for handling confidential information held by employees who cross affiliate company boundaries is inadequate to meet the nondiscrimination standard. In addition, there is no description as to how information will be managed on the Qwestnet network. The payroll employer of email recipients is not readily identifiable. Qwest expects that employees moving from one affiliate to another in the Qwest family of companies will retain the same email address. There is no ongoing assurance that the recipient of the information will recognize that the information is confidential and act appropriately.

47. The failure to identify adequately the employer of each employee within the shared information technology system (Qwestnet and e-mail) renders the improper sharing of confidential information (intentional or inadvertent) nearly certain. Since Qwest is relying on the separation of employees to meet the nondiscrimination provision, the proposed information technology system process must actually separate the employees from the information. Failure to do so under these circumstances violates the requirement of Section 272(b)(3) that the 272 Affiliate have separate

[91] Hearing Transcript Vol.1, p. 80.

employees from the BOC.

48. Qwest has not demonstrated by a preponderance of the evidence that it has sufficient safeguards in place to prevent the improper communication of confidential information between the Qwest BOC and the 272 Affiliate.

49. Qwest's policy of lending BOC employees to the 272 Affiliate violates the requirement of Section 272(b)(3) that the separate affiliate have separate employees. The policy of loaning employees contradicts the Master Services Agreement and constitutes a provision of services under terms and conditions not available to unaffiliated interLATA providers since the employees are under the supervision of the borrowing entity. Continued existence of this policy results in Qwest not meeting its burden of proof that the Qwest BOC and QCC will maintain separate employees if and when it obtains authority to enter the interLATA market.

50. The Department of Commerce asserted that the "sharing" of employees by the Qwest BOC and QCC under the terms of the Master Services Agreement constitutes a failure to maintain "separate employees" as required by Section 272(b)(3). The contracting for services between affiliates is expressly permitted by the FCC, so long as the other requirements, such as non-discrimination and retention of supervisory responsibility, are met.[92]

51. The Department of Commerce asserted that QCC should be required to compensate the Qwest BOC for intangible benefits received when experienced employees transfer from the BOC to the 272 Affiliate. The Department of Commerce recommended that a fee be imposed on transfers akin to that adopted by the California PUC.[93] The California PUC adopted a 25% "employee transfer fee" to be applied against the annual salary of any Pacific Bell employee that is transferred to an affiliate.[94]

52. The Department of Commerce maintains that imposing compensation for such employee transfers is important to prevent the cross-subsidization of the 272 affiliate from the BOC. The argument is that the 272 affiliate gains high level, experienced professionals from the BOC, while the BOC receives no comparably valuable employees or any compensation in return.[95] Qwest pointed out that no interLATA exchange carrier (IXC) compensates any former employer for the training received or added value of that employee's experience.

53. The obligation to maintain separate employees does not prevent employees from changing employment between BOC-affiliated companies. There is nothing in the separate employee requirement that would require compensation for employees moving between affiliated companies. The California PUC decision appears to address concerns of appropriate pricing of tariffed services, not the requirements of

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[92] *Third Order on Reconsideration*, para. 18.
[93] California Public Utilities Commission, D.87-12-067, 27 CPUC2d 1, 136.
[94] *Id.*
[95] *Id.*

Section 272. Requiring an employee transfer fee would impose a cost on the 272 Affiliate that is not required of competing IXCs.

54. There is legitimate concern over employee transfers as a means of evading the separate employee requirement. Requiring Qwest to maintain logs of employees hired between affiliates, with sufficient detail to determine the job titles of those employees and their length of service is a means of detecting such evasion. Such a listing is required to be developed during the biennial audit required by Section 272(d).[96] Maintaining that record on an ongoing basis can provide a means of self-policing by the Qwest BOC and the 272 Affiliate. As with the audit procedure, the transfers should be recorded between all Qwest affiliate companies. Similarly, requiring all such transfers to comply with all of the formalities of new hires is another means of ensuring that the transfers do not avoid other requirements of Section 272.[97]

55. The management structure of QCC (the 272 Affiliate) is divided between a Board of Directors and corporate officers. As of June 1, 2001, the QCC Board consisted of two individuals.[98] Both of these individuals were also officers of QCC. These same two individuals are also officers of Qwest Communications International, Inc. (QCI - the ultimate parent for the Qwest family of companies). In addition to these two officers, QCC has another eight officers. The titles of these individuals indicate that they also have officer functions in either QSC (the immediate parent of QCC) or QCI.[99] The QCC Director of Finance is a Qwest Services Corporation employee.[100] Ms. Brunsting is the only employee of the 272 Affiliate responsible for administration and public policy.[101] Ms. Brunsting reports directly to Carol Kline, who is an employee of Qwest Service Corporation.[102]

56. The Qwest BOC paid QCC for "management services" provided by Joseph P. Nacchio.[103] The Qwest BOC paid QCC for "management services" provided by a number of QCC supervisors, including Augustine M. Cruciotti.[104] Mr. Cruciotti is listed as a Director of the Qwest BOC.[105] Qwest explained that Mr. Cruciotti terminated his status as an employee of QCC on December 15, 2000.[106] He remains a Director for the Qwest BOC and an officer and employee of QSC (the parent company of both the

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[96] Ex. 22, p. 17.
[97] Requiring formalities provides an opportune time to sever an employee's electronic access to confidential information to avoid violations of the anti-discrimination provisions of Section 272.
[98] Exhibit 12, JLB 272.7.
[99] *Id.* The only exception to the common officers, judging by title, is the Treasurer.
[100] Hearing Transcript Vol.1, p. 210.
[101] Hearing Transcript, Vol. 1, p. 172.
[102] *Id.* at 173. Ms. Kline is also a member of the QCI Senior Management Team.
[103] Exhibit 22, p. 22. The terms of the contractual agreement are trade secret data, and therefore not included in this report.
[104] Exhibit 22, p. 23. The terms of the contractual agreement are trade secret data, and therefore not included in this report.
[105] Exhibit 12, JLB 272.8.
[106] Exhibit 14, p. 18.

Qwest BOC and the 272 Affiliate).[107]

57. Another Qwest executive, Robin Szeliga, is simultaneously Vice President and Chief Financial Officer of QCI, an officer of QCC, an officer of QLD, and an officer of QSC.[108] Ms. Szeliga signed a reporting statement on behalf of the Qwest BOC that was required to be signed by an officer of the BOC. Qwest described the action as an error,[109] and explained that her action resulted from Ms. Szeliga's position having "expanded or changed several times in the past year due to reorganizations resulting from the merger and the decision to use QCC as the 272 Affiliate."[110]

58. The management structure of the Qwest BOC is divided between a Board of Directors and corporate officers. As of June 1, 2001, the Qwest BOC Board consisted of two individuals.[111] These same two individuals are officers of QCI. One of these two individuals is an officer of Qwest BOC.[112] QCC paid the Qwest BOC for a substantial number of employees providing supervision or management of QCC employees.[113]

59. ATT and the Department of Commerce asserted that the proper analytical framework for separate employees, officers, and directors was whether such persons performed separate functions. Qwest asserted that the obligation was met solely by identifying the payroll employer, regardless of what that person was doing. The FCC has addressed whether common corporate officers and directors between parent companies and affiliates meets the separate officers and directors requirement of Section 272(b)(3). In the Ameritech Michigan Order, the FCC stated:

> We do not find it necessary to examine in detail the various corporate reporting relationships that TCG and Ameritech debate in their pleadings to find that Ameritech does not comply with section 272(b)(3). The fact, however, that the Presidents of both Ameritech Michigan [the BOC] and ACI [the 272 affiliate] report to the same Ameritech Corporation Executive Vice President, as Ameritech [the common parent] acknowledges, underscores the importance of the separate directors requirement. Generally, corporate officers report to their board of directors, and, in the case of the BOC interLATA affiliate, that board is to be a separate body than the BOC's board. Given that the principal corporate officers of Ameritech Michigan and ACI report to the same Ameritech Corporation officer, it is clear that as a practical matter (as well as a matter of law), Ameritech Corporation is the corporate director for both Ameritech and

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[107] *Id.*
[108] Exhibit 12, p. 17.
[109] Exhibit 3, p. 14.
[110] Exhibit 14, pp. 17-18.
[111] Exhibit 12, JLB 272.8.
[112] *Id.*
[113] Exhibit 22, p. 21. The terms of the contractual agreement are trade secret data, and therefore not included in this report.

ACI.[114]

60. The arrangement of officers and directors created by Qwest goes beyond the common reporting of officers to a single superior outside of the particular corporate entity. The directors and officers of both the Qwest BOC and QCC are integrated within each company and the officers and directors of each company are integrated into the corporate structure of the common parent. Some of these same individuals have provided management between the Qwest BOC and its 272 Affiliate by contract. This structure defeats the purpose of the separate officers and directors requirement, described by the FCC as follows:

> We recognize that corporations are ultimately responsible to their shareholders and that, in the context of any parent-subsidiary relationship, complete independence of management of the subsidiary will not always be possible. However, in enacting section 272(b)(3), Congress obviously required that the BOC and the interLATA affiliate be separately managed to at least some degree, and one of the affirmative requirements of that provision is the separate director requirement.[115]

61. Qwest has not attempted to show that independence of management is impossible here.[116] Qwest relies upon language in the *Non-Accounting Safeguards Order* to support its contention that it has met the requirements of Section 272(b)(3) regarding the officers and directors of the Qwest BOC and QCC. That language states:

> the section 272(b)(3) requirement that a BOC and a section 272 affiliate have separate officers, directors, and employees simply dictates that the same person may not simultaneously serve as an officer, director, or employee of both a BOC and its section 272 affiliate."[117]

62. The FCC explicitly mentioned that passage from the *Non-Accounting Safeguards Order* in the *Ameritech Michigan Order*.[118] The law governing the corporate relationships involved in that application resulted in the BOC and the 272 affiliate having, as a factual matter, different directors.[119] Despite this formal separation

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[114] *Ameritech Michigan*, at para. 362.

[115] *Id.*, at para. 361.

[116] In the *Bell South Louisiana II Order*, the FCC found having a single independent director adequate to carry out the "collective oversight and consideration for the effective realization of the Board of Director's substantial responsibilities." *Bell South Louisiana II Order*, at para. 330. A board cannot carry out an oversight function of corporate officers when all or even most of the members of the board are themselves corporate officers. It bears noting that the *Bell South Louisiana II Order* was issued prior to recent events highlighting the importance of effective board oversight of corporate officers. The FCC may well reconsider its holding on the adequacy of a single independent director, should the issue arise again.

[117] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990.

[118] *Ameritech Michigan*, para. 355 at footnote 917.

[119] Under the applicable law, the shareholders of the parent company were "deemed" to be directors of the 272 affiliate. The BOC asserted that the parent was not "deemed" to be directors of the BOC. *Ameritech Michigan*, para. 360.

between the directors of the two companies, the FCC held that, "[the 272 affiliate] lacks the independent management that Congress clearly intended in enacting the separate director requirement."[120] That separation is not to be "easily nullified merely through a legal fiction."[121] The same absence of independent management results from the management structure Qwest created for the Qwest BOC and QCC.

63. The integration of management structure proposed by Qwest conflicts with the FCC's interpretation of what constitutes separate officers and directors. The statement in the *Non-Accounting Safeguards Order* (that "separate" just means not the same person in each position) was significantly qualified by the FCC in its *Ameritech Michigan Order*, where reporting relationships (similar to those in the Qwest family of companies) were not a concern, because of the existence of independent directors to oversee the conduct of the corporate officers. There are no such independent directors in the Qwest proposed structure. The FCC's statement that the congressional intent of the separate officers and directors requirement was "obviously" to require separate management compels a finding that the structure proposed by Qwest does not meet the statutory standard.

64. Qwest has frequently cited the Biennial Audit process as assurance that any noncompliance will be rectified in a variety of areas. The audit process directs auditors to examine the corporate management structure, including reporting "to determine the independence of the affiliate."[122] Similarly, the audit procedures require examination of all services rendered by all affiliates to the 272 affiliate.[123] The auditors are directed "to determine whether any departments [of the 272 affiliate] report either **functionally or administratively (directly or indirectly)** to an officer of the BOC."[124] As this language makes clear, the issue is not the organizational chart, but the underlying structure of relationships used to manage the organization. The practice of having the same persons who are QCC officers and directors occupying positions elsewhere in the Qwest corporate management structure is the sort of functional, indirect reporting that is identified as a concern in the audit process.

65. Qwest has not demonstrated by a preponderance of the evidence that it has separate officers and directors between the Qwest BOC and its 272 Affiliate as required by Section 272(b)(3).

IX. SECTION 272(B)(4) -- PROHIBITING ANY CREDIT ARRANGEMENT THAT WOULD PERMIT RECOURSE BY A 272 AFFILIATE CREDITOR TO THE ASSETS OF THE BOC.

66. Section 272(b)(4) sets forth the requirement that a 272 affiliate:

> may not obtain credit under any arrangement that would permit a creditor,

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[120] *Ameritech Michigan*, para. 353.
[121] *Ameritech Michigan*, para. 361.
[122] Ex. 1, MES 272.14, p. 20.
[123] *Id.*
[124] *Id.* (emphasis added).

upon default, to have recourse to the assets of the Bell operating company.[125]

67. In the *Non-Accounting Safeguards Order*, the FCC interpreted Section 272(b)(4) as prohibiting a BOC, the parent of a BOC, or a non-section 272 affiliate of a BOC from co-signing a contract or other instrument with a section 272 affiliate that would permit a credit or recourse to the BOC's assets in the event of default by the section 272 affiliate.[126]

68. Qwest maintains that creditors of the 272 Affiliate do not and will not have recourse to the assets of the Qwest BOC. Qwest asserts that the 272 affiliate does not and will not make available to any creditor recourse to the BOC's assets indirectly through a non-272 Qwest Affiliate.[127] The 272 Affiliate is capitalized separately from the Qwest BOC, through Qwest Capital Funding, Inc., another affiliate of QCI.[128]

69. The integration that Qwest contemplates between its Qwest BOC and the 272 Affiliate requires the former to provide an extensive array of services for and on behalf of the latter.[129] These services are governed by the Master Services Agreement. The Master Services Agreement provides for payment by the 272 Affiliate 30 days after receipt by the 272 Affiliate of the invoice from the Qwest BOC.[130] DOC asserts that this arrangement has the effect of creating effectively permanent financing of QCC's purchases of BOC services for a period in excess of 30 days.

70. DOC maintains that the accounts receivable approach described by Qwest would place the Qwest BOC in the position of an unsecured creditor in the event of a default on the part of the 272 Affiliate. The Qwest BOC would be in the same position as any other unsecured creditor insofar as its ability to "collect" the debt from the 272 Affiliate.[131]

71. There is no improper provision of operating capital to the 272 Affiliate by maintaining a net account receivable from the 272 Affiliate, so long as the Qwest BOC offers the same terms and conditions in its accounting for receivables from unaffiliated entities. There is no requirement under Section 272 for the Qwest BOC to treat its separate affiliate less advantageously than competitors.

72. Offering the same terms and conditions to all providers of intraLATA services is the standard for compliance with several Section 272 requirements, including the issues raised regarding accounts receivable. The Master Services Agreement, Amendment No. 1, requires a late fee for unpaid balances in accounts

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[125] 47 U.S.C. §272(b)(4).
[126] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21995.
[127] Ex. 12, p. 18.
[128] Hearing Transcript Vol. 1, p. 208; Ex. 12, p. 18.
[129] Ex. 35, p. 57.
[130] Ex. 18 (Master Services Agreement).
[131] Ex. 35, at 57-58.

receivable.[132] The record contains copies of bills showing exactly this type of unpaid balance.[133] However, these bills indicate that the Qwest BOC had not levied late fees on the balances carried over by the 272 Affiliate, despite the terms in the amended Master Services Agreement imposing such a late fee.[134] There is no evidence from Qwest that late fees are not imposed on competing interLATA providers with overdue balances.

73. Despite the failure to charge late payment fees to the 272 Affiliate in the same manner as late fees are charged to other IXCs, failing to properly manage accounts receivable for services provided by Qwest does not constitute recourse to the assets of the Qwest BOC. The no recourse standard being imposed by Section 272(b)(4) is directed at third party creditors, not the 272 Affiliate itself. Failure to manage the accounts receivable to ensure timely payment for services provided to the 272 Affiliate does not constitute recourse to the assets of the Qwest BOC. The record shows that Qwest has managed receivables from the 272 Affiliate under terms more advantageous than those imposed on unaffiliated interLATA providers. That situation existed as recently as October 2001.[135] While this practice is, in effect, the Qwest BOC affording the 272 Affiliate an interest-free line of credit, the improper conduct relates to the nondiscrimination requirements, not the nonrecourse provisions. Qwest has met its burden of proving that the Qwest BOC and 272 Affiliate will operate in compliance with Section 272(b)(4).

X. SECTION 272(B)(5) – CONDUCTING ALL TRANSACTIONS BY THE 272 AFFILIATE WITH THE BOC ON AN ARM'S LENGTH BASIS.

74. Section 272(b)(5) sets forth the requirement that a 272 affiliate:

> shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.[136]

75. The Qwest BOC and the Qwest 272 Affiliate are wholly owned subsidiaries of the Qwest Services Corporation.[137] The organizational chart of the Qwest corporate structure indicates that both the 272 Affiliate and the Qwest BOC report to the Qwest Services Corporation.[138] Qwest Services Corporation provides legal and policy support services for all Qwest affiliates, including the Qwest BOC and the

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[132] Ex. 1, Att. MES-272.7; Ex. 18, Amendment 1.
[133] Ex. 9
[134] Ex. 1, Att. MES-272.7; Ex. 18, Amendment 1. Qwest's addition of a late fee to the amended Master Services Agreement supports the inference that Qwest usually charges a late fee on overdue billings
[135] Ex. 9 (Response to DOC IR 15031); Ex. 35, Att. 3.1 (*Affiliate Billing Request Form*, BART BAN# BIQCC030, and Invoice NO: A681201).
[136] 47 U.S.C. § 272(b)(5).
[137] Ex. 12, pp.161-62.
[138] Ex. 12, Att. 272.3.

272 Affiliate.[139]

76. In answering interrogatories sent by the Department to Qwest regarding the extent to which the Qwest BOC and the 272 Affiliate were engaging in joint marketing, a policy support analyst with the Qwest Services Corporation answered the questions.[140]

77. Ms. Brunsting is the only employee of the 272 Affiliate responsible for administration and public policy.[141] Ms. Brunsting reports directly to Carol Kline, who is an employee of Qwest Service Corporation.[142] The Director of Finance for the 272 Affiliate is an employee of the Qwest Services Company. Qwest Services Company provides a number of corporate accounting functions for the 272 Affiliate. The 272 Affiliate does not have its own Vice President or Director of Finance.[143] Persons holding officer, director, and supervisor positions within the Qwest family of companies also provide "management services" under contract to the Qwest BOC.

78. Qwest repeatedly stated that, for transactions between the BOC and the 272 Affiliate, it would "conduct all transactions on an arm's length basis, reduce them to writing, and make them available for public inspection."[144] DOC pointed out that QSC will be providing legal and policy planning services to each side of the Qwest BOC-QCC transaction. The separation between the Qwest BOC and QCC is bridged by the provision of services to both entities by the same employees who will be in possession of confidential information belonging to each entity not being offered to competitors on a nondiscriminatory basis. That separation is also bridged by the integrated management structure that places officers and directors in positions where they cannot exercise independent judgment regarding the interests of the 272 Affiliate.

79. Entities dealing with each other cannot depend upon the same source for legal services, public policy analysis, and financial consulting with respect to transactions occurring between the two entities and remain at "arm's length" in a transaction. The decision-maker at the separate affiliate cannot report to the same officer of the joint owner of the affiliate and the BOC and maintain "arm's length" in a transaction.[145] The practice of contracting for management and supervisors between the Qwest BOC and QCC also erodes the capacity of each entity to act at "arm's length" in transactions.

80. Qwest maintains that there are efficiencies arising from the use of services from a common source. These efficiencies, Qwest asserts, are legitimate practices that

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[139] Ex. 2, p. 31.
[140] Hearing Transcript, Vol. 1, p. 50; Ex. 6 (Qwest responses to DOC IRs 15036, 15038, 15049, and 15050).
[141] Hearing Transcript, Vol. 1, p. 172.
[142] Id. at 173.
[143] Id. at 210.
[144] Transcript Vol. 1, pp. 19-20.
[145] This is particularly true, where, as here, the Board of Directors is composed of other officers of the parent company who are also officers of the 272 Affiliate.

have been approved by the FCC. At no point has the FCC stated that a BOC can engage in practices that place a BOC-affiliated entity in a confidential relationship with both the BOC and its 272 affiliate when transactions between them are being conducted that must be at arm's length. Such an arrangement results in an evasion of the arm's length requirement.

81. Qwest witness Ms. Brunsting testified in her written affidavit that:

> As affiliates, the 272 affiliate and BOC have unique financial and business responsibilities and obligations to their boards of directors and ultimately to their shareholders, notwithstanding section 272 requirements.[146]

82. Ms. Brunstig states that one of those unique financial and business responsibilities is to ensure that the Qwest BOC's aggregate profits will be maximized, even if in order to accomplish those results, certain individual affiliates' profit levels would need to be sacrificed.[147]

83. The pricing of transactions is another critical component of the arm's length requirement. Where, as here, the 272 Affiliate is a wholly-owned subsidiary of Qwest Services Corporation, any profit or loss by QCC is ultimately experienced by the parent corporation. The same financial reality is true for the Qwest BOC, which is also a wholly-owned subsidiary of Qwest Services Corporation. Any financial transaction between the Qwest BOC and QCC results in a net difference of **zero** to Qwest Services Corporation when only the two subsidiaries are involved.[148] But Section 272(c) requires that any services offered by the BOC to its 272 affiliate be made available to competing interLATA providers on the same terms and conditions. A transaction with no net difference between entities with a common owner can have a dramatically different financial result when applied to competing carriers.

84. A single example is sufficient to demonstrate the potential for serious adverse impact on competition in the telecommunications market when pricing of services is manipulated. Combining local and long distance billing on a single monthly statement and paying both billings with a single payment is perceived by consumers as an attractive option. Qwest has already engaged in advertising suggesting that it will be able to offer that feature. QCC has already entered into an agreement with the Qwest BOC to pay at least $1.20 per bill (up to $1.50 per bill if volume discount totals are not met) for each monthly customer billing. Since most of QCC's billings will be made to customers of the Qwest BOC, relatively few of these bills will be generated independently of the existing bills that the Qwest BOC is already generating to its own customers. The actual costs incurred by the Qwest BOC in combining its billing with

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[146] Ex. 12, p. 17.

[147] Hearing Transcript Vol. 1, p. 193.

[148] Any service charge to QCC from the Qwest BOC is charged as an expense by QCC and income by the Qwest BOC in the same amount. Since both the Qwest BOC and QCC are wholly-owned subsidiaries of QSC, the profit and loss of each affiliate must be reported as QSC's own on its accounting statements. The same is true for QCI, with respect to QSC's profit or loss.

that of QCC may be lower than ten cents per bill page.[149] The payment between QCC and the Qwest BOC has no impact whatsoever on the revenues received by QSC (the common parent of QCC and the Qwest BOC) or QCI (the ultimate parent company). But the offering of the "negotiated price" to third parties can make participation in the service too expensive or impair the ability of those third parties to compete in the market.

85. The capacity for manipulating pricing between a BOC and its 272 affiliate has been recognized by the FCC.[150] Manipulation of pricing to the detriment of third parties is generically known as a "price squeeze." The FCC has been directed to consider the impact of any potential price squeeze in 271 applications.[151] Manipulation of Total Element Long Run Incremental Cost (TELRIC) pricing of network elements can impair the ability to compete of competing local exchange carriers (CLECs). Similarly, manipulation of pricing for services between the BOC and its 272 affiliate can impair competition in the interLATA services market.[152] Requiring that transactions be conducted at "arm's length" is a means of preventing such manipulation.

86. The arm's length requirement of Section 272(b)(5) means that transactions between the BOC and its 272 affiliate must reflect a bargained for price of the product or service. With interlocking management structures between the parent and affiliates, different means of pricing for different transactions, and the expressed

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[149] Exhibit 22, p. 63.

[150] *In the Matter of BellSouth Telecommunications, Inc. Permanent Cost Allocation Manual Petition for Waiver of Section 32.27 of the Commission's Rules*, ASD File No. 01-46 (December 17, 2001). Paragraph 5 of the FCC's Order states:

> BellSouth explains that the affiliate BellSouth Long Distance, Inc. (BSLD), was created to provide interLATA services pursuant to section 272 of the Communications Act of 1934, as amended (Communications Act). All transactions between a Bell operating company and its section 272 affiliate must comply with the arm's length requirements of section 272(b)(5). BellSouth contends that it can comply with the arm's length requirements by recording the transaction at incremental cost for regulatory accounting purposes. We disagree. Our rules require such transactions with section 272 affiliates, where no tariff rate, prevailing price or publicly filed agreement exists, to be recorded for regulatory accounting purposes at the higher of cost or market when the carrier is the seller or transferor, and the lower of cost or market when the carrier is the buyer or transferee. BellSouth has not demonstrated how an incremental cost valuation would comply with the statutory requirement that transactions be at an arm's length basis. It is not sufficient to assert that the statutory requirement is met if the price for the transaction is recorded for financial accounting purposes at fair market value. The Commission's revision of section 32.27(c) to allow the floor and ceiling discussed above does not apply to transactions with section 272 affiliates. For these reasons, we deny BellSouth's petition for waiver with respect to transactions with BSLD.

[151] *Sprint Communications Co. v FCC*, 274 F.3d 549, 553-56 (D.C.Cir. 2001).

[152] Qwest focuses its comments on the claimed desire of "entrenched" IXCs, such as ATT, to avoid competition with the 272 Affiliate. But the current competitive market contains a wide variety of interLATA providers, many of which do not have the market share or financial resources of large IXCs, such as ATT. Qwest has used fully distributed cost pricing for features not likely to be obtained by competitors. Qwest has used pricing significantly over its own costs to put QCC customer billings for telephone services on the Qwest BOC customer bill. The impact of a "price squeeze" in a desirable feature such as the single customer bill has the potential for the greatest impact on the smaller IXCs.

intent that transactions be structured for the benefit of the Qwest BOC,[153] the arm s length requirement of Section 272(b)(5) is not met.

87. The current operations of the Qwest BOC and the 272 Affiliate do not meet the arms length transaction requirement of Section 272(b)(5). Qwest's intended manner of operation of the 272 Affiliate is akin to that of a closely-held subsidiary, not a separate affiliate as required by Section 272.

XI. SECTION 272(B)(5) – MAKING ALL TRANSACTIONS WITH THE 272 AFFILIATE AVAILABLE FOR PUBLIC INSPECTION.

88. Section 272(b)(5) requires that any transactions between the BOC and the 272 affiliate must be available for public inspection. The FCC has clarified that this requirement consists of three components:

> (1) the 272 affiliate must provide, at a *minimum*, a detailed written description of the asset transferred or the service provided in the transaction, and post terms and conditions of the transaction on the company's home page on the Internet within 10 days of the transaction;[154]
>
> (2) the description "should be sufficiently detailed to allow us to evaluate compliance with our accounting rules";[155] and
>
> (3) the descriptions must be made available for public inspection at the BOC's principal place of business, and must include a statement certifying the truth and accuracy of such disclosures.[156]

89. The FCC has stated that the 272 affiliate must "provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction" and, that such description "should be sufficiently detailed to allow us to evaluate compliance with our accounting rules."[157] As the FCC has stated:

> In the *Accounting Safeguards Order*, however, we expressly stated that the information contained in a BOC's CAM [Cost Allocation Manual] is not sufficiently detailed to satisfy section 272(b) because the BOC's CAM contains only a general description of the asset or service and does not describe the terms and conditions of each individual transaction. Therefore, a statement of the valuation method used, without the details of the actual rate, does not provide the specificity we required in the *Accounting Safeguards Order*. Because Ameritech has failed to provide a sufficiently detailed description of the transactions to allow us to evaluate

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[153] *See* Findings 81 and 82.
[154] *Accounting Safeguards Order*, 11 FCC Rcd. at 17593-94
[155] *Id.*
[156] *Id.*
[157] *Id.*

compliance with our accounting rules, we are unable to find that Ameritech will carry out the requested authorization in accordance with section 272.[158]

90. ATT objected to the level of detail provided generally in the work orders posted to Qwest's website. Qwest responded that its work orders provide the same level of specificity found on those posted to the Southwestern Bell Corporation (an RBOC) website for its affiliate transactions.

91. When asked what specific details of an affiliate transaction must be posted on the Qwest web site, Ms. Schwartz responded:

> The details should be sufficient enough to allow a third party to determine whether or not they would be interested in providing that service and as you indicated, it would provide rates, terms, and conditions. . . . the FCC has further given guidance that that sufficiency should include the level and expertise of personnel, the frequency that the service is provided, any special equipment used, and so forth. So again, we do comply with the FCC sufficiency guidelines . . . .[159]

92. Ms. Schwartz testified that one of the purposes of posting work orders, such as the *Joint Marketing Work Order*, on the Internet is to ensure that the services that the Qwest BOC provides to its 272 affiliate are also available on the same terms and conditions to other competing IXCs.[160]

93. Each affiliate agreement includes a brief description of services to be provided, the employees providing the service, and the rate at which the service will be charged.[161] By FCC rule, a carrier must price a service at the greater of fair market value or fully distributed cost only after the total aggregate value of that service reaches or exceeds $500,000.[162] To assign a pricing method, Qwest provides a *Fair Market Value Questionnaire* to be filled out concurrently or prior to the execution of the contract. This Questionnaire asks the respondent to specify:

(1) if the estimated annual billing for this service is greater than $500,000;

(2) whether benchmarking studies have been performed (and if so, the studies must be attached to the worksheet); and

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[158] *Ameritech Michigan Order* at para. 369.
[159] Hearing Transcript, Vol. 1, pp. 66-67.
[160] *Id.* at 71.
[161] Ex. 35, Att. 2.2.
[162] 47 CFR 32.27.

(3) whether an external market exists for the service, and any explanation/studies this would entail.[163]

94. For the provision of joint marketing services to the 272 Affiliate, the Qwest BOC did not perform a fair market value study or undertake a benchmarking report.[164] Actual billing data provided in response to Department Information Request No. 15031, shows a total billing for joint marketing services that exceeds $500,000, on which no payments were made and no late charges were assessed.[165]

95. Qwest failed to comply with the rules on affiliate transactions when it failed to justify its pricing methodology on joint marketing. While the affiliate rules are not part of Section 272, Qwest also failed to post the terms and conditions of the transaction as required by Section 272(b)(5) by not disclosing that no interest or late fees would be charged on overdue payments from its 272 Affiliate.[166] Qwest has not demonstrated that its 272 Affiliate currently meets the applicable standards for posting transactions.

96. The *Information Technologies Services Work Order, Amendment 1*, between the Qwest BOC and the 272 Affiliate contains a provision for "Facilities Management" (floor space in the Qwest Corporation Zuni facility).[167] A portion of the Work Order entitled, "Facilities Management," appears to lease office space between the Qwest BOC and the 272 Affiliate in Denver, Colorado. There is no description of the *amount* of office space to be provided to the 272 Affiliate contained in the Work Order.[168]

97. Failure to reduce to writing the amount of office space provided by the Work Order does not comply with Section 272(b)(5) because it fails to include a critical term or condition of the transaction.[169] Failure to specify the amount of office space obtained does not describe with sufficient specificity the terms and conditions of the transaction reflected in the Work Order.

98. Qwest claims that the estimated annual billing for this "rental" of office space is below $500,000.[170] The Department of Commerce points out that this assertion cannot be tested because the amount of space for which the 272 Affiliate has

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[163] Ex. 35, Att. 3.1.
[164] *Id.*
[165] Ex. 9 (Response to DOC IR 15031); Ex. 35, Att. 3.1 (*Affiliate Billing Request Form*, BART BASIC BIQCC030, and Invoice No. A681201). The totals are trade secret data and therefore they are not provided in this Report.
[166] Qwest maintained that its Master Services Agreement had been amended in July 2001 to include the charging of interest and such interests has been billed retroactive to when the services were provided. Exhibit 3, at 18. The trade secret invoice is dated significantly later than July 2001 and contradicts Qwest's assertion that interest was being charged on overdue amounts payable after July 2001.
[167] Ex. 35, at Att. 3.15
[168] *Id.*
[169] Ex. 35, p. 44.
[170] Ex. 35, Att. 3.15.

contracted is unknown.[171] The $500,000 "trigger" requires application of particular methods of valuation to comply with FCC rules. There is no exemption from the posting requirement in Section 272(b)(5) for transactions falling below $500,000 in annual cost.

99. Qwest did not attempt to determine the fair market value of services for Accounts Payable services[172] and Human Resources services[173] by comparing costs from outside vendors. Qwest indicated that its services were customized to provide for specific Qwest BOC needs and, therefore, a fair market value study could not be undertaken. Qwest described these services as follows:

> The regulated employees who perform accounts payable functions provide for payment of vendor invoices, payment of employee expenses, image processing, corporate card, vendor base, reconciliation, system administration duties. These employees are specialists for Qwest in the knowledge of our accounts payable process. External vendors do not offer such a broad spectrum of support and services. Nor do they have the expertise specific to Qwest accounts payable process. Therefore, the services performed by these regulated employees are not available in the same degree in the market place.[174]

100. The fact that some "customization" of accounts payable, payroll, human resources or any other generic corporate operational function may be required does not render such functions incapable of being subject to a fair market value assessment.[175] The activities described by Qwest are generic and frequently "outsourced" (i.e., purchased from a third-party provider). Customization is part of the purchase price for that activity and does not impair Qwest's ability to obtain market valuation for these services.[176]

101. Qwest has no obligation to go beyond the level of specificity maintained by other RBOCs when posting affiliate transactions. But the FCC rules require fair market valuation for some transactions. Where certain transactions have triggered the fair market valuation provision, Qwest has failed to price appropriately and post the terms and conditions of those transactions. Further, where a particular transaction is conducted (such as rental of office space) the posting must include relevant specific details, such as the actual space obtained, to contain the terms and conditions of the transaction. The current manner of reporting these transactions between the Qwest BOC and the 272 Affiliate falls short of the requirement that such transactions be "public" within the meaning of Section 272(b)(5). Qwest must ensure that future postings will comply with this requirement to meet the standards of Section 272.

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[171] *Id.*
[172] Ex. 17 (Summary of Affiliate Transactions, *see* Finance Services Work Order).
[173] *Id.* (*see* Human Resources Work Order).
[174] Ex. 35, Att. 3.13.
[175] Ex. 35, p. 47.
[176] *Id.*

XII. SECTION 272(C) -- THE "NONDISCRIMINATION" REQUIREMENT.

102. Section 272(c) requires that a BOC not discriminate in favor of its 272 affiliate and against competitors. That statutory provision states:

> (c) NONDISCRIMINATION SAFEGUARDS- In its dealings with its affiliate described in subsection (a), . . . a Bell operating company--
>
> (1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; and
>
> (2) shall account for all transactions with an affiliate described in subsection (a) . . . in accordance with accounting principles designated or approved by the Commission.[177]

103. In its *Non-Accounting Safeguards Order*, the FCC interpreted this section to require a BOC to "provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions."[178]

104. The FCC has also concluded that the non-discrimination requirement in section 272(c)(1) extends to any good, service, facility or information that a BOC provides to its section 272 affiliate, including those that are not telecommunications-related,[179] as well as administrative and support services.[180]

105. Qwest has acknowledged that it has the obligation for the Qwest BOC to not discriminate in favor of its 272 Affiliate. Qwest has noted that the non-discrimination requirement extends to the use of confidential information between the Qwest BOC and its 272 Affiliate. Qwest does not intend to identify, price, or offer that information to competing IXCs. Instead, Qwest intends to rely upon other means to meet the non-discrimination requirement.

106. Qwest will rely upon the separation required by Section 272(b)(3) to comply with the nondiscrimination standard of Section 272(c) regarding the use of confidential information. Qwest has not described how common officers and directors of the parent companies and QCC will avoid being privy to such information (or if they are privy to it, how Qwest will assure that such confidential information is not used in the 272 Affiliate's decision-making process). Qwest's reliance on separation to meet the nondiscrimination standard means that it must apply that separation to officers and directors who will obtain confidential information indirectly through the parent, as well as

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[177] 47 U.S.C. §272(c).
[178] *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 22000-01.
[179] *Id.*
[180] *Id.* at 22007-08.

directly from the BOC.[181]

107. ATT asserts that Qwest discriminates by performing an evaluation for any services requested from the Qwest BOC by the 272 Affiliate. The process set out by Qwest provides a single point of contact for such inquiries which is then analyzed as to type of product, service, or information, manner of accomplishing the request, and the potential for risk arising from meeting the request.[182] The flowchart describing the process indicates that the submission of the request to the single point of contact is the "[s]ame process used by 3rd party requests for Products/Services/Information."[183] The process, as described, does not discriminate against competing IXCs.

108. Compliance with the non-discrimination requirements regarding transactions are assessed in the context of specific transactions for goods and services. Determinations regarding such compliance are discussed in Findings concerning such transactions. Specific instances of noncompliance are noted at Findings 73 and 117. Qwest has not met its burden to show that the Qwest BOC will not discriminate in favor of its 272 Affiliate.

XIII. SECTION 272(G) -- JOINT MARKETING.

109. Section 272(g) sets forth a BOC's ability to engage in joint marketing of its own local services with its 272 Affiliate's long distance service. The statute states in pertinent part:

> (1) Affiliate sales of telephone exchange service.
>
> A Bell Operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.
>
> * * *
>
> (3) Rule of construction
>
> The joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c).[184]

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[181] The need for such separation is particularly critical where the information technology is only restricting access to the 272 affiliate. Any other user may be able to access information that cannot be provided directly to the 272 affiliate. Allowing information transfers through such other users indirectly to the 272 affiliate, without making the information available to competitors, discriminates in favor of the 272 affiliate in violation of Section 272(c).

[182] Exhibit 1, MES 272.12.

[183] *Id.*

[184] 47 U.S.C. § 272(g).

110. In the *Non-Accounting Safeguards* proceeding, NYNEX (then an RBOC) asked the FCC to define "marketing activities" governed by Section 272(g)(3) to include "product development, product management, market management, channel management, market research, and product pricing."[185] The FCC declined to go so far in its Order, stating:

> In our view, such activities are not covered by the section 272(g) exception to the BOC's nondiscrimination obligations. We see no point to attempt at this time to compile an exhaustive list of the specific BOC activities that would be covered by section 272(g). We recognize that such determinations are fact specific and will need to be made on a case-by-case basis.[186]

111. The FCC reiterated this position in the *Third Order on Reconsideration*. In that order, the FCC stated:

> The broad interpretation of the "joint marketing and sale of services" exception BellSouth advocates would create a loophole that would allow potential BOC discrimination in countless activities. Section 272(c)(1) would provide little protection against BOC discrimination were we to construe section 272(g)(3) as *exempting all activities* that may impact on marketing and sales activities from the nondiscrimination requirements.[187]

112. The Qwest BOC intends to engage in "joint marketing" of local exchange services provided by the Qwest BOC and interLATA long distance services to be provided by its 272 Affiliate, once Qwest receives Section 271 authority.[188]

113. The *Joint Marketing Work Order* between the Qwest BOC and the 272 Affiliate defines the type of services the Qwest BOC agrees to provide the 272 Affiliate:

> *Planning for In-region InterLATA (Local Access and Transport Area) Services* — Includes planning functions required to be ready to sell interLATA services when 271 relief is granted. Also includes pre-implementation activities such as sales operations functions, budgets, establishing sales expectations, planning sales and promotion functions, developing marketing and customer segmentation plans such as provisioning billing, order entry and management, customer care, reporting, training, and compensation; and determining requirements for changes to systems and processes.
>
> *Qwest Communications Corporation (QCC) Sales* — Providing various aspects of selling QCC products and services inside and outside the 14

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[185] *Non-Accounting Safeguards Order*, para. 295.
[186] *Non-Accounting Safeguards Order*, 11 FCC Rcd 22048.
[187] *Third Order on Reconsideration*, 14 FCC Rcd 16325 (emphasis added).
[188] Ex. 1, pp. 32-33.

state region such as private line data and out of region long distance. Includes activities such as direct sales, supporting alternative sales channels, support for planning for out of region sales, managing marketing efforts for out of region services, and development of training for Section 272 products, services, policies and processes for sales and sales support personnel.[189]

114. Marie Schwartz (a Director in FCC Regulatory Accounting for the Qwest BOC) has approval authority over the *Joint Marketing Work Order*.[190] At the hearing, neither Ms. Schwartz nor Ms. Brunsting was able to provide specific details as to what type of services fall under "planning sales and promotion functions".[191]

115. When asked to describe what services were provided by the Qwest BOC to QCC under the *Joint Marketing Work Order* regarding the "planning function," Ms. Schwartz stated:

> I can't list the specific services listed under those functions, but in essence the work order in this section is basically designed to encompass those planning functions.[192]
>
> * * *
>
> I think planning means readying ourselves to joint market. I'm not familiar with the detailed plans associated, or that, you know, the details associated with the planning functions, however, you know to the extent that, for instance, it would include any marketing scripts, as we've discussed earlier, I'm not aware of any that have been drafted or prepared in final form.
>
> Q. Would you agree then that that phrase [planning, sales and promotion functions] is somewhat vague?
>
> A. Well, it does capture a number of activities that would be required to jointly market.
>
> Q. Like what?
>
> A. Well, for instance, as we just discussed, marketing scripts, making sure that we have the appropriate training available, as we talked about, to allow anyone in the customer ordering centers to be prepared to provide both in-region and -- excuse me, in-region local and interLATA service.[193]

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[189] Ex. 35, Att. 3.1.
[190] Hearing Transcript, Vol. 1, p. 64.
[191] Hearing Transcript, Vol. 1, pp. 73-74, 189.
[192] *Id.* at 71-73; 75.
[193] *Id.* pp. 72-73.

116. When asked to identify exactly what the Qwest BOC is providing to its 272 Affiliate with regard to the phrase "planning, sales, and promotion functions," as set forth in *the Joint Marketing Work Order*, Ms. Schwartz was unable to provide an explanation, but identified other Qwest BOC officials who might know.[194] The Qwest BOC has billed QCC in excess of $500,000 for these undescribed services.[195]

117. The *Joint Marketing Work Order* violates the nondiscrimination requirements of Section 272(c)(2) because it does not sufficiently disclose the services, terms, and conditions provided by the Qwest BOC to the 272 Affiliate.

118. The absence of a sufficient description of the services provided under the *Joint Marketing Work Order* implies that the Qwest BOC and QCC are not engaging in transactions with each other at arm's length as required by Section 272(b)(5).

119. Qwest acknowledged that its right to jointly market services for both the Qwest BOC and its 272 Affiliate does not exempt Qwest from the nondiscrimination requirement for "product design, planning, or development."[196] As the FCC has stated:

> BellSouth states that, to the extent BST engages in product development with BSLD, it will do so on a nondiscriminatory basis with unaffiliated entities so long as it is required to do so under section 272. We note that AT&T is concerned that BellSouth's joint marketing plans involve the development and creation of packages of services offered on an integrated basis, and that BellSouth has not shown that it will make these services available on a nondiscriminatory basis. We expect, however, as BellSouth commits in good faith, that to the extent BST is involved with planning, design, and development activities for BSLD, BST will make these services available to other entities on a nondiscriminatory basis pursuant to section 272(c)(1).[197]

120. Qwest intends to permit other IXCs to engage in joint marketing for telephone exchange services, information services, and product design, planning or development on the same terms and conditions that the service is made available to QCC.[198] Qwest did attempt to distinguish between product development services provided by QSC and those provided by the Qwest BOC.[199] Qwest's description of services in the *Joint Marketing Work Order* is insufficient to permit a competing IXC to

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[194] *Id.* pp. 73-75.

[195] Ex. 35, Att. 3.1. More examples of this arrangement between the Qwest BOC and QCC were identified by Mr. Skluzak. Ex. 22, p. 22. Since the amounts paid and personnel assigned in these transactions are trade secret data, those details are not included in this Report. A reasonable inference is that the transactions were not at arm's length, since details regarding the services provided are lacking and the amount paid for the services is substantial.

[196] Qwest Brief, p. 61.

[197] *BellSouth Louisiana II Order*, para. 360.

[198] Exhibit 3, p. 31; Exhibit 12, p. 24; Exhibit 14, p. 25.

[199] Exhibit 3, p. 31.

ascertain what specific services are being provided under that *Order*.[200] The *Joint Marketing Work Order* fails to describe the terms and conditions associated with the services provided in specific detail sufficient to allow a competing IXC to exercise its rights provided under section 272(g)(1). Qwest has not met its burden of proof that it will comply with Section 272(g)(1).

XIV. OTHER JOINT MARKETING ISSUES.

121. On July 24, 2001, Qwest ran advertisements in various Minnesota newspapers for the purpose of:

> informing the in-region population that J.D. Power and Associates has just ranked Qwest '#1 in Residential Long Distance Customer Satisfaction for High Volume Users.' Additionally, we [Qwest] will indicate that Qwest is working hard to be able to offer the same service in their area.[201]

122. The scripts used by the sales representatives for the Qwest BOC for answering responses to the advertisements directed the representative to inform the prospective customers to either call them at 1-866-LD-CHOICE, or go online to provide Qwest with contact information so that Qwest can contact them once the Qwest BOC offers long distance in the state.[202]

123. The advertisements and scripts used by Qwest demonstrate that Qwest has engaged in joint marketing activity for the products of the Qwest BOC and its 272 Affiliate prior to Qwest's entry into the interLATA market. This is joint marketing activity constituting a violation of section 272(g)(2).

124. Notwithstanding that the activity described in the preceding three Findings constitutes a violation, the particular activity the Qwest BOC engaged in was notice to the public of future planned activity. No customer was offered interLATA telephone service, either in the advertisement or on the telephone. The violation constitutes a *de minimus* failure to comply with the prohibition against joint marketing activity imposed by Section 272(g)(2).

125. ATT argues that Qwest's predecessor 272 affiliate, QLD (formerly known as U.S. West Long Distance), violated the prohibition against joint marketing. Based on these violations, ATT maintains that Qwest has not demonstrated current compliance with Section 272. Qwest maintains that the QLD noncompliance was not severe and should not prevent approval of Qwest's application now. The sale of interLATA services

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[200] Qwest maintains that no product development services have been provided to QCC after March 3, 2001. Qwest Brief, at 59. But Qwest has not identified what services have been provided to QCC that resulted in billings substantially in excess of $500,000 under the Joint Marketing Work Order. QCC is not currently eligible to market in-region interLATA services, therefore the Qwest BOC cannot jointly market those services either. The invoices on the billings described the subject of the transactions as "product development." Ex. 22, p. 22.

[201] Ex. 7, Att. A (Qwest response to Department of Commerce Motion).

[202] *Id.* at 1.

by U.S. West Long Distance occurred under a mistaken interpretation of the application of the Act. That past noncompliance, by itself, is insufficient support for a conclusion that Qwest will be unable to comply with the joint marketing requirements in the future.

126. Testimony from Qwest witnesses suggests that a critical component of Qwest's joint marketing is to offer long distance services from QCC to "inbound" local service customers of the Qwest BOC.[203] Commerce cites figures indicating that Qwest can reach over 20,000 new customers per month with this marketing message.[204] Due to the market reach of this method of customer contact, Commerce asserts that additional requirements beyond the federal standards should be placed upon Qwest's ability to jointly market services.

127. Commerce has suggested that states, on their own authority, may place more stringent competitive requirements on a BOC than those of the federal statute or the FCC, and that the State has the authority to enforce those requirements.[205] The Department cites Section 253(b) as support for this position, which states:

> (b) STATE REGULATORY AUTHORITY—Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[206]

128. The FCC has found, in the *Non-Accounting Safeguards Order*, that in the event that the FCC determines that the BOC has complied with Section 271, a state Commission has the authority to impose any requirements it deems necessary short of delay or denial of entry into the intrastate interLATA market.[207] The FCC held that:

> For all of the reasons discussed above, we conclude that sections 271 and 272, and the Commission's authority thereunder, apply to intrastate and interstate interLATA services provided by the BOCs or their affiliates. We hold, therefore, that the rules we establish to implement section 272 are binding on the states, and the states may not impose, with respect to BOC provision of intrastate interLATA service, requirements inconsistent with sections 271 and 272 and the Commission's rules under those provisions. In this regard, based on what we find is clear congressional

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[203] Ex. 12, pp. 21-24; Ex. 1, pp. 31-33.

[204] "Qwest Quarterly Service Settlement Report," a monthly report regarding Minnesota customers, as required by the Commission's *Order* in *Qwest Corporation's Alternative Form of Regulation (AFOR) Service Quality Plan*, Docket No. P-421/AR-97-154, filed November 15, 2001. With billing and collection calls and service calls, the number of customer contacts rises to over 400,000 per month. But the larger number is not very useful for assessing marketing impact, since the circumstances of the contact may not be conducive to effectively selling long distance services.

[205] Exhibit 35, p. 13.

[206] 47 U.S.C. § 253(b).

[207] *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21929.

> intent that the Commission is authorized to make determinations regarding BOC entry into interLATA services, we reject the suggestion by the Wisconsin Commission that, after the Commission has granted a BOC application for authority under section 271, a state nonetheless may condition or delay BOC entry into intrastate interLATA services.[208]

129. Qwest maintains that any action taken by the MPUC must be "competitively neutral" to comply with the *Non-Accounting Safeguards Order*. The action proposed by the Department of Commerce is to limit the information that the Qwest BOC may provide to callers when provisioning local telephone service. Such a limitation was entered in 1996 when the Bell System was broken up into seven RBOCs and ATT provided intraLATA telephone services in competition with other providers.[209]

130. The FCC has explicitly addressed what a BOC may state in jointly marketing interLATA telephone services. The FCC stated:

> We agree with BellSouth and Ameritech that a BOC, during an inbound telephone call, should be allowed to recommend its own long distance affiliate, as long as it contemporaneously states that other carriers also provide long distance service and offers to read a list of all available interexchange carriers in random order. In the Non-Accounting Safeguards Order, the Commission stated that the BOCs' existing obligation to provide any customer who orders new local exchange service with the names and, if requested, the telephone numbers of all of the carriers offering interexchange services in its service area in random order was not incompatible with the BOCs' right to joint market. The Commission concluded that a BOC could market its affiliate's long distance services to inbound callers as long as the BOC also informed those customers of their right to select the interexchange carrier of their choice and provided the names and numbers of all interexchange carriers in random order. Thus, the Non-Accounting Safeguards Order sought to balance a BOC's continuing equal access obligations pursuant to section 251(g) with the right of a BOC and its affiliate to market services jointly under section 272(g).[210]

131. The FCC identified the approach in the *BellSouth South Carolina Order* as a "safe harbor, so that the BOCs will have some guidance on what we view as consistent with sections 251(g) and 272."[211] The Department of Commerce has not identified how its proposed limitations on Qwest's marketing scripts can be applied in a

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[208] *Non-Accounting Safeguards Order*, para. 47.
[209] *In the Matter of an Investigation into IntraLATA Equal Access and Presubscription*, Minnesota PUC Docket No. P-999/CI-87-697, *Order Denying Reconsideration and Clarifying Order*, April 2, 1996, at 6.
[210] *Application of BellSouth Corporation, et al. to Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, para. 237 (December 24, 1997)(*BellSouth South Carolina Order*).
[211] *Id.*, para. 236.

competitively neutral fashion. The proposed limitation is beyond the authority of the MPUC in the context of this 271 application.[212]

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Minnesota Public Utilities Commission and the Administrative Law Judge have jurisdiction over the subject matter of this hearing pursuant to Minn. Stat. §§14.57-.62 and 216A.05 and Minn. R. 1400.5100-.8300.

2. The Minnesota PUC gave proper notice of the hearing in this matter, has fulfilled all relevant substantive and procedural requirements of law or rule and has the authority to take the action proposed.

3. As the party proposing that certain action be taken, Qwest must prove the facts at issue by a preponderance of the evidence, unless the substantive law provides a different burden or standard.[213] According to the FCC, the BOC at all times bears the burden of proof of compliance with section 271, even if no party challenges its compliance with a particular requirement.[214] As the Party proposing the action in this proceeding, Qwest has the burden of establishing facts supporting its proposals by a preponderance of the evidence. Similarly, any other Party advocating an affirmative proposal has the burden of proving that proposal by a preponderance of the evidence.[215] A party asserting an affirmative defense shall have the burden of proving that the defense by a preponderance of the evidence.[216]

4. Qwest has failed to demonstrate by a preponderance of the evidence that its 272 Affiliate (QCC) will operate independently from the Qwest BOC, in accordance with Section 272(b)(1).[217]

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[212] Should the MPUC conclude that joint marketing between all LECs and IXCs should be regulated, restrictions could be crafted on a competitively neutral basis. But a fuller record would need to be established to determine the proper extent of such regulation, beyond that developed in this proceeding.

[213] Minn. R. 1400.7300, subp. 5.

[214] *Application by SBC Communications Inc., Southwestern Bell Tel. Co. 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*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18374, para. 46 (2000) (*SWBT Texas Order*); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3972 para. 46 (1999) (*Bell Atlantic New York Order*), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

[215] Minn. R. 1400.7300, subp. 5.

[216] Minn. R. 1400. 7300, subp. 5.

[217] To obtain Section 271 approval, the BOC must show that its 272 affiliate is "operating independently" from the BOC. The FCC has determined that operating independently is a term of art with a special meaning for telecommunications companies. The term is construed to mean no joint ownership of telecommunications switching and transmission facilities and the land or buildings that hold those facilities. Qwest has the obligation to show that it will meet this requirement. But the record is lacking in

(Footnote Continued on Next Page)

5. Qwest has failed to demonstrate by a preponderance of the evidence that the 272 Affiliate will have separate officers, directors, and employees from the Qwest BOC of which it is an affiliate, in accordance with Section 272(b)(3).

6. Qwest has demonstrated by a preponderance of the evidence that the 272 Affiliate will not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Qwest BOC, in accordance with Section 272(b)(4).

7. Qwest has failed to demonstrate by a preponderance of the evidence that the 272 Affiliate will conduct all transactions with the Qwest BOC on an arm's length basis with any such transactions reduced to writing and available for public inspection, in accordance with Section 272(b)(5).

8. Qwest has failed to demonstrate by a preponderance of the evidence that the Qwest will comply with the joint marketing requirements in Section 272(g), since the descriptions of work performed under the Joint Marketing Work Order are insufficient to notify competing IXCs of what joint marketing services are available.

9. Qwest has failed to demonstrate by a preponderance of the evidence that the Qwest BOC, in its dealings its 272 Affiliate, will not discriminate between the 272 Affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards, in accordance with Section 272(c) in the areas of the handling of confidential information and the availability of services to competing IXCs on the same terms as the 272 Affiliate.

10. Any of the above Findings of Fact more properly considered Conclusions of Law are hereby adopted as such, and any Conclusions of Law more properly considered Findings of Fact are hereby adopted as such.

NOTICE

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE PUBLIC UTILITIES COMMISSION WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

(Footnote Continued From Previous Page)
an affirmative demonstration that no such joint ownership exists. The record does show that the allocation of facilities to QCC from QC is ongoing. Therefore it is impossible to conclude that the final allocation of assets actually demonstrates that QCC will operate independently from QC. The ALJ accepts that Qwest intends to comply with the "operating independently" requirement of Section 272(b)(1). But Qwest has the burden to show that it will comply. Lacking an inventory of facilities and land, Qwest cannot meet its burden.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Minnesota Public Utilities Commission:

1. Include in its Order in this proceeding a determination that Qwest has failed to meet the requirements set forth in 47 U.S.C. § 272; and

2. Include in its Order a determination that Qwest could meet the requirements set forth in 47 U.S.C. § 272 by modifying the relationships among Qwest Communications International, Inc. (QCI), its wholly-owned subsidiary Qwest Services Corporation (QSC), and QSC's wholly-owned subsidiaries, Qwest Corporation (QC) and Qwest Communications Corporation (QCC) as follows:

   a. QCC shall provide an inventory of the telecommunications switching and transmission facilities it owns, and identify the land and buildings in which such facilities are located, prior to receiving 271 authorization. QCC shall ensure that none of the facilities, land or buildings are jointly owned with QC.

   b. QCC shall provide more complete postings of transactions that identify the services being provided. Inadequate postings such as the *Joint Marketing Work Order* will be reposted with the detail needed to describe adequately the services provided.

   c. Transfers of employees between QC and QCC shall cease on the date that QCC receives 271 authorization. Any employee of one of these corporations that will be working for the other must formally terminate employment with the prior employer before formally entering employment with the subsequent employer.[218] At the time of termination, the employee will execute a confidentiality agreement that expressly precludes the use of the former employer's confidential information with the subsequent Qwest-affiliated employer. Qwest shall modify its code of conduct to clarify that QCC is to be treated as a third party, not "Qwest" or "us."

   d. Qwest shall maintain a log of employee movement between all of its affiliated entities. The log shall identity each employee's job title and length of service for each affiliated employer. The log shall be

[218] The formal termination of employment does not require any change in employee benefits or recalculation of seniority, if the benefit plans of QC and QCC are obtained from a single source and are otherwise transferable.

in the form of a database that can be searched by employee name, employer name, and length of service with employer

e. Qwest shall modify its information systems to isolate all employees of both the Qwest BOC and QCC from confidential information that is not in the possession of those employees' payroll employer. Access to confidential information by any other Qwest entity shall be afforded on a limited basis to assure that access to such information is not provided on a discriminatory basis to the 272 Affililate. Identifiers, such as email addresses, shall readily identify the employer of the email addressee.

f. Qwest shall revoke its proposed employee loan policy and replace that policy with a statement that reaffirms that the employees of QC and QCC are separate and that supervision can only come from the actual employer of the employee. The statement shall also include a mechanism whereby violations of the policy can be reported anonymously. Qwest shall maintain a record of the complaints received, all pertinent information regarding each complaint, and the action taken in response to each complaint.

g. QSC shall institute a policy that any of its employees providing services that involve a confidential relationship shall provide services to either QC or QCC, but not both. QSC shall institute procedures to ensure that employees providing such services are identified by recipient of the service. QSC shall incorporate this provision into its service agreements with QC and QCC that expressly require QSC to treat the information of each affiliate as confidential from the other. Such treatment extends to employees of either affiliate who transfer to QSC and employees of QSC who transfer to either affiliate.

h. QC and QCC shall maintain timely entry of billing for services to each other and shall strictly enforce the penalty for late payments.

i. Qwest shall reorganize the management structure of QCC to eliminate commonality between officers and directors. No officer or director of QCC shall hold an employee, officer, or director position with either QSC or QCI. Qwest shall not establish a management reporting structure that that permits the 272 Affiliate to obtain confidential information that is not made available to competing IXCs on a nondiscriminatory basis.

j. Qwest shall terminate any contract or work order that provides management or supervisory services from either QC or QCC to the other.

k. Qwest shall commit to business relationships between the 272 Affiliate (QCC) and the Qwest BOC (QC) to treat each entity as separate corporations acting at arm's length. Qwest shall not convey any expectation, express or implied, that the interests of the 272 Affiliate are not to be pursued using the best business judgment of the directors and officers of QCC.

Dated this _14th _ day of March, 2002.

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

Reported: Shaddix and Associates
Bloomington, Minnesota
Transcript prepared, Two Volumes

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Qwest has made significant efforts to transform its existing out-of-region, facilities-based interLATA carrier, QCC, into a 272-compliant affiliate to meet the needs of the Qwest BOC's 271 application. This transformation effectively began in January 2001 and is ongoing. But Qwest must demonstrate QCC's compliance with Section 272 in order to obtain approval for entry into the in-region interLATA market. Some modifications, such as the transformation of the accounting system to accomplish complete and timely posting of transactions, are necessarily going to take time to complete. Past noncompliance in such areas is not critical to the issues of future compliance. The ALJ has found that Qwest has met its burden there.

Other aspects of the QCC transformation are more problematic. Qwest has made certain choices with respect to confidential information that render nondiscrimination difficult absent stringent separation at the employee, officer, and director points of contact between QCC and the other members of Qwest's "family of companies." The corporate management structure proposed by Qwest does not allow for such separation. That corporate structure also makes arm's length transactions more an aspiration than an achievable goal. Qwest must show that its future operations will actually meet both these requirements before its 271 application should be granted.

Arm's length transactions are not accomplished merely by stating that each transaction is at arm's length. The testimony in this proceeding is unequivocal regarding how Qwest intends to treat transactions between QCC and the Qwest BOC:

> As affiliates, the 272 affiliate and BOC have unique financial and business responsibilities and obligations to their boards of directors and ultimately to their shareholders, notwithstanding section 272 requirements.[219]

In an arm's length transaction, there is no "unique relationship" that would require anything other than the normal exercise of business judgment. To comply with the arm's length requirement of Section 272(b)(5), QCC should anticipate dealing with the Qwest BOC on the same footing as ATT, WorldCom or any other IXC. Transforming the approach taken to arm's length transactions at each point of contact between the Qwest BOC and QCC will address most of the issues raised in this proceeding.

ATT asserted that instances of past noncompliance compel the conclusion that Qwest will not comply with Section 272 in the future. Qwest maintained that past noncompliance is not relevant to future compliance, because processes have been adopted to assure that the requirements of Section 272 will be met. The ALJ has not relied on past noncompliance in making these findings. Qwest's processes have been assessed to determine if they will result in future compliance using the standards set out by the FCC and in relevant caselaw. Where those processes are inadequate, changes have been suggested to address those shortcomings.

The need for independent management and operations between a BOC and its 272 affiliate has been clearly stated by the FCC. The record in this matter contains ample information regarding how Qwest's business operations can be structured to comply with Section 272. The suggestions made in the Recommendation are the ALJ's assessment of what modifications can be made to Qwest's proposed structure of QCC to conform the operation of the affiliate to the structural separation requirements of Section 272. These suggestions are not the only means of addressing these issues. The ALJ expects that the parties will make their own suggestions to the MPUC as to what modifications are necessary and appropriate.

R.C.L.

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[219] Ex. 12, p. 17.

RECEIVED
SOUTH DAKOTA PUB
UTILITIES COMMISS

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

AT&T'S VERIFIED COMMENTS ON

CHECKLIST ITEMS 2, 5 AND 6

MARCH 18, 2002

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AT&T Communications of the Midwest, Inc. ("AT&T") hereby files its verified comments on disputed issues regarding Checklist Items 2 (as it relates to combination of network elements), 5 (local transport) and 6 (local switching).

I. INTRODUCTION

The Telecommunications Act of 1996[1] was signed into law on February 8, 1996. The 1996 Act imposes a number of obligations on incumbent local exchange carriers ("ILECs"). One of these obligations is the duty to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory."[2] "To obtain the authority to provide in-region interLATA services, the regional Bell operating company ("RBOC" or "BOC") must demonstrate that it is in compliance with § 251(c)(3) and § 271 of the 1996 Act, more specifically for the purposes of these comments, §§ 271(c)(b)(ii), (v) and (vi).[3]

Subparagraph (ii) requires the RBOC to demonstrate that it is either providing or generally offering to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of §§ 251(c)(3) and 252(d)(1)." Subparagraph (v) requires the RBOC to demonstrate that it is either providing or generally offering to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching other services." Subparagraph (vi) requires the RBOC to demonstrate that it is either providing or generally offering to provide "[l]ocal switching unbundled from transport, local loop transmission or other services."

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[1] Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* ("1996 Act" or "Act").
[2] 47 U.S.C. § 252(c)(3).
[3] 47 U.S.C. § 271(c)(B)(ii)(v) and (vi).

The Federal Communications Commission ("FCC") has concluded "that a BOC 'provides' a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act or, where no competitor is actually using the item, if a BOC makes the checklist item available as both a legal and a practical matter. To be 'providing' a checklist item, a BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item."[4] "The phrase 'generally offers to provide such access or interconnection' requires a BOC to make the checklist available as both a legal and practical matter."[5] If the BOC claims it is generally offering an item, "the BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to its SGAT."[6]

The FCC has determined that the BOC must provide local transport and local switching as unbundled network elements under § 251(c)(3), independent of its obligation under § 271 to unbundle local transport and local switching.[7]

The FCC has defined the scope of the ILECs' obligation to provide nondiscriminatory access to unbundled network elements under § 251(c)(3):

> [A]n incumbent LEC could potentially act in a nondiscriminatory manner in providing access or elements to all requesting carriers, while providing preferential access or elements to itself. Accordingly, we conclude that the phrase "nondiscriminatory access" in § 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element *must be equal between all carriers requesting access to that element*; second, where technically feasible, *the access*

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[4] *Application of Ameritech Michigan Pursuant to § 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997), ¶ 110 ("*Ameritech Michigan Order*").

[5] *Application of BellSouth Corporation, et al. Pursuant to § 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, FCC 97-418 (rel. Dec. 24, 1997), ¶ 81 ("*BellSouth South Carolina Order*").

[6] *Id.*

[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, FCC 99-238 (rel. Nov. 5, 1999), ¶¶ 253 and 323 ("*UNE Remand Order*").

and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself."

> The duty to provide unbundled network elements on "terms and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself. We also conclude that, because § 251(c)(3) includes the terms "just" and "reasonable" this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, *we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete.*[9]

The Commission, when reviewing Qwest Corporation's ("Qwest's") Statement of Generally Available Terms and Conditions ("SGAT") and interconnection agreements, must determine whether Qwest has a concrete and specific legal obligation to provide the checklist items on a nondiscriminatory basis. The terms and conditions must be equal to the terms and conditions under which Qwest provisions elements to itself, and such terms and conditions must also provide CLECs with a meaningful opportunity to compete. The Commission should conclude that Qwest has failed to satisfy these requirements with respect to Checklist items 2, 5, and 6.

II. ARGUMENTS

A. The Provisioning and Combination of Unbundled Network Elements

Qwest is prohibited from separating network elements that are already combined in its network.[10] The Ninth U.S. Circuit Court of Appeals, moreover, has upheld provisions in

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[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶ 312 (footnotes omitted) (emphasis added) ("*Local Competition Order*"). *See also UNE Remand Order*, ¶¶ 490-491.

[9] *Id.*, ¶ 315 (footnotes omitted) (emphasis added).

[10] 47 C.F.R. § 51.315(b).

interconnection agreements requiring Qwest to combine network elements on behalf of CLECs.[11] Qwest has also stated that it will voluntarily combine network elements on behalf of CLECs. The Commission thus must determine whether the provision of network elements in combinations by Qwest is nondiscriminatory, "allows requesting carriers to combine such elements in order to provide such telecommunication service,"[12] and provides CLECs a meaningful opportunity to compete.[13] Qwest's proposed provisions fail to satisfy this standard in several material respects.

1. Qwest is obligated to build network elements on a nondiscriminatory basis for CLECs (CL2-13; UNE-C-8; EEL-5)

Qwest does not believe it has an obligation to build UNEs. The SGAT states that Qwest will provide CLECs access to UNEs "provided that facilities are available."[14] In the section of the SGAT regarding construction, it is clear that Qwest will not build UNEs unless it believes, based on "an individual financial assessment," that it is in *Qwest's* interests to do so.[15] It is AT&T's position that Qwest must build UNEs for CLECs under the same terms and conditions that Qwest would build network elements for itself (or its retail customers) at cost-based rates.[16]

The FCC has stated that,

> "[t]he duty to provide unbundled network elements on "terms, and conditions that are just, unreasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself."[17]

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[11] *U S WEST v. MFS*, 193 F.3d 744, 758-759 (9th Cir. 1999); *MCI v. U S WEST*, 204 F.3d 1262, 1267 (9th Cir. 2000).
[12] 47 U.S.C. § 251(c)(3).
[13] *See* AT&T's Multistate Comments (WS3-ATT-KLW-1) at 11-16 for a complete discussion of Qwest's legal obligations to provide UNE combinations.
[14] SGAT §§ 9.23.1.4, 9.23.1.5, 9.23.1.6 and 9.23.3.7.2.12.8. There are other sections that incorporate the notion that Qwest does not have to build UNEs, for example, SGAT §§ 9.1.2.1 and 9.19
[15] SGAT § 9.19. There is no reasonableness standard. Multistate Workshop 3 Transcript at 259 (March 27, 2001).
[16] For example, there should not be a situation where unbundled loops or transport are not "available" for a CLEC but the facilities are available as retail services.
[17] *Local Competition Order*, ¶ 315. In an accompanying footnote, the FCC stated that "[t]he term 'provisioning' includes installation." *Id.*, n. 684. Note that the FCC discusses "terms and conditions," not rates. Although, as between CLECs, rates must be nondiscriminatory, with respect to rates charged to all CLECs, the rates must be cost-based pursuant to § 252(d).

The FCC's rules also require that the ILEC provision network elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provides such elements to itself.[18]

In its *Local Competition Order*, the FCC does not explicitly state that ILECs do not have to build network elements, except for unbundled interoffice facilities.

> Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled interoffice facilities to existing incumbent LEC facilities. We also note that § 251(f) of the 1996 Act provide relief for certain small LECs from our regulations under § 251.[19]

In its order, the FCC recognized the economic impact on small ILECs of having to build transport. It explicitly held all ILECs need not build transport; however, it made clear that for all other network elements, § 251(f) provides the relief for *rural* ILECs from any economic impact imposed on the *rural* ILECs as a result of having to build network elements for CLECs.[20] Therefore, although it explicitly limited an ILECs obligation to provide interoffice facilities to existing facilities, the FCC made no explicit limitations for the other network elements, whether for rural or non-rural ILECs, and no such limitation can be inferred.

Furthermore, the FCC has held that the ILECs have an obligation to replace UNEs that are being provided to CLECs.[21] An obligation to replace UNEs is essentially the same as an obligation to build UNEs. Finally, the FCCs rules also require that the ILEC provision network

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[18] 47 C.F.R. § 313(b).

[19] *Local Competition Order*, ¶ 451. The FCC did not unbundle dark fiber in the *Local Competition Order*, so no inference can be made that the ILEC does not have to light dark fiber based on the FCC's language in paragraph 451. *Id.*, ¶ 450. *See also, UNE Remand Order*, ¶ 324. In the *UNE Remand Order*, the FCC discusses the lack of any obligation on the ILEC's part to build point-to-point interoffice facilities that the ILEC has not deployed for its own use. Once again, it cannot be inferred that the ILEC has no obligation to light dark fiber that is already in place.

[20] Section 251(f) applies only to rural ILECs; therefore, ILECs such as Qwest cannot seek exemption from it obligation to build under § 251(f).

[21] *Local Competition Order*, ¶ 268; 47 C.F.R. § 51.309(c). Qwest has argued it need not replace UNEs. This position is in conflict with the FCC order and rule. The Commissions should affirm that Qwest must replace UNEs.

elements to CLECs on terms and conditions no less favorable than the terms and conditions under which the ILEC provides such elements to itself.[22]

Qwest proposes to flout these requirements. Qwest proposes to have the authority to refuse to build a facility as a UNE for a CLEC when Qwest would build that same facility to enable Qwest to provide the same service to the same retail customer that the CLEC proposes to serve.[23] Qwest also proposes to be able to refuse to build a facility as a UNE under SGAT § 9.19 and agree to build it for the CLEC if the CLEC orders the facility as a retail service.[24] Qwest is willing to commit to building facilities for CLECs as UNEs only if Qwest has an obligation to build under its provider-of-last-resort obligations.[25] This offer is limited to DS0 loops.[26] Qwest's proposed limitations do not comply with the Act and the FCCs rules.

An ILEC must build network elements for CLECs (except point-to-point interoffice facilities) under the same terms and conditions that the ILEC would build the facilities for itself or its retail customers, at cost-based rates under § 252(d). Any other holding would be discriminatory and prevent the CLECs from having a meaningful opportunity to compete,[27] allowing Qwest to deny a CLECs request for a UNE and then build the network element for

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[22] 47 C.F.R. § 313(b).
[23] TR 225-226 (March 27, 2001).
[24] TR 226-227 (March 27, 2001).
[25] TR 212 (March 27, 2001); WS3-QWE-KAS-18. Qwest has provided language that provides an inclusive list of the incremental steps Qwest will take to make facilities available. TR 31-32 (March 28, 2001); SGAT § 9.1.2.1.2. However, this list represents only minor modifications and does not go far enough. For example, Qwest will not upgrade electronics to make network capacity available.
[26] TR 218 (March 27, 2001).
[27] *Local Competition Order*, ¶ 315. Qwest relies on language in an Eighth Circuit opinion, that an ILEC's obligation requires that it provide access only to its "existing network -- not to a yet unbuilt superior one." *Iowa Utils Bd. v. FCC*, 130 F.3d 753, 813 (8th Cir. 1998). Qwest's reliance on this language is misplaced. The Eighth Circuit in this portion of its decision was reviewing the FCC's rules that required ILECs to provide *superior* interconnection and access to network elements. It struck down these rules (47 C.F.R. §§ 51.305(a)(4) and 51.311(c). Any discussion of these rules and decision to vacate these rules cannot be extended to an ILEC's duties under § 251(c)(3) or other rules not vacated by the Eighth Circuit.

itself to provide the service to the same customer.[28] If Qwest refuses to build a network element for a CLEC and subsequently provides the service to the same customer, Qwest has discriminated against the CLEC because Qwest built the facility on terms and conditions that should have been offered to the CLEC.[29] The Commission, therefore, should require Qwest to construct facilities for CLECs as UNEs at cost-based rates under the same terms and conditions that Qwest constructs such facilities for its retail customers.

Consistent with this requirement, Qwest should be required to light unused dark fiber or augment electronics to provide UNEs, including UNE transport, to CLECs. Qwest alleges it does not have to light unused dark fiber and make it available as dedicated transport or replace the electronics to expand the existing capacity to make UDIT available[30] because it has no obligation to build UNEs. Qwest has taken the FCC statement that it does not have to build dedicated transport to extremes. The *Local Competition Order* and the *UNE Remand Order* do not provide any basis for the argument that the ILEC need not add electronics to dark fiber or change out the electronics to increase capacity of existing facilities.[31]

First, the FCC has determined that dark fiber is dedicated transport.[32] The FCC has held that dark fiber is no different than unused copper capacity that is "dormant until carriers put it into service."[33] The FCC also noted that dark fiber "is physically connected to the incumbent's network and is easily called into service."[34]

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[28] This is the likely result of Qwest's position. An end-user customer that is advised by a CLEC that facilities are not available is going to try to obtain the facilities from another carrier. If Qwest will not build the facilities for any CLEC, the customer will eventually wind up at Qwest, leaving Qwest to build the facilities on any terms it wishes.
[29] Once again, it should be noted that Qwest is fully compensated under § 252(c) for its costs. Arguably, its profits may not be as high as those it receives under its retail tariffs.
[30] Multistate Workshop 3 Transcript at 33 (March 28, 2001). Dedicated transport includes the necessary electronics. *UNE Remand Order*, ¶ 323.
[31] *See* n. 20, *supra*.
[32] *UNE Remand Order*, ¶ 325.
[33] *Id. See* also, ¶ 327.
[34] *UNE Remand Order*, ¶ 328.

Qwest has not made any arguments that it need not provide unused copper capacity. Similarly, if the dark fiber is in place, Qwest should not be permitted to claim that it does not have to do what is necessary to call that dark fiber into service to meet orders for dedicated transport. Furthermore, the rates for dedicated transport include the costs of the electronics, so Qwest is being compensated for lighting the fiber.

The FCC also has stated that ILECs must make reasonable modifications to provide access to UNEs. Lighting the dark fiber or replacing the electronics are reasonable accommodations. The FCC has "conclude[d] that the obligation imposed by §§ 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements."[35] The FCC noted that "to the extent incumbent LECs incur costs to provide interconnection or access under §§ 251(c)(2) or 251(c)(3), incumbent LECs may recover such costs from requesting carriers."[36]

Qwest may not discriminate against the CLECs. It must provide interoffice facilities on nondiscriminatory terms and conditions.[37] The FCC prohibited the ILECs from providing preferential treatment to themselves.[38] Qwest is going to light the fiber for itself at some point to provide dedicated transport to itself or its customers. Dark fiber is not going to remain dark indefinitely. Qwest will also increase the capacity of the electronics for its own use (but will not do so for the CLECs). Qwest, then, cannot argue it will never light dark fiber or replace electronics to make dedicated transport available to the CLECs. This would be a clear violation of the nondiscrimination provision of § 251(c)(3) of the Act and the FCC rules.[39]

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[35] *Local Competition Order*, ¶ 198. *See also* ¶ 202.
[36] *Local Competition Order*, ¶ 200. In fact, the costs to light the dark fiber are included in the rates for dedicated transport and no construction charges are necessary.
[37] *Local Competition Order*, ¶ 312.
[38] *Id.*
[39] 47 C.F.R. §§ 51.307 and 51.311.

It is entirely consistent with the FCCs rules to require Qwest to call dark fiber into service, add the necessary electronics and provide the dedicated transport requested by the CLEC. This is what Qwest must do if it needs to provide dedicated transport to its own customers. To find that Qwest does not have to add electronics to unused dark fiber to provide dedicated transport to CLECs would ignore that facilities are, in fact, in place and would allow Qwest to inventory and retain dark fiber entirely for its own use, thereby undermining its obligation under § 251(c)(3) to provide dedicated transport. The same situation occurs if Qwest need not replace electronics to increase capacity. To hold otherwise would be discriminatory and a violation of § 251(c)(3) of the Act and the FCCs rules.

Accordingly, the language "provided that facilities are available" should be stricken from SGAT §§ 9.23.1.4, 9.23.1.5, 9.23.1.6 and 9.23.3.7.2.12.8. Furthermore, SGAT § 9.19 should be amended. The first sentence of this section should be amended to read: "Qwest will conduct an ~~individual financial~~ assessment of any request which requires construction of network capacity, facilities, or space for access to or use of unbundled loops." The Commissions should also make clear that under § 9.1.2 of the SGAT and related provisions, Qwest is obligated to build UNEs, except dedicated transport, on a nondiscriminatory basis at cost-based rates under § 252(d).

2. The SGAT should be amended to remove any prohibition on connecting UNEs to finished services, except where expressly permitted by the FCC.

The SGAT at § 9.23.1.2.2 contains a section that prohibits CLECs from connecting UNEs to finished services, without going through a collocation. No such general limitation exists in the FCC orders or rules. In fact, the words "finished service" are not contained in the FCC orders or rules. The limitation should be removed. In addition, § 9.1.5 states that Qwest

may not restrict CLECs' use of UNEs or combinations of UNEs except as permitted by Existing Rules.[40]

The FCC was clear that the ILEC could not place any restrictions on the use of UNEs.

> An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.[41]

Section 251(c)(3) also allows access to UNEs at any technically feasible point[42] using any technically feasible method.[43] The FCC has held that "the use of the term 'feasible' implies that interconnecting or providing access to an ILEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, incumbent LEC equipment."[44]

Qwest has not provided any evidence that accessing UNEs by connecting the UNE to a finished service is not technically feasible.[45] In fact, the SGAT acknowledges connecting finished services to UNEs is technically feasible by requiring such connection be done in a CLEC's collocation.[46] This requirement simply adds unnecessary expense and denies CLECs a meaningful opportunity to compete.

Qwest's restriction requires CLECs to construct separate networks, private line circuit access and network elements, because Qwest's restriction on connecting UNEs to finished services precludes a CLEC from aggregating traffic on the same trunk groups.[47] This is

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[40] It is Qwest's position that the FCC's Existing Rules prohibit CLECs from connecting UNEs to finished services.
[41] 47 C.F. R. § 51.309(a).
[42] *See also* 47 C.F.R. § 51.307(a).
[43] *Id.*, § 51.321(a).
[44] *Local Competition Order*, ¶ 202.
[45] The ILEC has the burden to prove a method of accessing UNEs is not technically feasible. *See Id.*, § 51.321(b).
[46] SGAT § 9.23.1.2.2. *See also* SGAT § 9.6.2.1.
[47] Multistate Exhibit WS3-ATT-KLW-2, 3, and 4, Multistate Workshop 3 Transcript at pp. 39 & 41-42 (March 26, 2001).

inefficient, expensive and allows Qwest to control market entry by the CLECs by delaying the provisioning of facilities or allowing UNE capacity to be unavailable. Qwest's restrictions simply make it more difficult for the CLECs to meaningfully compete with Qwest.

The FCC has identified two instances where a UNE combination cannot be connected to tariff services. One instance is the loop-transport combination, or the EEL, discussed in the *Supplemental Order Clarification*.[48] All three safe harbor provisions identified in paragraph 22 of the *Supplemental Order Clarification* address loop-transport combinations. In a discussion in paragraph 28 of that order, the FCC rejected a suggestion that it "eliminate the prohibition on 'commingling' (*i.e.*, combining loops or loop-transport combinations with tariff special access services) in the local usage options discussed above."[49] However, once again, this "prohibition" does not extend to all UNEs, but is limited to connecting loop-transport combinations and loops to special access services.

The FCC also noted in paragraph 28 that it would address this issue in its Public Notice issued in early 2001. The Public Notice was issued on January 24, 2001.[50] Once again, the FCCs discussion addresses only loop-transport and loops and asks whether special access circuits converted to UNE combinations may remain connected to existing access circuits without regard to the nature of the traffic carried over the access circuits.[51] As is the case with the *Supplemental Order Clarification*, nowhere in the Public Notice is there any suggestion that there is a general prohibition on connecting UNEs to tariff services, nor does the FCC seek comment on the connection of UNEs to tariff services generally. Therefore, the FCCs rule §1.3001(a) prohibits

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[48] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, FCC 00-183 (rel. June 2, 2000), ¶ 22. ("*Supplemental Order Clarification*").
[49] The 3 local use options are contained in paragraph 22 of *Supplemental Order Clarification*. It is worth noting that the FCC does not discuss loops at all in paragraph 22.
[50] Public Notice, DA 01-169, Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service, (rel. Jan. 24, 2001).
[51] *Id.*, at 3.

any general restriction in the SGAT, or any interpretation of § 9.1.5 of the SGAT, that *all* UNEs cannot be connected to tariff or finished services.

Sections 9.6.2.1 and 9.23.1.2.2 should be amended to make it clear that UNEs can be directly connected to finished services, except where specifically prohibited by the FCC. Qwest's interpretation of SGAT § 9.1.5 should be similarly limited.

3. SGAT § 9.23.3.17 - Qwest's desire to take unfair advantage of misdirected CLEC customer contact is anticompetitive and constitutes a violation of § 271 of the Act.

SGAT § 9.23.3.17 deals with customers that, in error, call the wrong carrier with questions about service or maintenance and repair. Under the terms of its SGAT, Qwest maintains that it ought to be allowed to turn these misdirected calls into solicitation opportunities for itself. As grounds for this anticompetitive conduct, Qwest has claimed that the U. S. Constitution grants Qwest an unfettered right to interfere with the relationship between the CLEC and its end user customer.[52]

Fortunately, the U. S. Constitution provides no such right. Rather, the U. S. Supreme Court has clearly stated that freedom of speech is not without bounds.[53] In particular, for commercial speech -- which is precisely the speech Qwest employs, its attempt to snatch CLEC customers via erroneous or misdirected calls -- enjoys only "a limited measure of protection."[54] In fact, the Supreme Court has held:

> We have always been careful to distinguish commercial speech from speech at the First Amendment's core. '[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First

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[52] Multistate Workshop 3 Transcript at 16 (March 27, 2001).

[53] *Florida Bar v. Went For It, Inc.*, 51 U.S. 618, 623, 115 S.Ct. 2371, 2375 (1995); *see also Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 646, 101 S. Ct. 2559, 2564 (1981)("the First Amendment does not guarantee the right to communicate one's views at all times and places. ").

[54] *Id.*; *Central Hudson Gas & Electric Corp. v. Public Utilities Comm'n of New York*, 447 U.S. 557, 562, 100 S.Ct. 2343, 2350 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, m 1830 (1976).

> Amendment values' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'"[55]

Generally, commercial speech is protected if, and only if, it concerns lawful activity or is not misleading.[56] Even if the speech falls into these categories, it may still be subject to governmental regulation where, as here, the government has a substantial interest in support of its regulation and that the proposed restriction is narrowly tailored to materially advance that interest.[57]

By legislative mandate, a substantial interest exists here (*e.g.*, opening the local markets to competition and preventing anticompetitive behavior that threatens such competition).[58] Moreover, the CLECs are only asking that the limitation be narrowly drawn to apply to misdirected or erroneous calls, which Qwest's representatives can quickly discern by asking the customer the purpose of his or her call (most likely, the customer will volunteer this information in his or her first sentence or so). Such questioning is within reason and easily incorporated into the representative's existing scripts.[59] Similarly, the law in most states prohibits Qwest from engaging in tortuous interference with contracts (such as the contract between the CLEC and its end-user customer) and such prohibition does not constitute a violation of First Amendment rights governing commercial speech.[60]

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[55] *Florida Bar*, 115 S.Ct. at 2375.
[56] *Id.*
[57] *Florida Bar*, 115 S.Ct. at 2375; *Central Hudson*, 100 S.Ct. at 2350 ("The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.").
[58] 47 U.S.C. §§ 251 & 253.
[59] Most companies such as Qwest provide computer-available scripts for their representatives to follow while on the phone with customers.
[60] Qwest representatives receiving a misdirected call and then interfering with the caller's intent to reach his or her CLEC provider causing the caller to terminate any portion of the contractual relationship with the CLEC have committed tortuous interference with the CLEC's contract or business expectancy with its end user customer.

Finally, § 222 of the Act mandates the protection of customer information and restricts its use by carriers to the purpose for which it was intended.[61] In particular, §§ 222(a) and (b) provide, in pertinent part:

> (a) In General.—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications service
> ...
>
> (b) Confidentiality of Carrier Information.—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

When Qwest inadvertently receives information about a CLEC's customer service, maintenance or repair, such information is proprietary to the CLEC. How Qwest obtains such information, either through carrier-to-carrier exchanges or by a misdirected call, is irrelevant. The information is to be used by Qwest only for the purpose intended, in this case, to reach the CLEC for service, maintenance or repair. Any use by Qwest of such information for its own marketing purposes is prohibited.

Based upon this supporting law, AT&T asks that the Commissions protect nascent competition by not allowing Qwest to abuse its unique position as the dominant reseller controlling the underlying service provided in the resale context. Qwest should therefore be expressly prohibited in its SGAT from using the misdirected CLEC end-user calls as a sales opportunity. AT&T proposed adding the words "seeking such information" at the end of the SGAT § 9.23.3.17.[62] This is clearly a narrowly drawn restriction that safeguards the very

[61] 47 U.S.C. § 222 (a) & (b).
[62] Multistate Workshop 3 Transcript at 12 (March 27, 2001).

important legislative goal of encouraging the growth of competition in the local telecommunications market.

4. The SGAT does not contain language that permits adequate testing of Qwest and CLEC interfaces and systems

a. The Need for Testing Language Generally

The SGAT presently does not contain any language on testing of Qwest and CLEC operations support systems ("OSS") and interfaces. In response to concerns raised by AT&T regarding the lack of testing language and the failure of Qwest to provide a test environment that mirrors the production environment, Qwest proposed language to be included in the SGAT. AT&T also proposed testing language that is more comprehensive than Qwest's proposal and makes changes to the language proposed by Qwest.[63]

A fundamental question is whether there needs to be any language in the SGAT that explains the test options available to the CLEC to test Qwest and its OSS and interfaces. AT&T believes this goes without saying. It is absolutely essential to any contractual relationship between Qwest and a CLEC that the parties know the scope of Qwest's obligation to provide testing. AT&T's inability to reach agreement with Qwest on a comprehensive test in Minnesota after months of negotiation supports the need for test language. Otherwise, parties are at the mercy of Qwest. Even with the test language in AT&T's Minnesota interconnection agreement, Qwest had been unwilling to come to agreement on the terms of the test.[64] However, what is clear is that the test in the Minnesota agreement language provided AT&T with a specific contractual right that it

[63] Attached as Exhibit A (Multistate Exhibit WS3-ATT-MFH-2).
[64] Multistate Workshop 3 Transcript at 7 (March 28, 2001)

could enforce by filing a complaint at the Minnesota Commission. Without contract language, any complaint would have been very difficult to pursue.

It is crucial that the SGAT *clearly* spell out Qwest's obligation to provide for testing.[64] AT&T recommends that the Commissions adopt AT&T's proposed language.

b. Stand-Alone Test Environment

The FCC has made it clear that the ILEC must provide a test environment that mirrors the production environment.

> Competing carriers need access to a stable testing environment to certify that their OSS will be capable of interacting smoothly and effectively with Bell Atlantic's OSS as modified. In addition, *prior to issuing a new software release or upgrade, the BOC must provide a testing environment that mirrors the production environment in order for competing carriers to test the new release.* If competing carriers are not given the opportunity to test new releases in a stable environment prior to implementation, they may be unable to process orders accurately and unable to provision new customer services without delays.[66]

Qwest calls this environment the "stand-alone test environment" in its proposed language. The *Bell Atlantic New York Order* also made it clear that the stand-alone test environment must be available "prior to issuing a new software release or upgrade"[67] Qwest has proposed language in other jurisdictions to make clear it would provide the stand-alone test environment for new software releases or upgrades prior to implementing such release.[68] This new language must be adopted to conform any testing language finally adopted to the requirement in the *Bell Atlantic New York Order*.

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[64] This is essentially the basis of AT&T's amendments to Qwest's proposal -- to make the test language that Qwest proposed clearer

[65] *Application by Bell Atlantic New York for Authorization Under § 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999), ¶ 109 (footnotes omitted) ("*Bell Atlantic New York Order*").

[67] *Bell Atlantic New York Order*, ¶ 109.

[68] Qwest added a new § 12.2.9.4.2: "For a new software release or upgrade, Qwest will provide CLEC the stand alone testing environment as set forth in § 12.3.9.3.2, prior to implementing that release or upgrade in the production environment."

It is AT&T's position that a stand-alone test environment is necessary to meet checklist item 2, should be incorporated in the SGAT and the Commissions should reject any finding of compliance with checklist item 2 until a stand-alone test environment is, in fact, available.[69] Language in the SGAT (a paper promise) is insufficient.

c. **Comprehensive Production Testing.**

Qwest's proposed language fails to provide for testing by the CLEC in a comprehensive manner. Qwest's language provides for connectivity testing, a stand-alone testing environment, interoperability testing and controlled production. Each of these testing proposals has a specific, limited application and do not permit CLECs to test whether the Qwest systems and interfaces, and CLEC systems and interfaces built to Qwest's specifications, work as contemplated in a commercial setting in commercial volumes. Qwest's proposed language does not permit this type of testing.[70]

Connectivity testing "establishe[s] the ability of the trading partners to send and receive EDI data effectively. This test verifies the communications between the trading partners."[71] The stand-alone test environment allows CLECs to process preorder and order test accounts in a predetermined environment that mirrors the production environment.[72] "Interoperability testing verifies CLECs ability to send correct EDI transactions through the EDI/IMA system edits successfully."[73] Controlled production essentially allows the CLEC to place a *limited* number of actual orders using valid

[69] Due to the lack of commercial usage, to obtain a finding of compliance with checklist item 2, the stand-alone test environment should also be tested by the independent third-party as part of the OSS test.
[70] Multistate Workshop 3 Transcript at 23 (March 28, 2001).
[71] Multistate Exhibit WS3-QWE-KAS-17 (Stewart), § 12.2.9.3.1.
[72] *Id.* § 12.2.9.3.2
[73] *Id.* § 12.2.9.3.3

account and order data that are provisioned."[74] Generally, the CLEC must find a small number of "friendlies" to use as guinea pigs. Only controlled production testing allows end-to-end testing; however, this testing is very limited and requires the use of live customers.[75] The CLEC must, therefore, find customers willing to put their telephone service at risk.

None of Qwest's testing environments provide a robust test environment to really put the CLEC's and Qwest's processes through the ringer to verify that the preordering, ordering, billing, provisioning and maintenance and repair processes will work to allow large scale market entry.[76] AT&T's proposal allows for such testing.[77] AT&T's testing proposal is not unique. First, language in AT&T's Minnesota interconnection agreement with Qwest provides for such testing. Second, a number of RBOCs in other jurisdictions -- New York, Massachusetts, Pennsylvania, Virginia and Georgia -- are participating with AT&T in the same kind of test that AT&T seeks to conduct with Qwest.[78]

Qwest has limited its controlled production testing to few customers. Qwest offers no capability to allow CLECs to mass test Qwest's UNE-P or UNE offerings. Under AT&T's proposal, 1000 lines could be used to test AT&T's and Qwest's interfaces and OSS. Lines are installed to test equipment, eliminating the need for a significant number of friendlies. The test equipment would essentially make calls, monitor changes

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[74] *Id.*, § 12.2.9.3.4

[75] "What other CLECs have done over the last few years is placed a limited number of orders and hand-paddled them through to make sure that things work as expected between the CLEC and Qwest." Ms. Nancy Lubamersky, Qwest, Multistate Workshop 3 Transcript at 25 (March 28, 2001). This is hardly the kind of testing a CLEC should have to stake its future on.

[76] Multistate Exhibit WS3-ATT-MFH-2 (Hydock), § 12.2.9.3.5; Multistate Workshop 3 Transcript at 6 (March 28, 2001).

[77] Multistate Workshop 3 Transcript at 7-8 & 15 (March 28, 2001); WS3-ATT-MFH-1 (Hydock), ¶ 9.

[78] "As there are no natural standards dealing with CLEC-ILEC OSS interfaces, AT&T needs to establish and test its own interfaces for each ILEC or sub-ILEC entity that has a unique set of business rules for the OSS functions." Multistate Exhibit WS3-ATT-MFH-1 (Hydock), ¶ 9; Multistate Workshop 3 Transcript at 6 March 28, 2001).

to features and functions and swap service back and forth from AT&T to Qwest and Qwest to AT&T. Qwest would render actual bills with call detail.[79]

Qwest alleges that the Regional Oversight Committee ("ROC") test is sufficient.[80] However, the FCC has recognized that carrier-to-carrier testing is appropriate and relevant.[81] The testing proposed by AT&T is common in the industry.[82] Furthermore, the ROC test does not test AT&T's interfaces and OSS that have been built on Qwest's documentation.[83] AT&T should be able to do carrier-to-carrier testing before it enters the marketplace. Qwest wants the CLECs to enter the marketplace under its restrictive test environment.

CLECs should not be placed in the position of having to use its new customers as test subjects. If market entry is to be successful and occurs in any significant volumes, the CLEC should not have to risk loss of its goodwill and damage to its reputation due to problems that could have been uncovered by the testing AT&T proposes, before large-scale market entry. Accordingly, the Commission should adopt a method for testing as proposed by AT&T, including AT&T's testing language.

B. Local Switching - Checklist Item 6

1. Qwest should be required to provide AIN-based switch features

Qwest currently provides features through the use of software located in the switch or on its Advanced Intelligence Network ("AIN") platform. Qwest claims it does not have to make AIN features available to the CLECs, based on the FCCs *UNE Remand Order*.[84] It is AT&T's

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[79] Multistate Exhibit WS3-ATT-MFH-1 (Hydock).
[80] Multistate Workshop 3 Transcript at 11 (March 28, 2001).
[81] *Bell Atlantic New York Order*, ¶ 89.
[82] Multistate Workshop 3 Transcript at 15 & 24 (March 28, 2001).
[83] *Id.* at 9.
[84] *Id.* at 37 (March 26, 2001). Qwest relies on language in paragraph 419.

position that Qwest reads the FCC's order too broadly and that the FCC disregarded its own standards for determining whether a network element is proprietary or necessary.

The FCC has made it clear that the ILEC must provide all features, functions and capabilities of the switch as part of the local switching element.[85] This "includes all vertical features that the switch is capable of providing, including custom calling, CLASS features, and Centrex, as well as any technically feasible customized routing functions."[86] "Vertical switching features, such as call waiting, are provided through operations of hardware and software comprising the 'facility' that is the switch, and thus are 'features' and 'functions' of the switch."[87] In its *UNE Remand Order*, the FCC reaffirmed its definition of unbundled local switching.[88] The FCC found that the CLECs would be impaired if the ILEC did not provide the unbundled switch with all the features.

The FCC has ordered ILECs to "provide a requesting carrier the same access to design, create, test and deploy AIN-based services at the SMS, through a SCE, that the incumbent LEC provides to itself."[89] In its order, the FCC concluded that AIN service software qualifies as a proprietary network element and should be evaluated under the "necessary" standard because AIN software is often the subject of patent protection[90] and may be a trade secret. Ameritech had claimed that its Privacy Manager "is currently a trade secret because it has independent economic value, is not generally known by or readily discernable to Ameritech's competitors, and has been the subject of reasonable security measures."[91]

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[85] *Local Competition Order*, ¶ 412.
[86] *Id.*
[87] *Id.*, ¶ 413.
[88] *UNE Remand Order*, ¶ 244; 47 C.F.R. § 319(c)(1(iii).
[89] *UNE Remand Order*, ¶ 412.
[90] *Id.*, ¶ 409. *See also id.*, n. 82.
[91] *Id.*, ¶ 409. Ameritech's Privacy Manager is the only AIN feature specifically discussed by the FCC

On remand from the Supreme Court's decision upholding much of the FCCs jurisdiction but finding that the FCC did not properly articulate a necessary and impair standard, in its *UNE Remand Order*, the FCC established the necessary and impair standards. It should be noted that the necessary standard is applicable only if there is an initial finding that the element is proprietary, as defined by the FCC.

The FCC defined proprietary, adopting "a limited definition of the phrase 'proprietary in nature' that tracks the intellectual property categories of patents, copyrights and trade secrets."[92]

> We find that if an incumbent LEC can demonstrate that it has invested resources (time, material, or personnel) to develop proprietary information or network elements that are protected by patent, copyright, or trade secret law, the product of such investment is "proprietary in nature" within the meaning of § 251(d)(2)(A).[93]

The FCC identified a number of exceptions:

> The second circumstance is where an incumbent LEC cannot demonstrate that the information or functionality that it claims is proprietary differentiates its service from its competitors' services, or is otherwise competitively significant.[94] Information or functionalities that do not distinguish an incumbent LECs service from that of its competitors are unlikely to be the focus of an incumbent LECs efforts to innovate, and therefore do not require the high level of protection normally afforded to proprietary elements under the "necessary" standard. The third circumstance is where we find that lack of access to the proprietary element would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers. In such a circumstance, we may find that the incumbent LECs asserted proprietary interest is outweighed by the benefits of facilitating more rapid deployment of competition for the greatest number of consumers.[95]

If an element is found to be proprietary, and none of the three circumstances apply, the next step is to determine whether an element is "necessary".

> We conclude that a proprietary network element is "necessary" within the meaning of § 251(d)(2)(A) if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning

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[92] *Id.*, ¶ 34.
[93] *Id.*, ¶ 35.
[94] *Id.*, ¶ 37 (footnotes omitted).
[95] *Id.*, ¶ 37.

> by a request carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, *preclude* a requesting carrier from providing the services it seeks to offer. We agree with NTIA that the proper focus of the "necessary" standard is whether access to the incumbent LECs proprietary element is absolutely required for the competitor's provision of its intended service. We find, therefore, that an incumbent LEC must provide access to proprietary element, if withholding access to the element would prevent a competitor from providing the service it seeks to offer. In other words, we conclude that an incumbent LECs proprietary network element would only be available to a competitor if the competitor is unable to offer service, without access to the element, because not practical, economic, and operational alternative is available either by self-provisioning or from other sources.[96]

If the element is not "necessary," the ILEC need not offer it.

Reviewing the FCCs order, it is apparent that the FCC did not conduct an analysis consistent with its own standards. Although the FCC noted that several of the BOCs had patented AIN service software,[97] and one ILEC claimed *one* of its AIN services was a trade secret,[98] the FCC did not analyze the AIN service software provided by the ILEC's under the definition of proprietary. Furthermore, when analyzing whether the AIN service software is necessary, the FCC based its decision solely on to the fact that the AIN databases, SCE, SMS and ITPs are available to requesting carriers, concluding that because the CLECs have access to these facilities, the CLECs are not precluded from offering AIN service without access to the AIN service software.[99] Once again, the FCC ignored its own standard -- whether "the competitor is unable to offer service, without access to the element, because no practical, economic, and operational alternative is available, either by self-provisioning or from other sources."

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[96] *Id.*, ¶ 44 (emphasis in original).
[97] *Id.*, ¶ 409.
[98] *Id.*
[99] *Id.*, ¶ 419.

Simply stated, the FCC failed to conduct the fact-based analysis required by its own standards, instead relying on the simple fact that it had unbundled access to the AIN database and related facilities. The FCC should have determined whether:

- the AIN service software "differentiates its services from its competitors services, or is otherwise competitively significant;"[100]
- "lack of access would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers;"[101]
- as a practical, economic and operational matter, CLECs are precluded from providing the service it seeks to offer;[102]

a. Qwest has not demonstrated that its AIN features differentiate it from its competitors or is otherwise competitively significant

The FCCs discussion of AIN service software focused on Privacy Manager, a service provided by Ameritech that Ameritech held patents on and claimed was a trade secret.[103] The FCC described Privacy Manager in its order.[104] Privacy Manager is very similar to Qwest's Caller ID with Privacy+.[105] It does not appear that Qwest's service appears in any way unique to warrant a finding that it should be classified as proprietary. It appears to be no different than any other switch feature that Qwest is required to provide CLECs.

b. Lack of access to AIN features would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers

The FCC has stated that use of UNEs by a CLEC to provide telecommunication

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[100] *Id.*, ¶ 37.
[101] *Id.*
[102] *Id.*, ¶ 44.
[103] *Id.*, ¶ 41. Qwest also claims its AIN features are covered by patents.
[104] *Id.*, n. 799.
[105] Caller ID with Privacy+ is generally located in § 5.4.3 of Qwest's tariffs.

service is a permitted means of entry under the Act.[106] This position was affirmed by the Eighth Circuit[107] and the U. S. Supreme Court.[108]

The implications of not providing AIN features must be clearly understood -- when a customer that has an AIN service, for example, Caller ID with Privacy+, switches to a CLEC that wants to provide service using UNE-P, the AIN feature will be lost.[109] The CLEC will not be able to provide the service by using UNE-P, unless the CLEC develops the same software independently and without violating Qwest's patent,[110] or purchases the software from a third-party, *if available*,[111] and loads it into the AIN platform. The FCC without any basis, assumes this is an easy process or AIN features are available from third parties.

For the CLECs to recreate those features in AIN software would be incredibly difficult, burdensome and costly.[112] "Typically, the development cycle for features of this nature is at least two years."[113] It also raises the "chicken-or-the-egg" issue -- can the CLEC expend time and money before it enters a market or must it wait until the CLEC has enough customers to justify the cost? The problem is, will the CLECs get enough customers to justify the expense if it cannot provide the AIN features in the first place?

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[106] *Local Competition Order*, ¶¶ 328-341.
[107] *Iowa Utils Bd. v. FCC*, 120 F.2d. 815 (8th Cir. 1998).
[108] *AT&T v. Iowa Utils Bd.*, 119 S.Ct. 721, 736 (1999).
[109] Multistate Workshop 3 Transcript at 40-41 (March 26, 2001). The only option is to provide the service through resale, unless the CLEC chooses to develop AIN software.
[110] CLECs must create functionally equivalent AIN features that do not infringe on Qwest's patent because Qwest will not waive any patent infringement. *Id.* at 56.
[111] Qwest does not use any off-the-shelf AIN features. *Id.* at 47. There is no evidence that the AIN service software is available from a third-party vendor. *Id.* at 67-68. Furthermore, the current AIN features cannot be provided by switch-based features, as there are no functionally equivalent switched-based features. *Id.* at 42, 44, 63 and 65.
[112] *Id.* at 41, 60 & 70. Qwest agrees AIN features "take a lot of time and money to develop." *Id.* at 44.
[113] *Id.* at 41.

It is AT&T's position that the FCC's third circumstance has been met -- "lack of access to the proprietary element would jeopardize the goal of the 1996 Act to bring rapid competition to the greatest number of customers."[114]

c. As a practical, economic and operational matter, CLECs are precluded from providing the service it seeks to offer

The FCC did not look at the practical, economic and operational concerns regarding availability of AIN software, believing that if it made the AIN database available, the CLECs could enter its own AIN service software.

It simply is impractical for a CLEC to have to provide its own AIN service software to enter a market. The CLEC would either have to write its own software or purchase it, assuming it is available. This is not practical for a new market entrant. As pointed out, this is burdensome, expensive and time-consuming, and would take several years to accomplish. As an economic matter, there is an expense of having to write AIN service software or buy it, if available, and download it before a CLEC can hope to acquire customers that may be served by AIN service software. From an operational perspective, the FCC required the ILECs to provide proprietary routing tables, finding that it would jeopardize the goal of the Act because "[r]equiring requesting carriers to engage in the *potentially* lengthy process of compiling traffic studies and populating routing tables with data in the incumbent LECs unbundled switch would frustrate a requesting carrier's ability to use unbundled local circuit switching to serve customers quickly."[115] The same operational issues are raised by having to populate the AIN service

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[114] *UNE Remand Order*, ¶ 37.

[115] *UNE Remand Order*, ¶ 251 (emphasis added). This also supports AT&T's contention that lack of AIN features would frustrate the goal of bringing about rapid competition to the greatest number of customers.

software -- writing or obtaining the software and downloading it into the AIN platform could take years.

When properly analyzed based on the standards established by the FCC, the proper conclusion is that Qwest should be required to make its AIN service software available to CLECs that are using UNEs to provide telecommunications services.

2. Qwest is obligated to provide EELs in wire centers in density zone 1 if unbundled local switching is not available.

The FCC has determined that unbundled local switching is a UNE that ILECs must make available.[116] The FCC did "find, however, that an exception to this rule is required under certain market circumstances. We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link ("EEL"), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas ("MSAs")."[117]

Qwest argues that it does not have to provide unbundled switching if it *offers* the EEL in density zone 1 wire centers, whether or not an EEL is *available* from Qwest.[118] The FCC order, however, is not susceptible to such an interpretation. If an EEL is ordered by a CLEC and it cannot be provisioned by Qwest, Qwest must make the unbundled switching element available.[119]

The basis of the switching exemption is the *availability* of the EEL.[120] Indeed, that is the very essence of the FCCs conclusion.

> Our conclusion that competitors are not impaired in certain circumstances without access to unbundled switching in density zone 1 in the top 50 MDAs also is

[116] *Id.*, ¶ 253.
[117] *Id.*, ¶¶ 253 & 278.
[118] Multistate Workshop 3 Transcript at 87 (March 26, 2001).
[119] *Id.* at 88-89.
[120] *UNE Remand Order*, ¶ 288.

> predicated upon the *availability* of the enhanced extended link (EEL). As noted in § VI(B) [at paragraph 15] above, the EEL *allows* requesting carriers to serve a customer by extending the customers loop from the end office serving that customer to a different end office in which the competitor is already collocated. The EEL therefore allows requesting carriers to aggregate loops at fewer collocation locations and increase their efficiencies by transporting aggregated loops over efficient-high capacity facilities to their central switching location.[121]

The FCC's order is straightforward -- instead of attaching loops to an unbundled switching element or CLEC switches in multiple wire centers, the CLEC can use a loop and transport combination to transport the customer's traffic to one CLEC switch or a collocation in one central office. However, if the EEL is not available, the CLEC must either collocate in each central office served by the loops or use unbundled switching.

The FCC has stated that the CLEC is not impaired if it has to purchase its own circuit switch in density zone 1 switch *if the EEL is available*: "We therefore find that the cost of purchasing a circuit switch does not impair a requesting carriers ability to provide services it seeks to offer in density zone 1, *in certain circumstances*."[122] That circumstance is if the EEL is available. If it is not, the cost to the CLEC of purchasing multiple switches in zone 1 *does* impair a CLEC. The ILEC must make unbundled switching available to the CLEC in zone 1 if Qwest cannot provide an EEL ordered by the CLEC. Otherwise, the CLEC would be impaired because it would not have the EEL or unbundled switching in density zone 1.

Qwest is not relieved if its obligation to unbundle switching in wire centers in density zone 1 even if the Commission, unlike other state commissions, does not adopt AT&T's position. Qwest must make unbundled switching available in the wire centers in density zone 1 for customers with 3 lines or less, regardless of whether the EEL is made available.[123] If after

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[121] *Id.* (emphasis added). Available "1. Accessible for use: at hand." *Riverside Webster's II New College Dictionary*, Houghton Mifflin Company, 1995. The definition of "available" means more than offer contractually.
[122] *Id.*, ¶ 287 (emphasis added).
[123] Multistate Workshop 3 Transcript at 89-91 (March 26, 2001).

determining that an EEL is not available to serve a CLEC request. Qwest can simply make the unbundled switching element available to serve that customer.

Qwest is not in compliance with checklist item 6 if Qwest does not make unbundled switching available if an EEL is not available. If unbundled switching is not made available to the CLECs when an EEL is not available, the FCC's order is negated. The Commission should adopt language that makes clear that unbundled switching should be made available when Qwest cannot make an EEL available to a CLEC.

3. Qwest incorrectly claims customers should be counted on a wire-center basis, not a location basis

The FCC has held that unbundled switching is a network element; however, it made an exception, finding that the ILECs do not have to provide unbundled local switching to customers with 4 or more lines in density zone 1 wire centers if the ILEC makes the EEL available.[124] The SGAT is ambiguous regarding how lines should actually be counted, whether on per-wire center or per-location basis. The FCC provides no clarity. However it appears that Qwest will count the total number of lines a customer has in a wire center.[125] It is AT&T's position that the line count should be done on a location-by-location basis.[126]

As an initial matter, when evaluating whether to provide service to a customer, the question a CLEC must ask is whether unbundled switching is available to serve a customer located in a density zone 1 wire center. From a practical perspective, a CLEC should be able to determine this by looking at the number of lines serving the customer at the business location.

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[124] *UNE Remand Order*, ¶ 253.

[125] Multistate Workshop 3 Transcript at 93 & 95 (March 26, 2001). Qwest does not elaborate how this would be done as reality, nor is it spelled out in the SGAT.

[126] *Id.*

The FCC noted that 3 lines or less "captures a significant portion of the mass market."[127] This market was identified as residential and small business market.[128] This analysis is not definitive. A location that has 3 lines or less is a small business. Qwest would argue that an end user customer with multiple locations in density zone 1, all locations having 3 or less lines is not a small business. Since the FCCs order is of little help, the result is how best to implement the FCC requirement.

A location analysis is the easiest for the CLEC to implement. A CLEC can determine how many lines are at a location. A CLEC cannot always determine if an end user customer at a location has multiple locations.[129] The information may not be available to the CLEC. This information is in the possession of Qwest. Furthermore, Qwest has made no process available for the CLEC to obtain the information from Qwest.

The SGAT language as proposed is ambiguous and is far from clear how the CLEC's are to implement Qwest's proposal. It also is clear that the SGAT does not state explicitly how Qwest will implement its proposal. The more practical way to implement the "3 lines or less exception" to Qwest's obligation to provide the unbundled local switching network element is on a location basis.

4. Qwest is required to provide switch interfaces at the GR-303/TR-008 level

AT&T has requested that Qwest provide access to unbundled local switching using GR-303/TR-008 interfaces. Generally, Qwest has declined, arguing it is not obligated to provide such an interface[130] and based on operational concerns.[131] The issue of whether Qwest must make

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[127] *UNE Remand Order*, ¶ 293.
[128] *Id.*, ¶¶ 293-294.
[129] Multistate Workshop 3 Transcript at 98 (March 26, 2001).
[130] *Id.* at 138-39 (March 28, 2001).
[131] *Id.* at 104-07 (March 26, 2001).

access to unbundled switching available at the GR-303/TR-008 level is one of technical feasibility, of which security of the network is a sub-issue.

The FCC addressed the issue of technical feasibility in its *Local Interconnection Order*. Section 251(c)(3) of Act requires ILECs to provide access to unbundled network elements at any "technically feasible point." The FCC has "conclude[d] that the obligations imposed by §§ 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network element."[132] The FCC also concluded "that the 1996 Act bars consideration of costs in determining 'technically feasible' points of interconnection or access.[133] The FCC concluded that it was the intent of Congress to "obligate the incumbent to accommodate the new entrant's network architecture..."[134] "Consistent with that intent, the incumbent must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements."[135]

The FCC did conclude "that *legitimate* threats to network reliability and security must be considered in evaluating the technical feasibility of interconnection or access to the incumbent LEC networks."[136] However, the ILEC has the burden of proving to the state commission "with clear and convincing evidence, that specific and *significant adverse impacts* would result from the requested interconnection or access."[137] This is a very high hurdle for the ILEC to clear. Qwest has not cleared this hurdle.

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[132] *Local Interconnection Order*, ¶ 198.
[133] *Id.*, ¶ 199.
[134] *Id.*, ¶ 202.
[135] *Id.*
[136] *Id.*, ¶ 203 (emphasis added).
[137] *Id.* (emphasis added).

Qwest takes the position it was not obligated to provide access to the switch at the GR-303 level.[138] AT&T clarified its request that the CLEC be permitted to provide its own compatible remote terminal and then lease transport from Qwest or provide its own transport from the remote terminal back to Qwest's switch. The transport would interface with the switch with its own GR-303 signal.[139]

There are no issues that prevent Qwest having to provide access at the GR-303 level, as proposed by AT&T.[140] More importantly, Qwest has failed to demonstrate by clear and convincing proof that significant adverse impacts to the network would result from AT&T's proposal. AT&T's request should be approved.[141]

C. Local Transport - Checklist Item 5

1. The SGAT violates the Act because it fails to permit CLECs to lease the in-region facilities of Qwest Corp.'s affiliates pursuant to Sections 251 and 252 of the Act

In moving for approval of the merger of Qwest Communications International, Inc. ("QCI") and U S WEST, Inc., ("U S WEST") the parent corporations of Qwest Communications Corporation ("QCC"), LCI International Telecom Corp., USLD Communications, Inc., and U S WEST Communications, Inc., now known as Qwest Corp. ("USWC"), QCI and U S WEST represented to various Commissions that the proposed merger would create a stronger competitor and provide significant value for shareholders, employees, and customers because, among other things:

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[138] Multistate Workshop 3 Transcript at 151 (March 28, 2001).
[139] *Id.* at 107 (March 26, 2001); *id.* at 166-68 (March 28, 2001). AT&T also responded to Qwest's operational concerns, but those concerns are less problematic under AT&T's remote terminal/GR303 proposal. *Id.* at 110-17 (March 26, 2001).
[140] *Id.* at 178-80 (March 28, 2001).
[141] In Washington, Qwest proposed general parameters for meeting AT&T's request, demonstrating the technical feasibility of AT&T's request. In a workshop in another jurisdiction, Qwest proposed SGAT language acceptable to AT&T. If this language is adopted in South Dakota, this issue would be closed for AT&T.

- The combination of QCI and U S WEST would enable them to achieve gross revenue synergies of more than $12 billion and net financial and operational synergies of approximately $10.5 billion to $11 billion. They expected the synergies to be comprised of (1) incremental revenues as the combined company expands its local, data, Internet Protocol and long-distance service; (2) operating cost savings in areas such as network operations and maintenance, sales and marketing, billing and customer and back office support; and (3) capital savings through elimination of duplication in the companies' planned network build outs and in other infrastructure and back-office areas.

- The combination would accelerate strategic development and enable them to grow faster than each could grow alone and would increase revenues and profits faster than each would accomplish alone. In particular, they expected it to accelerate the delivery of Internet-based broadband communications services provided by QCI to the large customer base of U S WEST and bring together complimentary assets, resources and expertise and the network infra-structure, applications, services and customer distribution channels of their companies and the combination of customer bases, assets, resources and expertise in a timely manner will permit each to compete more effectively in their rapidly consolidating industries.

- They believe worldwide broadband end-to-end infrastructure, expanded range of products and services, access to each other's customers, people and process and combined use of distribution and operating systems will create growth for the combined company and that, as a large company with global scale and scope,

multiple capabilities, end-to-end broadband connectivity, and a full suite of data, voice and video products and services, they can successfully compete in the telecommunications industry in the long term.[142]

In this proceeding, Qwest maintains that it has no obligation to unbundle the dark fiber facilities owned by the companies affiliated with Qwest, including its affiliated CLECs.[143] AT&T disagrees with this position. Under the Act, Qwest affiliates that have facilities in the Qwest region must make those facilities available on a resale basis to CLECs, consistent with §§ 251 and 252.

Section 251(c)(3) obligates incumbent local exchange carriers ("ILECs") to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. Section 252(d)(1) additionally requires ILEC rates for unbundled network elements to be based on cost, to be nondiscriminatory and to include a reasonable profit.

Section 251(h) defines an incumbent local exchange carrier as,

> [W]ith respect to an area, the local exchange carrier that (A) on February 8, 1996, provided telephone exchange service in such area and (B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to § 69.601(b)); or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

Qwest and its affiliates are "successors and assigns" of USWC and are therefore "ILECs" as defined by the Act.[144] Undoubtedly, Qwest will argue that its parent and its affiliates are not

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[142] *Id.*, Verified Joint Application, dated August 19, 1999.
[143] Multistate Workshop Transcript at 60-66 (Jan. 18, 2001).
[144] Although this issue is briefed specifically as an impasse issue with regard to Qwest's SGAT provisions relating to dark fiber and dedicated transport, this argument applies to all SGAT provisions that Qwest intends to use to satisfy its ILEC obligations under the Act.

"successors and assigns" as those terms are used in the Act. The Commission should reject this argument.

In the SBC/Merger docket, the FCC determined that under § 251(h), an entity may become an incumbent LEC by being a successor or assign of a LEC that, as of February 8, 1996, was providing local exchange service in a particular area and was a member of NECA, even if that entity was not itself providing local exchange service in the area or a member of NECA as of that date. The FCC held, "this interpretation of 'successor and assign' is not only more consistent with the goals of § 251, but conforms more closely to the traditional notion of 'successor or assign.'"[145] Thus, Qwest cannot legitimately argue that it is not a "successor or assign" because neither Qwest International nor its subsidiaries were providing local service in former USWC exchanges or were members of NECA on the date the Act was enacted.

Moreover, in approving the QCI/U S WEST merger, the FCC determined that QCI and its affiliates were "successors and assigns" as used in § 251(h) of the Act.[146] In that proceeding, McLeodUSA asked the FCC to reject the merger application because, among other things, the merged entity "will have the ability to divert favored, high-volume customers to the affiliated [competitive] LEC, which can become the provider of new, innovative services, while the [incumbent] LECs traditional local services are degraded and serve only residential users and other [competitive] LECs."[147] McLeodUSA further argued that, after the merger, U S WEST would be able to use Qwest and its affiliates as competitive LECs "to attempt to avoid the

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[145] *Ameritech Corp. and SBC Communications, Inc. for the Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to §§ 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279 (rel. Oct. 8, 1999), ¶¶ 446-448, ("*SBC/Ameritech Merger Order*").

[146] *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Application for Transfer of Control of Domestic and International §§ 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, CC Docket No. 99-272, Memorandum Opinion and Order, FCC 00-91 (rel. March 10, 2000), ¶ 45.

[147] *Id.*, n. 131.

[incumbent] LEC obligations under § 251(c)(4) of the Act to offer for resale, at wholesale rates, any services the [incumbent] LEC offers at retail." The FCC rejected McLeod's argument, reasoning,

> Such an affiliate of U S WEST would be considered a "successor or assign" of U S WEST for the purposes of the obligations imposed by § 251(c)(4). Therefore, the competitive LEC hypothesized by McLeod would be treated as an incumbent LEC under § 251(c)(4).[148]

This conclusion is supported, too, by the analysis of the United States Court of Appeals for the District of Columbia in a recent case involving an appeal of the SBC/Ameritech merger approval.[149] There, the Court interpreted "successors and assigns" broadly to include affiliates of the ILEC that provide telecommunications services.

In *ASCENT*, the Court reviewed the FCCs decision to permit the merged entity to offer advanced services through a separate affiliate and, by doing so, avoid § 251(c)'s duties. Although as mentioned above, in the U S WEST/QCI merger docket, the FCC matter of factly concluded that QCI and its affiliated CLECs would be successors and assigns of U S WEST for purposes of the Act, in the SBC/Ameritech merger, the FCC painstakingly concluded that although the Act extends an ILECs market-opening obligations to an ILECs "successor and assign," the advanced services affiliate was not such a successor and assign so long as it complied with various structural and transactional safeguards.[150] The D.C. Circuit rejected this analysis, finding that allowing an ILEC to "sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme." The Court further found that the FCCs narrow interpretation of "successor and assign" in that context to be paradoxical:

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[148] *Id.*, ¶ 45 (footnotes omitted).
[149] *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).
[150] *Id.* at 665; *SBC/Ameritech Merger Order*, ¶¶ 444-476.

> [T]he Commission is using language designed by Congress as an added limitation on an ILEC's ability to offer telecommunications services as a statutory device to ameliorate §251(c)'s restriction. We do not think that in the absence of the successor and assign limitation an ILEC would be permitted to circumvent §251(c)'s obligations merely by setting up an affiliate to offer telecommunications services. The Commission is thus using the successor and assign limitation as a form of legal jujitsu to justify its relations of §251's restrictions.[151]

Although the *ASCENT* decision involved an advanced services affiliate of an ILEC, the reasoning of the D.C. Circuit in that case applies equally here. Interpreting the statute to *not* require QCI and its affiliates to be subject to the unbundling obligations of the Act would be to encourage the merged entity to "sideslip" §251's requirements by offering telecommunications services and investing in future network infrastructure through its wholly owned affiliates. In its merger application in Colorado, QCI stated that it intended to combine the two corporations' assets, operations and network infrastructure and to plan build outs jointly to achieve synergies that would benefit the public interest and the merged entity's shareholders. This combined operation is a successor and assign of an ILEC, USWC.

For these reasons, the Commission should require Qwest to add language to its SGAT that clarifies that QCI and its affiliates are obligated to unbundle their in-region facilities, including dedicated transport. This requirement is consistent with the goals of the Telecommunications Act and is necessary to prevent Qwest, through its affiliates, from usurping its obligations under § 251(c).

2. Qwest is required under the Act and the FCC Orders to allow CLECs to lease dark fiber that exists in "joint build arrangements" with third parties

"Joint Build Arrangement" means any arrangement between Qwest and another party to jointly or separately construct, install and/or maintain conduit, innerduct or fiber across a single route or routes. This arrangement will permit either or both Qwest and the third party to use the

[151] *Id.* at 667.

other's conduit, innerduct or fiber for transport of telecommunications traffic over such route or routes. This type of arrangement includes, among other things, meet point arrangements with third parties. Qwest has testified that it will make available dark fiber that exists in these arrangements up to Qwest's side of the meet point. However, it refuses to permit CLECs to obtain access to any rights that Qwest has to the use of the facilities of the third party.[152] AT&T disagrees with this position.

Section 251(c) and 47 C.F.R. §§ 51.307 and 309 require Qwest to provide nondiscriminatory access to unbundled network elements in Qwest's ownership or control. In addition, Qwest is obligated under §§ 251(b)(4) and 224 to afford CLECs nondiscriminatory access to poles, ducts and rights-of-way. To the extent these joint build arrangements give Qwest control and/or provide Qwest a right-of-way on a third-party's network, for the provision of Qwest's telecommunications services, Qwest must permit CLECs the same access to those rights-of-way. Without this access, CLECs are impaired in their ability to compete with Qwest in communities of the state where these joint build arrangements exist. In the rural areas in particular, CLECs may not even be able to reach particular communities that Qwest can reach through its joint build arrangement with a third-party.

Checklist item number 3 in § 271 also addresses Qwest's rights-of-way obligations. Qwest must demonstrate that it is providing nondiscriminatory access to its poles, ducts and rights-of-way at just and reasonable rates, terms and conditions.[153] This checklist item is satisfied if Qwest has nondiscriminatory procedures for the evaluation of facilities requests by competitors, granting competitors nondiscriminatory access to information about its facilities;

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[152] Multistate Transcript at 348-60 (Jan. 19, 2001).
[153] *Bell Atlantic New York Order*, ¶ 263.

permitting competitors to use non-Qwest workers to complete site preparation; and compliance with applicable rates.[154]

Qwest's SGAT fails to include even the basic right of nondiscriminatory access to its conduit and/or rights-of-way that exist in joint build arrangements. Qwest has testified that it is not aware of any such arrangements in the seven states.[155] In discovery, AT&T requested samples of any such arrangements that exist between Qwest and third parties in the state of Colorado. Qwest objected to responding to this data request. A review of such arrangements would indicate the nature of Qwest's ownership or control over this network element. If such network element is in the nature of a right-of-way, § 10.2 of the SGAT should be effective to provide access to CLEC. If such network element is in the nature of a leased facility, such as leased dedicated transport, § 9.7.1 should afford CLECs access to the facility. Alternatively, the agreements would indicate if such facility is some other arrangement – not a right-of-way or leased facility – over which Qwest has ownership or control. To the extent that those agreements provide Qwest rights to use the third-party's facilities, including the dedicated transport available on that particular route, Qwest must permit CLECs equal access to those facilities at just and reasonable rates and terms. Otherwise, Qwest fails its § 271 obligations.

For these reasons, the Commission should require Qwest to include terms in its SGAT that allow CLECs nondiscriminatory access to Qwest's rights to use third-party property consistent with those that Qwest enjoys in any joint build arrangement to which Qwest is a party.[156]

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[154] *BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-12, Memorandum Opinion and Order, FCC 92-271, rel. Oct. 13, 1998), ¶¶ 174 - 83.

[155] Multistate Transcript at 348-60 (Jan. 19, 2001).

[156] Qwest acknowledges that it already inventories in TIRKs dark fiber acquired from third parties or its parent company. Multistate Workshop 3 Transcript at 70 (March 27, 2001).

3. Qwest's definition of Finished Services is not supported by the FCCs orders and rules

Qwest's SGAT makes reference to "finished service" in a number of sections.[157] The SGAT did not have a definition for "finished service," so Qwest subsequently made one up. The FCC's orders and rules also do not make any references to "finished service." An FCC order does make reference to tariff service.[158] In its *Supplemental Order Clarification*, the FCC prohibits CLEC's from connecting EELs to tariff services.[159]

In its definition of finished service, Qwest includes Local Interconnection Service, or LIS trunks. LIS trunks are the trunks that connect traffic between CLECs and Qwest. These are not tariffed services and Qwest is required to provide them pursuant to § 252(c)(2) of the Act at cost-based prices.

There is no restriction in the FCC orders that prohibit connecting UNEs to interconnection trunks. Therefore, the restrictions contained in the SGAT that prohibits CLECs from directly connecting combinations of UNEs to finished services, in this case interconnection, or LIS, trunks runs afoul of 47 C.F.R. § 51.309(a).[160] The words "and Local Interconnection Services" should be stricken from the definition of "finished service."[161]

4. Qwest's distinction between UDIT and EUDIT conflicts with FCCs definition of dedicated transport

The FCC has identified dedicated transport as a network element.[162] Qwest has divided dedicated transport into two elements -- Unbundled Dedicated Interoffice Transport ("UDIT")

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[157] *See, for example*, SGAT § 9.23.1.2.2.
[158] *Supplemental Order Clarification*, ¶ 22.
[159] *Id.*
[160] *See* SGAT § 9.23.1.2.2.
[161] Qwest subsequently agreed to this change in subsequent workshops in other jurisdictions. If the change is adopted, this would close this issue.
[162] *See, generally, UNE Remand Order*, ¶¶ 322-68.

and Extended Unbundled Dedicated Interoffice Transport ("EUDIT").[163] There is no legal basis to make such a distinction, as other commissions in the Qwest region has previously concluded in rejecting Qwest's proposal. That distinction creates only unintended consequences, to the CLEC's detriment, and perpetuates an outdated rate structure that is inapplicable to carrier-to-carrier relationships.

In its *UNE Remand Order*, the FCC reaffirmed its definition of dedicated transport contained in the *Local Competition Order*.[164] The FCC concluded that "incumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between such offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and serving wire centers (SWC), SWCs and IXC POPs, tandem switches and SWCs, end office or tandems of the incumbent LEC, and wire centers of incumbent LECs and requesting carriers."[165] "[A]n interoffice facility could be used by a competitor to connect to the incumbent LECs switch or to the competitor's collocated equipment."[166]

Under Qwest's UDIT-EUDIT distinction, UDIT is Qwest's proposal for dedicated transport between Qwest's wire centers. If a CLEC wants dedicated transport from its wire center (or an IXC from its POP) to a Qwest wire center (the first wire center is called the SWC by Qwest), the CLEC would order EUDIT. UDIT is a distance-sensitive, flat-rated rate element.[167] EUDIT is flat-rated, non-distance sensitive. The CLEC end of EUDIT also does not contain the electronics necessary to provide the CLEC with the capability of the UNE.

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[163] *See* SGAT § 9.6.1.
[164] *UNE Remand Order*, ¶ 323.
[165] *Local Competition Order*, ¶ 440; 47 C.F.R. § 51.319(d)(1)(A).
[166] *Local Competition Order*, ¶ 440; 47 C.F.R. § 51.319(d)(2)(C).
[167] Multistate Workshop 3 Transcript at 102-03 (March 27, 2001).

The FCC did not make a distinction between dedicated transport between ILEC wire centers and dedicated transport between an ILEC wire center and a CLEC wire center. It is all defined as dedicated transport.[168] Qwest has made the distinction to perpetuate a rate structure used in the access world.[169] The entire dedicated transport link from point A to point Z should be based on a distance sensitive, flat rate charge.[170] This will more accurately reflect the costs to the CLEC.

The FCC requires dedicated transport to be recovered through a flat rate charge.[171] As a general rule, the costs for network elements "must recover costs in a manner that reflects the way they are incurred."[172] Qwest's rate structure for EUDIT does not follow the FCC's guidelines, because the rate for the EUDIT is non-distance sensitive. It is an average rate. As with any average rate, some CLECs will pay more than the cost and some will pay less. However, CLECs that elect to build closer to the Qwest wire centers lose the cost benefits of doing so under Qwest's proposal, because the CLEC has to pay the entire EUDIT rate.[173] Qwest's proposal for EUDIT fails to reflect the way costs are incurred.

The EUDIT /UDIT distinction also imposes disincentives on the CLEC to build facilities to a meet point between the CLEC wire center and Qwest SWC. If a CLEC does build to a meet point, the CLEC pays the entire EUDIT rate, as if the CLEC built none of its own facilities. This is because, unlike UDIT, EUDIT is a flat, non-distance sensitive rate. The EUDIT, because it is non-distance sensitive, is not adjusted to reflect the portion of the facility built by the CLEC. If

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[168] *See Local Competition Order*, ¶ 440.
[169] The EUDIT as dedicated transport is treated very similar to how entrance facilities in the access world are. Multistate Workshop 3 Transcript at 103-04 (March 27, 2001).
[170] *Id.* at 109-10.
[171] 47 C.F.R. §§ 51.507(a) and 51.509(c); *Local Competition Order*, ¶ 744.
[172] *Local Competition Order*, ¶ 743.
[173] Multistate Workshop 3 Transcript at 104 (March 27, 2001).

the CLEC must pay the entire rate, it has no incentive to build any of its own facilities between its wire center and Qwest's SWC. This demonstrates that the EUDIT is not cost-based, in violation of § 252(d) of the Act.

Qwest's proposal is also discriminatory. The SGAT provides that CLECs can use UDIT to connect to another independent telecommunications carrier or local exchange carrier using a midspan meet arrangement.[174] A midspan meet to an independent telecommunications carrier is priced on a fixed and per mile basis.[175] If a CLEC wishes to obtain dedicated transport to connect its wire center to a Qwest wire center it must use a non-distance sensitive EUDIT. If a CLEC wants to obtain dedicated transport from Qwest to connect from a Qwest wire center to another local exchange carrier, it can order a distance-sensitive UDIT. CLECs are also carriers, and the same ability to obtain dedicated transport on a distance-sensitive rate from Qwest wire center to the CLEC wire center should also be available.[176]

Finally, the EUDIT does not have electronics on the CLEC end. The CLEC is ordering and paying for dedicated transport to its wire center at a specific bandwidth. Under Qwest's proposal, the CLEC receives "half the dark fiber".[177] It is not "energized" to permit the transmission of voice or data. In its analysis requiring the unbundling of dedicated transport, the FCC made it clear that dedicated transport includes the electronics: "We clarify that this definition includes all technically feasible capacity-related services, including those provided by electronics that are necessary components of the functionality of capacity-related services and are used to originate and terminate telecommunications services." The FCC also noted that

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[174] SGAT § 9.6.
[175] Multistate Workshop 3 Transcript at 104 and 106-07 (March 27, 2001).
[176] *Id.*
[177] The FCC described dark fiber: "[D]ark or 'unlit' fiber, unlike 'lit' fiber, does not have electronics on either end of the dark fiber segment to energize it to transmit telecommunications service. *UNE Remand Order*, ¶ 325.

"[s]elf provisioning dedicated transport requires competitive LECs to incur significant direct and other costs, including the cost of the fiber, the cost of deploying the fiber in public rights-of-way, trenching and the cost of purchasing and collocating the necessary transmission equipment."[178] The FCC unbundled dedicated transport because it concluded that the CLECs would be impaired if they had to incur these costs, costs Qwest now seeks to impose on the CLEC.[179] It is inconsistent with the FCC *UNE Remand Order* and unlawful for Qwest to require CLECs to pay for electronic costs on the CLECs' end of EUDIT.

The Commission should order Qwest to eliminate the EUDIT/UDIT distinction, provide dedicated transport between all required locations on a flat rate, distance-sensitive basis and require Qwest to provide the electronics on dedicated transport terminating at a CLEC wire center.

5. The local use restrictions on the use of unbundled interoffice transport are unlawful

Section 9.6.2.4 of the SGAT imposes unlawful restrictions on the use of unbundled interoffice transport. The language prohibits the use of interoffice transport as substitutes for special or switched access services "except to the extent CLEC provides such services to its end user customers in association with local exchange services or to the extent that such UNEs meet the significant amount of local exchange traffic requirement set forth in § 9.23.3.7.2."[180] The FCC has made it clear that ILECs cannot place any restrictions on the use of UNEs.[181] The FCC reaffirmed its position in the *UNE Remand Order*.[182]

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[178] *UNE Remand Order*, ¶ 356. The FCC noted that the transmission equipment "can include such things as fiber distribution panels, optical terminating equipment, multiplexers, digital cross connects, and power equipment, digital loop carrier equipment, power distribution panels, and cable racks." *Id.*, n. 792 (emphasis added).

[179] *Id.*, ¶ 355.

[180] SGAT § 9.6.2.4.

[181] *Local Competition Order*, ¶ 356. 47 C.F.R. § 51.309(a).

[182] *UNE Remand Order*, ¶ 484.

The FCC, in its *UNE Remand Order*, made it clear that requesting carriers can order loop and transport combinations to provide interexchange service without any requirement to provide a certain amount of local exchange traffic.[183] This would permit carriers to convert special access circuits to lower-priced UNEs. The ILECs subsequently argued that they would lose substantial sums of universal service support. As a result, the FCC modified its conclusion in paragraph 486 of the *UNE Remand Order*, stating that CLECs or IXCs could not convert special access to combinations of loop and transport unless it provided a significant amount of local exchange service to a particular customer.[184] In its *Supplemental Order Clarification*, the FCC clarified what it meant by "a significant amount of local exchange service."[185] However, the FCC never extended the requirement "of a significant amount of local exchange service" to other than a loop/transport combination. There is no basis, then, to extend the restriction contained in paragraph 22 of the *Supplemental Order Clarification* to dedicated transport generally.

In its *UNE Remand Order*, the FCC noted that the record was insufficient for the FCC to determine how its rules should apply in the "discrete situation" where a requesting carrier uses dedicated transport between the incumbent LECs SWC and an IXC switch or POP, in lieu of special access.[186] The FCC concurrently issued its *Fourth Further Notice of Proposed Rulemaking* to take comments on the use of dedicated transport in this "discrete situation."[187] It was unclear, however, whether the FCC had prohibited the use of dedicated transport from the IXCs POP to the ILECs wire centers during the comment phase, considering its prior pronouncement and rules that ILECs could not place any restrictions on UNEs.[188]

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[183] *Id.*, ¶ 486.
[184] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999), ¶ 2 ("*Supplemental Order*").
[185] *Id.*, *Supplemental Order Clarification*, ¶ 22.
[186] *UNE Remand Order*, ¶ 489. This connection is referred to as EUDIT by Qwest.
[187] *Id.*, ¶¶ 492-496.
[188] *UNE Remand Order*, ¶ 484; 47 C.F.R. § 51.309(a).

The FCC made its position a little clearer in its *Supplemental Order* and *Supplemental Order Clarification*. Language in this order suggested that its decision in the *UNE Remand Order* placed a "temporary constraint" on the use by requesting carriers of dedicated transport from the IXCs POP to the ILECs SWC as a substitute for special access.[189] However, Qwest's language goes far beyond any temporary constraint by imposing local use restrictions on dedicated transport from and to all permissible locations. It also appropriately imposes the restrictions the FCC imposed on the use of EELs on dedicated transport, although there is no way to apply these restrictions to EUDIT.[190] Qwest's language in § 9.6.2.4 must be rejected as inconsistent with the provisions of the *UNE Remand Order*.

Qwest proposed the following language in other jurisdictions that is acceptable to AT&T and resolves this issue:

> CLEC shall not use EUDIT as a substitute for special or Switched Access Services except to the extent CLEC provides such services to its end user customers in association with local exchange services. Pending resolution by the FCC, Qwest will not apply the local use restrictions contained in 9.23.3.7.2.

6. CLECs should not have to pay a separate regeneration charge to receive dedicated transport at its collocation

It is AT&T's position that Qwest should be required to provide the signal ordered, whether it be a DS1 or DS3, for example, at the CLECs collocation cage.[191] Qwest contends that it should be allowed to bring the transport into the wire center and terminate it to an interoffice frame, what *it* calls the design-to point, and then charge the CLECs for an ITP to connect the transport from the frame to the CLECs' collocation. CLECs should not pay for regeneration from the interoffice frame to the CLECs' collocation. Qwest has control over the location of the

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[189] *Supplemental Order*, ¶¶ 4, n. 5 and 8 and 9; *Supplemental Order Clarification*, ¶ 3, n. 9
[190] Multistate Workshop 3 Transcript at 125 (March 27, 2001).
[191] Multistate Workshop 3 Transcript at 95-96 (March 27, 2001).

CLECs' collocation arrangements. Based on Qwest decisions, regeneration may or may not be necessary, for all or some of the CLECs collocated in a central office.[192]

Qwest is obligated to provide network elements on a nondiscriminatory basis to CLECs, in other words, treat all carriers equally.[193] Qwest's proposal does not do this. It is obvious some carriers must pay regeneration and other carriers do not. The correct answer is that no CLEC should have to pay for regeneration charges, as long as Qwest has the sole ability to determine the location of the CLECs' collocation arrangements. The Commission should conclude, as have other state commissions in the Qwest region, that no regeneration charge is appropriate for any CLEC under these circumstances.

7. **Qwest places unreasonable restrictions on the use of the EELS.**

The FCC has required the ILECs to provide the enhanced extended link ("EEL") under certain circumstances, as described above. The EEL is supposed to reduce the CLECs costs by allowing a CLEC to combine loops and transport and transport the traffic to a collocation in a different Qwest wire center. CLECs can multiplex multiple loops on to the transport and bypass the central office that the loops terminate at, instead terminating the loops in a collocation at another Qwest wire center.[194]

a. **Waiver of Termination of Liability Assessments ("TLAs"). (EEL-5)**

CLECs should not have to pay the TLAs for the private line/special access circuits they wish to convert to EELs. AT&T and other CLECs ordered a number of private line/special access circuits in lieu of loops and loop/transport combinations because Qwest would not provision the circuits as UNEs.[195] These orders may also have

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[192] *Id.* at 94-95.
[193] *Local Competition Order*, ¶ 315.
[194] *See UNE Remand Order*, ¶¶ 288 and 480.
[195] Multistate Workshop 3 Transcript at 104-07 (March 28, 2001).

had construction charges associated with them.[196] Qwest argues that it provides such combinations. However, Qwest did not begin to provide EEL combinations to CLECs until long after the FCC had identified its obligation to provide combinations. Qwest did not begin to permit the CLECs to order combinations of network elements until the U.S. Supreme Court[197] decision upheld Rule 315(b) and the Ninth Circuit Appeals found that a state commission could require a provision in an interconnection agreement that ILECs must combine UNEs on behalf of CLECs.[198] Therefore, although Qwest had an obligation to provide combinations since the *Local Competition Order* was released on August 8, 1996, Qwest refused to provide combinations until recently.

If AT&T wanted a loop/transport combination to serve a customer, it had to order and pay private line or special access rates. The agreements for these services also required TLAs and may have required construction charges. In order to get the benefits of the EEL *now*, after all this time, Qwest wants the CLECs to pay the termination liabilities. This is adding insult to injury. CLECs had to pay, and continue to pay, the higher private line/special access rates, rates they should not have had to pay since the day the circuits were provisioned, and now they cannot convert the very same circuits to EELs, although permitted by the FCC, because Qwest also wants the CLECs to pay the TLAs.

The only reasonable solution is for the Commission to order that all TLAs are waived for private line/special access circuits that qualify as EELs. CLECs have already

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[196] *Id.* at 104.
[197] *AT&T Corp. v. Iowa Utils. Bd.*, et al., 119 S.Ct. 721, 737 (1999).
[198] *U S WEST v. MFS*, 193 F.3d 744, 758-759 (9th Cir. 1999); *MCI v. U S WEST*, 204 F.3d 1262, 1267 (9th Cir. 2000). Qwest has testified that it did not have to provide DS1 loops and EELS until the *UNE Remand Order* was released by the FCC.

paid the higher rates since the date the circuits were provisioned as private line/special access instead of UNEs. The CLECs also may have paid construction charges. It is only reasonable to waive the TLAs because of Qwest's refusal to provision the circuits as UNEs in the first instance as required by law. Any other ruling rewards Qwest and penalizes the CLECs for Qwest's refusal to comply with the Act and FCC orders.

b. Waiver of use restrictions for private line/special access circuits that qualify as EELs but are not converted

CLECs have raised instances where Qwest has prohibited CLECs from connecting UNEs to special access/private line circuits. There are instances where special access/private line circuits may meet the local use restrictions and qualify as an EEL. However, the CLEC may determine that it is not economic to convert the circuits to an EEL because the TLAs would apply. The CLECs want to connect special access/private lines that would qualify as EELs to UNEs.[199] Qwest prohibits this.

This is another case where Qwest did not initially allow the CLECs to order a UNE combination, although required by law to do so. The TLAs in existing special access/private line contracts make it uneconomic to convert special access/private line circuits to EELs. Instead of converting the circuits to EELs and paying the TLAs, the CLECs want Qwest to waive the restriction on connecting UNEs to tariff services.

The Commission should confirm that Qwest cannot prohibit a CLEC from connecting UNEs to special access/private line circuits where the CLEC was unable to order the special access/private line circuits as UNEs. Once again, any other holding rewards Qwest and penalizes the CLECs for Qwest's refusal to comply with the Act and FCC orders.

[199] Multistate Workshop 3 Transcript at 110 (March 28, 2001).

CONTINUATION

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c. **Qwest should waive the local use restrictions on connecting UNEs to finished services where Qwest refuses to build UNEs.**

In another scenario, a CLEC may want to order a UNE DS1 loop, and Qwest responds that UNE DS1 loops are not available. Qwest argues it does not have to build UNEs. The CLEC, accordingly, orders a DS1 loop under a retail tariff. The CLEC is currently multiplexing UNE loops on to transport. The CLEC would like to use the same multiplexer used for UNE loops and multiplex the retail DS1 loop on to the UNE transport. Qwest does not permit the CLEC to do this.[200] The CLECs have asked Qwest to waive any use restrictions that may be applicable.

Although a UNE built under SGAT § 9.19 will be considered a UNE, Qwest has made it clear that its processes for building UNEs and private line or retail services are not the same.[201] It is possible that Qwest would build a retail service and not construct a UNE under SGAT § 9.19. Qwest, therefore, can impose significant costs on CLECs beyond those mandated by § 252 (d) by refusing to build a UNE, requiring the CLEC to obtain a retail service, and subsequently imposing the use restrictions on the use of that retail service, thus precluding the CLEC from using the same multiplexer and transport. And, as acknowledged by Qwest, this is a unilateral decision on Qwest's part.[202]

Qwest argues that the *Supplemental Order Clarification* provides a basis for its position that the retail DS1 loop (a tariff service) cannot be connected to an EEL.[203] Assuming that the UNE loops are being multiplexed on to Qwest transport, Qwest argues

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[200] *Id.* at 187.
[201] *Id.* at 59-60.
[202] *Id.* at 259 (March 27, 2001).
[203] *Supplemental Order Clarification*, ¶ 22.

that the EEL restrictions apply and the EEL cannot be connected to a tariffed service, in this case the retail DS1 loop.[204]

However, the matter does not end there. Qwest has taken the position that it does not have to build UNEs, in this case, a DS1 loop. The only way to get the loop is for the CLEC to order from the retail tariff and pay the corresponding retail rate, and possibly construction charges.[205] However, in addition to having to pay retail rates, Qwest's refusal to build a loop also creates additional consequences that add even more costs. Since Qwest will not allow the CLEC to connect the retail loop to an EEL or UNE, the CLEC cannot multiplex the one DS1 loop on to its existing dedicated transport. The CLEC must, therefore, pay for additional multiplexing and transport costs, independent of the existing multiplexer and dedicated transport costs for the UNEs. The correct solution is for the Commission to find that Qwest is required to build UNEs (which AT&T has shown is the law). Many of the unreasonable restrictions that are the subject of this brief are caused by Qwest's position that it need not build UNEs. At minimum, the Commission should eliminate any restrictions on connecting tariff or finished services to UNEs.[206]

d. CLECs should be permitted to place different type trunks on the same trunk groups

As the SGAT now stands, CLECs cannot aggregate different types of traffic on the same trunk. CLECs should be able to use a large pipe (*e.g.*, DS3) to carry both tariff

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[204] However, if the CLEC is providing its own transport, there is no prohibition on the CLEC multiplexing UNE loops and retail loops on the same multiplexer. Any such prohibition runs afoul of 47 C.F.R. § 51.309(a).

[205] A CLEC could order a loop under SGAT § 9.19; however, Qwest has no obligation to build. Assuming Qwest will not build the loop under § 9.19, it is forced to order it out of the retail tariff. Qwest has the ability then to impose extraordinary costs on the CLEC by its refusal to build UNEs.

[206] *See* SGAT §§ 9.1.5 and 9.23.1.2.2.

(*e.g.*, private line) and non-tariff (*e.g.*, UNEs) DS1 facilities or circuits. By changing its definition of "Finished Services" by eliminating LIS trunks, CLECs can now place interconnection trunks and UNE trunks on the same, larger pipe. However, there are still restrictions on placing private line or retail services on the same, larger pipe.[207]

The restrictions contained in the SGAT are inconsistent with good engineering and network efficiency. As it is now, CLECs have to have separate trunks for private line, LIS trunks (as long as the definition of finished services includes LIS trunks) and dedicated transport. It wastes capacity and adds cost to the CLEC.[208] More importantly, UNEs are not always available.[209]

Qwest's position, along with a number of other positions by Qwest, only add costs to the CLECs. A CLEC may have DS1s available on a private line DS3. Because Qwest does not allow the CLEC to place DS1 UNEs on this DS3, the CLEC must order a separate UNE DS3. However, Qwest may not have a DS3 UNE available. Qwest argues it does not have to build UNEs, change out electronics to make more available capacity on existing facilities or add electronics to dark fiber. And, the CLEC cannot use spare capacity on the private line for DS1 UNEs because of Qwest's restrictions on connecting UNEs to finished services. In the meantime, the DS3 private line is underutilized.[210]

Conversely, the CLEC may have a DS3 UNE with available capacity. The CLECs may wish to place private line DS1s on the DS3 UNE, but is prohibited from doing so. The CLEC must buy a DS3 private line and both of the DS3s are underutilized.

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[207] Multistate Workshop 3 Transcript at 36-39 & 183-185 (March 28, 2001).
[208] *Id.* at 201.
[209] *Id.* at 53-55; 183-185 & 204.
[210] *Id.* at 183-86 & 204.

The more efficient method is for CLECs to be permitted to aggregate DS1s of different type traffic on larger pipes. AT&T is willing to keep discreet traffic on the various DS1s.[211] The DS3 would be priced on a pro rata basis.[212]

Qwest's interpretation of existing FCCs rules has placed the CLECs in a Gordian knot. Like Alexander the Great, the Commission should cut this knot and untie the CLECs' hands. The Commission should find that Qwest's restrictions violate 47 C.F.R. § 309(a) by placing unreasonable restrictions in the use of UNEs.

III. CONCLUSION

AT&T has demonstrated that Qwest fails to comply with §§ 251(c)(3) and 271 of the Act in numerous respects. The Commissions should find that Qwest is not in compliance with checklist items 2, 5, and 6 of the Act.

Dated this 18th day of March 2002.

DAVIS WRIGHT TREMAINE LLP
Attorneys for AT&T Communications
of the Midwest, Inc.

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[211] *Id.* at 41-42 & 205.
[212] *Id.* at 46-47.

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**

VERIFICATION OF MICHAEL HYDOCK

I, Michael Hydock, being duly sworn, hereby state that I am District Manager in the Local Services and Access Management organization of AT&T. By this verification, I hereby affirm the factual assertions of AT&T's Verified Comments on Checklist Items 2, 5 and 6 as true and correct statements to the best of my knowledge and expertise.

Dated this 18th day of March 2002.

Michael Hydock

STATE OF COLORADO	)	
	)	**ss**
CITY AND COUNTY OF DENVER	)	

SUBSCRIBED AND SWORN TO before me this 18th day of March 2002 by Michael Hydock, who certifies that the foregoing is true and correct to best of his knowledge and belief.

Witness my hand and official seal.

Notary Public

My commission expires: 1/22/06

NOTARY PUBLIC
ADAM W. WALCZAK
STATE OF COLORADO

My Commission Expires 1/22/06

PROJECT PLAN FOR UNE-P TESTING

December 12, 2000

This Project Plan sets forth the working agreement for Unbundled Network Element Platform ("UNE-P") testing between Qwest Corporation ("Qwest") and AT&T Corp. ("AT&T"), both of which are collectively referred to as the "Testors" in the state of Minnesota. AT&T wishes to test the methods, processes and operating systems ("OSS") for ordering, provisioning, maintenance and repair, and billing for UNE-P services provided by Qwest (the "Test"). The Testors will proceed as follows:

1. The Testors will conduct a cooperative operational test for the sole purpose of testing the methods, processes and operating systems for ordering, provisioning, maintenance and repair, and billing associated with the UNE-P provided by Qwest in Minnesota. The Test will consist of: (i) converting Qwest retail residential lines to UNE-P, (ii) provisioning UNE-P lines; (iii) processing orders to make subsequent changes to services or features provided on the UNE-P Test lines, and (iv) migrating a number of lines to or from the Testors. Subject to the availability of facilities, the Test lines will be provided by (i) provisioning 800 Qwest retail residential lines to the agreed upon AT&T business location(s); and (ii) provisioning 200 UNE-P lines, both as set forth in Appendix 1. The Testors will jointly manage the volume of orders. Qwest will process the Test orders over the mutually agreed upon electronic interface (EDI Version 6.0).

None of the services provided by Qwest as part of this Test will be used to provide local exchange service or exchange access service to end user customers or by AT&T for any business

purpose other than for use by AT&T for the sole purpose of testing such operating systems and services as described herein. All Test facilities and services will be provided pursuant to the terms of Qwest's applicable retail, carrier tariff(s) and the Minnesota Interconnection Agreement between AT&T and Qwest, and AT&T will pay Qwest for all retail services and UNE-P provided to AT&T during the course of the Test in accordance with and subject to the terms and conditions of Qwest's tariffs and the Minnesota Interconnection Agreement. AT&T will have sole responsibility for all charges billed to such Test lines, including, but not limited to, interexchange, intraLATA toll, and local usage charges, up to and including such time that the Test lines are disconnected. For purposes of this Test only, the Test locations will be considered residential locations and will be treated as residential lines under applicable Qwest Tariffs and the Minnesota Interconnection Agreement. However, when the lines are converted to UNE-P they will carry a distinct USOC of U5R or U5RAX.

The Test will commence on April 16, 2001 and continue for a period not to exceed nine (9) months. However if Qwest does not provision the Test lines by March 1, 2001, or if AT&T is unable to test the Qwest Release 6.0 of EDI based upon the release of final system specifications scheduled for release on November 6, 2000 because of a delay in the release, AT&T may, without negotiation, extend the Test duration by the same period of time such test lines or EDI release is delayed, whichever is longer.

2. Order Types.

(a) AT&T will send UNE-P Test orders containing features, services, attributes and/or elements.

(b) AT&T intends to submit orders for an agreed to amount of UNE-P Test lines for migration back to Qwest retail services. Such migration orders will request features, functions, and services for Qwest retail as were provisioned on the UNE-P line at the time the Test line is migrated back to Qwest retail services.

(c) In the event that AT&T determines that it would like to continue the use of all or some of the Test lines after the conclusion of the Test, AT&T will notify Qwest of this desire no later than two (2) weeks prior to the conclusion of the Test and the Testors will negotiate in good faith regarding an extension.

3. Trouble Tickets.

(a) When AT&T sends an order and the orders are unsuccessful for reasons AT&T has reasonably determined are attributable to Qwest, AT&T will open timely and accurate trouble tickets with Qwest for each order. Qwest will address and resolve the failure in a reasonable and timely manner.

(d) (b) With respect to all trouble tickets opened by AT&T, AT&T will cooperate with Qwest in resolving the problems and/or failures presented in such trouble tickets. Qwest will provide a cause and disposition of all found troubles.

(e)

4. Qwest and AT&T will each provide their own personnel resources necessary to complete the Test activities. Qwest and AT&T will identify key points of contact for each of the activities before any Test activities begin.

Qwest will report the Test results consistent with the Regional Oversight Committee PIDs. Either party may provide test data to a government agency, regulator or any third party designated by such agency or regulator (collectively, "Regulator"), without providing the test data to the other party prior to disclosure to the Regulator. In such instances, unless the Regulator directs otherwise, the disclosing party ("Disclosing Party") shall provide the other party ("Non-disclosing Party") with the test data at the same time it provides the test data to the Regulator. In the event test data is provided to a Regulator, the Disclosing Party -- upon request by the Non-disclosing Party -- shall use best efforts to meet in person or via a conference call with the Non-disclosing party, within two (2) business days of disclosing the test data to the Regulator, to discuss the disclosed test data. Notwithstanding any provision of this Agreement, this section shall not apply to the disclosure of Test data by Qwest in aggregate form (combined with other carrier data) unless and until the state commission orders Qwest to provide such aggregate data to, and meet with, AT&T in the same manner that AT&T provides Test data to, and meets with, Qwest under this section.

APPENDIX 1

1. Provisioning

(i) The Test lines will be located at AT&T Tower 901 Marquette, Minneapolis, MN 55402.

(ii) AT&T will order and Qwest will install 800 Qwest retail residential lines in Minnesota. AT&T can obtain the current baseline information with the current Universal Service Order Codes (USOCs), directory listing types, blocking types, and features available for these lines via the IMA/EDI interface. Subject to the availability of facilities, Qwest will use commercially reasonable efforts to install these residential lines no later than March 1, 2001. Upon the submission of timely and complete orders from AT&T, Qwest will migrate these lines to UNE-P, and process the subsequent changes to the services and features on these lines in a timely manner.

(iii) AT&T will order 200 UNE-P lines by submitting a local service request ("LSR") electronically to Qwest. Subject to the receipt of timely and complete orders from AT&T, Qwest will use commercially reasonable efforts to properly install these lines in a timely manner. Qwest will provide to AT&T an installation report after the lines are provisioned. Upon submission of timely and complete orders from AT&T, Qwest will process subsequent changes to the services and features on these lines in a timely manner.

2. Termination of Test Lines

Because AT&T may order the disconnection and migration of lines as part of the Test, AT&T will, no later than the agreed to termination date, send electronic mail or other written notice ("Termination Notice") to AT&T's account manager at Qwest stating that any disconnection order received by Qwest after receipt of the Termination Notice will be treated by

Qwest as a final disconnection ("Final Disconnection") of that line. However, since the Test orders will be processed as normally intended, disconnect orders submitted during the course of the Test will cause service on the lines to be disconnected. If AT&T wishes to continue to use these lines during the Test, it will issue a new connect order for these lines via electronic LSRs. For the Final Disconnection of all UNE-P lines, AT&T will send the Final Disconnection orders via electronic LSRs to Qwest. Any Test lines that are billed as retail lines as of less than one week prior to the applicable termination date will be disconnected by Qwest on the applicable termination date.

3. Inside Wire. AT&T will have sole responsibility for all inside wiring connected with all Test lines to a Network Interface Device at a demarcation point identified and agreed to by the Testors.

4. Billing. During the trial, Qwest will provide the following information to AT&T related to billing and measurement: Summary Bills, a wholesale bill based upon mutually agreeable bill dates, an Access Daily Usage File (ADUF), an Optional Daily Usage File (ODUF). Billing details of the transmission of data will be determined by a working team consisting of members from Qwest and AT&T. Billing data for the Test will be exchanged via existing electronic interfaces used between the companies for such purposes.

5. Operator Services and Directory Assistance. Qwest will allow AT&T to test variations of routing that will enable AT&T to test different vendors' operator services and directory assistance platforms. This testing will be concurrent with the test period.

6. Primary Local Carrier (PLOC) Designation Testing. During the timeframe of the trial, AT&T and Qwest will test the PLOC indicators by allowing AT&T to convert the agreed to amount of lines back to Qwest using the PLOC conversion process, and to re-convert those lines back to AT&T.

7. Certification Test Issues. In order to allow AT&T to perform test certification on IMA/EDI release 6.0 for the trial. Qwest agrees to provide AT&T with access to the test lines as soon as such a test facility is available and no later than it is available to other CLEC's. Access to these test lines will be made available no later than January 26, 2001. In the event the test lines are not available on January 26, 2001, AT&T may extend the test duration without negotiation for the same period that access to those test lines and facility are unavailable.

Agreed to by:

_____

Qwest Corporation

_____

AT&T of the Mountain States

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 GRANTING MOTION AND DENYING MOTION 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 FiberCom) 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 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.

On March 5, 2002, Black Hills FiberCom filed a Motion for Order Denying Petition. On March 7, 2002, Midcontinent filed a Motion for Definition of Track A Analysis. On March 11, 2002, Midcontinent submitted a Motion to Suspend Procedural Schedule or Supplement Prefiled Testimony. On March 13, 2002, AT&T filed a Joinder on Midcontinent Communications' Motion to Suspend Procedural Schedule and Request for Expedited Decision.

At its March 14, 2002, meeting, the Commission considered Midcontinent's Motion to Suspend Procedural Schedule or Supplement Prefiled Testimony and AT&T's Joinder on Midcontinent Communications' Motion to Suspend Procedural Schedule and Request for Expedited Decision. After listening to the arguments of the parties, the Commission voted to grant Midcontinent's Motion to Supplement Prefiled Testimony. Thus, if the Commission's decisions on Black Hills FiberCom's motion or Midcontinent's motion concerning Track A impact the prefiled testimony of any of the parties, the parties will have the opportunity to supplement their prefiled testimony prior to the hearing. The Commission also voted to deny AT&T's Motion to Suspend Procedural Schedule. It is therefore

ORDERED, that Midcontinent's Motion to Supplement Prefiled Testimony is granted under the conditions stated above and AT&T's Motion to Suspend Procedural Schedule is denied.

Dated at Pierre, South Dakota, this 20th day of March, 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 3/21/02

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

ROBERT K. SAHR, Commissioner

STOEL RIVES LLP
ATTORNEYS AT LAW

RECEIVED
MAR 2 1 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

March 21, 2002

Mary S. Hobson
Direct (208) 389-9405
mshobson@stoel.com

Debra Elofson, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

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

Dear Ms. Elofson:

Enclosed for filing please find an original and 10 copies of Qwest Corporation's Brief in Response to the Motions filed by Black Hills FiberCom, L.L.C. and Midcontinent Communications regarding Qwest's section 271 application in South Dakota.

Sincerely yours,

Mary S. Hobson

MSH:cw
Enclosures
Cc: Steven Weigler
David A. Gerdes
Gregory J. Bernard
Colleen Sevold
Tom Welk

STOEL RIVES LLP
ATTORNEYS AT LAW

RECEIVED
MAR 2 2 2002
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March 21, 2002

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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

Dear Counsel:

Enclosed please find a copy of Qwest Corporation's Brief in Response to the Motions filed by Black Hills FiberCom, L.L.C. and Midcontinent Communications regarding Qwest's section 271 application in South Dakota.

Sincerely yours,

Mary S. Hobson

MSH:cw
Enclosures

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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 TELECOMMUNICATIONS ACT OF 1996	)	DOCKET TC 01-165
	)	
	)	QWEST'S BRIEF IN OPPOSITION TO FIBERCOM'S MOTION TO DENY PETITION AND MIDCONTINENT'S MOTION TO DEFINE TRACK A ANALYSIS

Qwest Corporation ("Qwest") submits this brief in response to the motions filed by Black Hills FiberCom, L.L.C. ("FiberCom") and Midcontinent Communications ("Midcontinent") (collectively, "Intervenors") regarding Qwest's section 271 application for South Dakota.[1] Those CLECs claim that, because Qwest is proceeding under Track A of section 271 of the 1996 Telecommunications Act ("Act" or "1996 Act"), it must use interconnection agreements with individual CLECs to demonstrate compliance with the competitive checklist requirements of section 271(c)(2)(B), and may not use its statement of generally available terms ("SGAT").

The Intervenors' arguments are of academic interest at best. Even if Intervenors were right that Qwest may only use individual interconnection agreements to prove its compliance with the competitive checklist (and they decidedly are not), it would make no difference at all: At least two CLECs have already opted into the current version of the South Dakota SGAT,

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[1] *See* Black Hills FiberCom, L.L.C.'s Motion for Order Denying Petition, *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 (Mar. 4, 2002) ("FiberCom Motion"); Brief in Support of Black Hills FiberCom, L.L.C.'s Motion for Order Denying Petition, *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 (Mar. 4, 2002) ("FiberCom Br."); Motion for Definition of Track A Analysis, *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 (Mar. 7, 2002) ("Midcontinent Motion"); Brief in Support of Motion for Definition of Track A Analysis, *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 (Mar. 7, 2002) ("Midcontinent Br.").

turning it into exactly the type of individual interconnection agreement that Intervenors are demanding. By the time the Federal Communications Commission ("FCC") is ready to consider a section 271 application for South Dakota and make its final Track A and checklist compliance determinations (which is the only time frame that matters for Intervenors' argument), this Commission will no doubt have approved those two interconnection agreements and, perhaps, several others. Qwest, CLECs, and other parties have negotiated SGAT terms in twelve states that are reflected in the current version of the South Dakota SGAT. Additionally, virtually all SGAT modifications recommended by the Multistate Facilitator, are also reflected in the current SGAT. After all, the very purpose of negotiating and approving an SGAT is to create a CLEC-friendly model agreement that CLECs can opt into with a minimum of effort.

But Intervenors' reading of the law is assuredly not right. Intervenors have confused two different requirements of section 271: the question whether Qwest has met the Track A requirements under section 271(c)(1) is entirely different from the question whether Qwest has satisfied the competitive checklist under section 271(c)(2). There is nothing on the face of the latter provision that limits the type of agreement a BOC may use to prove checklist compliance based on how it proved compliance with Track A or Track B. The FCC has now approved section 271 applications in ten states, and *every single one* of those applications — which were *all* filed under Track A of the Act — relied in whole or part on SGATs, pattern interconnection agreements,[2] or tariffs to prove the BOC's compliance with the competitive checklist. Likewise, Qwest has completed workshops on the competitive checklist in twelve states, and all of those states are basing the checklist compliance aspects of their section 271 dockets on a review of

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[2] The SGAT is analogous to the pattern interconnection agreements used by SBC in its section 271 applications (*e.g.*, T2A, K2A).

Qwest's SGAT. Not a single state commission or participant in these dockets has ever suggested that the proceedings are null and void for the reason Intervenors suggest. Put bluntly, in order for the Intervenors' legal argument to be right, every single FCC order approving a section 271 application must be wrong, as well as twelve other commissions in Qwest's region.

There is simply nothing preventing this Commission, as part of its informal consultative role in the federal section 271 process, from using a pattern interconnection agreement (*i.e.*, SGAT) as its procedural vehicle for reviewing Qwest's compliance and for articulating Qwest's obligations going forward. The SGAT is an absolute practical necessity in a docket as sprawling as this one. It allows all parties to review and negotiate a single comprehensive document that covers *everything* a CLEC could foreseeably need, even terms that are not affirmatively required by section 251 or 271,[3] while providing an easy mechanism for CLECs to incorporate the resolutions reached in this docket into their own agreements at the end of the day. Whatever the relevance of Intervenors' arguments to the FCC's final determination (assuming, by that point, they are not entirely moot), those arguments do not govern or make practical sense for this Commission's advisory review.

BACKGROUND

On October 25, 2001, Qwest filed its section 271 application for South Dakota with this Commission.[4] Section 271 of the 1996 Act permits a BOC to provide in-region interLATA

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[3] The SGAT includes, but goes beyond, the terms that are required in an interconnection agreement, in order to facilitate reaching contracts with CLECs.

[4] *See* Petition of Qwest Corporation for Commission Recommendation that the FCC Grant Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act of 1996, *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 (Oct. 25, 2001) ("Qwest 271 Petition"). Qwest included its revised SGAT as Attachment 36 to that pleading.

services by demonstrating that it has met its statutory obligations to open its local market to competition. As part of the statutory requirements of section 271(c)(1), the BOC must demonstrate either that it has interconnection agreements with facilities-based competitors (as per section 271(c)(1)(A), also known as the "Track A" provision) or, if no competitors have requested interconnection, that it has an SGAT in place for the state (as per section 271(c)(1)(B), also known as the "Track B" provision). A BOC must also demonstrate that "either the agreement(s) or general statement satisfy the 'competitive checklist'"[5] described in section 271(c)(2)(B).[6] Because other carriers have requested interconnection in South Dakota, Qwest has attempted to demonstrate its compliance with the Track A provision; to that end, Qwest has submitted evidence in support of Track A compliance showing that it has entered into — and the Commission has approved — over 30 interconnection agreements between Qwest and CLEC's in the state.[7] Qwest has also demonstrated that it provides access to all 14 of the competitive checklist items primarily (though not exclusively) through its SGAT.

In section 252 of the 1996 Act, Congress provided several paths by which a BOC can offer terms for interconnection to its competitors, including negotiated agreements (section 252(a)), arbitrated agreements (section 252(b)), and SGATs (section 252(f)). An SGAT is a pattern or model interconnection agreement that a BOC has made "generally available" to any

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5 Memorandum Opinion and Order, *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 ¶ 7 (1997) ("Ameritech Michigan Order").

6 47 U.S.C. § 271(c)(2).

7 *See* Qwest 271 Petition at 9 (citing Affidavit of David L. Teitzel). Given that Qwest's section 271 petition makes it perfectly clear that Qwest is seeking interLATA relief for South Dakota under Track A, *see id.* at 7, FiberCom's citation to the FCC's *SBC Oklahoma Order* for the proposition that Qwest cannot meet the requirements of Track B, *see* FiberCom Br. at 3 (citing Memorandum Opinion and Order, *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma*, 12 FCC Rcd 8685 ¶¶ 27-59 ("*SBC Oklahoma Order*")), is beside the point.

CLEC that wishes to adopt its terms.[8] Section 252(f)(1) requires a BOC to "file" the SGAT with the appropriate state commission. At that point, the commission has 60 days to either approve the SGAT (if it meets the requirements of section 252(d) and section 251),[9] or simply "permit such statement to take effect."[10] Once an SGAT goes into force, it imposes a binding, specific, and concrete legal obligation on the BOC. The BOC may not withdraw that SGAT unilaterally and (as discussed below) any CLEC can immediately opt into any provision of the SGAT it wishes. CLECs, however, are not required to take the terms and conditions of the SGAT; they can negotiate their own terms and conditions for their interconnection agreement.

Qwest has used an SGAT to demonstrate checklist compliance for two reasons. First, as described in greater detail below,[11] the FCC has now approved Track A-based section 271 applications for ten states, and in every one of those states the BOC based its checklist showing on an SGAT, model interconnection agreement, or generally available tariff, not just on interconnection agreements with individual CLECs. Qwest's application and evidentiary showing are thus entirely consistent with FCC precedent. Second, the SGAT is a single comprehensive model interconnection agreement that a number of interested parties, including CLECs and state commission staff, helped to develop in the seven-state collaborative processes. The SGAT was carefully reviewed by the multistate Facilitator and modified in many important respects to meet his concerns. Therefore, unlike an individual interconnection agreement, the SGAT is the product of much more than simply the negotiations between Qwest and a single CLEC. Indeed, the SGAT now contains terms going beyond what sections 251 and 271

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8 47 U.S.C. § 252(f).

9 *Id.* §§ 252(f)(2) & 252(f)(3)(A).

10 *Id.* § 252(f)(3)(B).

affirmatively require of Qwest. For this reason, it is a fair and efficient way for CLECs to get the access and interconnection they need from Qwest.

As noted above, once an SGAT has gone into effect pursuant to section 252(f)(3)(B), every CLEC is entitled to adopt any of the services or terms of the agreement that it likes. Section 252(i) of the 1996 Act, the so-called "pick and choose" provision, states, "[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[12] The FCC has implemented that requirement as follows:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.[13]

The FCC has specifically held that section 252(i)'s "pick and choose" rule applies to SGATs.[14]

Qwest filed its original SGAT for South Dakota with this Commission on November 22, 2000, and asked the Commission to open an SGAT docket and begin the section 252(f)(3) 60-day review process.[15] The Commission gave notice of the filing on November 23, 2000, and, soon after, AT&T, McLeodUSA Telecommunications Services, Inc., and Midcontinent filed

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11 *See* section II.C *infra*.

12 47 U.S.C. § 252(i).

13 47 C.F.R. § 51.809(a). The Supreme Court specifically upheld the FCC's implementation of section 252(i) in *AT&T v. Iowa Utilities Board*. *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 395-96 (1999).

14 Third Report and Order in CC Docket No. 98-147 & Fourth Report and Order in CC Docket No. 96-98, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 ¶ 167 (1999).

15 Order Allowing SGAT To Go Into Effect, *In the Matter of the Filing By Qwest Corporation for Approval of its Statement of Generally Available Terms and Conditions*, Docket No. TC00-191 (Jan. 24, 2001).

Petitions to Intervene in the SGAT proceeding.[16] After considering the CLECs' comments, the Commission allowed the SGAT to go into effect pursuant to section 252(f) of the Act, "subject to future approval or disapproval by the Commission."[17]

Qwest submitted a revised version of the SGAT on November 2, 2001. The new SGAT reflects the consensus reached with CLECs in section 271 proceedings in other jurisdictions on numerous provisions and the recommendations of the Multistate Facilitator. The Multistate Facilitator of the multistate process and CLECs suggested a number of changes to the SGAT that Qwest agreed to implement. Because the Commission did not reject the revised SGAT within 60 days of submission, it has "take[n] effect" under the terms of section 252(f) of the Act, and CLECs are currently able to opt into the SGAT pursuant to section 252(i) and FCC rules.

Premiere Network Services, Inc. ("Premiere"), has recently elected to adopt Qwest's November 2001 SGAT for South Dakota; Qwest fully supports Premiere's decision, and filed an application for approval of the agreement with the Commission on March 5, 2002.[18] The Commission docketed the application on March 7, and comments on the application are due on March 27. KMC Telcom, a nationwide provider of voice, data, and Internet services, also elected to adopt the current SGAT on March 15. An application for approval of that interconnection agreement is being mailed to the Commission for filing today.

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16 *Id.*

17 *Id.*

18 *See* Letter from Thomas J. Welk, Attorney For Qwest Corporation, to Debra Elofson, Executive Director, Public Utilities Commission of the State of South Dakota (Mar. 5, 2002).

ARGUMENT

I. THE MOTIONS WILL SOON BE MOOT, SINCE CLECS HAVE ALREADY OPTED INTO THE SGAT, TURNING IT INTO EXACTLY THE TYPE OF INDIVIDUAL INTERCONNECTION AGREEMENT INTERVENORS WOULD REQUIRE.

The Intervenors' entire argument is that Qwest must use interconnection agreements with individual CLECs to prove its compliance with the competitive checklist and may not use its South Dakota SGAT. Even assuming *arguendo* that Intervenors are correct (which, as explained in the next section, they are not), their argument would make no difference. Two CLECs have *already* opted into the current version of the South Dakota SGAT without substantive alteration, and those agreements either have been, or shortly will be, filed with this Commission for approval. As soon as the Commission approves one of those agreements, the SGAT will be exactly the sort of state-approved individual interconnection agreement that Intervenors are demanding. Once that happens, the Intervenors' concerns will simply be moot. This event should be imminent, and is certain to occur by the time the FCC is ready to consider a South Dakota section 271 application. Comments on the filed agreement with Premiere are due in six days, and a Commission decision is expected shortly thereafter. Qwest has no reason to believe that anyone will oppose the Premiere agreement, as evidenced by the fact that no parties opposed or even commented on VarTec's decision to adopt the November 2000 version of the SGAT.[19] If the Commission approves the interconnection agreement between Premiere and Qwest, the

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[19] *See* Order Approving Agreement, *In the Matter of the Filing For Approval of Statement of Generally Available Terms and Conditions For Interconnection, Unbundled Network Elements, Ancillary Services and Resale of Telecommunications Services Between Qwest Corporation and VarTec Telecom, Inc.*, Docket No. TC02-002 (Feb. 8, 2002).

SGAT will no longer be just a "generally available" model; it will be a state-approved individual interconnection agreement.

Moreover, since Qwest's SGAT has gone into effect in South Dakota pursuant to section 252(f)(3)(B), Qwest is *currently* under a "concrete and specific legal obligation"[20] to permit CLECs to opt into any or all of its terms under the "pick and choose" provision of the Act, 47 U.S.C. § 252(i). Certainly, more CLECs will take advantage of this obligation to opt into the SGAT in the near future. By the time Qwest files its section 271 application for South Dakota with the FCC and that agency faces Intervenors' argument, it is likely this Commission will have approved an even larger number of SGAT-based interconnection agreements.

FiberCom claims that the checklist items in the SGAT "are not available 'as a practical matter'" because competitors wishing to "graft provisions of the SGAT into their Interconnection Agreements . . . will not receive the requested services 'upon demand.'"[21] However, as noted above, the Act's "pick and choose" rule allows FiberCom to add any of the SGAT terms that it likes to its interconnection agreement *right now* with a minimum of effort.[22] The whole point of the "pick and choose" rule is to help CLECs like FiberCom; as the FCC has noted, section 252(i) "was intended to 'make interconnection *more efficient* by making available to other carriers the individual elements of agreements that have been previously negotiated.'"[23] Clearly the FCC believes the "pick and choose" process is simple enough to consider another interconnection

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20 *Ameritech Michigan Order* ¶ 110.

21 FiberCom Br. at 5 (quoting *Ameritech Michigan Order* ¶ 113).

22 Indeed, section 1.8.2 of the SGAT contains expedited "pick and choose" provisions that have been established through negotiations in other workshops.

23 First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ¶ 1311 (quoting *Report of the Committee on Commerce, Science, and Transportation on S. 652*, S. Rpt. 104-23, 104th Cong., 1st Sess. (1995) at 21-22) (emphasis added).

agreement to be practically available to a CLEC that wishes to opt in. The FCC has made it plain, for example, that interconnection agreements do not individually need to contain all checklist items to count for purposes of section 271 compliance[24]; as long as some other agreement covers the missing items, a CLEC can simply opt into other agreements for whatever items it is missing. In any event, the combination of a comprehensive SGAT and the "pick and choose" rule is certainly far more efficient for CLECs than the individually negotiated arrangements that FiberCom would require Qwest to use.

II. THE ACT PERMITS A BOC TO USE AN SGAT OR ITS EQUIVALENT TO PROVE COMPLIANCE WITH THE COMPETITIVE CHECKLIST, EVEN IN A "TRACK A" APPLICATION, AND *EVERY* FCC APPROVAL ORDER TO DATE HAS CONSIDERED AND RELIED ON SUCH EVIDENCE.

Intervenors' entire legal argument is premised on conflating two separate provisions of the Telecommunications Act: 47 U.S.C. § 271(c)(*1*), which contains the "Track A" and "Track B" requirements, and 47 U.S.C. § 271(c)(*2*), which lays out the competitive checklist that *all* BOCs must follow (regardless of their "track") and specifies what evidence they may use to prove checklist compliance. The two provisions are not the same, and the BOC's proof of compliance with Track A or Track B under section 271(c)(1) does not restrict the type of evidence it may use to establish checklist compliance under section 271(c)(2). Intervenors' argument reads language into section 271(c)(2) that is simply not there. It also ignores the fact that every single FCC section 271 approval order to date has considered SGATs, model interconnection agreements, or similar evidence to establish the BOC's compliance with the competitive checklist, *even though all of those applications were filed under Track A.*

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[24] *See Ameritech Michigan Order* ¶ 72 ("[W]e find nothing in section 271(c)(1)(A) that requires each interconnection agreement to include every possible checklist item, even those that a new entrant has not requested, in order to be a binding agreement for purposes of section 271(c)(1)(A).").

Section 271(c)(*2*) lays out the competitive checklist and the evidence needed to prove compliance. On its face, section 271(c)(2) applies to all BOCs, regardless of whether they are offering "Track A" or "Track B" evidence to satisfy section 271(c)(1). Section 271(c)(2) says that the BOC must have *either* an SGAT *or* individual interconnection agreements in place that cover the fourteen items specified in the checklist:

> (A) AGREEMENT REQUIRED.—A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought —
>
> (i) (I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [the "one or more binding agreements that have been approved under section 252" discussed above], ***or***
>
> (II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and
>
> (ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph [the competitive checklist].[27]

Section 271(c)(2) plainly does not say that a BOC must use one kind of agreement instead of the other to establish that it has met the requirements regarding access and interconnection discussed in section 271(c)(2)(A). Nor does it specify which type of agreement the BOC must use to prove checklist compliance. Section 271(c)(2) merely says that, whichever vehicle the BOC chooses to put forward, that agreement or agreements must meet the checklist.

The Intervenors simply smash the two provisions together. They suggest that, whichever type of evidence the BOC offers under section 271(c)(*1*) to prove that it is subject to binding interconnection obligations, the BOC must use the *same* kind of evidence to prove checklist compliance under section 271(c)(*2*). No such requirement appears on the face of the Act. While section 271(c)(2) cites to the preceding section as a shorthand for describing state-approved

individual interconnection agreements and SGATs, it does *not* say that the BOC must use the same agreement to prove checklist compliance that it used to establish compliance with Track A or B. On the contrary, by its plain words, section 272(c)(2) permits the BOC to prove checklist compliance with either individual agreements or an SGAT or both, and it contains no limitation on the BOC's ability to choose which type of evidence to use.

The other provision Intervenors cite, 47 U.S.C. § 271(d)(3)(A), is structured identically and says the same thing. That section (which governs the *FCC's* section 271 determination) requires the FCC to find that the BOC "(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A), has fully implemented the competitive checklist in subsection (c)(2)(B); or (ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B), such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B)."[28] Like the earlier one, this provision simply states that whichever type of agreement the BOC proffers must be comply with the checklist, but does not say which type of agreement that must be. The provision uses different language for each type of agreement only because (as discussed below) SGATs must contain *all* checklist item terms, while individual interconnection agreements might not.[29]

But even if Intervenors were correct that, in a Track A application, the BOC had to prove checklist compliance with an interconnection agreement that complied with the terms of section 271(c)(1)(A) (the Track A provision), it would be of no avail. The "agreements" that section

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27 *Id.* § 271(c)(2)(A) (emphasis added).

28 *Id.* § 271(d)(3)(A).

29 *See Ameritech Michigan Order* ¶ 72.

271(c)(1)(A) describes are simply agreements that have been approved under section 252, of which an SGAT is one. The relevant language of section 271(c)(1)(A) states as follows:

> A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved *under section 252* specifying the terms and conditions under which the Bell operating company is providing access and interconnection . . . .[30]

An SGAT *is* an "agreement" (a pattern agreement) that is submitted and approved "under section 252." SGATs are governed by section 252(f) of the Act (47 U.S.C. §252(f)). As discussed above, the South Dakota SGAT is currently in force in the state pursuant to section 252(f)(3)(B), and thus imposes a binding, concrete, and specific legal obligations on Qwest. Hence, even if Qwest is required to use a section 271(c)(1)(A)-compliant agreement to prove that it has complied with the competitive checklist, Qwest's South Dakota SGAT qualifies.

B. The Intervenors' Argument Is Contrary to the FCC's Interpretation of the Statutory Language.

A consistent line of FCC section 271 orders from the *Ameritech Michigan Order* to the present endorses Qwest's reading of section 271(c) and (d). The FCC has consistently described its task under section 271(d) as "to verify that the BOC has one or more state approved interconnection agreements with a facilities-based competitor, *or a statement of generally available terms and conditions (SGAT)*, and that either the agreement(s) *or general statement* satisfy the "competitive checklist."[31] Moreover, as the next section explains in detail, every

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30 47 U.S.C. § 271(c)(1)(A) (emphasis added).

31 Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 20 (1999), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) ("Bell Atlantic New York Order") (citing 271(d)(2)(B)) (emphases added); *see also Ameritech Michigan Order* ¶ 7 (same); 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 ¶ 11

single FCC order approving a section 271 application from the 1999 *Bell Atlantic New York Order* to last month's Rhode Island decision has permitted the BOC to use its SGAT, pattern interconnection agreement, or similar evidence to prove its compliance with the competitive checklist, even though the applications were filed under Track A.

Intervenors' out-of-context citations to the *Ameritech Michigan Order* are not to the contrary. There, the FCC was trying to determine whether a BOC that *did* choose to use individual interconnection agreements to prove checklist compliance could rely on provisions of these agreements that covered various checklist items but that no CLECs were actually using.[12] The legal issue was whether Ameritech in fact "provided" access and interconnection under these agreements within the meaning of section 271(d)(3)(A)(i) when it had not yet actually *furnished* access to checklist items because the CLECs had not yet ordered the relevant service. Several long-distance carriers had tried to suggest that "Congress's contrasting use of 'provide' and 'generally offer' throughout section 271" meant that the two terms could not have overlapping meanings — in other words, that "provide" had to mean actually "furnish" and not

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(2000) ("SBC Texas Order"); *SBC* 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 ¶ 10 (2001), *modified, Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) ("SBC Kansas/Oklahoma Order"); 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 (2001) App. D ¶ 2 ("Verizon Connecticut Order"), ; Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 App. D ¶ 2 (2001) ("Verizon Pennsylvania Order"); Memorandum Opinion and Order, *Joint Application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, App. D ¶ 2 (2001) ("SBC Arkansas/Missouri Order"); *See* Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Rhode Island*, CC Docket No. 01-324, FCC 02-63 (rel. Feb. 22, 2002) App. D ¶ 2 ("Verizon Rhode Island Order").

explained above, an SGAT *is* a pattern interconnection agreement that is submitted to and approved by the state commission, and it imposes "a concrete and specific legal obligation" on Qwest "to furnish the item on request." The same order makes clear that CLECs cannot be permitted to game the system and keep the BOC out of the interLATA market simply by requesting access and slow-rolling the process of signing interconnection agreements and taking service:

> Requiring a BOC petitioning for entry under Track A actually to furnish each checklist item would make BOC entry contingent on competing LEC's decisions about when to purchase checklist items and would provide competing carriers with an opportunity to delay BOC entry.[37]

The rule that Intervenors are suggesting would enable CLECs to do exactly what the FCC wanted to avoid. One CLEC requesting access is sufficient to require an application to proceed under Track A.[38] If that event immediately barred the BOC from using an SGAT to prove checklist compliance, then CLECs could bring the 271 process to a standstill simply by refusing to negotiate interconnection agreements that addressed every checklist item.[39] This would send perverse and inefficient incentives to CLECs to delay their competitive entry into the local market to protect their market share and to delay competition in the long distance market. This

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[37] *Id.* at ¶ 111.

[38] *Cf. SBC Oklahoma Order* ¶ 27 (finding that BOCs cannot proceed under Track B if they have received a "request for access and interconnection must be from an unaffiliated competing provider that seeks to provide the type of telephone exchange service described in section 271(c)(1)(A)").

[39] For example, CLECs could negotiate everything they wanted in their interconnection agreements, and decide to provide their own OS/DA which would be completely omitted from the interconnection agreement. The Intervenors' argument would lead to the conclusion that Qwest would not be able to establish a concrete and specific legal obligation that it complies with Checklist Item 7 (which includes OS/DA). Additionally, demand for stand-alone unbundled switching has been virtually non-existent across Qwest's entire region. Intervenors' argument leads to the conclusion that Qwest would be unable to establish compliance with Checklist Item 6 if CLECs decided to exclude language from their interconnection agreements relating to this undesired item.

inevitable result would frustrate the core, fundamental purpose of the Act. That cannot be the rule.

C. The FCC Has Based Every One of Its Section 271 Authorization Orders on Review of an SGAT, Model Interconnection Agreement, or Generally Applicable Tariff.

Every FCC order approving a section 271 application has done so on the basis of exactly the sort of evidence Qwest has presented here, *even though all of these were Track A applications*. The FCC has now approved eight section 271 applications for ten different states. In each of those applications, the BOCs used either model interconnection agreements, SGATs, or generally available tariffs to establish their compliance with the requirements of the checklist, and the FCC has approved every one.

SBC has now received section 271 approval from the FCC for Texas, Kansas, Oklahoma, Arkansas, and Missouri. In each of those Track A applications, SBC submitted a "model interconnection agreement" as evidence of its compliance with the checklist.[40] The model interconnection agreement is the functional equivalent of the SGAT. The model agreement for SBC was originally developed in a series of collaborative workshops that were "open to participation by all interested parties . . . ."[41] SBC offered the T2A as part of the evidence of its commitment to offer each of the checklist items as part of its Track A application, and the FCC found that SBC had fully complied with each of the checklist requirements through either its interconnection agreements or the T2A. For example, the FCC found that SBC met "its

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[40] *See SBC Texas Order* ¶ 13; *SBC Kansas/Oklahoma Order* ¶¶ 12, 15; *SBC Arkansas/Missouri Order* ¶¶ 6, 8.

[41] *SBC Texas Order* ¶ 13.

obligation to provide the customized routing function," and thus satisfied checklist item 6. through section 5.2.3.4 of the T2A.[42] For checklist item 2, for example, the FCC held:

> Based on the evidence in the record, SWBT demonstrates that it provides requesting telecommunications carriers with nondiscriminatory access to unbundled network elements (UNEs) at any technically feasible point. . . . We base our conclusion on evidence of actual commercial usage, and *also on SWBT's legal obligation to provide such access as established in the T2A.*[43]

The FCC granted SBC section 271 authorization for Texas in June 2000.

SBC also submitted model agreements patterned on the T2A to the state commissions in Kansas (the "K2A"), Oklahoma (the "O2A"), Arkansas (the "A2A"), and Missouri (the "M2A"). SBC also modified each of the model agreements based on the particular demands or needs of each state; for example, the K2A "includes arbitration decisions of the Kansas Commission and Kansas-specific terms,"[44] and the Oklahoma commission ordered several modifications to the O2A.[45] SBC once again submitted the model agreements as evidence that it was in compliance with the checklist for its Track A-based section 271 applications for the four states, just as Qwest is doing here with its SGAT. As with SBC's application for Texas, the FCC found SBC in compliance with the checklist requirements in each of the four states; the FCC did *not*, however, question or find fault with SBC's use of a model interconnection agreement to demonstrate compliance with the competitive checklist. For example, in its *Kansas/Oklahoma Order*, the FCC held:

> [W]e find that SWBT complies with checklist item 6 concerning unbundled packet switching because it has demonstrated that it has a present legal obligation under the K2A and O2A, as well as existing interconnection agreements, to provide

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42 *SBC Texas Order* ¶ 341 & n.952.

43 *Id.* ¶ 216 (emphasis added).

44 *SBC Kansas/Oklahoma Order* ¶ 12.

45 *Id.* ¶ 15.

> access to unbundled packet switching in accordance with our rules. *In doing so, we limit our finding to a review of the legal obligations contained in the K2A and O2A and expressly reserve judgment on SWBT's interpretation of its obligation with respect to unbundled packet switching until faced with more concrete factual circumstances.*[46]

The FCC made similar findings in its *Arkansas/Missouri Order*.[47]

Likewise, Verizon has received section 271 authorization from the FCC in five states — New York, Massachusetts, Pennsylvania, Connecticut, and Rhode Island — and all of these Track A applications involved a mix of evidence to prove checklist compliance, not just individual interconnection agreements, as Intervenors would demand. In its Track A-based section 271 application for Connecticut, Verizon demonstrated that it was in compliance with the competitive checklist through a combination of its SGAT, tariffs approved by the Connecticut Department of Public Utility Control, and individual interconnection agreements. For example, with respect to checklist item 5, the FCC found "that Verizon has a specific and concrete legal obligation to provide transport under its tariffs, interconnection agreements and SGAT in Connecticut."[48] In the other four states in which it has received section 271 authorization, Verizon used a combination of state-approved tariffs and individual interconnection agreements, and the FCC has repeatedly found such showings to be an acceptable means of demonstrating checklist compliance.[49] The FCC, of course, has approved Verizon's applications for each of the

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[46] *SBC Kansas/Oklahoma Order* ¶ 245 (emphasis added).

[47] *See, e.g., SBC Arkansas/Missouri Order* ¶ 106 (finding that SBC satisfied its line-splitting obligations in Missouri through its M2A).

[48] *Verizon Connecticut Order* ¶ 66.

[49] *See, e.g., Bell Atlantic New York Order* ¶ 68 ("Bell Atlantic makes interconnection available in New York through interconnection agreements and through a state approved tariff"); *Verizon Massachusetts Order* ¶ 194 ("Verizon provides physical and virtual collocation through state-approved tariffs"); *Verizon Pennsylvania Order* ¶ 94 ("Verizon has a concrete and specific legal obligation in its interconnection agreements and tariffs to make its retail services available for resale to competing carriers at wholesale rates."); *Verizon Rhode Island Order* ¶ 78

five states, and it never questioned Verizon's use of either an SGAT or a generally available tariff to demonstrate compliance with the checklist as part of a Track A application.

Even before the recent string of FCC orders approving section 271 applications, the FCC accepted SGATs as evidence competent to prove checklist compliance. For example, BellSouth based its 1998 application in Louisiana on "both its state-approved interconnection agreements and its SGAT."[50] Although the FCC denied that application because BellSouth had not yet met *all* of the checklist requirements, it did not object to BellSouth's use of an SGAT in a Track A application and, in fact, found that BellSouth had satisfied some of the checklist requirements through its SGAT. The FCC found that, "[b]ased upon our review of the SGAT and interconnection agreements, we conclude that BellSouth" had met the requirements of checklist item 3,[51] and it made similar findings with respect to checklist items 5[52] and 7.[53]

The section 271 orders discussed above plainly demonstrate that, as part of its consideration of a section 271 application in which the BOC proceeds under Track A, the FCC will consider individual interconnection agreements, SGATs, generally available tariffs, or state-approved model interconnection agreements as evidence that the BOC is complying with the requirements of the competitive checklist. In contrast, the FCC has *never* stated that a BOC's evidentiary showing for the checklist requirements must be limited to the terms of interconnection agreements with individual CLECs. As discussed above, the FCC only requires

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("Verizon makes available xDSL-capable loops in Pennsylvania through interconnection agreements and pursuant to tariffs approved by the Rhode Island Commission.").

50 Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599 ¶ 55 (1998).

51 *Id.* ¶ 175.

52 *Id.* ¶ 203.

a BOC to show that it has "a concrete and specific legal obligation to furnish" the checklist items[54]; by its actions in approving every one of the section 271 applications discussed above, the FCC has demonstrated that it is indifferent to the form that showing takes. For this reason, regardless of whether Qwest's SGAT is considered as a live interconnection agreement, a model interconnection agreement, or a section 252(f) agreement, the SGAT became a binding commitment on Qwest as soon as the South Dakota Commission allowed it to take effect, and therefore it can be used to demonstrate compliance with the checklist.

III. NOTHING PREVENTS THIS COMMISSION FROM REVIEWING A MODEL INTERCONNECTION AGREEMENT AS PART OF ITS ADVISORY ROLE.

Finally, while the 1996 Act provides a consultative role for state commissions with respect to several aspects of a BOC's federal section 271 application, including checklist compliance, there is no question that the FCC is the ultimate decision maker. The Act directs the FCC to "*consult with* the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)" of section 271.[55] Section 271(d)(3) of the Act goes on to state that, "[n]ot later than 90 days after receiving an application under paragraph (1), the Commission [*i.e.*, the FCC] shall issue a written determination approving or denying the authorization requested in the application for each State,"[56] and specifically requires the *FCC* to determine whether or not a BOC submitting a Track A application has "fully implemented the competitive checklist in

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53 *Id.* ¶ 237.

54 *Ameritech Michigan Order* ¶ 110.

55 47 U.S.C. § 271(d)(2)(B) (emphasis added).

56 *Id.* § 271(d)(3).

subsection (c)(2)(B)."[57] The state commissions, by contrast, serve as fact finders for the FCC. given the short 90-day time period in which it must evaluate a section 271 application, the FCC relies heavily on the states to develop the evidentiary record.

In light of the FCC's and the state commissions' respective roles in evaluating a BOC's section 271 application, the Intervenors concerns with Qwest's use of its SGAT to show checklist compliance would be relevant, if at all, only to the *FCC's* eventual consideration of Qwest's section 271 application. Even if the Intervenors' arguments were right, it is the FCC that would have to decide whether Qwest's application and evidentiary showing met federal Act's requirements for interLATA authorization. The state commissions, however, can and should consider all the evidence that is relevant to a BOC's section 271 application. In this proceeding, that evidence includes Qwest's SGAT: The SGAT is a single agreement that a number of parties, including many CLECs, helped to develop, and it has been allowed to take effect by this Commission and is currently legally binding on Qwest. For those reasons, it represents an efficient means for the Commission to evaluate Qwest's compliance with the checklist requirements.

As noted above, the other BOCs have repeatedly used SGATs, model interconnection agreements, and generally available tariffs to demonstrate checklist compliance. Notably, no state has ever rejected a BOC's application on these grounds. Qwest has also used its SGAT to show checklist compliance in twelve of the other states in its region, and none of those states has rejected or even raised any concerns with that approach. Indeed, seven of Qwest's states (Iowa, Idaho, Utah, New Mexico, North Dakota, Montana, and Wyoming), joined by Qwest and a number of CLECs, have been participating in a multistate collaborative process for evaluating

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57 *Id.* § 271(d)(3)(A)(i).

the elements of Qwest's section 271 application for those states. None of the CLEC's or state commissions participating in the multistate proceeding took issue with Qwest's use of its SGAT, and the Facilitator overseeing the collaborative has already found, with some modifications, that Qwest's SGAT complies with all of the checklist requirements[58] and that the SGAT's general terms and conditions are also satisfactory.[59]

The states outside Qwest's region have done the same thing. In Arkansas, for example, the Staff of the Arkansas Public Service Commission considered the same question Intervenors present here, and concluded that, regardless of whether SBC could use a model interconnection agreement to prove checklist compliance in its eventual FCC filing, the state commission could certainly consider that model agreement as part of its advisory role:

> [T]he Commission could comment on the A2A, including its compliance with federal law and its benefits compared to currently approved interconnection agreements. Although[] the Commission does not generally issue advisory opinions, this proceeding is unique in that the Commission is not taking binding action on SWBT's proposal, only submitting its recommendation to the FCC on this proposal.[60]

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58 *See* Paper Workshop Issues Report, *In the Matter of Qwest Corporation's Motion for an Alternative Procedure to Manage Its Section 271 Application*, Seven State Collaborative (Mar. 19, 2001) (finding that Qwest's SGAT satisfies checklist items 3, 7, 8, 9, 10, and 12); Second Report — Workshop One, *In the Matter of Qwest Corporation's Motion for an Alternative Procedure to Manage Its Section 271 Application*, Seven State Collaborative (May 15, 2001) (finding that Qwest's SGAT satisfies checklist items 1, 11, 13, and 14); Unbundled Network Element Report, *In the Matter of Qwest Corporation's Motion for an Alternative Procedure to Manage Its Section 271 Application*, Seven State Collaborative (Aug. 20, 2001) (finding that Qwest's SGAT satisfies checklist items 2, 4, 5, and 6).

59 *See* General Terms and Conditions, Section 272 & Track A Report, *In the Matter of Qwest Corporation's Motion for an Alternative Procedure to Manage Its Section 271 Application*, Seven State Collaborative (Sep. 21, 2001).

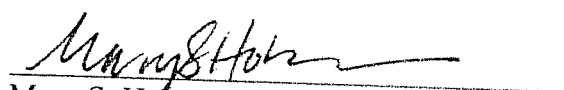
60 *See* Brief in Response to Order 13, *In the Matter of the Application of the Southwestern Bell Telephone Company for Authorization to Provide In-Region InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996 and For the Approval of the Arkansas Interconnection Agreement*, Docket No. 00-211-U (Nov. 1, 2000) at 3.

As noted above, the Arkansas Commission ultimately did review SBC's model A2A, and the FCC did approve SBC's eventual section 271 application on the basis of that model interconnection agreement. This Commission should do the same.

CONCLUSION

The Intervenors' objections to Qwest's use of its South Dakota SGAT to demonstrate compliance with the competitive checklist requirements are meritless and should be dismissed. Qwest has shown that those concerns will be moot in the near future, and that Qwest's proffer of its SGAT is entirely consistent with the requirements of the 1996 Act and the FCC orders implementing those requirements. Finally, the Intervenors' concerns can only be relevant to the FCC's determination of Qwest's section 271 application for the state, and there is no reason this Commission cannot fully consider the SGAT at this stage of the process. For the reasons discussed above, Qwest respectfully requests that the Commission dismiss the Intervenors' motions.

Dated this 21st day of March, 2002.

By: 

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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 ___ day of March, 2002, true and correct copies of Qwest Corporation's Brief in Response to the Motions filed by Black Hills FiberCom, L.L.C. and Midcontinent Communications were sent to the following intervenors:

Steven H. Weigler — **via E-Mail and Overnight Delivery**
AT&T Communications of the Midwest
1875 Lawrence Street
Denver, CO
Email: weigler@lga.att.com

Black Hills Fiber Com — **via E-Mail and Overnight Delivery**
Gregory J. Bernard
Morrill, Thomas, Nooney & Braun
PO Box 8108
Rapid City, SD 57709

Midcontinent Communications — **via E-Mail and Overnight Delivery**
David A. Gerdes
May, Adam, Gerdes & Thompson LLP
503 S. Pierre St.
Pierre, SD 57501-0160

Harlan Best, Staff Analyst — **via Overnight Delivery**
Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

Karen Cremer, Staff Attorney — **via Overnight Delivery**
Public Utilities Commission
500 East Capitol Avenue
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Mary S. Hobson
Attorney for Qwest Corporation

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March 22, 2002

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RECEIVED
MAR 25 2002
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Debra Elofson, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

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

Dear Ms. Elofson:

Enclosed please find an original and ten copies of a corrected first page of Qwest's Brief in Opposition to FiberCom's Motion to Deny Petition and Midcontinent's Motion to Define Track A Analysis. The substitute page provides a heading.

Thank you for your consideration of this matter.

Sincerely yours,

Mary S. Hobson

MSH:cw
Enclosures
Cc: Steven Weigler
David A. Gerdes
Gregory J. Bernard
Colleen Sevold
Tom Welk

STOEL RIVES LLP
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March 22, 2002

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PO Box 8108
Rapid City, SD 57709

Midcontinent Communications
David A. Gerdes
May, Adam, Gerdes & Thompson LLP
503 S. Pierre St.
Pierre, SD 57501-0160

Re: Docket No. TC01-165

Dear Counsel:

Enclosed please find a corrected copy of the first page of Qwest's Brief in Opposition to FiberCom's Motion to Deny Petition and Midcontinent's Motion to Define Track A Analysis containing the proper heading.

Sincerely yours,

Mary S. Hobson

MSH:cw
Enclosures

Oregon
Washington
California
Utah
Idaho

RECEIVED
MAR 2 2 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

BEFORE THE
PUBLIC UTILITIES COMMISSION
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 TC 01-165

INTRODUCTION

Qwest Corporation ("Qwest") submits this brief in response to the motions filed by Black Hills FiberCom, L.L.C. ("FiberCom") and Midcontinent Communications ("Midcontinent") (collectively, "Intervenors") regarding Qwest's section 271 application for South Dakota.[1] Those CLECs claim that, because Qwest is proceeding under Track A of section 271 of the 1996 Telecommunications Act ("Act" or "1996 Act"), it must use interconnection agreements with individual CLECs to demonstrate compliance with the competitive checklist requirements of section 271(c)(2)(B), and may not use its statement of generally available terms ("SGAT").

The Intervenors' arguments are of academic interest at best. Even if Intervenors were right that Qwest may only use individual interconnection agreements to prove its compliance with the competitive checklist (and they decidedly are not), it would make no difference at all: At least two CLECs have already opted into the current version of the South Dakota SGAT,

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[1] *See* Black Hills FiberCom, L.L.C.'s Motion for Order Denying Petition, *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 (Mar. 4, 2002) ("FiberCom Motion"); Brief in Support of Black Hills FiberCom, L.L.C.'s Motion for Order Denying Petition, *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 (Mar. 4, 2002) ("FiberCom Br."); Motion for Definition of Track A Analysis, *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 (Mar. 7, 2002) ("Midcontinent Motion"); Brief in Support of Motion for Definition of Track A Analysis, *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 (Mar. 7, 2002) ("Midcontinent Br.").

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March 22, 2002

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Black Hills Fiber Com
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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

Dear Mr. Bernard:

Enclosed are Qwest's Data Requests pertaining to the above-referenced docket. Although technically your responses are not due for 30 days, we would very much appreciate it if you could provide your responses prior to the filing of Qwest's rebuttal on April 2. If that is not possible, we would nevertheless appreciate your response as soon as you can provide the requested information.

I am also enclosing copies of the Data Requests that Qwest is propounding to the other intervenors in this case.

If you have any questions please feel free to contact me.

Sincerely yours,

Mary S. Hobson

MSH:cw

cc: Parties of record

BEFORE THE
PUBLIC UTILITIES COMMISSION
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 TC 01-165

QWEST CORPORATION'S DATA REQUESTS FOR BLACK HILLS FIBERCOM

Qwest Corporation, ("Qwest") pursuant to SDCL 15-6-33 and 15-6-34, propounds the following Data Requests to the above-named Intervenor, for answer under oath within thirty (30) days of the service hereof. These Requests shall be deemed continuing in nature, requiring said intervenor to supplement said Requests when said intervenor, its agent or attorney obtains information in addition to or different from any information provided in said intervenor's original answers to the Requests.

You are reminded that your answers must include all information available not only to you, but also available to your agents, attorneys, insurers, or others who have information available to you upon your inquiry of them.

REQUESTS FOR INFORMATION/PRODUCTION OF DOCUMENTS

Request No. 1: Please provide the number of end user residential lines you currently serve in Qwest service territory in South Dakota through facilities entirely owned by you. For purposes of this Request, the term "facilities" includes, but is not limited to copper, coaxial, or fiber facilities.

NOTE: this Request does not seek information regarding access lines served via unbundled network elements (UNEs).

Request No. 2: Please provide the number of end user business lines you currently serve in Qwest service territory in South Dakota through facilities entirely owned by you. For purposes of this Request, the term "facilities" includes, but is not limited to copper, coaxial, or fiber facilities.

NOTE: this Request does not seek information regarding access lines served via unbundled network elements (UNEs).

Request No. 3: Please provide the number of end user residential lines you serve in Qwest service territory in South Dakota using services purchased from Qwest services for resale.

Request No. 4: Please provide the number of end user business lines you serve in Qwest service territory in South Dakota using services purchased from Qwest services for resale.

Request No. 5: Please provide the number of end user residential lines you serve in Qwest service territory in South Dakota using stand-alone unbundled loops purchased from Qwest. For purposes of this Request, the term "stand-alone unbundled loops" does not include UNE-Platform services.

Request No. 6: Please provide the number of end user business lines you serve in Qwest service territory in South Dakota using stand-alone unbundled loops purchased from Qwest. For purposes of this Request, the term "stand-alone unbundled loops" does not include UNE-Platform services.

Request No. 7: Please provide the number of end user residential lines you serve in Qwest service territory in South Dakota using a finished package of unbundled network elements (often identified as "UNE-Platform" or "UNE-P") purchased from Qwest.

Request No. 8: Please provide the number of end user business lines you serve in Qwest service territory in South Dakota using a finished package of unbundled network elements (often identified as "UNE-Platform" or "UNE-P") purchased from Qwest.

Dated this 22nd day of March, 2002.

By: _____

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March 22, 2002

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SOUTH DAKOTA PUBLIC
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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

Dear Mr. Gerdes:

Enclosed are Qwest's Data Requests pertaining to the above-referenced docket. Although technically your responses are not due for 30 days, we would very much appreciate it if you could provide your responses prior to the filing of Qwest's rebuttal on April 2. If that is not possible, we would nevertheless appreciate your response as soon as you can provide the requested information.

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Sincerely yours,

Mary S. Hobson

MSH:cw

Cc: Parties of record

BEFORE THE
PUBLIC UTILITIES COMMISSION
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 TC 01-165

QWEST CORPORATION'S DATA REQUESTS FOR MIDCONTINENT COMMUNICATIONS

Qwest Corporation, ("Qwest") pursuant to SDCL 15-6-33 and 15-6-34, propounds the following Data Requests to the above-named Intervenor, for answer under oath within thirty (30) days of the service hereof. These Requests shall be deemed continuing in nature, requiring said intervenor to supplement said Requests when said intervenor, its agent or attorney obtains information in addition to or different from any information provided in said intervenor's original answers to the Requests.

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Dated this 28th day of March, 2002.

By: Mary S. Hobson

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March 22, 2002

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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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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

Dear Mr. Weigler:

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Sincerely yours,

Mary S. Hobson

MSH:ew

cc. Parties of record

BEFORE THE
PUBLIC UTILITIES COMMISSION
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 TC 01-165

QWEST CORPORATION'S DATA REQUESTS FOR AT&T COMMUNICATIONS OF THE MIDWEST

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