6/25/02
Qwest's Motion to
Amend thru
7/1/02 - Response brief
of AT&T re: Item 4

07/01/02 - Midcontinent's Post Hearing Brief;
07/01/02 - AT&T's Brief Regarding Public Interest;
07/01/02 - AT&T's Brief Regarding Qwest's Change Management Process;
07/01/02 - Response Brief of AT&T Regarding Paper Workshop Issues;
07/01/02 - AT&T's Responsive Post-Hearing Brief to Qwest's Post-Hearing Brief in Support of the QPAP and Request for Additional Supplementation of the Record;
07/01/02 - AT&T's Response to Qwest's Opening Post-Hearing Brief on Emerging Services;
07/01/02 - AT&T's Brief Regarding Qwest's Interconnection Obligations;
07/01/02 - AT&T's Brief on Checklist Items 2, 5 and 6 and Section 272 Compliance;
07/01/02 - Response Brief of AT&T Regarding Checklist Item 4 - Unbundled Loops and Checklist Item 11 - Local Number Portability;
07/02/02 - Intervenor Black Hills FiberCom's Response to Qwest's Post-Hearing Brief;
07/03/02 - AT&T's Comments on the ROC OSS Final Report;
07/03/02 - Qwest's Verified Comments;
07/03/02 - Request for Confidential Treatment;
07/03/02 - Staff's Comments;
07/10/02 - Midcontinent's Joinder in Staff's Position on Public Interest;
07/15/02 - Transcript of Hearing held 7/11/02;
07/17/02 - Qwest's Overview Reply Brief;
07/17/02 - Qwest's Post-Hearing Reply Brief on Compliance with the 14-Point Competitive Checklist;
07/17/02 - Qwest's Reply Brief in Support of the QPAP;
07/17/02 - Qwest's Post-Hearing Reply Brief on General Terms and Conditions, Section 272, and Track A;
07/17/02 - Qwest's Post-Hearing Reply Brief on the Public Interest;
07/17/02 - Qwest's Post-Hearing Reply Brief Regarding Change Management;
07/17/02 - Qwest's Exhibit 92;
07/17/02 - Qwest's Exhibit 93;
07/17/02 - Certificate of Service;
07/22/02 - Motion for Withdrawal of Counsel (Gregory J. Bernard);
07/22/02 - Request for Confidential Treatment of Information;
08/12/02 - Qwest Performance Results - Regional and South Dakota - July 2001 - June 2002;
09/19/02 - Procedural History; Order Regarding Checklist Items 3, 7, 8, 9, 10 and 12;
09/19/02 - Order Regarding Checklist Items 1, 11, 13 and 14;
09/25/02 - Qwest's Notice of Updated Statement of Generally Available Terms and Conditions;
09/27/02 - AT&T's Motion to Reopen and Supplement the Record;
09/30/02 - Qwest's Request for Acceptance of PO-20 for Inclusion in the QPAP;
09/30/02 - Memorandum in Support of Qwest's Request for Acceptance of PO-20 for Inclusion in the QPAP;
10/07/02 - Certificate of Service;
10/10/02 - AT&T and WorldCom's Comments on Qwest's Proposed PO-20 Measurement;
10/10/02 - Opposition of Qwest to AT&T's Motion to Reopen and Supplement the Record;
10/16/02 - AT&T's Notice of Supplemental Authority Regarding PO-20;
10/24/02 - Notice of Supplemental Authority Denying AT&T's Motion to Reopen the Record;
10/25/02 - Notice of Supplemental Authority Denying AT&T's Motion to Reopen the Record;
11/12/02 - Order Regarding General Terms and Conditions and Track A;
11/12/02 - Order Regarding Checklist Items 2, 4, 5, and 6;
11/18/02 - Qwest's Notice of Updated Statement of Generally Available Terms

STOEL RIVES LLP
ATTORNEYS AT LAW

RECEIVED
JUN 2 · 2002
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

May 23, 2002

FAX Received JUN 2 5 2002

**VIA FACSIMILE TO:**
**(605) 773-3809**

**VIA OVERNIGHT DELIVERY**

Debra Elofson, Executive Director
SD Public Utilities Commission
500 East Capitol
Pierre, SD 57501

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

**Dear Ms. Elofson:**

Enclosed are an original and ten copies of QWEST'S MOTION TO AMEND THE SCHEDULING ORDER.

Thank you for your consideration of this matter.

Very truly yours,

Mary S. Hobson

Enclosures

cc: Steven H. Weigler
Gregory J. Bernard
David Gerdes
Karen Cremer
Harlan Best
Warren R. Fisher
Mark Stacy
Marlon Buster Griffing
Roylane Ailts Wiest
Colleen Sevold
Thomas J. Welk

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

RECEIVED
JUN 18 '02
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION
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| | |
|---|---|
| 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 |

## QWEST'S MOTION TO AMEND THE SCHEDULING ORDER FOR REVIEW OF THE ROC OSS TEST

Pursuant to ARSD 20:10:01:29 and 20:10:01:30.01, Qwest Corporation ("Qwest") moves the Commission to amend the procedural schedule set out in the Commission's scheduling order dated June 19, 2002 ("Scheduling Order"). That order sets out the following steps.

1. July 3, 2002 – Parties may file comments on the ROC OSS test.

2. July 11, 2002 – A hearing will be held at which the ROC OSS vendors will present live testimony on the ROC OSS test. All parties will be allowed an opportunity for cross-examination and the opportunity to present additional testimony, which will also be subject to cross-examination.

3. July 22, 2002 – Qwest may file a post-hearing brief concerning issues related to the ROC OSS test.

4. August 5, 2002 – Staff and Intervenors may file a post-hearing brief concerning issues related to the ROC OSS test.

5. August 12, 2002 – Qwest may file a rebuttal brief.

Qwest respectfully suggests that the procedure outlined above contains an unnecessary and redundant step that serves to create substantial delay in the submission of the parties' positions on the OSS test results, thereby delaying the consideration of this last piece of the 271 analysis and, potentially Qwest's filing with the Federal Communicatioss Commission.

The unnecessary step is the July 22 post-hearing brief from Qwest. Qwest does not anticipate a need to file a post-hearing brief setting out its position on the ROC OSS test results. Qwest's position that the tests are completed and that the results fully support its position that it complies with the requirements of section 271 is evidenced by, among other things, the filing of an FCC Petition covering five of its states based on the same ROC OSS tests.[1] Qwest requests, therefore, that the Commission eliminate step three above and move the Staff and Intervenor brief deadline to that date. Qwest will then file a reply, if necessary, to any issues raised about the ROC OSS test by those parties.

Qwest recognizes that the Commission's procedural schedule was designed, in part, to assure that the Staff and Intervenors have a full opportunity to review and analyze Qwest's position as well as to express their own positions. To respond to this concern, Qwest pledges that it will file comments on July 3, as contemplated in the Scheduling Order. These comments will provide the same kind of information that the post-hearing brief would be expected to

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[1] *Application by Qwest Communications International, Inc. for authorization Under Section 271 of the Communications Act to Provide In-Region Interlata Service in the States of Colorado, Idaho, Iowa, Nebraska & North Dakota*, (F.C.C. June 13, 2002) (Public Notice, DA 02-1304, WC Docket 02-148).

provide but will do so in a manner that will allow the Staff and Intervenors additional time to review and analyze the Qwest position before attending the July 11 hearing. It also provides these comments nineteen days before Staff and Intervenors are required to prepare and file their own briefing, as opposed to the fourteen-day period contemplated by the Scheduling Order. In a further effort to assure that no party is prejudiced by this proposed schedule change, Qwest will commit to pay for an expedited version of the transcript of the July 11 hearing so that Staff and Intervenors will not have to await the transcript's release to prepare their post-hearing briefs.

Under the proposed schedule, therefore, the schedule would have the following deadlines.

1. July 3, 2002 – Qwest would file comments on the ROC OSS test. Comments by other parties would be optional.

2. July 11, 2002 – Hearing.

3. July 22, 2002 – Staff and Intervenors may file a post-hearing brief concerning issues related to the ROC OSS test.

4. July 29, 2002 – Qwest may file a rebuttal brief addressing issues raised by Staff or Intervenors.

Qwest respectfully submits that the foregoing proposal will expedite these proceedings while not prejudicing any party.

Finally, because of the short time between the submission of this Motion and the July 11 hearing, Qwest respectfully requests that the Commission consider this Motion to amend its prior Scheduling Order on an *ad hoc* basis to avoid any delay associated with attempting to deal with this Motion at a scheduled Commission meeting.

Wherefore, Qwest moves the Commission to amend the Scheduling Order to provide that Staff and Intervenors may file a post-hearing brief by July 22, 2002, and Qwest may file a rebuttal brief by July 29, 2002.

Dated this 25th day of June, 2002.

Respectfully submitted,

Mary S. Hobson
STOEL RIVES LLP
101 S. Capitol Boulevard - Suite 1900
Boise, ID 83702-5958

Thomas J. Welk
BOYCE, MURPHY, MCDOWELL & GREENFIELD, LLP
101 N. Phillips Ave., Suite 600
Wells Fargo Center
Sioux Falls, South Dakota 57117

John Munn Qwest Corporation
1801 California Street - Suite 4900
Denver, CO 80202

Attorneys for Qwest Corporation

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2002, I served the foregoing QWEST'S MOTION TO AMEND THE SCHEDULING ORDER FOR REVIEW OF THE ROC OSS TEST upon all parties of record in this matter by mailing a copy thereof properly addressed, with postage prepaid as follows:

| | |
|---|---|
| Debra Elofson, Executive Director<br>SD Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>Fax: (605) 773-3809<br>debra.elofson@state.sd.us | VIA FACSIMILE AND OVERNIGHT DELIVERY |
| Harlan Best, Staff Analyst<br>SD Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>harlan.best@state.sd.us | VIA E-MAIL AND OVERNIGHT DELIVERY |
| Karen Cremer, Staff Attorney<br>SD Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>karen.cremer@state.sd.us | VIA E-MAIL AND OVERNIGHT DELIVERY |
| Rolayne Ailts Wiest, General Counsel<br>SD Public Utilities Commission<br>500 East Capitol Avenue<br>Pierre, SD 57501<br>rolayne.wiest@state.sd.us | VIA E-MAIL AND OVERNIGHT DELIVERY |
| Steven H. Weigler<br>AT&T Communications of the Midwest<br>1875 Lawrence Street<br>Denver, CO 80202<br>weigler@lga.att.com | VIA E-MAIL AND OVERNIGHT DELIVERY |
| Black Hills Fiber Com<br>Gregory J. Bernard<br>Morrill, Thomas, Nooney & Braun<br>625 Ninth Street – 8th Floor – O Box 8108<br>P.O. Box 8108<br>Rapid City, SD 57709-8108<br>gjbernard@mtnlaw.com | VIA E-MAIL AND OVERNIGHT DELIVERY |

| | |
|---|---|
| Midcontinent Communications<br>David A. Gerdes<br>May, Adam, Gerdes & Thompson LLP<br>503 South Pierre Street<br>Pierre, SD 57501-0160<br>dag@magt.com | **VIA E-MAIL AND OVERNIGHT DELIVERY** |
| Warren R. Fischer, Senior Consultant<br>QSI Consulting<br>3333 East Bayaud Avenue - Suite 820<br>Denver, CO 80209-2945<br>wfischer@qsiconsulting.com | **VIA E-MAIL AND OVERNIGHT DELIVERY** |
| Mark Stacy<br>QSI Consulting<br>5300 Meadowbrook Drive<br>Cheyenne, WY 82009<br>mstacy@wyoming.com | **VIA E-MAIL AND OVERNIGHT DELIVERY** |
| Marlon "Buster" Griffing, PhD<br>Senior Consultant<br>QSI Consulting<br>1735 Crestline Drive<br>Lincoln, NE 68506<br>bgriffing@qsiconsulting.com | **VIA E-MAIL AND OVERNIGHT DELIVERY** |

Brandi L. Gearhart

By: Brandi L. Gearhart
Legal Secretary to Mary S. Hobson
Stoel Rives LLP

# 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 DENYING MOTION TO REOPEN RECORD; ORDER DENYING PETITION TO INTERVENE; ORDER EXTENDING BRIEFING SCHEDULE TC01-165 |

On October 25, 2001, Qwest Corporation (Qwest) filed with the Commission a Petition for Commission Recommendation that the Federal Communications Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act Of 1996. Specifically, Qwest requests that this Commission find, based upon the record presented, that Qwest has met the competitive checklist and other requirements of 47 U.S.C. section 271, which prescribe the mechanism by which Qwest may be found eligible to provide in-region interLATA services and rely upon that finding to provide a favorable recommendation to the Federal Communications Commission (FCC). In support of its petition, Qwest submitted 25 affidavits, a revised Statement of Generally Available Terms, and seven Reports submitted in the Seven-State Process.

On November 1, 2001, the Commission electronically transmitted notice of the filing and the intervention deadline of November 16, 2001, to interested individuals and entities. A Petition for Leave to Intervene was received from Black Hills FiberCom, L.L.C. (Black Hills) on November 7, 2001, a Petition to Intervene was received from Midcontinent Communications (Midcontinent) on November 9, 2001, and a Petition for Leave to Intervene was received from AT&T Communications of the Midwest, Inc. (AT&T) on November 15, 2001. At its November 27, 2001, meeting, the Commission granted the interventions. The Commission also requested that the parties submit proposed procedural schedules by December 7, 2001. The Commission received proposed procedural schedules from all of the parties.

At its December 12, 2001, meeting, the Commission considered the proposed procedural schedules. The Commission set the following procedural schedule:

January 18, 2002 - Intervenors and Staff identify disputed issues (except for issues relating to the final OSS report which has not been issued yet);

February 7, 2002 - A prehearing conference will be held beginning at 2:30 p.m., in Room 468, State Capitol Building, Pierre, South Dakota;

March 18, 2002 - Staff and Intervenors' testimony is due;

April 2, 2002 - Qwest may file rebuttal testimony; and

April 22-26, 2002 - A hearing will be held beginning at 9:00 a.m. on April 22, 2002 and continuing through April 26, 2002, in Room 412, State Capitol Building, Pierre, South Dakota.

The hearing was held as scheduled, beginning on April 22, 2002 and ending on April 30, 2002. At the conclusion of the hearing, the Commission set a post-hearing briefing schedule.

On May 14, 2002, the Commission received from AT&T a Motion to Reopen Proceedings. On May 24, 2002, the Commission received Qwest Corporation's Opposition to AT&T's Motion to Reopen Proceedings. On May 30, 2002, the Commission received AT&T'S Reply to Qwest Corporation's Opposition to AT&T's Motion to Reopen Proceedings. On June 4, 2002, the Commission received Touch America Inc.'s Petition to Intervene and Motion to Reopen Issues. On June 11, 2002, the Commission received Qwest's Opposition to Touch America's Petition to Intervene and Motion to Reopen Issues.

At its June 13, 2002, meeting, the Commission considered AT&T's and Touch America's motions. After listening to the arguments by the parties, the Commission voted to deny AT&T's Motion to Reopen Proceedings because the record was still open. In addition, the Commission had previously requested, among other things, that Qwest file copies of any written agreements with competitive local exchange companies that had not been filed with the Commission. See Hearing Transcript for April 30, 2002, at pages 6-7. The Commission points out that this is the type of information that AT&T was requesting be placed into the record. Qwest responded to the Commission's request for information on June 13, 2002. Since Qwest's response had just been filed, the Commission extended the current briefing schedule for Intervenors and Staff until July 1, 2002. The Commission denied Touch America's Petition to Intervene due to its untimeliness. The Commission notes that the deadline for intervention in this proceeding was November 16, 2001, a hearing has been held, the parties are currently briefing the issues, and the issues raised by Touch America are not issues that have just arisen. Since the Commission did not grant Touch America's Petition to Intervene, Touch America's Motion to Reopen Issues was moot. It is therefore

ORDERED, that AT&T's Motion to Reopen Proceedings is denied; and it is

FURTHER ORDERED, that Touch America's Petition to Intervene is denied; and it is

FURTHER ORDERED, that the Intervenors and Staff shall file briefs on or before July 1, 2002.

Dated at Pierre, South Dakota, this 27th day of June, 2002.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By Melanie Kolbo

Date 6/28/02

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

ROBERT K. SAHR, Commissioner

# 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 AMENDING BRIEFING SCHEDULE<br><br>TC01-165 |

On October 25, 2001, Qwest Corporation (Qwest) filed with the Commission a Petition for Commission Recommendation that the Federal Communications Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act Of 1996. Specifically, Qwest requests that this Commission find, based upon the record presented, that Qwest has met the competitive checklist and other requirements of 47 U.S.C. section 271, which prescribe the mechanism by which Qwest may be found eligible to provide in-region interLATA services and rely upon that finding to provide a favorable recommendation to the Federal Communications Commission (FCC). In support of its petition, Qwest submitted 25 affidavits, a revised Statement of Generally Available Terms, and seven Reports submitted in the Seven-State Process.

On November 1, 2001, the Commission electronically transmitted notice of the filing and the intervention deadline of November 16, 2001, to interested individuals and entities. A Petition for Leave to Intervene was received from Black Hills FiberCom, L.L.C. (Black Hills) on November 7, 2001, a Petition to Intervene was received from Midcontinent Communications (Midcontinent) on November 9, 2001, and a Petition for Leave to Intervene was received from AT&T Communications of the Midwest, Inc. (AT&T) on November 15, 2001. At its November 27, 2001, meeting, the Commission granted the interventions. The Commission also requested that the parties submit proposed procedural schedules by December 7, 2001. The Commission received proposed procedural schedules from all of the parties.

At its December 12, 2001, meeting, the Commission considered the proposed procedural schedules. The Commission set the following procedural schedule:

> January 18, 2002 - Intervenors and Staff identify disputed issues (except for issues relating to the final OSS report which has not been issued yet);
>
> February 7, 2002 - A prehearing conference will be held beginning at 2:30 p.m., in Room 468, State Capitol Building, Pierre, South Dakota;
>
> March 18, 2002 - Staff and Intervenors' testimony is due;
>
> April 2, 2002 - Qwest may file rebuttal testimony; and
>
> April 22-26, 2002 - A hearing will be held beginning at 9:00 a.m. on April 22, 2002 and continuing through April 26, 2002, in Room 412, State Capitol Building, Pierre, South Dakota.

The hearing was held as scheduled, beginning on April 22, 2002 and ending on April 30, 2002. At the conclusion of the hearing, the Commission set a post-hearing briefing schedule.

At its May 30, 2002, meeting, the Commission listened to comments from the parties on how to proceed with consideration of the Regional Oversight Committee (ROC) Operational Support Systems (OSS) test. The Commission has jurisdiction in this matter pursuant to SDCL Chapter 49-

31, specifically 49-31-81 and 47 U.S.C. section 271. The Commission set the following procedural schedule to consider the ROC OSS test:

July 3, 2002 - Parties may file comments on the ROC OSS test. These comments are optional. A party may present testimony at the hearing without filing comments;

July 11, 2002 - A hearing will be held beginning at 8:30 a.m. on July 11, 2002, in Room 412, State Capitol Building, Pierre, South Dakota. The ROC OSS vendors will present testimony on the ROC OSS test. The following vendors will be giving presentations: MTG - Denise Anderson and Marie Bakunas; KPMG - Mike Weeks and Joe Dellatorre; and HP - Geoff May, Liz Gragert, and Don Petry. All parties will be allowed an opportunity for cross-examination. Following that testimony, all parties will be allowed the opportunity to present additional testimony, which will also be subject to cross-examination. The Commission is scheduling only one day for this hearing. If necessary, the hearing may extend into the evening hours;

July 22, 2002 - Qwest may file a post-hearing brief concerning issues related to the ROC OSS test;

August 5, 2002 - Staff and Intervenors may file a post-hearing brief concerning issues related to the ROC OSS test; and

August 12, 2002 - Qwest may file a rebuttal brief.

On June 25, 2002, the Commission received Qwest's Motion to Amend the Scheduling Order for Review of the ROC OSS Test. Qwest stated that it did not anticipate a need to file a post-hearing brief and requested that Staff and Intervenors file any post-hearing briefs on or before July 22, 2002, and allow Qwest the option of filing a rebuttal brief on or before July 29, 2002. The Commission contacted all of the parties and none of the parties objected to the amendment of the procedural schedule. It is therefore

ORDERED, that Staff and Intervenors may file a post-hearing brief concerning issues related to the ROC OSS test on or before July 22, 2002, and Qwest may file a rebuttal brief on or before July 29, 2002.

Dated at Pierre, South Dakota, this 27th day of June, 2002.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By Melanie Kaebe

Date 6/28/02

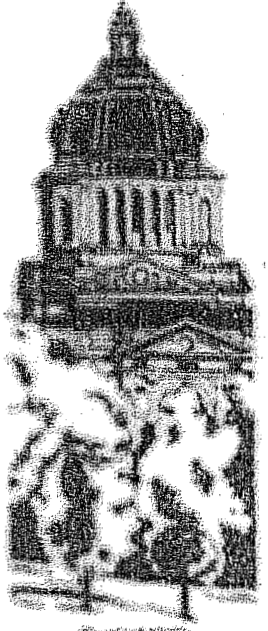
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

JAMES A. BURG, Chairman

PAM NELSON, Commissioner

ROBERT K. SAHR, Commissioner



# South Dakota Public Utilities Commission

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

DATE: July 1, 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 each of you will find a copy of Staff's Brief 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.

Capitol Office
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FAX (605) 773-1809

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Pam Nelson
Chairman
Jim Burg
Vice Chairman
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Commissioner

Debra Elofson
Executive Director

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Lisa Hull
Dave Jacobson
Amy Koenig
Bob Knadle
Delaine Kolbo
Gregory A. Rislov
Keith Senger
John Smith
Rolayne Ailts Wiest

# 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 | ) ) ) ) | STAFF'S BRIEF<br><br>TC01-165 |

## STATEMENT OF THE CASE

On October 25, 2001, Qwest Corporation (Qwest) filed with the South Dakota Public Utilities Commission (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 (the Act). Qwest requested that the Commission find, based upon the record presented, that Qwest met the competitive checklist and other requirements of 47 U.S.C. § 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 and set a procedural schedule based on those suggestions.

On March 5, 2002, Black Hills FiberCom filed a Motion for Order Denying Petition. On March 6, 2002, Qwest filed a Motion to Remove Document from Commission Record. 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's Motion to Suspend Procedural Schedule and Request for Expedited Decision.

At its March 14, 2002, meeting, the Commission voted to grant Midcontinent's Motion to Supplement Prefiled Testimony. The Commission also voted to deny AT&T's Motion to Suspend Procedural Schedule. At its March 28, 2002, meeting, the Commission considered Qwest's Motion to Remove Document from Commission Record, Black Hills FiberCom's Motion for Order Denying Petition, and Midcontinent's Motion for Definition of Track A Analysis. The Commission also considered scheduling additional time for the hearing and how to schedule witnesses and/or issues for the hearing. The Commission voted to grant Qwest's motion. The Commission then listened to arguments concerning Black Hills FiberCom's Motion for Order Denying Petition and Midcontinent's Motion for Definition of Track A Analysis. After considering the arguments of the parties, the Commission voted to grant Midcontinent's Motion. The Commission found that Qwest may

not rely solely on its SGAT to prove compliance with the 14 point checklist but should also use interconnection agreements and any other evidence to demonstrate to the Commission that it is in compliance with the checklist items. Based on its March 20, 2002, order, the Commission allowed supplemental testimony to be filed. The Commission also extended the time for the hearing through the morning of May 9, 2002.

A hearing was commenced on April 22, 2002, and testimony was completed on April 30, 2002, in the above-captioned matter. Qwest filed its post hearing briefs on May 22, 2002. Staff, by and through its undersigned counsel, submits this brief in response to Qwest's post hearing briefs. Commission Staff (Staff) will address its disputed issues only. References to the hearing transcript will be "Vol." followed by the appropriate volume and page number.

## BACKGROUND

On October 25, 2001, 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. Qwest requested that the Commission find, based upon the record presented, that Qwest met the competitive checklist and other requirements of 47 U.S.C. § 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 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. Section 271 of the Telecommunications Act of 1996, 47 U.S.C. § 271, establishes the

means for a Bell Operating Company (BOC), which includes Qwest, to obtain authorization to begin providing in-region interLATA and interstate telecommunications services. A BOC may enter the interLATA long-distance market once the FCC determines the BOC satisfies the requirements of Section 271. In making its determination, the FCC is required 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 [Section 271]." 47 U.S.C. § 271(d)(2)(B). Thus it is left to each state to make a record and provide a recommendation regarding a BOC's compliance with Section 271.

Section 271(c)(2)(B) contains a checklist of 14 items relating to access and interconnection a BOC must meet in each state where it provides local service. 47 U.S.C. § 271(c)(2)(B). Titled "competitive checklist," the 14 checklist items set forth broadly stated requirements or categories for access and interconnection Qwest must provide to competitors desiring interconnection with its facilities. In addition to satisfying the requirements of the competitive checklist, a BOC must satisfy other components of Section 271. For example, Section 271(c)(1) requires a BOC to provide access and interconnection to its network facilities pursuant to approved interconnection agreements (Track A), or to provide terms for access and interconnection in a statement of generally available terms (SGAT) by which a competitive provider may gain access to the BOC's network and facilities (Track B). The FCC must also determine that the BOC's entry into the interLATA market is in the public interest, Section 271(d)(3)(C). Finally, the BOC must show that it is prepared and able to offer interLATA services through a separate subsidiary pursuant to the requirements of Section 272, Section 271(d)(3)(B).

## I. COMPETITIVE CHECKLIST SECTION 271(c)(2)(B)

### A. Statement of Generally Available Terms (SGAT)

The purpose of reviewing the general terms and conditions of the Qwest SGAT is to ensure that the compliance with the individual checklist items, purportedly achieved in the specific SGAT provisions, is not undermined by the general requirements of the contract. Staff attempted to review the SGAT prior to the hearing only to find that many of the changes could not be tracked. At the conclusion of the hearing, the Commission ordered Qwest to provide a chart showing how the consensus and disputed items have been incorporated into the most current SGAT or Qwest Performance Assurance Plan (QPAP) or if they were not incorporated, why they were not incorporated. Qwest was also ordered to file an updated SGAT and QPAP showing the changes from the October 2001 filing. Vol. VI, p. 266.

On May 22, 2002, Qwest submitted, inter alia, an SGAT designated Exhibit 81. Staff found that it still had a number of questions regarding the SGAT after conducting a cursory review of Exhibit 81. On May 30, 2002, Staff informed Qwest of its concerns and asked if Qwest wished to respond to Staff's concerns. Staff was informed that Qwest would respond to Staff's concerns in its reply brief.

Qwest either agreed to most of the SGAT changes recommended in Staff Direct Testimony or offered a suitable compromise in the 271 Hearings. Staff has reviewed the post-hearing briefs to see if the amendments were completed. There are a few important changes that were not referenced, namely Qwest's agreement to provide Qwest DSL

service in cases where the CLEC provides the voice service (Vol. III, pp. 221-224; 234-235) and line sharing provisioning intervals (Vol. III, pp. 219-220).

Staff's recommendation as to whether or not Qwest has met the requirements of the competitive checklist is qualified. Staff has concluded that Qwest, for the most part, satisfies the access and interconnection requirements of the competitive checklist in 47 U.S.C. § 271(c)(2)(B). However, until such time as Qwest files its reply brief and responds to the concerns that Staff raised regarding the Second Revision of the SGAT (see Attachment A), and Staff has time to review such response, Staff's recommendation remains uncertain. Staff's final recommendation to the Commission also will depend on the outcome of the Regional Operating Company (ROC) Operating Support System (OSS) Test Process hearing.

B. Checklist Items

**ISSUE 1: Prohibiting Access by CLEC Marketing and Legal Personnel to Landowner Agreements [Brief-Paper Workshop (3, 7, 8, 9, 10, 12), pp. 4-5]**

The Facilitator in the Multi-State process set a precedent that marketing and legal personnel from a CLEC or Qwest should not have access to sensitive materials of the other company when the need for access was driven by a desire to determine technical feasibility, ownership, or certain other matters. The issue of Landowner Agreements had already been addressed at the time the Facilitator made this recommendation. Qwest changed language after the fact to reflect the precedent, but did not clarify in its testimony that Qwest, not the Facilitator, had written this specific language..

**STAFF RESPONSE 1:**

The prohibition is reasonable and fair as Qwest marketing and legal personnel are similarly prohibited from having access to certain sensitive CLEC material. The point is, the Commission is the authority that will make the final decision as to whether the prohibition is appropriate and it does not have a recommendation from the Facilitator specifically addressing this matter.

**ISSUE 2: Large Request Response Times [Brief-Paper Workshop (3, 7, 8, 9, 10, 12), pp. 4-5]**

Qwest asked for the right to request a waiver of the 45-day rule, which requires that ILECs respond within that period to CLEC requests for access to poles, ducts and rights of way. Qwest says that when a request involves large numbers of the requested items it may need more time to give an accurate response.

**STAFF RESPONSE 2:**

The Facilitator recommended granting Qwest's request, which is the best solution to a potentially complicated problem.

**ISSUE 3: Direct Trunked Transport in Excess of 50 Miles [Brief-Workshop 1 (1, 11, 13, 14), pp. 17-18]**

Qwest asks that if the parties cannot agree on who will build direct trunked transport in excess of 50 miles that the matter be brought before the Commission on an individual case basis.

**STAFF RESPONSE 3:**

Qwest's request represents a modification of its position prior to the 271 Hearing, which placed more responsibility on CLECs contrary to the recommended resolution of the Facilitator. The modified position is a good compromise.

**ISSUE 4: Interconnection at Qwest Access Tandem Switches [Brief-Workshop 1 (1, 11, 13, 14), pp. 51-52]**

CLECs may terminate local traffic at Qwest access tandem switches. When the volume of traffic between a CLEC and the Qwest switch reaches a DS1 level, Qwest may initiate a process requesting the CLEC order a direct trunk group. The CLEC has an opportunity to reject the request if it can demonstrate complying would harm its operations or be adverse economically. Qwest can then offer an economically equivalent interconnection, but the CLEC has to accept only if Qwest can demonstrate the arrangement will not harm CLEC operations and failing to make the change will hurt Qwest.

**STAFF RESPONSE 4:**

Qwest's position was modified in the 271 Hearing and represents a suitable outcome.

**ISSUE 5: Collocation Provisioning Interval without a Forecast [Brief-Workshop 1 (1, 11, 13, 14), p. 26]**

Qwest has agreed to a compromise reached in Arizona. The compromise, introduced in the 271 Hearing, makes the collocation provisioning interval 90 days without a CLEC forecast unless Qwest can demonstrate facilities modification or conditioning is necessary. With a forecast, the need for such extraordinary work will be identified and the interval will be 90 days.

**STAFF RESPONSE 5:**

The compromise is suitable, extending as it does the collocation interval only when conditions warrant.

**ISSUE 6: Tying Qwest Data Service and Voice Service [Not addressed in the brief]**

Qwest agreed during the 271 Hearing to continue or initiate its Qwest DSL service when a CLEC has the voice service when the CLEC is providing voice by UNE-P or resale. Qwest did not agree to provide DSL as a standalone product.

**STAFF RESPONSE 6:**

Qwest's clarified position is acceptable, however it does not appear in the brief. Qwest should confirm its offer stands.

**ISSUE 7: Line Sharing Provisioning Interval Update [Not addressed in the brief]**

Qwest agreed in the 271 Hearing to insert language recommended by the Facilitator that would update the interval for wholesale line sharing provisioning as Qwest improved its retail provisioning.

**STAFF RESPONSE 7:**

Qwest's position is acceptable, but it did not reiterate its agreement in the brief. Qwest should demonstrate it has made the insertion in the SGAT.

**ISSUE 8: Access to LFACS and Other Loop Information Databases [Brief-Workshop 3, Group 4 (2, 4, 5, 6), pp. 75-76]**

Qwest testified in the 271 Hearing that it was providing CLECs access to Facility Check, the database to which the Facilitator said was appropriate for CLECs to have access to. In

the brief, Qwest says that it continues to provide this access and that it has enhanced CLEC access to loop qualification material.

**STAFF RESPONSE 8:**

Qwest has complied with this issue.

**ISSUE 9: Limiting Line Sharing to UNE-P [Brief-Workshop 3, Group 4 (2, 4, 5, 6), pp. 86-87]**

The Facilitator recommended that Qwest develop and include terms and conditions for loop splitting in its SGAT.

**STAFF RESPONSE 9:**

Qwest has complied with this recommendation in the SGAT and KMC agreement.

**ISSUE 10: Change Management Process [Brief-Workshop 3, Group 4 (2, 4, 5, 6), pp. 32-42]**

Qwest presents updated statements that its ongoing Change Management Process (CMP) complies with 271 requirements.

**STAFF RESPONSE 10:**

The Final Report concerning the Qwest OSS Evaluation (the ROC OSS Test) was issued on May 28, 2002, approximately a month after the 271 Hearing and shortly after Qwest filed its brief. The Report contains a statement about the CMP that deserves further investigation by the Commission.

> In KPMG's professional opinion, the draft CMP document does not include all of the components that constitute a well-formed and complete Product/Process CMP. Although Qwest and CLECs have made significant progress in CMP Redesign, the parties have not completed discussions about Product/Process CMP, and have not documented all activities within

> CMP. For example, Redesign discussions continue for the definition of a CR Postponement Request and the Exception process. The CMP Redesign Process itself is scheduled through June 2002.

Qwest Communications, OSS Evaluation, *Final Report*, Version 2.0, May 28, 2002, p. 526 (Report).

KPMG Consulting was the OSS Test Administrator and charged with carrying out the evaluation of Qwest's systems. It is recommended that KPMG's representatives at the ROC OSS Test hearing be asked if anything has happened since the test to cause them to change their opinion about Qwest's CMP. If not, the representatives should state if the shortcomings in the CMP are sufficient, in their opinion, to withhold Section 271 approval from Qwest.

## II. PUBLIC INTEREST SECTION 271(d)(3)(C)

> Section 271(d)(3) of the Act provides in pertinent part as follows:
> "The commission [1] shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—
>
> *****
>
> (C) the requested authorization is consistent with the public interest, convenience, and necessity."

The FCC has established a three-part test for a BOC to meet the Section 271(d)(3)(C) requirements, above and beyond compliance with the 14 enumerated checklist items. First, granting the Section 271 application must be

> "consistent with promoting competition in the local and long distance telecommunications markets."[2] Second, there must be assurances that the

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[1]In the Act, "commission" refers to the Federal Communications Commission.

[2]Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services d/b/a Southwestern Bell Long Distance Services

> market will remain open after the application is granted. And, finally, the FCC must consider whether there are any other "unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications."

Id., at Par. 267. *See also* Par. 281-282.

Satisfaction of the 14-point checklist is the most basic component of meeting the public interest standard. But compliance with the well-known 14-point competitive checklist outlined in Section 271 is only one of the requirements of the Act. The FCC has made it clear that checklist compliance alone is insufficient to establish that local markets are open for purposes of the public interest analysis.

> 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 the section 271, basic principles of statutory construction, and sound public policy...[T]he text of the statute clearly establishes the public interest requirement as a separate, independent requirement for entry.

In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 To Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order, FCC 97-298, CC Docket No. 97-137, (released August 19, 1997)(Ameritech Michigan Order), Par. 389. See also, Application by Bell Atlantic New York for Authorization Under Section 271 To Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (released December 22, 1999) (Bell Atlantic New York Order), Par. 423 ("Nonetheless, the public interest analysis is an

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in Kansas and Oklahoma, FCC 010-29, CC Docket No. 00-217, released January 22, 2001, (SBC Kansas/Oklahoma Order) at ¶268.

independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination."). The FCC has noted that Congress specifically rejected a proposed amendment to the Act that would have stipulated that implementation of the checklist necessarily satisfies the public interest analysis. Id. at n. 1302, citing, 141 Cong. Rec. S7971, S8043 (June 8, 1995).

In addition to establishing that the local market is open to competition before BOC entry into the in-region interLATA market, the public interest analysis requires assurances that the local market will remain open after BOC entry into the interLATA market, if entry is permitted. Ameritech Michigan Order, Par. 399.

The public interest analysis, including the requirement for assurances of future performance in compliance with the Act, is critical in evaluating the potential risks and potential benefits of BOC entry into the in-region interLATA market in a specific, individual state, such as South Dakota. Prior to passage of the 1996 Act, BOCs such as Qwest were prohibited from providing in-region interLATA service as part of the terms of the 1984 break-up of the Bell system. By carefully conditioning BOC entry into the in-region interLATA market on showings that the local market is irreversibly open to competition and likely to remain so, Congress accomplished two things. First, Congress created an incentive. Long-distance entry is a reward designed to provide BOCs such as Qwest with a powerful incentive to open their local markets. Second, Congress attempted to minimize the risks to competition of BOC entry into the in-region interLATA market. If a BOC such as Qwest is truly one provider in a vigorously competitive local exchange market, there is far less risk that Qwest will retain the characteristics of a monopoly or increase its

monopoly control after entry into the in-region interLATA market. However, the threshold conditions to entry mean nothing if entry is permitted in the absence of the required showings that the local market is truly open and likely to remain so after entry. Premature Section 271 approval, or approval without adequate assurance for future compliance, is likely to result in the worst of both worlds -- a local market that is not open to competition where the incumbent has the opportunity and incentive to control local exchange and exchange access facilities and services, to discriminate against any emerging rivals, and to cross-subsidize interexchange ventures. Premature authorization or authorization in the absence of a sufficient Performance Assurance Plan (PAP) would effectively cancel and undo the advances that have been made thus far toward a competitive market and would make the development of competition even slower and more difficult, in clear contravention of the public interest. This would have significant detrimental impacts in South Dakota.

Section 271 places on Qwest, as the applicant, the burden of proving that all of the requirements for authorization to provide in-region interLATA services are satisfied. See 47 U.S.C. Section 271(d)(3) and Ameritech Michigan Order, Par. 43. A BOC must present a *prima facie* case that all of the requirements of Section 271 have been satisfied. *Id.* at Par. 44. The term "all the requirements of Section 271" includes the public interest requirement. Therefore, Qwest, as the applicant, has the burden of making persuasive and adequate assurances that the local market is open to competition before BOC entry into the in-region interLATA market and that the local market will remain open after entry into the interLATA market, if entry is permitted.

States have great latitude in determining what kind of PAP provides adequate and persuasive assurance that the local market in that state will remain open.

> While the details of such mechanisms developed at the state level may vary widely, we believe that we should examine certain key aspects of these plans to determine whether they fall within a zone of reasonableness, and are likely to provide incentives that are sufficient to foster post-entry checklist compliance.

Bell Atlantic New York Order at Par. 433. The FCC has provided guidance indicating that a sufficient plan should include the following "important characteristics":

> potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; a reasonable structure that is designed to detect and sanction poor performance when it occurs; a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and reasonable assurances that the reported data is accurate.

Id.

Evaluation of the QPAP submitted by Qwest is critical to the Commission's public interest analysis. See e.g. Bell Atlantic New York Order, Par.429, and In the Matter of Application by Southwestern Bell for Provision of In-Region InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (released June 30, 2000), (SWBT Texas Order), Par. 420. Qwest itself fostered a strong identification between the public interest analysis and its proposed QPAP. Qwest often implied that, from Qwest's perspective, if Qwest agrees to a PAP, all public interest concerns should be laid to rest. Despite this critical linkage, Qwest has down-played the issue of whether its proposed QPAP is adequate and has sought to minimize review of the specific structure, mechanisms, assumptions, omissions, and issues associated with its filed QPAP.

When faced with questions about the sufficiency of its QPAP to assure future compliance, Qwest's standard response is: "this is similar to the plan approved in Texas so it must be sufficient." See for example, Teitzel, Vol. I, pp. 40-41, 85, 87, 104; Exhibit 1, 1A; Reynolds, Vol. IV, pp. 110, 112, 117, 122, 124, 185; Exhibit 77, 78; Stang, Vol. IV, pp. 185, 186.

Qwest has brought little evidence to this record in support of its position regarding public interest issues, specifically with respect to the QPAP, other than to argue that its plan is similar to what has been approved in other states. Staff strongly urges this Commission to review these public interest issues in South Dakota-specific terms, and base their decision on that consideration as well as the record in this docket.

A. QPAP

The consequences of Section 271 approval in the absence of an adequate plan to assure that the local market remains open would be devastating for the development of a vigorous competitive market in South Dakota. Vol. VI, p. 52, lines 10-24. As the FCC has stated in an oft-quoted passage, the details of post entry performance plans are developed "at the state level" and the plans "may vary widely". Bell Atlantic New York Order, Par. 433. Staff agrees with the FCC's wise decision to allow states wide latitude in making these important decisions regarding performance plans.

The relevant question for the public interest analysis is: What is the underlying purpose of developing the standards reflected by the QPAP? The FCC has given us the answer: the purpose of a performance assurance plan and its terms and standards is to

provide adequate assurance "that the local market will remain open after [the BOC] receives section 271 approval". Bell Atlantic New York Order, Par. 429.

That said, it appears that Qwest's main concern is that a performance assurance plan that is structured to provide effective and meaningful consequences for backsliding and eliminating loopholes and safe havens for poor performance, will simply cost Qwest too much. This obvious concern on Qwest's part belies Qwest's underlying claims in this proceeding and undermines and casts doubt on its purported assurances of future compliance.

Qwest is obligated to provide assurances that the local market will remain open after Section 271 authority is granted. Section 271 places on Qwest the burden of proving that all of the requirements for Section 271 authorization are satisfied. See 47 U.S.C. Section 271(d)(3) and Ameritech Michigan Order, Par. 43. The term "all the requirements of Section 271" includes the public interest requirement. Therefore, Qwest has the burden of making persuasive and adequate assurances both that the local market is open to competition before entry and that the local market will remain open after entry, if entry is permitted.

If Qwest's assurances are insufficient, the public interest requirement dictates that Section 271 authority should be withheld. The federal statutory scheme provides that the Commission will consult with the FCC on Qwest's South Dakota application. If Qwest's assurances that the local market in South Dakota is and will remain open are insufficient, the public interest will require this Commission to recommend to the FCC that 271 authority should not be granted for our state.

Staff's recommendation regarding the adequacy of the performance plan is that the Commission should not recommend to the FCC that Qwest's Section 271 application should be approved unless and until the Commission has approved a strong PAP. In order to deter performance backsliding and anti-competitive conduct by Qwest, this PAP should provide for sufficient penalties/incentives and should not give Qwest a safe-haven by placing a monthly cap or an overall cap on penalties/incentive payments triggered by the plan.

In response to Qwest's brief, rather than playing games by taking testimony out of context in an attempt to bolster its argument, Staff intends to clearly state its position on the issues and not go "tit-for-tat" in its brief. Staff would request that the Commission refresh its memory of Mr. Stacy's testimony by simply re-reading his prefiled testimony and the hearing transcripts and drawing its own conclusions if there is any ambiguity in Staff's position in this matter. Vol. VI, pp. 187-213.

Procedurally Staff would object to Qwest's attempt to introduce evidence into the South Dakota record that apparently exists in another state's Section 271 record and would request that all such references to the phantom letters be stricken. See footnote 31 of Qwest Corporation's Post-Hearing Brief in Support of the QPAP.

**ISSUE 1: QPAP's SHOULD FIT THE INDIVIDUAL NEEDS OF EACH STATE**

In general, the Qwest brief alludes to the fact that the FCC "has previously found" that enforcement mechanisms developed in other jurisdictions are sufficient. Qwest further contends that Qwest's QPAP filed in South Dakota fits within what the FCC describes as the "zone of reasonableness." One of the chief arguments on which Qwest relies is that

there is no way to demonstrate assurance that a plan is effective. Based on this rationale, Qwest proposes certain caps - the level of which is based on nothing more than past FCC rulings.

Qwest argues consistently that this Commission should fall in line with what other commissions have done with respect to the QPAP - going so far as recommending that the SD Commission simply adopt certain provisions to prevent backsliding just because the FCC has found them to be "sufficient in the past."

**STAFF RESPONSE 1:**

In its brief, Qwest cites many FCC orders, including the Massachusetts order. At Par. 239 of that order, the FCC recognizes that the PAP adopted in that proceeding "has undergone several changes" since the initial filing. This is a critical observation, in that it illustrates that performance plans are continually evolving in real time. In other words, to date, there has been no PAP that is recognized by anyone - at the state or federal level - as being the only means to prevent backsliding. The Qwest region provides another illustration of this fact in that the QPAPs coming from different states have varied widely.[3] This variation in

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[3]See for example In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996, Docket No. UT-003022 and In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996, Docket No. UT-003040 (Washington State) dated May 20, 2002; In the Matter of Qwest Corporations Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process, Utility Case No. 3269 and In the Matter of Qwest Corporation's Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996, Utility Case No. 3537 (New Mexico), dated May 29, 2002; In the Matter of Qwest Corporation, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify compliance with Section 271(c), Application No. C-1830 (Nebraska), dated May 29, 2002; IN RE: U S WEST COMMUNICATIONS, INC., n/k/a QWEST CORPORATION, Docket Nos. INU-00-2; SPU-00-11, (Iowa) dated May 7, 2002.

plans, and the continual tweaking of plans by other state Commissions-even after the plans have been adopted-drives home the FCC's clear intent that plans can and should vary according to state-specific needs.

The FCC goes on to clearly state in In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region Interlata Services in Massachusetts, Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130 (released April 16, 2001) (Massachusetts Order) Par. 240, that "plans may vary in their strengths and weaknesses, and there is no one way to demonstrate assurance." In other words, the FCC is saying that states are free to vary from other states, and that simply because a state adopts an "unlimited cap" rather than a 36%, 44%, or other cap doesn't mean that that state has adopted something that is incorrect. There is no "recipe" for developing a QPAP in South Dakota. The QPAP adopted in South Dakota should err on the conservative side - that is - the QPAP is designed to prevent backsliding, therefore, the QPAP should provide for as much room as is necessary in setting payments to prevent backsliding.

**ISSUE 2: QPAP SHOULD BE SD SPECIFIC**

Qwest contends that since the FCC has found that previous models of performance plans have been found to be acceptable, that in order for this Commission to make a "rational

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Staff has not submitted copies of these orders as ATT has stated that it will be submitting copies of them.

recommendation," it must identify some factual basis in the record for concluding that competitive conditions in South Dakota justify its rejection of those models.

**STAFF RESPONSE 2:**

Staff is not recommending that the Commission reject the FCC's previous findings. Staff is in total agreement with the FCC with respect to the fundamental concept of including penalties within PAPs. What Staff is recommending is compatible with the natural evolution of these plans throughout the nation - an evolution that has been recognized and encouraged by the FCC. In fact, Staff is merely responding to Qwest's proposal consistent with how other parties from around the country have responded - recommending that the performance plan adopted for a state allow for payments sufficient to make ILEC non-compliance an unattractive choice (to date, there has been no occurrence of a performance plan having its cap reduced after it was put in place, but in at least one instance, New York, the cap was increased after it was recognized that it was too low to begin with). Therefore, the Staff is not recommending that the Commission reject anything that has been done previously by the FCC. The FCC recognized that plans will vary, Staff is simply recommending that in order to protect, preserve and enhance the competitive market in South Dakota, that the SD QPAP vary by being stronger than some of the plans that have come before it, some as long ago as 1999. This recommendation is entirely consistent with the FCC "prior guideposts."

**ISSUE 3: THE INFAMOUS TEXAS PLAN**

Qwest contends that "virtually all of the critical principles of the QPAP proposed by Qwest in South Dakota and at issue in this docket were derived from the Texas plan approved by the FCC (and approved in at least four other plans thereafter)."

**STAFF RESPONSE 3:**

Staff recommends that the Commission make its recommendation to the FCC based on the record in this case, not on the results of a proceeding that took place more than 48 months ago in Texas. Performance plans have been evolving continually since the Texas plan was adopted, and the Commission should take into account not only other states that have adopted plans, but to consider the evidence provided in the record in *this* case. Qwest has not, for example, explained to the Commission why a 36% cap is appropriate as opposed to a 46% cap or even a 96% cap. In fact, after insisting that a 36% cap was appropriate, Qwest came forward at the eleventh hour with a different level cap. (This proposal will be addressed in greater detail later). Staff is not recommending a cap of any level as this avoids the obvious problems that could come later if the cap is too low and not all the CLECs can be compensated; it takes the guess work out of determining what the "perfect cap" would be; it does not place healthily competition at risk; and it does not penalize Qwest. Vol. VI, pp. 204-207. Staff also believes that caps generally do not benefit the public interest. Id.

**ISSUE 4: THE UTAH PLAN**

Qwest has revised its QPAP in conformance with a stipulation reached in Utah.

**STAFF RESPONSE 4:**

This plan should be rejected. It is similar to the QPAP initially filed--that is, it still lacks support for its basis. If Qwest was interested in achieving a result that was suitable to Qwest and the South Dakota marketplace, why were they negotiating with the Utah Advocacy Staff? Qwest should be ordered to file a QPAP with the Commission that reflects the South Dakota Staff's recommendations. Staff's doors were always open to Qwest to discuss any and all aspects of Staff's recommendation. Neither the Staff nor its consultants were approached by Qwest despite their availability.

**ISSUE 5: QUID PRO QUO DOCUMENT**

Qwest contends that the QPAP should be reviewed as a comprehensive document. Qwest supports this contention by citing language from Mr. Antonuk's report saying that "we need to be careful not to support an improvement in what [a] party got without considering what had been given in return."

**STAFF RESPONSE 5:**

The FCC criterion most critical to the prevention of backsliding (from Staff's perspective) is very clear - to provide incentive for the ILEC to comply with the terms of the SGAT. The FCC's criteria - as laid out in Mr. Stacy's testimony - do not include any provisions that address the "give and take" to which Mr. Antonuk alludes. The QPAP should be a document that is designed to provide strong incentives for Qwest to comply with the SGAT, not a document that makes compliance with the SGAT something that Qwest "can live with", given the concessions made by CLECs. Such give and take would weaken the effectiveness of the plan and only adds to Staff's concern that Qwest seeks a plan that will allow it to remain profitable while absorbing the penalties associated with noncompliance.

**ISSUE 6: LIABILITY CAP**

Qwest initially proposed a hard cap of 36%. At the eleventh hour, Qwest offered (in order to address concerns raised by parties) a procedural cap that can move from 24% to 44%. Qwest criticizes Staff concerns regarding the adequacy of "even a 44% cap."

**STAFF RESPONSE 6:**

Staff has not specifically criticized any certain "level" of capping Qwest's liability. Staff's only concern is that the liability to which Qwest is subject is sufficient to provide an incentive for Qwest to not abuse its market power and essentially run South Dakota CLECs out of business. Qwest has provided no support (other than past FCC findings, which are totally unsupported) for a 24%, 36% or 44% cap. Qwest cannot expect the Commission to believe that Qwest cannot calculate approximately how much of its revenues it is willing to forfeit in order to achieve two goals, those being to enter the long distance market and gain access to enormous long distance revenues, and to protect its existing local revenues (by not complying with the terms and conditions of the SGAT). If Qwest is unwilling to provide the Commission with support for any of its proposed caps - support that demonstrates that the incentive would in fact be adequate - the Commission has no other choice than to not limit Qwest's exposure. To adopt a hard cap that is not supported in any manner would clearly be exposing the competitive market in South Dakota to an unacceptable level of risk - that risk being that Qwest would not comply, CLECs could not compete, and South Dakota consumers would not benefit from a competitive telecommunications market.

The FCC has stated that the level of potential liability under a performance plan matters, as a plan with relatively low potential liability would be unlikely to provide meaningful incentives to maintain service quality levels. Bell Atlantic New York Order, Par. 436. In its QPAP filing, Qwest states that its potential liability under the QPAP provides a meaningful and significant incentive to comply with the designated performance standards, in large part because the QPAP exposes Qwest to potential financial liability in an amount up to 36% of net returns. Qwest notes that the FCC approved Bell Atlantic's application for New York with Bell Atlantic placing at risk 36% based on ARMIS data. Qwest argues that

the FCC considered 36% of net returns sufficient incentive for the BOC to "maintain a high level of performance."

However, Qwest has disregarded an important aspect of this Bell Atlantic New York precedent. In the same order, the FCC stated that: " [A]n overall liability amount would be meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread performance failure." Bell Atlantic New York Order, Par. 437. Should the Commission determine that a liability amount is needed, it should adjust automatically to reflect changes to Qwest's yearly net return in the ARMIS reports. Failure to do so would mean the liability amount would do less to mitigate the harm done to CLECs and consumers if Qwest's net return rises and total payments by Qwest in a year reach the cap set by the Commission.

**ISSUE 7: APPROPRIATENESS OF AN UNLIMITED CAP**

Qwest cites FCC language that rejects suggestions that a 36% cap is not adequate.

**STAFF RESPONSE 7:**

Although Qwest cites language from the Kansas/Oklahoma Order purporting to show that the FCC rejects such arguments, a closer examination of the FCC language should be enlightening.

> *Total Liability At Risk.* We conclude that the total of $45 million for Kansas and $44 million for Oklahoma in potential penalties placed at risk, on an annual basis, under the performance plans represents a meaningful incentive for SWBT to maintain a high level of performance. As a percentage of the applicant's in-state net return, these penalty plans place the same amount at stake as the plans adopted in Texas and New York. We thus disagree with commenters that suggest that this amount is insufficient and fails to provide adequate assurance of SWBT's compliance in the future. The performance plans adopted by the Kansas and Oklahoma Commissions do not represent the only means of ensuring that SWBT continues to provide nondiscriminatory service to competing carriers. In addition to the $45 million in Kansas and $44 million in Oklahoma at stake under the Plans, as noted above, SWBT faces other consequences if it fails to sustain a high level of service to competing carriers, including: federal enforcement action pursuant to section 271(d)(6); liquidated damages under interconnection agreements; and remedies associated with antitrust and other legal actions.

Kansas/Oklahoma Order at Par. 274. As noted, the Kansas/Oklahoma Order indeed rejects suggestions from other parties that a 36% level is not adequate. However, the FCC does not cite any evidence supporting that number. In fact, in the same paragraph, the FCC appears to acknowledge that it is uncertain as to whether the 36% cap is adequate by going on to say that there are also other remedies available. What the FCC is saying is that they hope 36% is adequate, but if not, they hope that the other consequences faced by ILECs will be sufficient incentives to ensure that the ILECs do not abuse their market power. Further, the FCC does not provide any reasoning why an unlimited cap would not be appropriate. Undoubtedly, Qwest's proposed new cap of 44%, would not be rejected by the FCC as being excessive, in fact the FCC has never found a recommended cap to be too high.[4] Doing so would be entirely inconsistent with the FCCs own criteria to prevent backsliding. To summarize Staff's position:

- The FCC has not found solid evidence supporting a 36% cap.
- The FCC itself expresses some uncertainty regarding the adequacy of the 36% cap (in light of the FCC not knowing if the 36% cap is adequate).
- Given the criteria set forth by the FCC, and in light of the fact that no one knows what level of cap is adequate, a higher cap would be less likely to be too low to provide the proper incentives than a lower cap.
- An unlimited cap (such as is proposed by Staff) would entirely eliminate any doubt that the proper incentives are provided.

## ISSUE 8: OTHER CONSEQUENCES PROVIDE ADEQUATE INCENTIVES TO PREVENT BACKSLIDING

Qwest argues that other consequences ("risk of federal enforcement action") will provide sufficient incentive for Qwest to not backslide.

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[4] For example, the FCC recently approved a cap of 44% in Georgia in the Memorandum Opinion and Order, Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, CC Docket No. 02-35, FCC 02-147, ¶ 296 (May 15, 2002) (Georgia/Louisiana Order)

**STAFF RESPONSE 8:**

The way Qwest characterizes the consequence is telling. Qwest does run a "risk" of federal enforcement action, but nobody can gauge what that risk is. Stated another way, Qwest may be exposing itself to a great risk of federal enforcement action if it does not comply, but conversely its risk exposure may be quite limited. The reason nobody can gauge what risk Qwest is subject to is that nobody knows what the FCC will or will not do given noncompliance, or even what the FCC considers to be noncompliance. There is no set of compliance standards that immediately trigger FCC intervention. This lack of standards creates great uncertainty in that all state commissions can really do is hope that the FCC will intervene in a timely manner before CLECs start to go out of business in their states - a very risky proposition. It the FCC did not have certain standards or guidelines, clearly defining for state commissions when federal action would be taken, perhaps this Commission could rest easier with Qwest's proposal. However, this Commission has no idea when to expect the FCC to intervene on behalf of South Dakota consumers or if the FCC would ever do so.

Further, South Dakota, being one of the smaller states in terms of population and number of local access lines (ranked 48th) may not be given the same level of attention as larger states such as New York.[5] The FCC did intervene when Verizon lost 80,000 orders in New York in the first several weeks following Verizon's entry into the long-distance market and only a few weeks after the FCC said Verizon had achieved checklist compliance. Staff Exhibit 5; Vol. VI, pp. 201-203. If that is what it takes to get the FCC to determine that federal intervention is necessary South Dakota could be in trouble, as 80,000 lines in South Dakota constitutes nearly a quarter of all of the lines in the state.

Qwest argues that a hard cap is sufficient due to the risk associated with federal intervention, but that argument does not consider the risk taken by the Commission in adopting a hard cap. The Commission would be taking an enormous risk with respect to its duty to protect the public interest by hoping that the FCC would intervene and put things

[5]According to the FCC's "Trends in Telephone Service" released May 22, 2002.

right should the hard cap not be sufficient to protect competition in South Dakota. Obviously the Commission is not willing to run that risk - allowing the FCC to take responsibility for protecting the public interest in South Dakota - as it has taken a hands-on approach to this matter from the start.

**ISSUE 9: ZONE OF REASONABLENESS**

Qwest contends that the numerous caps they propose fall within the FCC's "zone of reasonableness." Further, Qwest contends that there is no evidence to suggest that when it comes to Qwest's liability, "more is better."

**STAFF RESPONSE 9:**

The "zone of reasonableness" is totally undefined. There are no lower or upper bounds to this "zone." Staff argues that in order to meet the FCC's criteria, the complete elimination of the cap and all other mechanisms that would limit Qwest's liability fall within the "zone of reasonableness." As noted previously, the FCC has never rejected a recommendation on the basis that the cap was too high.

With respect to the "more is better" issue - Qwest admits at page 11 of its brief that it is willing to agree to a higher upper limit (44%) on the cap in order to address parties concerns, and to allow the Commission to protect the public interest. If more is not better, wouldn't Qwest have addressed parties concerns by offering to accept a cap that is **lower** than 36%? Clearly, the higher the cap is, the less likely it would be that Qwest could absorb the penalties associated with noncompliance and still remain profitable. What is missing with the latest proposal, and all other proposals that advocate a cap, is any evidence on the record showing that the higher 44% cap would be sufficient to accomplish the goal of preventing Qwest from backsliding. This is due to the fact that like the 36% cap proposed by Qwest initially, the 44% cap that Qwest negotiated in Utah is completely unsupported. This glaring omission leaves the Commission, and the other parties to this proceeding, wondering if the establishment of any one of the caps proposed by Qwest would do the job. Qwest has consistently - and inappropriately - attempted to lay the burden of proof regarding Qwest's liability at the feet of the other parties. It is Qwest's burden to provide the Commission with the solid evidence that Qwest criticizes other

parties for not providing. Staff has provided all of the evidence it could with respect to the possible inadequacy of Qwest's proposed caps. This is due to the fact that Staff does not have access to Qwest's post entry business plans, marketing plans or projected internal rate of return. It is therefore impossible for Staff or this Commission to make any determination regarding the adequacy of a 36% or 44% cap. An unlimited cap eliminates the potential that Qwest could (based on these factors) remain profitable while simultaneously avoiding its section 271 obligations.

Additionally, at page 14 of its brief, Qwest describes an instance that occurred in New York in which Bell Atlantic began a pattern of non-compliance immediately after receiving section 271 approval from the FCC. Only after increasing Bell Atlantic's liability was the FCC able to bring that ILEC into compliance. Thus, in that case, "more *was* better."

**ISSUE 10: QWEST'S MARGINAL COST OF COMPLIANCE**

Qwest argues that no party submitted evidence as to Qwest's marginal cost of compliance.

**STAFF RESPONSE 10:**

The parties do not need to calculate Qwest's marginal cost of compliance if the QPAP is properly designed, which is to say with no annual cap on payments or a cap on escalation of payments for individual performance measures. It is not surprising, therefore, that no parties submitted such evidence. The only party that needs to calculate Qwest's marginal cost of compliance is Qwest, which is the only party to this proceeding that has the data and information needed to make the calculation. Nonetheless, Qwest contends that it is not able to perform the necessary work required to determine its incremental costs of complying. This argument does not withstand close scrutiny given that Qwest routinely undertakes such complex tasks as estimating costs associated with the provisioning of unbundled network elements to CLECs throughout its region and preparing tax returns that require assigning costs for capital equipment to multiple jurisdictions and multiple years. Staff concedes that such analysis is complex, but *does not concede* that Qwest cannot perform the analysis necessary to provide at least an estimate of its marginal cost of compliance. Qwest makes contrary assertions about what Staff has said, but reading the

entirety of Staff's comments and testimony rather than the selected and edited portions cited by Qwest will show Staff's position in this matter.

Furthermore Qwest's attempt to focus the discussion on whether it can or cannot calculate its costs of complying is beside the point. The issue is whether the benefits to Qwest of not complying, and thereby suppressing competition, exceed its costs of not complying. No party has submitted evidence as to what those benefits might be, including Qwest. Again, no party other than Qwest is in a position to undertake a calculation of those benefits. And again, it is not necessary for any party other than Qwest to have at least a reliable estimate of those benefits. It is not necessary for other parties to take on the task as long as the QPAP provides the opportunity for the marginal cost of not complying, that is annual payments and individual payments, to rise until they exceed those benefits. This amount could be 36% of Qwest's net ARMIS return, it could be 6%, or it could be 66%. No matter, when the cost in the form of payments for non-compliance exceeds the benefits in the form of profits retained from suppressing competition, then, and only then, can the Commission be sure that Qwest will have incentive to comply. If payments are capped, then the benefits may exceed the costs and Qwest will see the rational course of action to be noncompliant.

As for Mr. Stacy's statement that such an analysis of costs and benefits would involve "speculation," all complex business processes involve speculation, as no one can predict the future. Even Mr. Reynolds admitted that Qwest's involvement in the 271 proceedings involved speculation on behalf of Qwest regarding what the costs would be. Vol. IV, P. 154. Obviously, Qwest decided to absorb those costs in order to receive the benefits associated with 271 relief - exactly as Qwest could decide to absorb the costs for noncompliance that would occur under a hard cap.

## ISSUE 11: WHAT QWEST PAYS FOR COMPLIANCE IS SOLELY WITHIN ITS CONTROL

Qwest argues that what Qwest pays is not entirely under its control.

**STAFF RESPONSE 11:**

The elimination of the cap does not penalize Qwest. Qwest can limit its payments by complying with what it has pledged to do. By refusing to accept an unlimited cap, Qwest is asking the SD Commission, SD CLECs and SD consumers to bear the risk for Qwest's potential non-compliance. Additionally, Qwest's incentive to take steps to comply would be severely diminished if Qwest's exposure is limited by a hard cap.

**ISSUE 12: TIER 2 PAYMENTS**

Qwest argues that the trigger for Tier 2 payments should not be one month of non-compliant performance.

**STAFF RESPONSE 12:**

Qwest argues that Tier 2 payments should not be made until three consecutive months of non-compliant performance is recorded because these payments are an additional incentive beyond Tier 1 payments, are paid at an aggregate level, and do not serve as compensation. Qwest also argues that the delay in reporting results and the subsequent lag between learning of the results and addressing non-compliant performance make the three-month trigger appropriate. Qwest fails to provide support for these unsubstantiated arguments. Accordingly, Qwest has failed to justify its proposed three-month trigger.

The Qwest QPAP Brief gets one thing right when it says the nature of Tier 2 payments is to motivate behavior. The main purpose of Tier 2 payments is to serve as an incentive to motivate Qwest to provide compliant performance for the benefit of the competitive local market in the state. The three-month trigger weakens the ability of Tier 2 payments to perform this motivating role.

First, the three-month rule introduces delay into the process of Qwest making payments for poor performance, delay that benefits Qwest alone and is at odds with the FCC's third important characteristic of a sufficient performance enforcement mechanism. Specifically, the FCC has indicated that a sufficient performance assurance plan should be able to detect and sanction that poor performance when it occurs. Bell Atlantic New York Order, Par. 433. Admittedly, detection and sanction cannot be simultaneous given the limits of the data collection and analysis system. However, adding two months to the

break between poor performance in Month 1 and payment, as Qwest's proposed three-month trigger does, means payment occurs in Month 5 instead of Month 3, an outcome that only further severs the important link between detection and consequence.

The lag also postpones the moment when Qwest will have to take steps to upgrade any non-compliant performance. Qwest will have the opportunity to wait until the third consecutive month of nonconforming performance is reported. Then, following Qwest's logic that it takes two months to effectively respond to poor performance due to the need to hire and train personnel, it is likely that correction might occur in Month 5 rather than Month 3. It is very difficult to understand how Qwest thinks this argument helps to establish that the three-month trigger is a necessary ingredient in a plan whose purported goals are to detect and sanction poor performance when it occurs, to incent compliant performance and to provide assurance that local markets will remain open. In fact, Qwest's arguments only help to establish how the three-month trigger damages the effectiveness of Tier 2 payments and consequently, how the trigger weakens Qwest's proposed QPAP.

Qwest's argument that the Tier 2 trigger should be something less than immediate has two prongs: Tier 2 payments have a different purpose than Tier 1 payments and Qwest's ability to detect non-compliant performance is poor.

Qwest states that Tier 2 payments are an extra incentive, whereas Tier 1 payments, which do have a 1-month trigger, are compensatory in nature. Qwest's argument ignores the character of Tier 2 payments.

Tier 2 payments exist for two different reasons. One kind of Tier 2 measure reflects the limits of record-keeping systems. Performance on behalf of individual CLECs cannot be tracked by these systems. Therefore, payments for non-compliant performance are determined by the aggregate Qwest performance on behalf of CLECs and directed to the State.

The other kind of Tier 2 performance measurement has a Tier 1 counterpart. The purpose of having this extra payment is to avoid overcompensating CLECs, yet still creating sufficient incentive for Qwest to comply. The need for this second type of Tier 2

payment is explained by the fact that the profits CLECs will earn in a competitive market will not be as large as the profits Qwest earns as a monopolist. Thus, the amount necessary to compensate CLECs for lost customers caused by non-compliant performance is not sufficient to offset the gains to Qwest of suppressing competition. Hence, a Tier 2 payment directed to the State rather than the CLEC has been created to keep Qwest's total payments sufficient to account for this difference in profits for the companies. This type of Tier 2 payment can be viewed as the loss to consumers of competition failing to take hold due to non-compliant performance by Qwest.

Hence, Qwest's argument that Tier 2 payments are only an extra incentive does not hold up under investigation. To accept Qwest's position is to accept that consumers are not as important as CLECs when it comes to being compensated for non-compliant performance or to agree that CLECs need not be compensated immediately for non-compliant performance through systems that lump all CLECs together.

Qwest also argues that a longer trigger is needed before Tier 2 payments begin because it will learn of the non-compliant performance only after the passage of time. Believing that Qwest will somehow have 2 months of failure behind it before it knows it strains credulity. Qwest is a sophisticated organization. It will learn of non-compliant performance well before the 30 days it has to report such performance. To believe that Qwest will require as much time or more to start lumbering toward a solution also requires seeing Qwest in an unlikely light.

In summary, a 1-month trigger for Tier 2 payments is fair to CLECs and consumers alike because it recognizes their interest in having non-compliant performance detected and sanctioned when it occurs. It is also fair to Qwest, despite Qwest's protests that it will be slow to uncover Tier 2 failure.

**ISSUE 13: ESCALATED PENALTIES**

Qwest argues that limiting escalation to six months is appropriate.

**STAFF RESPONSE 13:**

The Colorado Hearing Commissioner rejected Qwest's argument to limit the per occurrence payment amounts to the six-month level. The statement explaining the

decision expresses quite well the reasons for rejecting Qwest's proposed 6-month cap on escalation.

> Qwest's argument to freeze escalated penalties makes no logical sense. It bases its argument on the simple fact that the escalated payment would potentially "dwarf" the cost of the service in question. This argument misses the point that the payment escalations are meant to be a balance between compensating the CLECs for their losses and ensuring that the penalty is higher than the amount that Qwest is willing to absorb as a cost of doing business. Since the value to Qwest of suppressing competition in a particular market may "dwarf" the cost of the relevant services that Qwest should be selling, sometimes the escalation may have to be significant to motivate Qwest to perform. Although the idea that Qwest would rationally evaluate whether it is more valuable to absorb penalties and retard competition or to adhere to the law and avoid penalties is still purely speculative, one of the underpinnings of this performance plan is to ensure that this type of strategic action is deterred. Continuous escalation of payments for continuous poor performance should help prevent this strategic activity.

In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado, Decision No. R01-997-I, Docket No. 01I-041T, (Colorado Performance Assurance Plan), dated September 26, 2001, pp. 59-60.

Qwest also states that continued escalation beyond six months will create an incentive for CLECs to create non-compliant performance, or to game the system. Qwest uses selective quotations of Dr. Griffing to create the impression he endorses the probability of such an incentive existing. As Dr. Griffing did not testify before this Commission on this issue, the transcript of his testimony entered into evidence by Qwest should be read in its entirety to obtain a correct understanding of his views related to this matter. Qwest's Exhibit 80.

Finally, Qwest ignores a key characteristic that must be necessary for parties attempting to cause noncompliance to be successful and undetected: its behavior must not be observable. CLECs participation in the system will be recorded at every step, so it is the antithesis of an action carried out in secret. For example, a CLEC attempting to create missed firm order confirmations or missed installation dates could submit a month's worth

of orders on one day.[6] Even if successful in causing Qwest problems, the ploy would be easily detected because the pattern of a dramatic spurt in orders followed by utter inactivity would be there for all to see, especially Qwest, which could then resort to the bad faith provision of the QPAP for relief.

**ISSUE 14: STICKY DURATION**

Qwest argues that there is no support for sticky duration also noting that Mr. Antonuk found it to be inappropriate.

**STAFF RESPONSE 14:**

As noted in Qwest's brief, the Wyoming Commission differed from Mr. Antonuk on this issue. The WPSC's reasoning was sound and should be adopted by this Commission:

> 10. The Workshop Report on the QPAP advocates that payment levels should de-escalate after a certain period of corrected performance. The argument seems to be that lowering payment levels should be considered a reward for good behavior by Qwest. We disagree. The actual reward for good behavior should be not having to make payments under the QPAP because Qwest's performance complies with it. The idea of encouraging good behavior and then lessening the payment for bad behavior as a reward for an interim period of good behavior is a perverse incentive. We therefore decide that escalated penalties should be "sticky." That is, once a payment has escalated to a level at which Qwest complies with a provision of the QPAP, that particular payment should remain at that level. Again, compliance should be rewarded and this is the better way to encourage this behavior. The QPAP should not lend itself to a "cost-benefit" analysis under which the price of noncompliance might be weighed and found by Qwest to be an acceptable cost of doing business.

In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms, Docket No. 7000-TA-00-599 (Wyoming) dated January 30, 2002.

Staff's position is that Qwest can completely avoid penalty payments by complying

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[6]The example completely ignores the effect on customers of having orders for business with the CLEC held for weeks at a time so that the CLEC can submit a cluster of orders large enough to overload Qwest's systems. The customers would desert such a CLEC in droves, meaning its incentive to engage in such behavior is nonexistent.

with the standards to which it has previously agreed. The QPAP was never intended to reward Qwest for meeting the minimum standards but rather as a means of keeping Qwest from acting in a discriminatory, anti-competitive manner.

**ISSUE 15: SIX-MONTH REVIEW**

Qwest proposes that the 6-month review follow language developed in Utah but not yet adopted in that state or anywhere else.

**STAFF RESPONSE 15:**

The Nebraska Public Service Commission recently adopted language governing the six-month review that retains the right of the Commission to control the process. Staff recommends that the Commission look to the Nebraska QPAP for model language for this provision. See In the Matter of Qwest Corporation Seeking Approval of Its Revised Statement of Generally Available Terms and Conditions (SGAT) Pursuant to Section 252(f) of the 1996 Telecommunications Act, Application No. C-2666, Revised Exhibit K to the Statement of Generally Available Terms and Conditions ( Nebraska Order) dated June 10, 2002.

As proposed by Qwest, the QPAP six-month review is short of procedural details and leaves too much power in Qwest's hands. The QPAP does not outline procedures protecting the due process interests of all parties, including CLECs. Finally, the QPAP includes the application of a "collar" which Staff would argue that this is not something the Commission would want to implement.

The Commission must have final authority to any changes in the six-month review process to allow the QPAP to change as necessary to ensure that competition in the state continues to develop. The Commission has and must retain the capacity to change any element of the plan as needed for our state.

This is an especially important issue for South Dakota. Small CLECs or larger CLECs with small volumes may find that the QPAP developed in large part by bigger companies in a multistate process was designed for higher volumes or bigger companies and is inadequate in the developing competitive market in South Dakota. If so, the six-month review process should be available to the affected parties to request the

Commission to modify the QPAP as necessary to remedy any inequities discovered after the plan has been functioning in South Dakota for awhile.

**ISSUE 16: OFFSET**

Qwest proposes language developed in Utah concerning Qwest offsetting other payments with payments it makes under the QPAP.

**STAFF RESPONSE 16:**

Both the Nebraska Public Service Commission and the North Dakota Public Service Commission have adopted offset language recently. The South Dakota Commission should turn to these QPAPs for its model offset language.

> 25. As to Qwest's provisions regarding offset, it is clear that double recovery for the same damages is legally barred. However, offset is a judicial concept for the finder of fact to consider to assure that an aggrieved party does not receive double recovery. The Commission questions why Qwest did not adopt the Texas PAP language (also found in the Colorado CPAP and Utah Advisory Staff Report) which does not preclude Qwest from arguing for offset in the relevant court of law. However, as stated in the Texas Plan § 6.2 "whether or not the nature of damages sought by CLEC is such that an offset is appropriate will be determined in the relevant proceeding," not unilaterally by Qwest in this proceeding.

Nebraska Order, QPAP APPROVED AS AMENDED, dated April 23, 2002.

B. Hausman Study

Qwest argues allowing it to enter the interLATA market will result in savings for consumers, which is consistent with the public interest. It also argues that allowing a BOC to enter a state's interLATA market serves to spur entry by CLECs into local markets, which also results in savings for consumers and again is in the public interest. Finally, Qwest asserts that the long-distance savings in the New York and Texas markets as identified in the Hausman Study "... depend only on the addition of the BOC as a competitor in the long distance market, and hence do not turn on checklist compliance ..." Qwest Corporation's Opening Brief on Public Interest, pp. 8-13.

Qwest offers as support for its assertion that allowing it to enter the interLATA market will be in the public interest the following quotation from the FCC's Bell Atlantic New York Order, par. 428:

> 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*. (Emphasis added.)

In this passage the FCC is recognizing that competition in the local market and competition in the interLATA market are interrelated given the high likelihood that a company able to operate effectively in both markets will be a strong competitor in both markets. Thus, to grant BOC entry into the long-distance market before its local markets are effectively opened to competition would not be in the public interest because the BOC would be the only company able to operate effectively in both markets. Savings to consumers from increased long-distance competition would be short-lived in such a situation as the BOC gained market share and came to dominate its rivals. On the other hand, if other companies could offer the bundle of local and long-distance services that a BOC granted Section 271 relief could, consumers could reasonably expect some or all of such benefits as lower prices, more choice, and better service to ensue in both markets.

Qwest's explanation for why CLEC entry into the local markets in New York increased after the BOC Verizon was granted Section 271 relief similarly ignores as a factor the opening of the local markets that Section 271 checklist compliance is intended to bring about. That CLECs increased their local market share in New York after Verizon entered the long-distance market is indisputable; that the cause of the increased CLEC activity was Verizon's long-distance entry is not. An alternate explanation is that CLECs believed they had a reasonable chance to compete in the New York local market only after Verizon opened it to them effectively by achieving checklist compliance. Since checklist compliance and Verizon entry are so close together in time, it is impossible to say that one or the other was the sole cause of CLEC local market entry.

Qwest is dead wrong in its assertion that the Hausman Study demonstrates that the savings in the long-distance market depend only on Verizon entry into long distance. The

absence of other variables from the study precludes drawing any conclusion about their contribution to the savings, and it certainly does not prove that only Verizon entry had an effect. A more complete study would allow some insight into the relative strengths of the factors affecting long-distance market competition. Vol. VI, pp. 150-151; Staff Exhibit 4.

Staff does not dispute that Qwest entry into the long-distance market has the potential to lead to savings for consumers. Staff merely wants the Commission to not prematurely grant Qwest approval, which is to say prior to the demonstration of checklist compliance. The Hausman Study argues for a watering down of the checklist compliance standards. The flaws of the Hausman Study cast doubt on the conclusions Qwest draws from it, undermining that request for leniency from the Commission. Moreover, the completion of the ROC OSS Test means that the time for evaluating checklist compliance has arrived. Thus, Qwest can stand on its performance on that test rather than attempting to convince the Commission to ignore the standard as set forth in the Act. If Qwest meets that standard, then its entry into the long-distance market will serve the public interest.

## III. COMPLIANCE WITH SECTION 271(c)(1)(A)

In order for the FCC to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or section 271(c)(1)(B) (Track B). 47 U.S.C. § 271(c)(1).

To meet the requirements of Track A, a BOC must have interconnection agreements with "one or more unaffiliated competing providers of telephone exchange service . . . to residential and business customers." Id. The FCC has further held that a BOC must show that at least one "competing provider" constitutes "an actual commercial alternative to the BOC," which a BOC can do by demonstrating that the provider serves "more than a *de minimis* number" of subscribers. SWBT Kansas/Oklahoma Order, par. 42; see also Ameritech Order Par. 78 (1997).

The FCC has interpreted Track A not to require any particular level of market penetration. The United States Court of Appeals for the District of Columbia has affirmed that the Act "imposes no volume requirements for satisfaction of Track A." Sprint

Communications Co. v. FCC, 274 F.3d at 553-54; see also SBC Communications Inc. v. FCC, 138 F.3d 410, 416 (D.C. Cir. 1998).

Staff would agree with Qwest that it satisfies the requirements of Track A in South Dakota.

## IV. SECTION 272 SEPARATE AFFILIATE REQUIREMENTS

Section 271(d)(3)(B) provides that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272." 47 U.S.C. § 271(d)(3)(B).

Staff would agree that Qwest has demonstrated that it will comply with the requirements of section 272.

## V. UNE PRICES AND TELRIC STANDARDS

Even if the terms of the SGAT were perfect and the QPAP provided incentive for complete compliance, competition in South Dakota would not flourish if the prices for unbundled network elements were not priced in accordance with TELRIC standards. These prices, therefore, are every bit as critical to the South Dakota telecommunications market being and remaining open as the SGAT itself. Because many of the UNE prices listed in the SGAT have not come under scrutiny in a TELRIC proceeding, Staff recommends that the Commission withhold any recommendation regarding Qwest's Section 271 compliance pending the resolution of Docket TC01-098. Once the Commission has determined that UNE prices offered by Qwest are indeed consistent with TELRIC standards, Staff will consider Qwest to be in conformance with that particular Section 271 - but not until such time.

## VI. OSS TESTING RESULTS AND CMP

The OSS final report and the CMP must be reviewed before the Commission can make a recommendation regarding the fourteen-point checklist as it pertains to a public interest determination.

## VII. LATE FILED CONTRACTS

It is Staff's position that Qwest entered into secret agreements with certain CLECs that provided those CLECs with terms and conditions for interconnection and access to unbundled network elements (UNEs) that were not made available to all CLECs thus violating Sections 251 and 252 of the Act. A separate docket should be opened to inquire into such matters.

## CONCLUSION

Staff requests that the Commission order Qwest to file the number of retail access lines in the state of South Dakota on a monthly basis. Qwest presently submits monthly reports that include Earnings and Expenses (MR No. 1), Balance Sheet (MR No. 1), Summary of Operating Revenues (MR No. 4), Operating Expenses (MR No. 5), Monthly Analysis No. 9, Depreciation Reserve Balance Report (MA 6), Construction Expenditures-Current Month (MR 21), the balance for account 2001 (plant in service), situs and equivalent employee head count, total salary and wage expense, and SD Total Company Network Access Lines.

David L. Teitzel stated that as of August 31, 2001, Qwest had 231,707 retail lines in South Dakota. Exhibit 2, p. 22. SD Total Company Network Access Lines, from the monthly report data submitted by Qwest to Staff for this dame date was 273, 180.

By April 2002 the Total Access Lines had decreased by approximately 11,000. Qwest appears to be fast approaching the 200,000 retail access lines which is what triggers the Commission's jurisdiction of local recurring and nonrecurring rates pursuant to SDCL 49-31-86.

Qwest has not met its burden of establishing that Section 271 approval would be in the public interest at this time. Qwest has not yet established that the local market in South Dakota is open to competition. As established in this brief, Qwest has also not provided adequate assurances that the local market in South Dakota will remain open after Section 271 approval, if Section 271 approval occurs. The QPAP presented by Qwest is fatally flawed. Such a weak and ineffective plan will not properly incent Qwest to foster and maintain local competition, and will cost South Dakota consumers and businesses too

many dollars through the inefficiencies of monopolistic and anti-competitive pricing and service. South Dakota cannot afford this outcome.

Based upon the still existing deficiencies in the SGAT and Qwest's response that it will wait to address them in its reply brief, it is not possible for Staff to conduct a final review of the SGAT at this time. That will not take place until Qwest's reply brief is filed. That, coupled with the problems associated with the QPAP, and the yet to be determined UNE prices, make it impossible for the Commission to make an unconditional finding within the context of a Recommendation that granting Qwest's Section 271 Application is in the public interest.

Dated at Pierre, South Dakota, this 1st day of July, 2002.

Respectfully Submitted,

Karen E. Cremer

Karen E. Cremer
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South Dakota Public Utilities Commission
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(605) 773-3201

CERTIFICATE OF SERVICE

I hereby certify that copies of Staff's Brief 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 1st day of July, 2002.

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ATTACHMENT A

The following was submitted on May 30, 2002, to Qwest for its response:

1. Section 6.2.6 Facilitator's Report (AZ workshop)
   CLEC may not reserve blocks of Qwest telephone numbers except as allowed by a Federal Communications Commission order. Tariffs: First Revised SGAT and Second Revision
   The parties may not reserve blocks of telephone numbers except as allowed by Applicable Law or regulation.
   On the record a statement was made that AZ and CO held workshops before the multistate, i.e., facilitator's report.
   Where did this language change come from?

2. Second Report - Workshop One 5/15/2001
   page 32 - 2. Entrance Facilities as Interconnection Points
   On page 33 "Qwest should change the SGAT here to reflect this commitment."
   Redlined Second Revision has no footnote regarding the Washington order, therefore can not tell if the S.D. SGAT picks up the Facilitator's Resolution.

3. Paper Workshop Issues 3/19/2001
   Issues Resolved During This Workshop page 13 - 9. Inspection Costs
   "Qwest has agreed to delete the Section 10.8.2.16 provision that disclaims such liability."
   Cannot tell if this has taken place. [Original SGAT, First Revision SGAT, and Second Revision SGAT all read the same.]

4. Page 7, Footnote 8: The name of the CLEC questionnaire has been changed to "New Customer Questionnaire".
   Which state(s) agreed with this change?
   When was this determined?
   Which companies agreed with this change?

5. Footnotes 13, 20, 21, 33, 36, 37, 42 and 44 This change reflects post workshop consensus language.
   For each footnote, provide the following information:
   Which state(s) agreed with this change?
   When was this determined?
   Which companies agreed with this change?

6. Footnote 16 Facilitator's Report on Workshop One page 49, 5th and 6th line from bottom. "Qwest generally agreed with the changes to SGAT Section 4..." Only change in the Report is to "Collocation".
   Need further support for this change.

7. Page 21 - Miscellaneous Charges
   The redlined version indicates the 2nd line and the 5th line changed in some manner. What changed?

8. Page 23 - Percent Local Usage
   The redlined version indicates that something changed on the last line. What changed?

9. Footnote 47 - AT&T's request in the S.D. Docket or some other state? Explain.

10. Footnote 48 - Where in Attachment 31 can this language revision be found?

11. Footnote 58 - Where in Attachment 31 can this language revision be found?

12. Footnote 67 - Facilitator Report, Workshop One page 39 - "Qwest made a substantial change in this provision."
    No language was shown in the Report.
    Provide support for the revision made to the SGAT

13. Footnote 68 - references Footnote 67, where no revised language is shown.
    Why not reference Freeberg, Qwest Exhibit 15, page 14 which shows revised language?

14. Section 7.2.2.8.12 -- see Freeberg, Qwest Exhibit 15, page 15 when in Freeberg agrees that this section should be removed.
    What then would happen to Sections 7.2.2.8.12.1, 7.2.2.8.12.2, 7.2.2.8.12.3 and 7.2.2.8.12.4?
    Section 7.2.2.8.12.2 was revised to reflect post AZ workshop consensus
    Section 7.2.2.8.12.3 was revised to reflect post AZ workshop consensus [deleted]
    Section 7.2.2.8.12.4 was revised to reflect post AZ workshop consensus [deleted]

15. Footnote 86 - Where does this language come from?

16. Footnote 92 - Complies with the Workshop One Frozen SGAT page 29 - "Qwest made several detail changes to the section..."
    No language was provided.
    Provide support for the modifications made.

17. Footnote 94 - "Qwest agreed to this modification in the collocation workshop..."
    Which state(s) agreed with this change?
    When was this determined?
    Which companies agreed with this change?

18. Footnotes 95, 96 and 97 - "... result of post Arizona Workshop (Consensus)."
For each footnote, provide the following information:
Which state(s) agreed with this change?
When was this determined?
Which companies agreed with this change?

19. Footnote 107 - "Qwest agreed to bring this language into South Dakota during the April 2002 Hearings."
Which witness?
If not in rebuttal affidavit, where on the record can this modification be found?

20. Section 9.3.3.5 The second insert is taken from Karen A. Stewart, Qwest Exhibit 66, page 24. Where does the first insert come from?

21. Footnote 110 - "Qwest areed to bring this language into South Dakota during the April 2002 Hearings."
Which witness?
If not in rebuttal affidavit, where on the record can this modification be found?

22. Footnote 113 - Which state(s) agreed with this change?
When was this language agree upon?
Which companies agreed with this language?

23. Footnote 115 - Which state(s) agreed with this change?
When was this language agree upon?
Which companies agreed with this language?

24. Footnote 117 - Which state(s) agreed with this change?
When was this language agree upon?
Which companies agreed with this language?

25. Footnote 118 - Which state(s) agreed with this change?
When was this language agree upon?
Which companies agreed with this language?

26. Footnote 119 - Which state(s) agreed with this change?
When was this language agree upon?
Which companies agreed with this language?

27. Footnote 120 - Which state(s) agreed with this change?
When was this language agree upon?
Which companies agreed with this language?

28. Section 9.23.1.2.3 see Karen A. Stewart, Qwest Exhibit 64, page 26, lines 16 to 22

change "DS1" to "high capacity"
Footnote 121 - Where does "similar bandwidth" come from? It is not in the Facilitator's Report Attachment 30, page 67

29. Section 10.3.4.6 "Arizona language is added as Qwest added"
Where in the record was this agreed to be placed in the SGAT?

30. Section 10.3.9.4.2 see Bumgarner, Qwest Exhibit 33, Exhibit BSB-9T1-6, page 4 of 6 1.4.2 within the above exhibit - The last sentence was dropped. Explain why.

31. See Freeberg, Qwest Exhibit 17, pages 8 and 9. Sections 10.8.2.27, 10.8.2.27.1, 10.8.2.27.2, 10.8.2.27.3 and 10.8.2.27.4 were not incorporated into the Second Revision SGAT. Explain why.

32. See Freeberg, Qwest Exhibit 17, page 9 Section 10.9.4.1.3 was not incorporated into the Second Revision SGAT. Explain why

33. Footnotes 142, 143, 146, 147, 148, 149, 150, 152, 156, 162, 164, 165, 166, 167, 169, 171 and 172 - " reflects past workshop language. "
For each footnote, provide the following information
Which state(s) agreed with this change?
When was this determined?
Which companies agreed with this change?

34. Footnote 158 - "... agreed upon the redlined language in the Change Management Redesign Sessions"
Which state(s) agreed with this change?
When was this determined?
Which companies agreed with this change?

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**HAND DELIVERED**

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

RE: **QWEST 271 FILING**
Docket: TC01-165
Our file: 0053

Dear Debra:

Enclosed are original and ten copies of Midcontinent's Post Hearing Brief. Please file the enclosure.

With a copy of this letter, I am sending copies of the Brief to the service list. Thank you very much.

Yours truly,

MAY, ADAM, GERDES & THOMPSON LLP

DAVID A. GERDES

DAG:mw

Enclosures

cc: Service List
Tom Simmons

RECEIVED

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

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

| | | |
|---|---|---|
| IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996 | ) ) ) ) ) | TC01-165 **MIDCONTINENT'S POST HEARING BRIEF** |

Pursuant to the Commission's procedural schedule and the extended briefing schedule established by the Commission at its May 30, 2002, meeting, Midcontinent Communications ("Midcontinent") files this brief.

## INTRODUCTION AND SUMMARY OF POSITION

As the Commission is well aware, Section 271 of the Telecommunications Act of 1996 ("The Telecommunications Act") establishes the criteria which Qwest must meet before it can be granted authority to provide in-region interLATA services originating in this state. 47 U.S.C. § 271. Generally speaking, Section 271 requires RBOCs to apply to the FCC for this interLATA authority. The FCC must consult with relevant state commissions prior to acting upon the RBOC's request. Thus, the Commission in this proceeding is ultimately making a recommendation to the FCC pursuant to 47 U.S.C. § 271(d)(2)(b).

Also pending before the Commission is the position taken by Black Hills Fibercom and Midcontinent concerning whether a Tract A

analysis or a Track B analysis applies to the evidence in this proceeding. Qwest apparently now agrees with this position because in its Overview Post-Hearing Brief and Index to Briefing Materials, it recognizes that ". . . the FCC is required to consult with the relevant state commission regarding Track A and the competitive checklist."[1] This being a Track A proceeding, as advocated previously by Midcontinent, Track B evidence proffered by Qwest should be disregarded as irrelevant by the Commission.

Midcontinent's position can best be summarized by Tom Simmons' closing remarks to his summary of testimony when he testified before the Commission on April 30, 2002, as follows:

> I believe the Qwest South Dakota team clearly understands the importance of the vendor/customer relationship. Our concerns, however, have again more to do with the systems and structure Qwest is or will provide to support their people and frankly support us in our development as intended by the act.
>
> We also offered direct testimony on the UNE pricing issue. In fact, we joined AT&T in their concerns about UNE pricing. Based on our experience, we have found unbundled network elements and UNE-P in particular an unacceptable network choice for residential customers. A table of our customer sample is included in the handout on page 5.
>
> As I stated earlier, we believe the level of cooperation between Midcontinent and Qwest has improved. There is concern, however, that once the checklist has been deemed complete, the level of cooperation may diminish. That's why we raised the issues of facility

[1] Qwest Corporation's Overview Post-Hearing Brief and Index to Briefing Materials, p. 2.

availability, comparability of terms for new products, service quality responsibility, and numerous QPAP issues that determine what happens in the future if a normal business relationship fails and we have nowhere else to go. Those are listed on the next page of the handout.

Our concern, of course, is that without our ability to interconnect and utilize network offerings from Qwest, we can't go to the other RBOC in the market. There is none and won't be until such time that adequate competition exists in the markets that we serve.

We sincerely hope our relationship will continue to develop and grow toward a more natural vendor/customer relationship where the vendor, Qwest, actually wants to sell the customer, Midcontinent, more services. The best way to sell a customer more services is to demonstrate the applications of individual services and price them attractively. And that's what we hope will happen going forward from this exercise.[2]

Midcontinent does not work extensively with the Statement of Generally Available Terms ("SGAT"), and therefore relies upon staff and its experts to make sense of a seemingly unnecessarily overcomplicated issue. Given the fact that the SGAT is a Track B requirement, proof of a satisfactory SGAT is not proof of Track A compliance. The Qwest performance assurance plan ("QPAP") is the keystone of a satisfactory and effective relationship with its CLECs. The recent revelation of the existence of secret agreements between selected CLECs is highly troubling. An effective mechanism must be established for independent review of all contracts directly affecting retail purchase of services from Qwest by CLECs.

[2]Transcript, Volume II, pp 17-19.

## DISCUSSION

### (A) Midcontinent Checklist Issues

Midcontinent commented upon a wide variety of checklist issues in an effort to give the Commission a flavor for its relationship with Qwest, the RBOC. As testified by Tom Simmons, an unsatisfactory relationship with the RBOC severely hampers the ability of a CLEC to survive in what has become a highly competitive business. A common thread runs through most if not all of these issues, and it will not be repeated throughout this discussion. That is, the incumbent carrier has a significant and potentially unassailable advantage in the competition for customers. It has been the original carrier for all customers and the natural inertia of the human condition favors the incumbent carrier. This means that to succeed the CLEC must be as good as, and probably better than, the incumbent carrier in both price and performance in provisioning services to customers. This is a high goal for a CLEC, but it cannot be reached if the RBOC does not provide services to its CLECs in a prompt, efficient and timely manner. Because, in the eyes of the CLEC customer, it is the CLEC's fault, not the RBOC's fault, if the customer is inconvenienced or disadvantaged by an RBOC failure in provisioning services.

As stated in Mr. Simmons' opening remarks, Midcontinent utilizes virtually all of Qwest's voice network services. Those services are listed on page 2 of Exhibit 39.[3] Midcontinent raised a number of issues in its prefiled testimony filed March 18, 2002, which Qwest witnesses pointed out were resolved by the time of the hearing. Two significant points should be kept in mind here, the level of Qwest's attention to and resolution of issues increased markedly as the time of the hearing approached, and Midcontinent's motive for mentioning many of these items was to show the evolution of Qwest cooperation and performance from first contact with Midcontinent to more recent interaction between the two. On this latter point, Mr. Simmons' testimony reflects a marked improvement in Qwest's attention to CLEC services, and Midcontinent's major concern is that this level of attention not backslide once Qwest eventually obtains Section 271 compliance.

Midcontinent raised significant white pages issues ranging from botched directory listings for resold customers in January and February of this year, to a dropped business listing in August of 2001.[4] While Qwest witness Lori Simpson would not characterize 66 botched residential directory listings as a significant problem

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[3] Transcript, Volume VI, p. 14. A copy of Mr. Simmons' summary, Exhibit 39, is attached to the brief for ease of reference.

[4] Simmons prefiled testimony, Exhibit 38, pp. 3 through 6.

for a small CLEC such as Midcontinent, because the error rate was as good as Qwest's, she did admit that a bad listing is a bad thing, as well as that the issue was serious enough to invoke specific attention and review by Qwest personnel.[5] Ms. Simpson also could not dispute Mr. Simmons' testimony that a request for an unlisted number was not published in Qwest's telephone book because it was caught in time, but the information had already been sent on to McLeod and that listing was published in the McLeod telephone book.[6]

Finally, Midcontinent mentioned a dropped business directory listing in the August 2001 telephone directory which gave rise to a series of liability negotiations with the customer. As Mr. Simmons testified, "[f]ailure to list a business customer raises the issue of potential lost business and surely will launch a liability dispute between the customer and the provider."[7] While Ms. Simpson agreed that it is a serious thing when a business listing is omitted from the directory, she denied that Qwest had anything to

---

[5] Transcript, Volume III, pp. 29 through 32.

[6] Id. at p. 31. Unfortunately, Ms. Simpson's testimonial technique was similar to many of Qwest's witnesses. It appeared she sought to give the impression that if she could not confirm a fact within Qwest, it did not occur. However, she does admit that the fact that she could not confirm a fact within Qwest does not mean that it didn't occur.

[7] Simmons Prefiled Testimony, Exhibit 38, p. 6.

do with it.[8] She did finally admit, however, that this was apparently a misunderstanding between Midcontinent and Qwest, because Qwest had two different sets of rules for changing listings involving resale as distinguished from UNE-P.[9] She also admitted when pressed that she did not know if directory training for Qwest employees was ever optional.[10]

UNE-P prices received considerable attention before the Commission, with respect to Mr. Tietzle's Exhibit 6, p. 7, and Mr. Simmons' Exhibit 39, p. 5. Without repeating the detail of this testimony, Midcontinent will simply state that it believes that it made its point. As Mr. Simmons testified in his prefiled testimony:

> Some CLECs have argued that UNE prices are too high to permit CLEC entry into the local exchange market in a profitable way. While profitability should not be a direct issue, lack of profitability is usually considered a major barrier to entry. A CLEC simply cannot enter a market with a plan to lose money. In the QSI consulting report, it was noted that AT&T provided evidence to support the conclusion that Qwest 1FR rates were lower than UNE prices. Midcontinent's experience confirms AT&T's conclusion. As part of early facilities-based testing, we provided residential local exchange services over UNE local loops. A combination of a high UNE local loop price and the nonrecurring set up charge proved this network option too costly for residential services. Midcontinent has chosen to provide local exchanges services through its own hybrid fiber coax network, where available, or via Qwest's resold services.

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[8] Transcript, Volume III, pp. 35 through 41.

[9] Id. pp. 39 and 40.

[10] Id. pp. 40, 41.

> At current prices, a UNE local loop is simply not competitive for residential services.[11]

It was clear from David Tietzle's testimony on cross-examination[12] and Commission questioning[13] that Mr. Tietzle was comparing apples to oranges, was unsuccessfully attempting to characterize UNE-P as too overpriced and was unconvincing in his effort.

Based upon the foregoing record, it is clear that UNE-P is overpriced and it is in the public interest that Qwest's price to CLECs be adjusted to a reasonable and realistic level. The Commission's recommendation to the FCC should be conditioned upon a state-by-state examination, and adjustment if necessary, of UNE-P prices.

The Commission has been faced with a mountain of paper in this proceeding. To in some small way reduce that burden, Midcontinent will simply summarize the other issues which it has raised. Qwest's briefing would indicate its opinion that virtually all of these issues have been met. In most cases that is true. But as stated at the outset, the issue here is not whether they occurred and were eventually corrected, but whether Qwest's zeal for eliminating problems in the future will continue past its receipt

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[11] Tom Simons Prefiled Testimony, Exhibit 38, pp. 19 and 20.

[12] Transcript, Volume 1, pp. 87 through 97.

[13] Id. at pp. [illegible].

of 271 interLATA long distance authority. Here is a summary of Midcontinent's other issues:

Past Experiences

- Qwest's ability and willingness to port numbers; timing issue that caused service outage for customers. Simmons' direct, Exhibit 38, pp. 7 and 8.
- Potential misuse of competitive information; questionable mailing that may have been an example of data mining confidential information. Qwest has an explanation that would indicate that competitive information was not misused. Midcontinent continues to question the form of the mailing, see Qwest Exhibit 58, which carries Midco's exclusive reseller identification number with Qwest on an envelope available to the public.
- Internal controls; specific service and billing problems which took nearly a year to resolve, such as Qwest's failure to update their own tariff resulting in a billing dispute where Midcontinent was ultimately credited, and a rate review which internally adjusted Midcontinent's resale rate to the wrong amount (adjusted to the original agreement when the agreement had been amended) where Qwest's response was slow and it took six months to resolve an amount due Midcontinent of over $200,000. Simmons direct, pp. 13 to 15.

Current Experiences

- Ownership of inside wiring; issue of charges for verification of the network. Simmons direct, p. 8.
- Carrier access billing issues; continuing problem of not being able to receive carrier access data from Qwest for toll terminated calls from Qwest customers. Simmons direct, p. 21.

Future Experiences

- Lack of available facilities; will facilities be available in small South Dakota communities? Simmons direct, pp. 6 and 7.
- Comparability of terms for new products and services; will new products be available to CLECs in a timely manner? Will current products change? Simmons direct, p. 10.

**(B) Statement of Generally Acceptable Terms**

Midcontinent does not have sufficient day-to-day contact with the Statement of Generally Available Terms, nor did it actively participate in the multi-state workshops. Thus, Midcontinent relies upon staff and its experts to address carrier issues associated with the SGAT. It is important to keep in mind that the SGAT is simply a starting point, and that as several Qwest witnesses suggested, the terms and conditions stated in the SGAT are negotiable for each carrier.

**(C) Qwest Performance Assurance Plan**

The Qwest Performance Assurance Plan is indeed an important component in the regulatory scheme guaranteeing compliance by ILECs with their requirement to foster competition in the local loop. As testified to by Mr. Simmons as a part of his public interest testimony, QPAP damages should be liquidated. Simmons direct testimony, Exhibit 38, p. 17.

The QPAP represents the major regulatory component to assure that Qwest does not back slide in its cooperation with its CLECs. While issues such as UNE-P remain, Qwest has made significant strides in the last six months in improving its relationship with its customers who are CLECs. The closer Qwest gets to treating CLECs as customers, *i.e.*, seeking them out and looking for ways to improve services to them, the closer the industry will come to true competition in the local loop, the goal of the Telecommunications Act.

**(D) Secret Agreements**

The AT&T filing made following the hearing in this matter raises troubling issues. It can be as simple as a misunderstanding by Qwest as to what might constitute an interconnection agreement, as it can be a cynical attempt by Qwest to circumvent the clear requirements of the Telecommunications Act. Certain of the disclosures, such as agreements from CLECs or potential CLECs to

refrain from opposing Qwest's 271 application in certain states, raise serious questions.

The problem created by these secret agreements for CLECs such as Midcontinent is obvious. If a CLEC competing with Midcontinent gets a better deal from the ILEC than Midcontinent gets, Midcontinent is placed at a competitive disadvantage. Further, if the special deal is secret, Midcontinent has no way to determine whether it should, or can, opt in to the special deal. These special arrangements clearly violate both the spirit and the letter of the Telecommunications Act and should not be tolerated!

Giving Qwest the benefit of the doubt (which may be more than that to which it is entitled), Midcontinent believes at a minimum the Commission should fashion a mechanism to require that a disinterested third party review any and all agreements between ILECs and CLECs which have any characteristic whatsoever of an interconnection agreement. Those which do not constitute the wholesale purchase of services for subsequent retail sale could be excluded. The Commission should take evidence on the manner in which this rule should be enforced. Qwest has shown at the very least the need for an objective third-party review of all contracts having any characteristic involving interconnection for retail resale. Sadly, from the agreements that were filed, these even

need to be settlement agreements, since several of the confidential settlement agreements contain market-driven provisions.

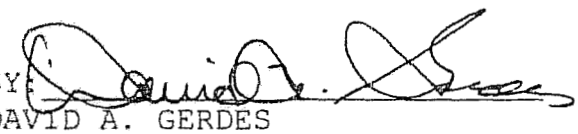
## CONCLUSION

As was stated at the outset, it is in Midcontinent's interest to have Qwest as a strong and viable presence in the market place. It is only through Qwest's strength and responsible delivery of wholesale telecommunications services that robust competition can exist in the local retail marketplace. In that sense, Midcontinent is allied with Qwest's interests. Midcontinent's initial position in this matter was simply that Qwest continue its improvement, learn to treat its CLEC customers responsibly and refrain from backsliding on the quality of its services to CLECs. However, the presence of the secret agreements creates another dimension. The potential harmful effect of agreements such as this in the marketplace is palpable. Measures must be taken to eliminate the possibility that anticompetitive practices such as this continue to occur.

Midcontinent seeks to reiterate that it has a close relationship with local Qwest personnel and the utmost confidence in their integrity. Qwest as a corporation, however, has had largely self-imposed financial pressures from the debt which it has chosen to carry. The company as whole must become committed to ethical practices in the marketplace.

Dated this 1st day of July, 2002.

MAY, ADAM, GERDES & THOMPSON LLP

BY: 
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CERTIFICATE OF SERVICE

David A. Gerdes of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 1st day of July, 2002, he mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at their last known addresses, to-wit:

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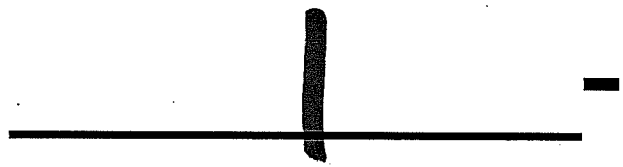
# CONTINUATION



Mido Exh 21

# Midcontinent Communications Testimony

## Docket TC01-165

## Qwest Compliance with Section 271(c) Of the Telecommunications Act of 1996

## Summary

W. Tom Simmons
April 29, 2002

Midcontinent

Fifty Years of Value

Midcontinent
COMMUNICATIONS

# Overview

## Midcontinent Communications Telephone Services

## Network Options

- Qwest Resold Services: Residential Customers
- Qwest UNE Local Loops: Business Customers
- Qwest UNE-P Service: Business Customers
- Midcontinent Fiber Facilities: Business Customers
- Midcontinent HFC Facilities: Residential and Small Business Customers

Midcontinent COMMUNICATIONS

# Past Experiences

Qwest's Ability and Willingness to Port Numbers

Checklist #11
Simmons direct, p. 7,8

- Timing issue that caused service outage for customers.

Misuse of Competitive Information

General Terms and Conditions
Simmons direct, p. 13

- Questionable mailing that may have been an example of data mining confidential information.

Internal Controls

Section 272
Simmons direct, p. 13-15

- Specific service issues
- Billing problems that took nearly a year to resolve

Midcontinent
COMMUNICATIONS

# Current Experiences

Directory Listings Issues

Checklist #11
Simmons direct, p. 4-6

- High error rate and training issues.

Ownership of *inside* wiring

Checklist #2
Simmons direct, p. 8

- Issue of charges for verification of network

Carrier access billing issues

Public Interest
Simmons direct, p. 21

- Continuing problem of not being able to receive carrier access data from Qwest for toll terminated calls from Qwest customers.

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# Current Experiences (Continued)

UNE prices

Public Interest
Simmons direct, p. 19

- UNE or UNE-P prices not effective option for residential customers.

| Cost per line | Res. UNE | Res. UNE-P | Res. Resold | Bus. UNE | Bus. UNE-P | Bus. Resold |
|---|---|---|---|---|---|---|
| Local Loop | $18.00 | $22.00 | $15.42 | $18.00 | $22.00 | $32.45 |
| Long Distance [illegible] | $ 4.50 | $ 4.50 | $4.50 | $24.00 | $24.00 | $24.00 |
| Carrier Access | $ 0.00 | $ 0.00 | $2.00 | $0.00 | $0.00 | $10.00 |
| Total | $22.50 | $ 26.50 | $21.92 | $42.00 | $46.00 | $66.45 |
| [illegible] | $21.95 | $21.95 | $21.95 | $69.95 | $69.95 | $69.95 |
| Carrier Access Revenue | $ 2.00 | $ 2.00 | $2.00 | $8.00 | $8.00 | $8.00 |
| Total Revenue | $23.95 | $23.95 | $23.95 | $77.95 | $77.95 | $77.95 |
| [illegible] | $1.45 | $2.55 | $2.03 | $35.95 | $31.95 | $11.51 |

#21,43

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Midcontinent
COMMUNICATIONS

# Future Experiences

| | |
|---|---|
| Lack of Available Facilities | Checklist #1, 11, 13, 14<br>Simmons direct, p. 6,7 |

- Will facilities be available in small South Dakota communities?

| | |
|---|---|
| Comparability of Terms for New Products and Services | General Terms and Conditions<br>Simmons direct, p. 10 |

- Will new products be available to CLECs in a timely manner? Will current products change?

| | |
|---|---|
| Responsibility for Retail Service Quality Assessment Against CLECs | General Terms and Conditions<br>Simmons direct, p. 12 |

- A CLEC needs reassurance that it will not be left "holding the bag" before the Commission for Qwest service quality issues.

| | |
|---|---|
| Working Relationship Going Forward | QPAP<br>Simmons direct, p. 16,17 |

# Quest for a Qwest

# True Business Relationship

# CONTINUATION

# [2.]

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

# AT&T'S BRIEF REGARDING PUBLIC INTEREST

AT&T Communications of the Midwest, Inc. ("AT&T") submits this reply brief, in response to Qwest Corporation's Opening Post-Hearing Brief on the Public Interest. AT&T hereby incorporates by reference the previously filed Comments of AT&T Corp. Regarding Public Interest, as if the same were stated verbatim herein. See Exhibit A, attached here.

For the reasons contained here, Qwest's application for authority to provide interLATA long distance service under 47 U.S.C. 271 is not in the public interest, and Commission approval of that application should be withheld.

## A. Introduction

In its *en banc* order of June 13, 2002, the Commission extended the due date for briefs in this matter, and allowed parties to present evidence and argument on the issue of unfiled agreements. In response to that order, AT&T submits herewith a copy of the eleven (11) unfiled agreements which are at issue in Minnesota. See Exhibit B, attached here. A twelfth agreement, between Qwest and Z-Tel Communications, came to light during the course of a commission investigation in New Mexico, and is appended here as Exhibit C.

In addition, AT&T notes that the staff of the Arizona Corporation Commission ("ACC") has recommended the assessment of fines against Qwest in connection with Qwest's failure and refusal to file certain interconnection agreements. The Arizona Commission staff also finds that seven agreements under scrutiny there include provisions in which CLECs agreed not to participate in certain regulatory proceedings before the ACC. The staff in Arizona calls for the imposition of higher fines in connection with this latter category of agreements because "agreements which attempt to suppress participation by all parties for full development of the record in regulatory proceedings before the Commission are not in the public interest."[1]

Similarly, the Iowa Utilities Board has expressly found that Qwest has engaged in anticompetitive conduct with respect to its negotiation of secret agreements. See Exhibit D, attached here. In addition, the Minnesota Public Utilities Commission has held that Qwest engaged in bad faith, and a pattern of anticompetitive conduct, in connection with UNE-P testing requested by AT&T. See Exhibit E, attached here.

The Minnesota decision is particularly germane because at least one of the secret agreements at issue involved "consulting services" which Qwest claims to have received from Eschelon. In other words, while Qwest was resisting AT&T's attempts to obtain UNE-P testing, Qwest was also engaging in secret collaboration, outside the section 271 workshop process, with Eschelon. The resulting discriminatory treatment is a clear violation of Qwest's obligations under section 271, and undermines the supposedly open collaborative process which Qwest itself sought and received as part of its efforts to obtain section 271 approval.

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[1] Arizona Corporation Commission Staff Report and Recommendation in the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996 (Docket No. RT-00000F-02-0271), June 7, 2002.

Qwest's anticompetitive conduct extends beyond the area of secret, unfiled agreements. TouchAmerica has filed motions to re-open proceedings in a number of states, to allow commissions to take additional evidence relating to TouchAmerica's allegations that Qwest has continually violated section 271 since the time the U S WEST/Qwest merger was approved.

In addition, Qwest is the subject of a well-publicized investigation by the Securities and Exchange Commission, seeking information on Qwest's accounting practices in connection with a variety of different transactions, including the negotiation of contracts for indefeasible rights of use (IRUs) for fiber optic facilities.

In short, regulators at both the state and federal levels are finally beginning to notice irregularities in the way which Qwest conducts its business. More importantly, where those regulators have taken the time to examine and investigate these irregularities—*viz.*, Minnesota and Iowa—they have issued findings of fact that Qwest has engaged in a *pattern* of anticompetitive conduct, bad faith, and willful violation of state and federal law.

For the South Dakota Commission, at this time, to turn a blind eye and reward such conduct with approval of Qwest's 271 application would clearly be contrary to the public interest.

### B. Secret Agreements

*1. The agreements at issue here directly reflect upon Qwest's unwillingness and inability to provide interconnection on a nondiscriminatory basis.*

AT&T's review of the agreements at issue here reveals that each of them directly reflects upon Qwest's unwillingness and inability to provide interconnection to CLECs

on a nondiscriminatory basis.[2] More specifically, AT&T finds the following terms and conditions, while not by any means an exhaustive list, to be among the best examples of preferential treatment of some CLECs by Qwest:

a. Qwest offered Eschelon a dedicated on-site provisioning team, while offering AT&T only a single individual representative, with off-site presence, multiple additional responsibilities, and limited availability.

b. Qwest also offered Eschelon the opportunity to "consult" with Qwest in exchange for a ten percent reduction in "aggregate billed charges for all purchases made by Eschelon from Qwest," while at the same time denying AT&T's request for UNE-P testing accommodation in Minnesota.

c. Qwest provided Eschelon a $13.00 per-line per-month credit (which it later increased to $16.00) ostensibly as compensation for Qwest's failure to provide accurate recording of access minutes through its daily usage files ("DUF"), while AT&T and other carriers struggled in vain to obtain accurate recording in order to properly bill access usage.[3]

d. Qwest provided a similar $2.00 per-line per-month credit to Eschelon for intraLATA toll traffic terminating to Eschelon's switch, where Qwest knowingly provided inaccurate access records to Eschelon for this type of traffic, while forcing other carriers to negotiate each such instance from the ground up.

e. Qwest agreed to provide Covad with more favorable service interval terms than any other carrier, including AT&T.

In each of these instances, Qwest provided important and useful interconnection services to one CLEC without making the same services available to others. Thus it is clear that Qwest has engaged in discrimination and preferential treatment of one group of CLECs over another. What remains unclear is the extent to which other acts of

[2] See generally Exhibits B and C, *supra*, containing twelve of the available, previously unfiled agreements which are pertinent here.

[3] AT&T is informed, and believes, that Eschelon disputes Qwest's characterization of this payment, and maintains instead that the additional $3.00 payment per line is compensation for poor service quality.

discrimination have also occurred.[4] Without a thorough investigation into the agreements at issue here, any Commission decision on Qwest's application for 271 authority will be based on an incomplete record. AT&T therefore believes that the South Dakota Commission should exercise its independent authority to investigate these allegations and reach its own determination on them prior to arriving at any conclusion on Qwest's application for 271 authority.

2. *These agreements show Qwest's willingness to violate federal law, and that in turn carries public interest implications.*

Aside from the discrimination inherent in these agreements, there is also the matter of Qwest's failure and refusal to file and seek Commission approval of the agreements, in violation of 47 U.S.C. 252(e). This in turn carries important implications for the public interest analysis of Qwest's 271 application. To quote the FCC directly in this regard:

> Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anti-competitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.[5]

As the FCC has noted, the very success of the federal Act depends on BOC compliance; however, that compliance is absent here. The negotiation and

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[4] AT&T is informed and believes that additional evidence exists relating to unfiled interconnection agreements between Qwest and McLeodUSA. See *In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation*, Docket No. P-421/C-02-197, Second Amended Verified Complaint, at pp. 42, *et seq.*, attached here as Exhibit F.

[5] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997), at para. 397.

implementation of these special agreements, in secret and away from the prying eyes of competitors and regulators alike, not only undermines the potential for the Act to be successful, but also undermines the authority of this Commission, and the integrity of the record in this case.

Qwest has repeatedly asserted on the record that it is providing nondiscriminatory interconnection throughout the state. Indeed, that is one of the fundamental elements of its 271 application.[6] Yet, the evidence here is frankly to the contrary. Interconnection is in fact not being provided in a nondiscriminatory manner. Moreover, other carriers—unaware of the existence of these special agreements—have been unable to contradict the assertions of Qwest in this regard. Others have been prevented from coming forward by the terms of the agreements themselves. As a result, the record here misrepresents the true state of competition. Furthermore Qwest is responsible for that misrepresentation, because Qwest has a burden, under the Act, to file these agreements and seek Commission approval for them. By failing and refusing to do so, and then representing itself as being in compliance with the federal Act, Qwest is attempting to deceive not only this Commission, but its competitors and the public at large as well.

In addition, the simple fact is that by failing and refusing to file these agreements and seek approval for them, Qwest has also flaunted the authority of the Commission, and undermined the Commission's ability to properly regulate a monopoly carrier, in accordance with the public interest.

At the very least, the discovery of these special agreements warrants withholding approval of Qwest's application for interLATA authority pending further investigation.

[6] For example, the testimony of David L. Teitzel purports to provide totals of the various interconnection agreements entered into between Qwest and new entrants. Then, relying upon these totals, Qwest claims to have fulfilled the public interest and track A requirements of the Act.

The question of whether and to what extent these proceedings have been tainted by misrepresentations by the applicant Qwest is of vital importance to maintaining the Commission's integrity, and a proper respect for the truth.

*3. The attempt by Qwest to silence its opponents in these and other proceedings impugns the integrity and completeness of the record in this case.*

In at least two instances, Qwest bargained for and received a promise from its competitors—Eschelon and Z-Tel—to be silent and refrain from opposing Qwest's 271 application in all fourteen states. In the first of these, the Eschelon agreement, Qwest promised preferential treatment to Eschelon, and thereby not only discriminated against its other competitors, but silenced one of its most important critics in the very proceedings intended to open the local market to all competitors. In the second of these, the Z-Tel agreement, Qwest had the audacity to condition the negotiation of an interconnection agreement—something Qwest has a statutory obligation to negotiate in good faith—on Z-Tel's agreement not to disparage or criticize Qwest in any regulatory, legislative, or judicial forum.[7]

This is yet another reason for concern over the integrity and completeness of the record in this case. Qwest's actions here have actively precluded the Commission from hearing evidence from a group of potential witnesses.

The whole purpose of the collaborative process advocated by Qwest from the very inception of its 271 application was to ensure that all parties could benefit from the dialogue which was to occur. The intention—and Qwest's major selling point—of the so-called collaborative approach was to engage in an open dialogue, work out interconnection issues publicly, and provide equal treatment to all CLECs. However,

[7] See Exhibit B, *supra*.

with respect to the Eschelon agreement of November 15, we have a situation in which Qwest, in the midst of this purportedly collaborative process, has engineered a separate, private deal for one CLEC. Qwest promises to focus on the needs of this one CLEC, privately and apart from the public "collaboration," and in exchange the CLEC promises to remain silent during the "collaborative" process.

In other words, while Qwest was collaborating with some CLECs publicly, it was also being *more* collaborative with others privately. Other CLECs did not benefit from whatever dialogue might have occurred between Eschelon and Qwest with respect to Eschelon's interconnection needs. They were shut out of that dialogue. Clearly the creation of private, side-agreements, as here, does not promote the overall collaboration which was supposed to occur, but instead undermines it.[8]

Under these circumstances, the entire 271 process has been compromised in two distinct ways: first, at least two of Qwest's critics were artificially kept out of those proceedings, detracting from the quality of the public dialogue, and secondly, the group that did participate in the collaborative process did not receive the benefit of the dialogue which evidently took place between Qwest and Eschelon. Participants have therefore been short-changed by Qwest, and should at a minimum be allowed to re-examine the issues discussed between Qwest and Eschelon prior to any grant of 271 approval by this Commission.

Furthermore, the memorandum of understanding between Qwest and Z-Tel dated May 18, 2001 (the "Z-Tel Agreement"), presents, on its face, clear evidence of a

[8] There is also evidence that Qwest kept Eschelon from participating in the 271 process by means of coercion and strong-arm tactics. See letter from Richard Smith to Joseph Nacchio dated February 8, 2002, pp. 4, *et seq.*, attached here as Exhibit G.

violation of federal law by Qwest.[9] In accordance with 47 U.S.C. §251(c), Qwest has the express legal obligation to "negotiate in good faith in accordance with section 252 the particular terms and conditions" of interconnection with other carriers. However, despite this express legal obligation, Qwest in the Z-Tel Agreement has insisted, as a condition precedent to any such negotiations, that Z-Tel "not file any documents (including, but not limited to comments, complaints, ex partes, etc.) or advocate in any forum (including, but not limited to, regulatory, judicial, or legislative) during this 60 day period ("litigation stand-down") anything which is disparaging or critical of Qwest...."[10]

Under the circumstances, it is clear that Qwest is not fulfilling its obligations under section 251. The imposition of this condition precedent by Qwest is a blatant violation of Qwest's obligations under 47 U.S.C. 251(c). Moreover, by its refusal to negotiate with Z-Tel in the absence of such a condition, Qwest's conduct is clearly outrageous.

4. *The standard for filing agreements under 47 U.S.C. 252 is clear.*

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

AT&T will address each of these separately.

First of all, AT&T believes that the standard for filing, approval, and "pick and choose" of interconnection agreements under section 252 is quite clear. The Iowa

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[9] Exhibit B, *supra.*
[10] Id.

Utilities Board, for example, had no difficulty establishing and applying a simple, complete, and practical standard for filing such agreements:

> For purposes of this proceeding, the phrase "interconnection agreement" as used in 47 U.S.C. §§251(c) and 252(a) through (i) and 199 IAC 38.7(4) should be defined to include, at a minimum, a negotiated or arbitrated contractual arrangement between an ILEC and a CLEC that is binding; relates to interconnection, services, or network elements, pursuant to §251, or defines or affects the prospective interconnection relationship between two LECs. This definition includes any agreement modifying or amending any part of an existing interconnection agreement.[11]

Thus, at this stage it is clear that Qwest has an obligation to file certain agreements, there is evidence that it has failed and refused to do so, and competitors have been harmed by that failure and refusal.

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

Ultimately, the question presented here is whether or not Qwest has unlawfully discriminated against some CLECs and in favor of others. In other words, in the face of these secret agreements, has Qwest given the same terms and conditions to all CLECs on a nondiscriminatory basis? Under these circumstances, while the standard for filing these agreements is certainly important, it is secondary to the question of whether discrimination has occurred in violation of federal law.

Likewise, the existence of Qwest's petition to the FCC for declaratory ruling on the standard for filing documents should not deter this Commission from proceeding with

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[11] Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing, *In Re: AT&T Corp. v. Qwest Corporation*, Iowa Utilities Board Docket No. FCU-02-2, issued May 29, 2002, attached here as Exhibit D.

its own investigation. It has not deterred the Minnesota or New Mexico Commissions. In fact, the New Mexico Public Regulation Commission's Hearing Examiner on May 23, 2002, flatly rejected Qwest's motion to stay its proceedings. Qwest's New Mexico motion was based on the erroneous idea that the state commission should await the decision of the FCC with regard to the filing standard under section 252.[12]

Qwest's fretfulness over the definition of a governing standard for filing agreements is entirely unnecessary. Over the six or more years in which the Act has been in effect, there have been innumerable agreements negotiated between carriers, and approved by various state commissions including the South Dakota PUC. Most of these agreements were thoroughly and painstakingly negotiated, and in many cases arbitration was necessary in order for them to be concluded and implemented. One result of this process is that the subject matter of interconnection agreements is at the same time fairly broad, yet well-defined. A brief glance at the table of contents for the AT&T/Qwest agreement reveals that the subject matter of an interconnection agreement can range from the obvious topics of payment, pricing, branding, resale, and the definition of unbundled network elements, to the more indirect (but no less important) subjects of dispute resolution, maintenance, and network security.[13]

From AT&T's perspective, it appears reasonable to insist that any agreement between carriers which addresses the same issues, or deals with the same subject matter as an interconnection agreement should be approved, filed, and made available in the same manner as any other interconnection agreement. This follows directly from the

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[12] Order from the bench, May 23, 2002, *In the Matter of an Investigation into Unfiled Agreements Between Qwest Corporation and Competitive Local Exchange Carriers*, Utility Case No. 3750.

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

express requirements of sections 252(e), 252(h), and 252(i). Guidance with respect to what subject matter constitutes "interconnection" can be derived from industry practice over the past six years, by examining the contents of previous interconnection agreements approved and filed by this Commission.

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

Furthermore, Qwest's assertion in other jurisdictions that a national standard is necessary for determining which agreements should be filed and which need not, is contrary to the letter and spirit of the federal Act. Under 47 U.S.C. §252(e)(3), "[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement...." In other words, the federal Act not only establishes that individual states have the right to review and approve interconnection agreements, but they also have the right to impose and enforce other requirements, consistent with state law, in the review of an agreement. Thus, the plain language of the Act is expansive when it refers to state jurisdiction over interconnection agreements. The federal Act does not anticipate establishing a national standard here, and in fact expressly rejects the need for such a standard.

In short, this Commission has full statutory authority to establish a state-specific standard for filing interconnection agreements. The fact that the Commission has not yet

done so should not deter the Commission from proceeding with a determination on this issue, based on the plain language of the federal Act.

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

In other jurisdictions, Qwest has attempted to argue that section 252(a)(1) limits the applicability of the filing and approval requirements of section 252. Qwest usually begins this argument by asserting that section 252(a)(1) requires inclusion of a detailed schedule of charges for interconnection and each service or network element, and therefore any agreement which does not contain such a detailed schedule is not subject to the filing and approval requirements. Such a strained interpretation would eviscerate the nondiscrimination requirements of the remainder of section 252, and lead to a situation in which an ILEC could discriminate against individual CLECs with impunity, on the terms and conditions of interconnection. Such a result would be clearly contrary to the letter and spirit of the Act.

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

The language of section 252(a)(1) must be read in context, and not in a vacuum as Qwest would prefer. For example, section 252(e) requires that "any" interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the

state commission. Furthermore, the grounds for rejection of an interconnection agreement are clear: such an agreement must be rejected, *inter alia*, if the agreement *or any portion thereof* discriminates against a telecommunications carrier not a party to the agreement. The nondiscrimination requirements of section 252(e) are an integral part of the approval requirements of that same section, as well as the filing requirement of section 252(h). In turn, these nondiscrimination requirements are implemented and enforced by way of the "pick and choose" requirement found in section 252(i) of the Act.

Each of these nondiscrimination protections is as applicable to terms and conditions as it is to price. Therefore the filing requirements of section 252 must apply to agreements containing terms and conditions, as well as to agreements containing or relating to price.

The language of the Act, when read in its entirety and unencumbered by Qwest's selective myopia, calls for a broad interpretation of what agreements are subject to state commission approval, filing, and "pick and choose." Not only should "any" interconnection agreement be filed with the state commission, but the commission may reject it if even a *portion* of the agreement is found to be discriminatory. Additionally, when asked about the applicability of the filing, approval, and nondiscrimination requirements of section 252, the FCC clearly chose to use an expansive interpretation of which agreements should be subject to those requirements.[14]

The strained interpretation of section 252(a)(1) which Qwest has urged in other jurisdictions should be summarily rejected here in South Dakota.

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

6. *Qwest's promises to address and resolve these problems are empty and do not adequately address the public interest concerns inherent in the secret agreements issue.*

Qwest has represented to this Commission that it has committed voluntarily to "file all contracts, agreements, or letters of understanding between Qwest Corporation and CLECs that create obligations to meet the requirements of sections 251(b) or (c) on a going forward basis."[15]

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

In short, the creation of this internal committee does not obviate the need for further investigation into the discriminatory business practices of Qwest. Nor does it cure the underlying violations of federal law, the discriminatory conduct, and anticompetitive behavior by Qwest which renders Qwest's 271 application contrary to the public interest. The promises by Qwest to alter and improve its internal structure do not change the underlying need for oversight by this Commission.

7. *These secret agreements render Qwest's 271 application contrary to the public interest.*

The existence of these secret agreements renders Qwest's 271 application contrary to the public interest for several reasons. First, these agreements are

[15] Letter from R. Steven Davis to Commissioners Burg, Nelson and Sabo dated May 31, 2002 attached as Exhibit 1 to the Affidavit of Todd Lundy filed on June 13, 2002.

discriminatory and therefore demonstrate that Qwest's local markets are not opened. Instead, Qwest is acting as a gatekeeper for its local markets, giving preferences to whom it will, and withholding important information and benefits from others. Second, these agreements are evidence that Qwest has violated state and federal law. As noted previously, the FCC has specifically stated that violations of state and federal law by an applicant are relevant to whether a grant of 271 authority is in the public interest. Clearly in this case, approval of Qwest's 271 application is not in the public interest. And third, the negotiation of at least one of these agreements—*i.e.*, the Eschelon agreement—was contrary to, and undermined, the collaborative process which Qwest itself sought for the examination of its 271 application. Qwest has failed and refused to play by its own rules, and should not be rewarded for that anticompetitive behavior.

### C. UNE-P Testing

As this Commission is already aware, on March 21, 2001, AT&T filed a complaint against Qwest with the Minnesota Public Utilities Commission ("MPUC") regarding Qwest's violation of its interconnection agreement with AT&T as well as violations of state and federal law.[16]

On April 9, 2002, the full Commission concurred with the Minnesota ALJ's findings that Qwest engaged in anti-competitive behavior, and imposed fines against Qwest in the amount of $892,500.[17] Thus, the ALJ's recommended decision, with only minor modifications, is now binding.

The ALJ's findings there not only demonstrate an on-going pattern of anticompetitive behavior on the part of Qwest, they also show a willingness and ability

[16] See Exhibit A, *supra*, pp. 28-31.
[17] See Exhibit E, *supra*.

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.

This behavior goes directly to the credibility, or lack of credibility, attributable to Qwest in its dealings with competitors and regulators generally. It also demonstrates a lack of willingness on Qwest's part to cooperate in the opening of its markets throughout its 14 state service territory. Moreover, as previously mentioned, Qwest's behavior demonstrates once again the discriminatory treatment by Qwest of CLECs attempting to enter the local market. While Qwest was seemingly cooperating privately with some CLECs, negotiating secret, preferential agreements with them, Qwest was simultaneously blocking others from obtaining the necessary information to proceed with market entry. Once again, this renders Qwest's 271 application contrary to the public interest and should cause this Commission to be very cautious with regard to the nature and number of promises which it has heard from Qwest during the course of these 271 proceedings.

### D. Touch America

Qwest was required to divest its in-region long distance business in order to merge with USWest. TouchAmerica is the company that purchased Qwest's in-region long distance business.

TouchAmerica has been forced to file two FCC complaints against Qwest as well as a federal lawsuit. One of the FCC complaints asserts that Qwest has in effect reneged on many aspects of the in-region long distance divestiture. The complaints filed in federal court and at the FCC against Qwest are directly relevant to these 271 proceedings.

because they assert *inter alia* violations of section 271. According to those complaints, Qwest continues to market and provide in-region interLATA services through its "Q-Wave" service, which provides inter-LATA 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.

In addition, however, the TouchAmerica complaints are highly unusual, because they relate to allegations of violations of section 271 by a company seeking 271 authority. AT&T believes that the existence of these complaints, reflecting as they do on Qwest's compliance with section 271, is highly relevant to this Commission's consideration of Qwest's application for interLATA authority under that same section of the federal Act.

The Commission should clearly take additional evidence relating to TouchAmerica's allegations that Qwest has continually violated section 271 since the time the USWest/Qwest merger was approved. AT&T believes the Commission should hear that evidence before making any decision relative to Qwest's section 271 application. In view of the collaborative nature of the 271 process, it is difficult to see how the inclusion of such evidence would prejudice any party. In fact, in the interests of developing a full and complete record here, it would appear imperative to allow for the presentation of this evidence.

### E. Qwest's Anticompetitive Corporate Attitude

In addition to anti-competitive behavior, an anti-competitive attitude pervades the ranks, from top to bottom at Qwest. Evidence of this anticompetitive corporate attitude

abounds: the existence and content of the secret agreements; the refusal of Qwest to perform requested testing for AT&T (testing which was to be conducted at AT&T's expense), while at the same time providing Eschelon with opportunities for testing (and *paying* Eschelon consulting fees in the form of purchase discounts); e-mail distributed to approximately 190 Qwest employees, dancing on Covad's grave (see Exhibit A, p. 15); multiple and continuing violations of section 271; a whole panoply of other discriminatory and anticompetitive acts:

- Qwest's outrageous pricing of entrance facilities, power delivery, and collocation, in Minnesota, all contrary to the orders of the Commission there, as well as Qwest's withholding of payment under its interconnection agreement with Onvoy, Inc.

- Qwest's failure and refusal to provide interconnection SunWest Communications in a timely manner, depriving customers of telephone service and, again, withholding payment of amounts due and owing.

- Qwest's discriminatory practices in offering ADSL-capable loops and ISDN-capable loops to CLECs, including Rhythms Links, Inc.

- Qwest's unwarranted and protracted delays in providing service to MCIMetro, causing the chairwoman of the Washington Commission to express stern criticism of Qwest's "consistent pattern of behaviors."

- Qwest's outrageous conduct in padlocking points of access and ripping out wiring and conduit placed by AT&T technicians in Washington.

The list goes on.

For purposes of this public interest analysis, the critical element demonstrated here is that Qwest does not really consider its CLEC-customer business to be at all important. As a result, 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 retail customers are unable to reap the competitive benefits envisioned by Congress and this Commission.

The Texas Commission, early on in its examination of SBC's application for section 271 authority, saw this same problem of corporate attitude in the BOC applicant, examined it in the context of public interest, and took specific steps to remedy it prior to a grant of the section 271 application. As Commissioner Pat Curran of the Texas PUC expressed it:

> [W]ith regard to the public interest, no matter what safeguards and protective measures we recommend, we cannot be assured that competition will become irreversible in Texas until Bell is committed to treating CLECs as customers rather than as competitors. This change in business attitude is entirely within Bell's power. This Commission cannot order Bell to change its attitude. We can, however, provide concrete actions; steps which we believe will result in an open market.[18]

Ultimately, the steps taken by the Texas Commission are as follows:

1. The Commission shall establish a collaborative process whereby SWBT, Commission staff, and participants in this project establish a working system that addresses all of the issues raised in this recommendation;

2. SWBT needs to show this Commission and participants during the collaborative process by its actions that its corporate attitude has changed and that it has begun to treat CLECs like its customers;

3. SWBT needs to establish better communication between its upper management, including its policy group, and its account representatives. As a first step, SWBT shall develop policy manuals for its accounts representatives and put in place a system, such as e-mail notification, to communicate decisions by the policy group to account representatives and questions or comments back to the policy group;

4. SWBT needs to establish consistent policies used by all SWBT employees in responding to issues raised by CLECs. Toward that end, SWBT shall establish an interdepartmental group whose

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[18] See *Transcript of Consent Agenda Proceedings, Agenda Items 19-28, Before the Texas Public Utility Commission*, May 21, 1998, pp. 207-208, attached here as Exhibit I.

responsibility is trouble-shooting for CLECs engaged in interconnection, purchase of UNEs, and resale. This group shall be headed by an executive of SWBT with the final decision making power.

5. SWBT needs to establish a system for providing financial or other incentives to LSC personnel based upon CLEC satisfaction.

6. SWBT needs to commit to resolving problem issues with CLECs in a manner that will give CLECs a meaningful opportunity to compete.

7. SWBT shall draft a comprehensive manual for CLECs to ensure the timely provision of all aspects of interconnection, provision of UNEs and resale. The manual shall be written in a fashion that clearly delineates parties' responsibilities, the procedures for obtaining technical and other practical information, and the timelines for accomplishing the various steps in interconnection, purchase of UNEs and resale. The manual should also set forth SWBT's policy with regard to a CLEC's ability to adopt an approved interconnection agreement pursuant to Section 252(i) (this process will be referred to as the "MFN" process.

8. SWBT needs to treat CLECs at parity with the way it treats itself or its unregulated affiliates.

9. SWBT needs to show proof that it has made all the changes it agreed to make during the process of the Commission's 271 hearing, all of which have been detailed in the record.

10. SWBT needs to establish that its interconnection agreements are binding and are available on a nondiscriminatory basis to all CLECs.

11. To the extent SWBT chooses to establish 271 requirements by relying upon interconnection agreements it has executed, SWBT should consider adopting a minimum of generally available terms and conditions.

12. SWBT needs to establish that it is following all Commission orders referenced in this recommendation and that it intends to follow future directives of the Commission.

13. SWBT needs to establish its commitment to offering the terms of current interconnection agreements during any period of

renegotiation, even if the negotiations extend beyond the original term of the interconnection agreements;

14. Commission staff, SWBT, and the participants need to establish adequate performance monitoring (including performance standards, reporting requirements, and enforcement mechanism) during the collaborative process that will allow self-policing of the interconnection agreements after SWBT has been allowed to enter the long distance market;

15. SWBT shall not use customer proprietary network information to "winback" customers lost to competitors.[19]

AT&T believes that these same steps are appropriate here in South Dakota. Qwest has demonstrated on the record in these proceedings that it does not value its CLEC customers, and that it views CLECs exclusively as competitors. As a result, instead of cooperation, the CLECs in South Dakota receive discriminatory treatment, with Qwest hindering new entrants virtually at every turn. Under the circumstances, Qwest's application for section 271 authority is contrary to the public interest, and will remain so unless and until Qwest's corporate attitude changes.

## F. Conclusion

The evidence produced in these proceedings demonstrates a clear and unbroken pattern of anticompetitive behavior on Qwest's part: from Qwest's refusal of a CLEC's request for testing, to its secret agreement with another CLEC to provide discounts, from the improper provisioning of interLATA service by Qwest—in violation of section 271 itself—to an e-mail addressed to 190 employees celebrating the demise of one of the

[19] *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Public Utility Commission of Texas, PUC Project No. 16251, at pp. 2-3. See Exhibit J attached here.

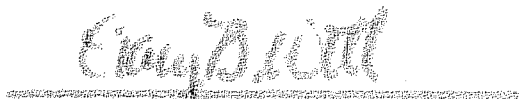
rivals. All of these several incidents add up to a pattern of anticompetitive behaviour, a pattern explicitly found in the Minnesota ALJ's decision relating to OSS-P testing.[20]

Other states have encountered this kind of attitude in an RBOC seeking 271 authority, and have taken specific steps to address and eliminate it. AT&T urges this Commission to refrain from any grant of approval to Qwest's section 271 application until Qwest's anticompetitive attitude has been corrected, and there is solid evidence of that correction.

At the present time, Qwest's 271 application is not in the public interest and it should be denied.

Respectfully submitted this 1st day of July, 2003.

AT&T COMMUNICATIONS OF THE MIDWEST, INC.



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[20] See Exhibit E, *supra*.

Exhibits

A. AT&T's Verified Comments in South Dakota
B. Full copies of the eleven unfiled agreements at issue in Minnesota
C. The agreement between Z-Tel and Qwest
D. The IUB decision on secret agreements
E. The Minnesota decision on AT&T's UNE-P testing complaint
F. Second Amended Verified Complaint in Minnesota Docket No. P-421/C-02-197
G. Letter from Richard Smith to Joseph Nacchio dated February 8, 2002
H. Table of contents from AT&T's interconnection agreement with Qwest
I. Texas transcript from open agenda dated May 21, 1998
J. Texas decision on public interest

# EXHIBIT A

Exhibit A

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

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[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 *thwarted* competitors to failure.
>
> *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 CLEC's out of the

[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 Incentive*, Before the Public Service Commission of Utah, Docket No. 00-049-08, attached here as Exhibit A, page 7-8.

residential market, but that the local residential market will remain closed to competitors 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 run—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 B17 (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, Intermedia Communications, GST Telecommunications, eSpire, Pathnet, NorthPoint, FOCAL, 360Networks, Inc., Winstar Communications, Inc., Teligent, RCN Net, Flashcom, 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

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[17] One important factor in the demise of these DLEC's has been the slim margins to which they have been subject. Clearly it is within Qwest's control, and it is in Qwest's interest, to keep these margins razor-thin.

regarding the reliability of DSL providers, touting its own DSL service, and touting 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 second 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 enthusiasm 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 portion 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 the e-mail has been disciplined. See Exhibit F, supra, attached hereto, Transcript, Special Open Meeting, Arizona Corporation Commission, August 23, 2001, pp. 318-319. 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.

# CONTINUATION

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As a result of this strategy, Qwest now leads the nation in DSL penetration and plans to double its DSL customer base in 2001.[29] 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

[29] See Qwest's annual report for the year 2000, at page 4, 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 activations and disconnections, 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. Those 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 fairly grounded in law, and in a recognition of the RBOCs' ability (including Qwest's) to abuse competition 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 (1983). 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 prohibitions mentioned. The fact that Qwest now complains about this prohibition demonstrates its continuing efforts to deceive—or, at best, its sloppy and superficial efforts to 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 differences 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), ¶¶ 136, 139, p. 19-21

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

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[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

minute. In the interim, however, SBC had managed, using predatory pricing, to capture nearly 20 percent of the Texas long distance market. Moreover, even after it had raised its prices, SBC was still able to continue to add new customers and increase the number of lines it serves with interLATA service. See the articles from the *Dallas Morning News*, Exhibit H, attached hereto.

This Commission must address Qwest's anti-competitive, exorbitant access charges *before* Qwest receives approval to provide in-region interLATA services in South Dakota.[24] The forward-looking economic cost for Qwest to provide access to itself for intrastate long distance calls is substantially less than the price that Qwest charges IXCs for the same, identical access. As demonstrated above, Qwest's competitors will be disadvantaged by a perpetuation of the current access pricing structure, unless it is corrected prior to Qwest's entry into the in-region long distance market. To allow that entry prior to fixing access rates at or near the true cost of providing access will be contrary to the public interest, and will ultimately damage or destroy the vibrant competition which currently exists in the interLATA marketplace.

In arguing in favor of its 271 application, Qwest also places great reliance in a study by Dr. Jerry Hausman of MIT, which Qwest asserts "suggests South Dakota customers can save as much as $16.6 million a year when Qwest enters the interLATA market." However, an examination of that study reveals that "the various research methods and analysis techniques that were utilized by Hausman et al. are fatally

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[24] AT&T is encouraged in this regard by actions taken by some state commissions to examine access pricing policies. For example, the Colorado Commission has opened Docket No. 00I-494T to examine all forms of intercarrier compensation. In addition, the Montana Commission has opened a docket to examine the impact of access charge prices on interLATA competition in a post-271 environment. See *In the Matter of the Commission's Investigation of the Need to Reduce Qwest's Carrier Access Charge Rates with Associated and Necessary Rebalancing and Mitigation Measures*, Utility Division Docket No. D2001.6.75 (Montana, June 28, 2001).

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.
>
> 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 *130,000* 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. Stats. §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.
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> c) Sending the letter of August 29, 2001, to AT&T making false and misleading statements.

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[4] 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 *perpetrate 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 RBOCs, 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. 395, "[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. 266

[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]

[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 to Both Unbundled*

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 heavy 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 488*, Utility Case No. 3495, 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.

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[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 renomonopolization 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 intraLATA 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.

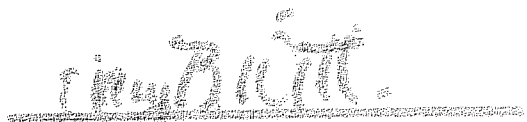
Lastly in this regard, the record here shows a complete lack of appropriate, adequate assurances that Qwest will keep its local exchange markets open, once they are

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 intraLATA 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. TC00-165 |

VERIFICATION OF DIANE F. ROTH

I, Diane F. Roth, being duly sworn, state that I am an Associate 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 belief.

Dated this 14th day of March 2002.

Diane F. Roth

STATE OF COLORADO )
) ss
CITY AND COUNTY OF DENVER )

SUBSCRIBED AND SWORN TO before me on this 14th 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: 12/31/06

NOTARY PUBLIC
ADAM W. WALCZAK
STATE OF COLORADO

My Commission Expires 12/31/06

- 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<br><br>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

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").

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 competitor 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 CLECs 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 construct 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.*

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 IFR 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.*

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.

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 instructive 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.*

8. Inducing Competition

AT&T argued that allowing Qwest to enter the InterLATA market would stifle competition in the local market.[33] 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.[34] 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."[35]

9. Other Issues

The Staff properly declined to discuss a number of miscellaneous issues raised by the interveners, including the OSS test, DSL and advanced services, and change management, all

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33 *See* Iowa OCA Br. at 22; AT&T Comments at 16-17.

34 *See* Iowa OCA 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).

35 Staff's Report at 12.

## 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 PPAP 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.

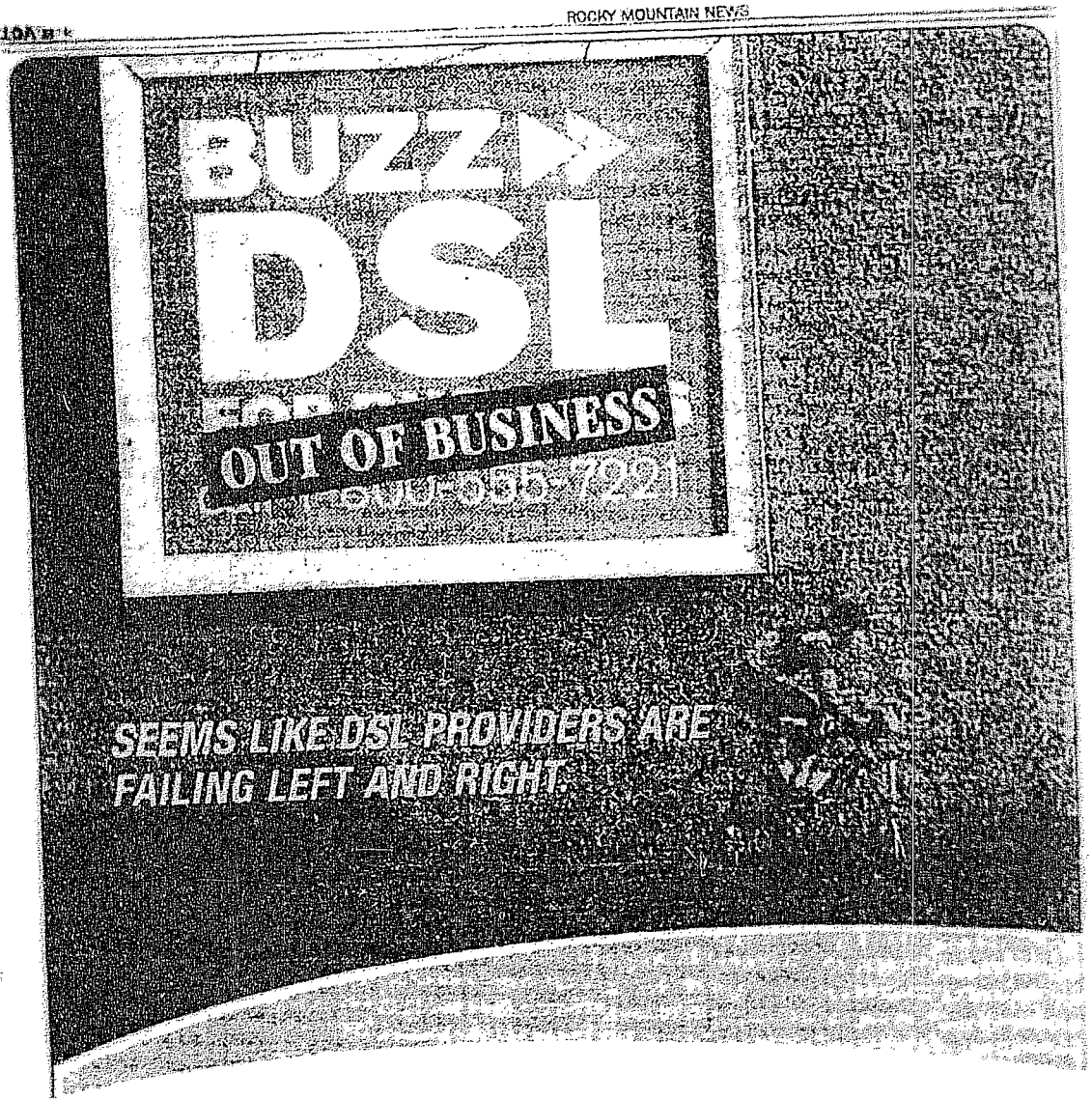
/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard,
Commission Secretary
GW28303

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Qwest.

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:** sales@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.

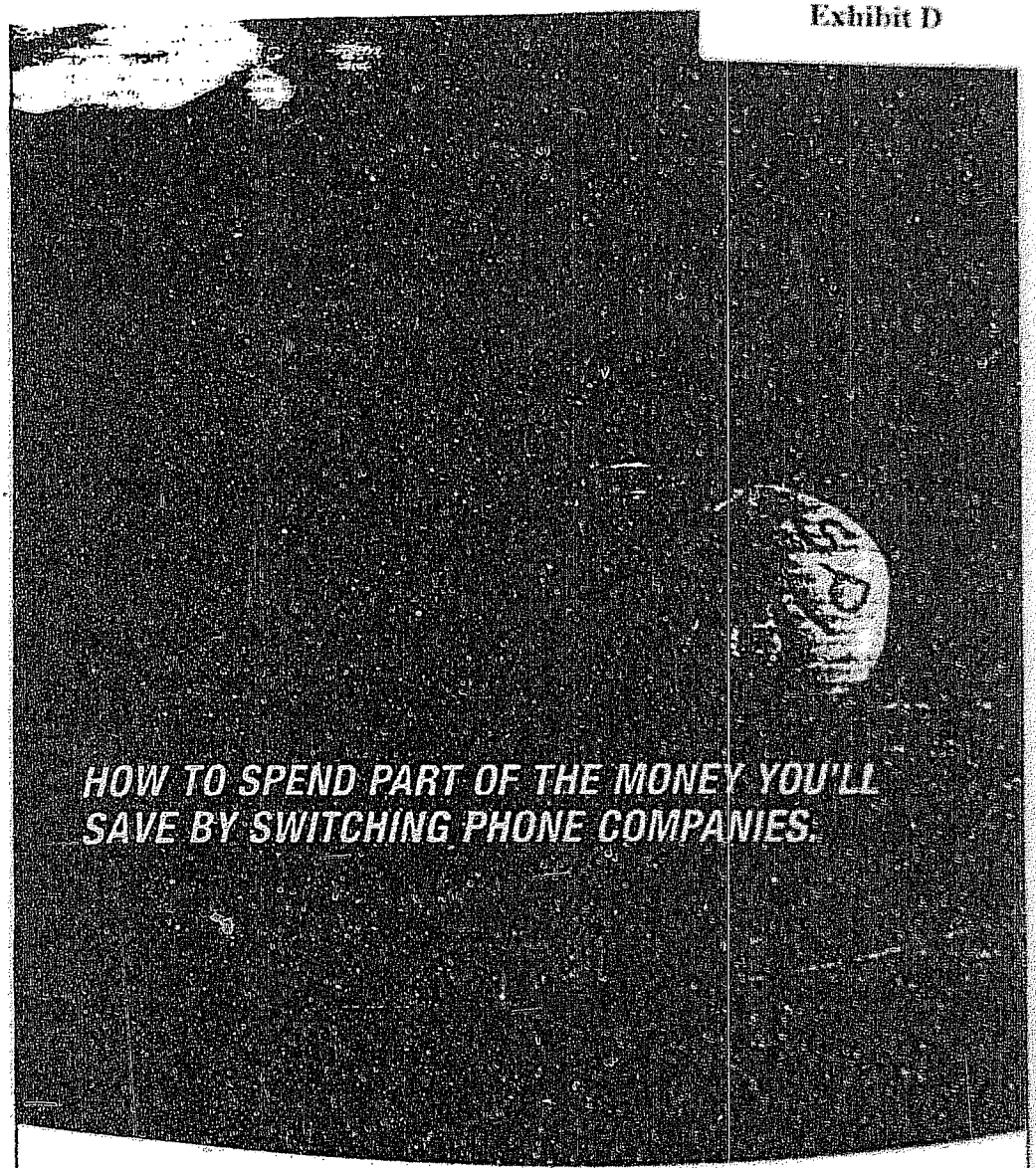
Qwest offers some of the most aggressive pricing in the DSL industry.* For example, we offer Qwest DSL Pro services for Business customers for as little as $50 per month. Our Qwest DSL Pro service offering includes a special 1-800 number for responsive technical support as well as service level assurances 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/mopricе.htm for current Qwest DSL subscriber pricing.

Thank you for your time.

Sincerely,
The Qwest DSL Marketing team



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Returned Qwest Customer

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> Importance: High
>
> That's been done. 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 no pre-Ch 11- negotiated agreement that Covad will pay bondholders
> $X.XX 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
> vendor customers' 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.
>
> Ed Bedard
> Senior Market Intelligence
> <<COVD Ch 11.doc>>
>
>
>

> 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

COM. IRVIN: I just wanted to throw in 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 those 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.

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

ARIZONA REPORTING SERVICE, INC.
Court Reporting
Suite Three
2627 North Third Street
Phoenix, Arizona 85004-1103

By: CAROLYN T. SULLIVAN, RPR
CCR No. 50528

CECELIA BROCKMAN, RPR
CCR No. 50154

Prepared for:

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, I'm 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 disputed 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 record, 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 opposing 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 those 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 Naechio 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

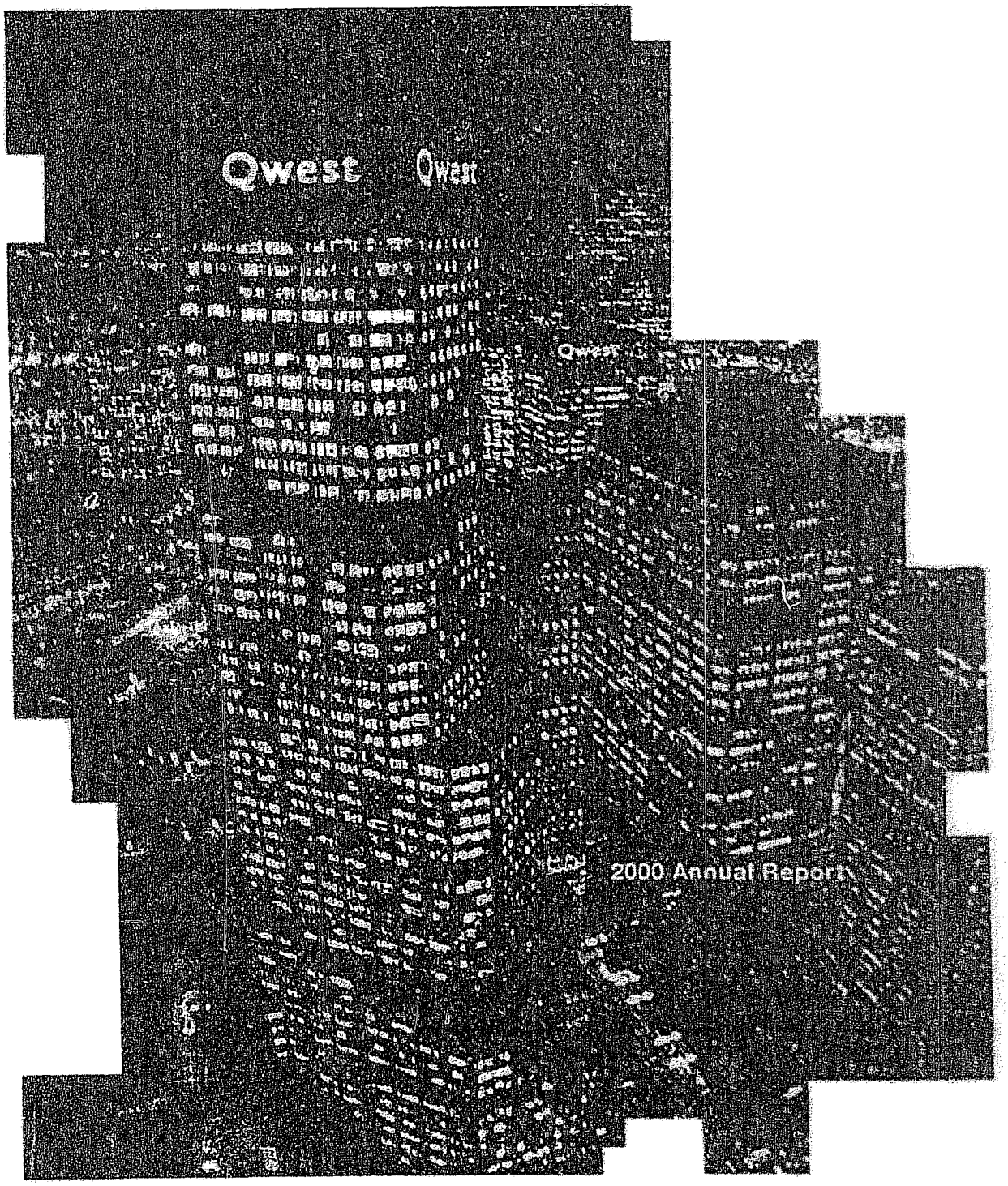
the position of Qwest, and that's been taken care of, and I believe we've apologized to Covad, letting them know.

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

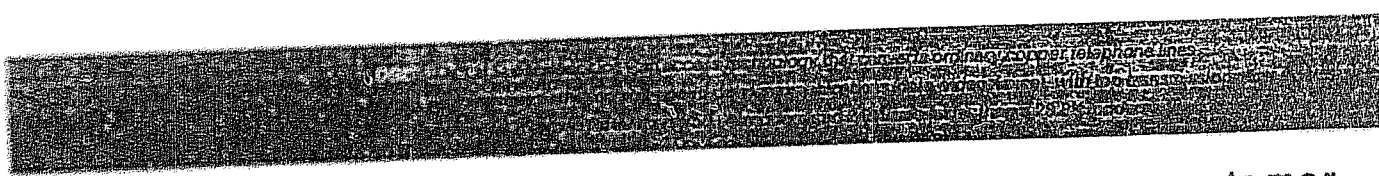
**Leslie Petrowski**
**Freelance Writer**

*"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 Petrowski'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 allow her when she's trying to get through while she's on another call). An Internet Service Provider. Broadband Internet access. And wireless.

She found all of these 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).



## *connecting with the right products and services for every customer >*

customers, Qwest exceeded its year 2000 goal for wireless customers; now call for double that number by the end of 2001. Qwest got off to a rocketing start in 2001 by adding New Mexico to its wireless service region. It 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 63 percent a year earlier), the best customer service results since 1995. And a new two-yea contract extension to 2003 that Qwest signed with union employees is

Exhibit H

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 325,000 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 Belgrade, 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 Maribel 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 750,000 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 Bells' 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 10 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.

# 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 services 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, BOCs engaged Professor Jerry A. Hausman of MIT and the Lexicon consulting firm to produce a study[1] 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 analysis techniques that were utilized by Hausman *et al* are fatally deficient, in that they rely upon undocumented and nonreproducible econometric

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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/Leonard/Sidak" or "HLS"), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=289851

# CONTINUATION

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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.

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 real price of long distance calling by nearly 80% 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 threatens these incentives, and portends a diminution of competition and a potentially serious loss — certainly not a gain — in consumer welfare.

**The recession of price decreases of residential long distance service are in sense the result of or caused by 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 60% 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 Part 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).

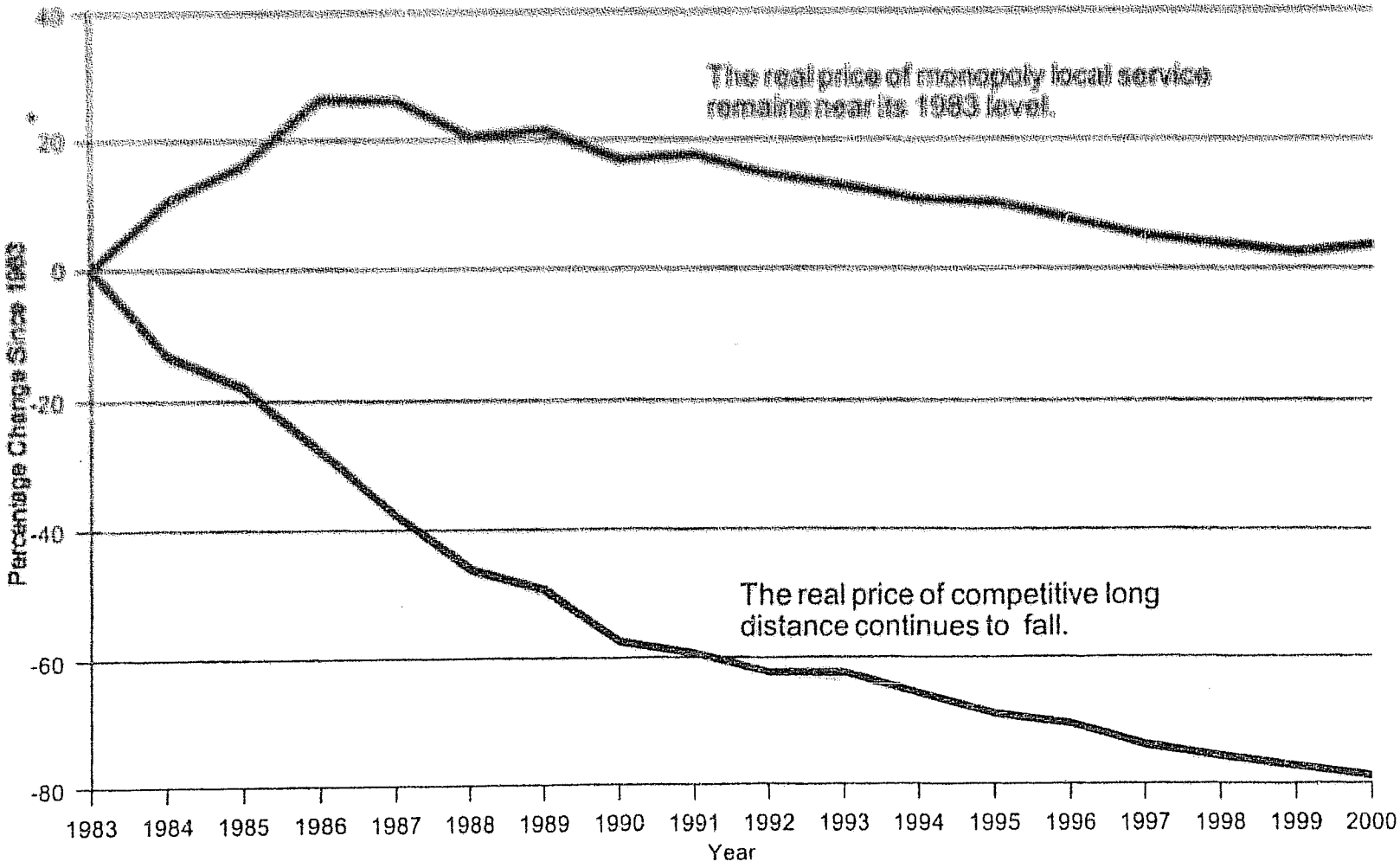


**Figure 1: Adjusted for inflation, long distance rates have fallen by nearly 80% since 1983, the last year before the Bell System break-up. By contrast, ILEC local rates have remained essentially unchanged over that same period.**

Source: FCC, *Trends in Telephone Service*, Table 14.5; FCC, *Statistics of Communication 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:

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3. Hausman/Leonard/Sidak, at 3.

4. *Id.*, at 13.

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...)

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 2000 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 mistakenly used the total 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:

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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 | | $10.10 | $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 | $0.15 | $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 | $11.56 |
| Total Savings | | | $2.08 | | | $1.38 |
| 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% | | | |

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."

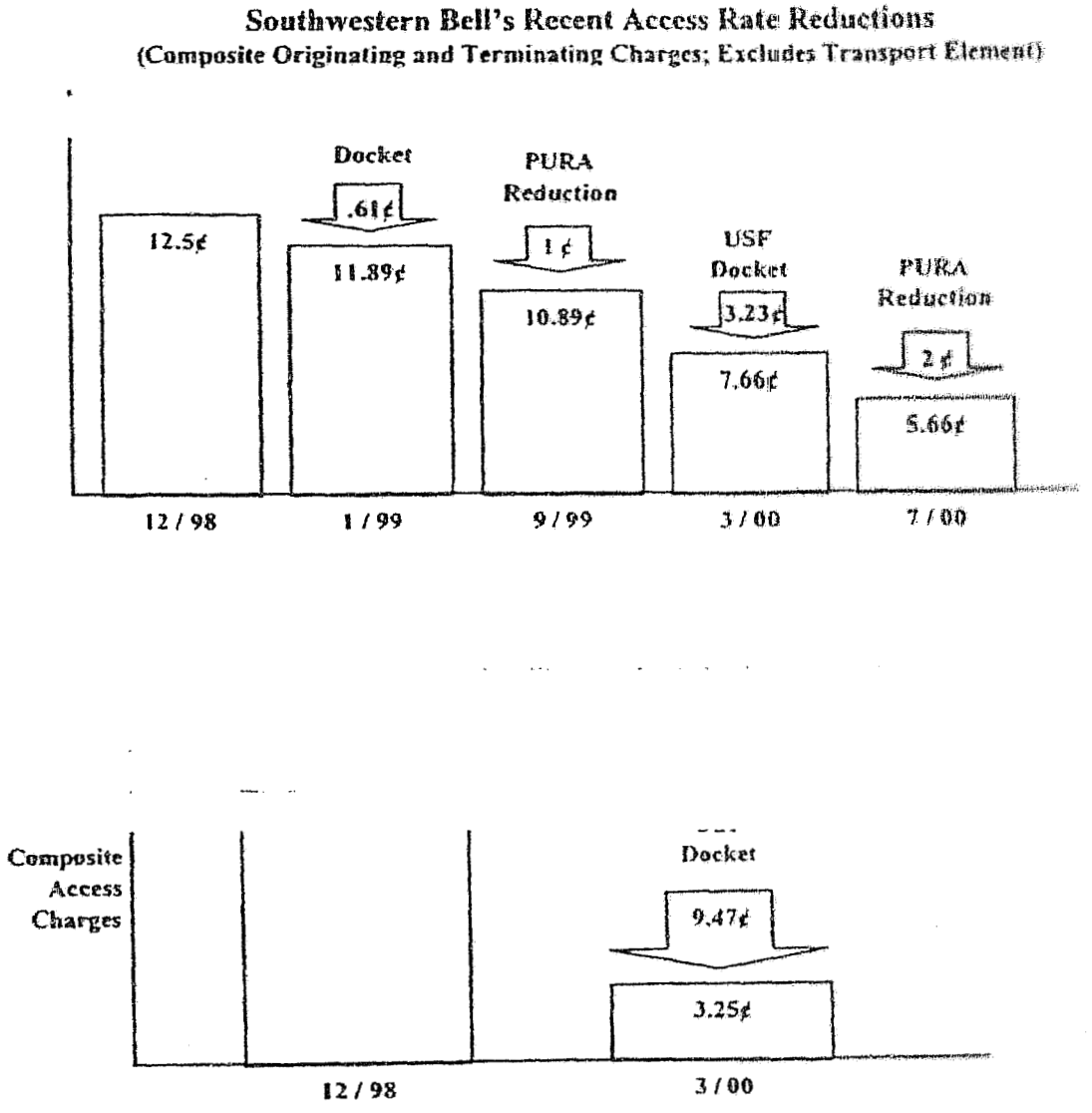


**Figure 2.** Recent reductions in Texas intrastate switched access charges. Source: Texas Public Utilities Commission, *Report on Switched Access Charges*, December 29, 2000, Chapter 1, "Recent Changes in Access Charges."



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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 13.7 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 12-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.

Indeed, whereas 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*

12. Hausman/Sidak, at 16.

13. 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 savings per Texas customer at $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 1999 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 $0.004.

*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 since 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, 1998, 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 market 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. Their 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, Wisconsin, Missouri 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

AT&T

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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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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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*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

*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."[7] 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.*

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[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.

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.

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]

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(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

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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 in-region states 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 service . . . not a combined package of local and long distance service," 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 relevance of broader Qwest involvement in light of its GAO protest submission, it is,

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(footnote continued from previous page)

Protest of Qwest Communications International, Inc., B-287495 Opposition to

(footnote continued on following page)

Radhika Karmarkar

* * *

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 audit of the 366 accounts to determine when they were acquired, whether and when the revenue associated with those accounts has been handed over to Bell Atlantic, 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 Matley
Anthony Dale

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(footnote continued from previous page)

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. Matley, Deputy Chief, Common Carrier Bureau, to Sharon Bobinsch, 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.

Exhibit F

Federal Communications Commission
Washington, D.C. 20554

June 1, 1999

Mr. Bruce E. Perry
Senior Vice President
Federal Relations and Regulatory Law
U S WEST, Inc.
1020 19th Street, N.W., Suite 700
Washington, D.C. 20036

Dear Mr. Perry:

We have been following with concern events subsequent to U S WEST's filing of its February 12, 1999 Petition before the Arizona Corporation Commission (ACC) in Arizona Docket No. RT-00000J-98-0095, and that Commission's Decision No. 61698 dated May 13, 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 telecommunications 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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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:

Exhibit L

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 S. Tribby, AT&T, 1875 Lawrence Street, 15th Floor, Denver, Colorado 80202 and W. Patrick Judge, Briggs & Morgan, P.A., 332 Minnesota Street, Suite W-2500, 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.

14.1 Cooperative Testing

14.1.1 Definition

Cooperative Testing means that USWC shall cooperate with AT&T upon request 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 connection 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.

14.1.1.1 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.

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.

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 combined 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]

[illegible]

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

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

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

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

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

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

[23] Tr. 723-725
[24] Tr. 734-743
[25] Tr. 723, 734, 777
[26] Ex. 30 at 2
[27] Tr. 666-668

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,

[32] Ex. 24.
[33] Tr. 296-98, 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. 2338
[38] Tr. 1014
[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.

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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]

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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 test other than the 1-2-3 test or the ROC test, to proceed. And he did not inform Pelto that it would be up to Qwest to decide whether AT&T had a legitimate purpose for the UNE-P test.[47]

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

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

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

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[45] Ex. 2008 at 12.
[46] Tr. 1236-38.
[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 than just a 271 test, Qwest would do the test. Tr. 1260-63. Davis and Qwest felt that they could refuse to test if the test was only for 271 purposes, so it is most likely that he would have told Pelto that.
[48] Tr. 37-38.
[49] Tr. 38-39.
[50] Id. at

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.

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

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

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

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

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

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[redacted]

[redacted] Halvorson also believes that a test is not a "friendly trial at all," if the results are used in an [redacted] manner. Tr. 39

[redacted]

[redacted] and Miller testified that Terry and Hydock said the test involved lines to employee homes. Tr. [redacted] 1061. Terry and Hydock testified they did not. Tr. 566, 1059. It is most likely that Terry and Hydock [redacted] such statements because they specifically and expressly said otherwise in their documents [redacted] knew at some that employee homes were not involved.

[redacted]

[redacted]

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. 1002-03
[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, 261-82.

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. 209, 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 <u>not</u> doing this.
>
> Viewed as a "copy" of the ROC test and not something designed to test their systems.
>
> Qwest is not going to allow them to enter residential markets.
>
> No large test bed . . .

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

[122] Tr. 32, 476.

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

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

JoAnn – Regulatory manager

- Chairman has told her that we need to move forward.

Copy Tim Bessey on meeting minutes

Invite Tim to meetings[125]

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

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

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

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

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

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

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[125] Ex. 2027 (emphasis in original).
[126] Ex. 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. 1291

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

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

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

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

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

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

113. Meanwhile, AT&T and Qwest attempted to negotiate a settlement. On May 8, 2001, the deposition of Edward Gibbs of AT&T was taken.[141] On Friday, May 11, Qwest filed a Motion to Vacate the Contested Case Hearing. A telephone conference hearing on the motion was held at 3:00 p.m. that day. Quest argued that the hearing was unnecessary because all issues had been resolved by a Memorandum of Understanding (MOU) and an Initial Testing Plan that had been negotiated between Qwest and AT&T. However, AT&T argued that the MOU had not been finalized and the Department argued that it had not approved the MOU. During the telephone conference, Qwest stated, for the first time, that it would proceed with the test as set out in the Initial Testing Plan, regardless of the results of any further proceedings in this matter. AT&T conceded that Qwest's agreement to proceed satisfied AT&T's testing request, albeit belatedly. The Department also agreed that the testing issues were resolved by the Qwest decision to proceed with the requested testing. During the conference, the Administrative Law Judge determined that the time constraints imposed by the need to determine whether the UNE-P testing should proceed no longer applied, and ordered that the hearing previously scheduled to start May 14, 2001, be continued and that a prehearing conference be held May 15, 2001, to consider various motions and to reschedule subsequent proceedings.[142]

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

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

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[139] Pre-Hearing Order, dated June 6, 2001, at 3.
[140] Transcript of May 1, 2001 Pre-Hearing Conference, at 94.
[141] Ex. 46.
[142] Pre-Hearing Order, ¶¶ 10-14.
[143] Pre-Hearing 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 Clarify to the Commission the issue of Enforceability of the Memorandum of Understanding, which the Administrative Law Judge had already determined was abandoned by the parties. The motion was denied by the Administrative Law Judge in the *Administrative Law Judge's Second Prehearing Order*, issued June 28, 2001.

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

**Post-Hearing Actions**

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

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

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

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

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

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

[illegible] states that he then decided to confirm his understanding of Dickinson's messages because the e-mail had not mentioned the decision not to upgrade 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]

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]

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

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[illegible]
[illegible] Qwest Outside Counsel letter dated August 30, 2001, attachment.
[illegible]
[illegible] Order, December 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 gross revenue and taxable [illegible] 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;

(4) 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

(5) 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 assert 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).

(a) the history of past violations, including the gravity of past violations, recency 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;

(b) the number of violations;

(c) the economic benefit gained by the person committing the violation;

(d) any corrective action taken or planned by the person committing the violation.

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.

15. 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).

16. 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).

17. 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.

5. Dismissing Qwest's Counterclaim against AT&T.

Issued February 22, 2013

STEVE M. MIHALCHICK
Administrative Law Judge

# EXHIBIT B

Exhibit B

[redacted]

ride the light

Qwest

March 13, 2002

Dr. Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

Re: In the Matter of the Complaint of the Minnesota Department of Commerce
Docket No. P-421/C-02-197

Dear Dr. Haar:

Enclosed for filing are the original and fifteen (15) copies of the agreements at issue in this docket (Department of Commerce Complaint Exhibits 1 through 11). Consistent with Qwest Corporation's indication at the March 5, 2002 hearing in the above-referenced docket, Qwest has re-designated these exhibits as Non-Trade Secret.

If you have any questions, or require additional information, please do not hesitate to contact me.

Very truly yours,

Jason D. Topp

RECEIVED
AT&T Corp. Legal - Denver

MAR 1 8 2002

OV-NIT _____ PRO SER _____
MESS _____ REG MAIL ✓
INTER-OF _____ FAX _____
OTHER _____ INITIALS _____

JDT/bardon

Enclosures

cc: Service List

ATI
Advanced Telecommunications, Inc.

March 2, 2000

Mr. Kevin Saville
US West, Inc.
200 South 5th Street
Room 395
Minneapolis, MN 55402

Re: Stipulation
Docket No. P3009, 3052, 5096, 421, 3017/PA-11-1192

Dear Mr. Saville:

Enclosed please find a copy of the fully executed Stipulation Between ATI and US We
which is confidential and trade secret.

Sincerely,

Dennis D. Ahlers
Senior Attorney

Enclosure

730 Second Avenue South • Suite 1200 • Minneapolis, MN 55402 • Phone (612) 376-4400 • Fax (612) 376-

Q110028

CONFIDENTIAL/TRADE SECRET

STIPULATION BETWEEN ATI AND US WEST

February 28, 2000

Trade Secret Data Begins

WHEREAS, US WEST, Inc., ("USWC") and Advanced Telecommunications, Inc., d/b/a Cady Communications, Inc., Cady Telemanagement, Inc., American Telephone Technology, Inc., Electro-Tel, Inc. and Intellecom, Inc. (collectively "ATI") have reached a settlement agreement that resolves numerous disputes between ATI and USWC (collectively "Parties"), including the proposed merger currently being considered by the Minnesota Public Utilities Commission ("MPUC") in MPUC Docket No. P-3009, 3552, 3556, 421, 3017/PA-99-1192; and

WHEREAS, the settlement agreement between the Parties includes both regulatory and non-regulatory components; and

WHEREAS, as a result of this settlement agreement, ATI has agreed to drop its opposition to the proposed merger, as modified by this agreement; and

WHEREAS, USWC and ATI have memorialized the regulatory components of our settlement agreement in a Stipulation and Agreement ("Agreement") to be filed February 28, 2000 with the MPUC; and

WHEREAS, the Parties wish to set forth the additional terms of their agreement in this separate document; and

WHEREAS, the Parties consider these additional provisions to be of critical importance in reaching an overall resolution of this matter; and

WHEREAS, ATI has made clear that without these additional provisions, it would have continued to oppose the proposed merger and may also have pursued other legal recourse;

NOW, THEREFORE IT IS AGREED THAT:

Confidentiality

1. The terms of this agreement are confidential, contain trade secret information and shall not be disclosed unless pursuant to a lawful Order compelling such disclosure. In such event that production is compelled, neither Party shall disclose the terms of this agreement without first notifying the other Party.

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2. In the accompanying Agreement filed with the MPUC on February 28, 2000, the Parties agreed to implement certain Direct Measures of Quality (DMOQs) under the Parties' Minnesota Interconnection agreement. The Parties agree that the implementation of these DMOQs shall become effective upon execution of this agreement. The DMOQ provisions in the Minnesota Interconnection Agreement include, among other things, Overall Performance Index measurements and credits. With respect to the Overall Performance Index credits for October and November, 1999, U S WEST agrees to credit ATI $89,290 by March 15, 2000.

3. In USWC states other than Minnesota in which ATI presently operates or in which ATI shall establish operations, the Parties agree to assess USWC wholesale service quality using the same three performance measurements identified in the accompanying Agreement. In these states, the measurements shall be called "Service Performance Measurements" (SPMs). The Service Performance Measurements shall be based upon the Overall Performance Index DMOQs implemented pursuant to the interconnection agreement in Minnesota except that the minimum standards will be mutually negotiated by the parties. These SPMs may from time to time be modified under this agreement unless the Parties agree otherwise. Further, since the Parties intend these SPMs to be used for measurement purposes only, the Parties agree that this agreement provides no basis for a claim against US WEST to issue credits or pay penalties associated with the SPMs.

4. As soon as reasonably practicable, the Parties shall negotiate mutually acceptable minimum standards for assessing USWC's performance under each SPM in each state other than Minnesota. USWC shall report its performance under these standards to ATI on a monthly basis. The Parties agree that the SPMs for other states shall apply to customer migration from resale to unbundled loops.

5. The Parties understand that the standard for each SPM may differ from state to state. If USWC's performance fails to meet or exceed the standard for any SPM in any state for a consecutive three month period, the signatories to this agreement, or their successor officers, shall meet to determine how to improve performance. The Parties further agree that the standards initially established are performance baselines. The Parties agree that the standards should be evaluated from time to time and that they will in good faith negotiate modifications as appropriate.

6. ATI does not waive its right to any performance or per occurrence measurements or credits that may be established for USWC in any state under state or federal law, rule, or regulation or as may be available to ATI from adopting a new or amending its existing Interconnection Agreements. US WEST likewise reserves it right to challenge any performance or per occurrence measurements or credits that may be

established for USWC in any state under state or federal law, rule, or regulation or as may be available to Cady from adopting a new or amending its existing Interconnection Agreements.

Reciprocal Compensation

7. Cady has asserted that USWC must pay reciprocal compensation for Internet related terminating traffic under its Interconnection Agreements and under applicable state and federal law. USWC has asserted that it has no legal obligation to pay reciprocal compensation for such traffic. Notwithstanding these differences and without waiving their positions, the parties agree for settlement purposes that reciprocal compensation for terminating Internet traffic shall be paid at the most favorable rates and terms contained in an agreement executed to date by USWC. The parties will develop a full implementation plan on these reciprocal compensation issues by March 31, 2000. Further, the parties agree that for purposes of applying these rates and terms and conditions they will work cooperatively to develop a means by which ISP traffic will be broken out in the least costly manner practicable.

Resale Agreement Issues

8. The Parties have had a long dispute over various wholesale discount and resale agreement issues. USWC continues to disagree with ATI's position on these issues. However, USWC agrees to pay ATI $380,000 to resolve outstanding disputes between the Parties relating to the wholesale discount and the definition of the circumstances in which the discount on twenty or more stations/lines at a single location as described in ATI's February 22, 2000 letter. This credit shall be made on or before March 15, 2000 and will resolve all past and future claims associated with: (1) the implementation of the Resale discount; and (2) the interpretation of a "location" for the application of a discount for Centron systems consisting of twenty or more stations/lines at a single location.

9. USWC also agrees to credit ATI with $15,800 through its normal business process to correct past errors in applying the appropriate discounts for flat rated trunking and to apply the flat rate trunking discount appropriately on a going forward basis. In addition, USWC has as of February 15, 2000, credited ATI for $175,918 relating to situations where both Parties agree that ATI has twenty or more lines at a location, but the discount had not yet been applied. ATI will verify that the credits have been appropriately made. USWC will make every effort to accurately apply the twenty or more line discount on a going forward basis and agrees to provide appropriate credits to ATI in the event of errors in this process.

10. With respect to termination liability assessments (TLA) and while the Minnesota Commission continues to have an open docket on this issue, USWC agrees to continue to suspend such assessments in Minnesota when a USWC customer converts to an ATI customer on a resale basis and to credit ATI with any such TLA payments ATI



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has made in Minnesota. USWC understands that the outstanding TLA charges that remain to be suspended is approximately $16,000. ATI understands that USWC will continue to levy TLAs in other states. ATI reserves its right to pursue all avenues available to protest such assessments in any forum. USWC reserves its right to seek to have TLAs reinstated in Minnesota, and to assess such TLAs going forward, if permitted under law. Both Parties reserve all rights, but agree to negotiate in good faith, with respect to any potential retroactive assessments, should TLAs be permitted under Minnesota law.

Dedicated Provisioning Team

11. USWC agrees to dedicate Aimee Creatt as a Coach and locate her at ATI's offices at 511 11th Avenue South in Minneapolis for a period of at least six months. If Ms. Creatt is not available for assignment, USWC will provide another Coach who is knowledgeable of and experienced in working with all the different groups and functions within USWC related to provisioning. ATI must approve the assignment of any Coach other than Ms. Creatt. USWC will also utilize a service delivery coordinator (SDC) to assist the Coach. The parties recognize that the Coach and the SDC will need to complete training before the requirements in this paragraph 11 and paragraph 12 can be fully implemented. All properly input orders that, for one reason or another, are not flowing through the accepted process would be the responsibility of the Coach or SDC. The Coach would have access to all USWC's systems and would work within the USWC organization and using USWC's processes to resolve issues as quickly as possible. The Coach would track the reasons for problem orders to aid in defining and refining current processes for both USWC and ATI. ATI will provide any facilities requested by USWC for the Coach. ATI has also indicated that it will work cooperatively with USWC to identify and pay the incremental and extraordinary costs associated with the dedicated provisioning team.

12. At the appropriate time, USWC agrees to dedicate a provisioning team to work with the Coach and handle all interaction with ATI on order processing. After spending two months on site with the ATI provisioning team, the Coach and/or the SDC should have the criteria and information available to make a decision as to how many U S West provisioners will be needed to oversee the ATI orders. The provisioning team will be physically located at the 511 11th Avenue South location. The parties agree to evaluate the dedicating provisioning team requirement in 12 months after the effective date of this agreement.

Migration of ATI customers from resale to facilities based service

13. In the accompanying agreement, USWC and ATI agreed to continue to work together to develop a specific and detailed migration plan. The Parties agree that the DMOQs under the Minnesota interconnection agreement and accompanying agreement will apply to customer migration from resale to UNEs. The Parties here also agree that the SPMs for other states will apply to migration of customers in those states.

Dispute Resolution

14. In the event of future disputes between the Parties, in addition to the dispute resolution mechanism provided under the Interconnection Agreement, the Parties agree to use the following alternative dispute resolution procedures as their preferred remedy; provided, however, that in the event the negotiations referenced below do not resolve the dispute within thirty (30) Business Days of the initial written request, unless the Parties mutually agree to a different time frame. Either Party may elect, before filing a claim or response in arbitration (as the case may be) to submit an otherwise arbitrable dispute to the Commission, the FCC, or a court of appropriate jurisdiction.

Negotiations. At the written request of a Party, each Party will appoint a knowledgeable, responsible representative to meet and negotiate in good faith to resolve any dispute arising between the Parties. The Parties intend that these negotiations be conducted by non-lawyer, business representatives. The location, format, frequency, duration, and conclusion of these discussions shall be left to the discretion of the representatives. Upon agreement, the representatives may utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations. Discussions and correspondence among the representatives for purposes of these negotiations shall be treated as confidential information developed for purposes of settlement, exempt from discovery, and shall not be admissible in the arbitration described below or in any lawsuit without the concurrence of all Parties. Documents identified in or provided with such communications, which are not prepared for purposes of the negotiations, are not so exempted and may, if otherwise discoverable, be discovered or otherwise admissible, be admitted in evidence, in the arbitration or lawsuit.

Arbitration. Unless either Party chooses to submit the dispute to the Commission, FCC or court of competent jurisdiction, if the negotiations do not resolve the dispute within the applicable time frame, the dispute, if allowed under applicable law, shall be submitted to binding arbitration by a single arbitrator pursuant to the Commercial Arbitration Rules of the American Arbitration Association, except that the Parties may select an arbitrator outside American Arbitration Association rules upon mutual agreement. A Party may demand such arbitration in accordance with the procedures set out in those rules. Discovery shall be controlled by the arbitrator and shall be permitted to the extent set out in this section. Each Party may submit in writing to a Party, and that Party shall so respond to, a maximum of any combination of thirty-five (35) (none of which may have subparts) of the following: interrogatories, demands to produce documents, or requests for admission. Each Party is also entitled to take the oral deposition of one individual of another Party. Additional discovery may be permitted upon mutual agreement of the Parties. The arbitration hearing shall be commenced within thirty (30) Business Days of the demand for arbitration. The arbitrator shall control the scheduling so as to process the matter expeditiously.



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The Parties may submit written briefs. The arbitrator shall rule on the dispute by issuing a written opinion within thirty (30) Business Days after close of hearings. The times specified in this section may be extended upon mutual agreement of the Parties or by the arbitrator upon a showing of good cause. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

Expedited Arbitration Procedures. If the issue to be resolved through the negotiations referenced above directly and materially affects service to either Party's end user customers, including, without limitation, any dispute that relates to the timeliness of USWC's processing or provisioning of a request or order for collocation, then the period of resolution of the dispute through negotiations before the dispute is to be submitted to binding arbitration or other legal recourse shall be seven (7) Business Days. Once such a service affecting dispute is submitted to arbitration, the arbitration shall be conducted pursuant to the expedited procedures rules of the Commercial Arbitration Rules of the American Arbitration Association (i.e., Rules 53 through 57).

Costs. Each Party shall bear its own costs of these procedures, including the costs of responding to reasonable discovery. If the arbitrator finds that a Party's discovery requests require the responding Party to undertake unreasonable or unnecessarily burdensome efforts or expense, the Party seeking discovery shall reimburse the responding Party the costs of production of documents in response to such requests (including search time and reproduction costs). The Parties shall equally split the fees of the arbitration and the arbitrator.

Severability

15. The Parties agree that in the event that any provision of this agreement is found to be unlawful or otherwise prohibited by a regulatory agency or court of competent jurisdiction, the remaining provisions of this agreement shall remain in full force and effect.

Execution and Effective Date

16. This Stipulation resolves numerous issues between Cady and USWC, including all issues among the parties in MPUC Docket Number P-3009, 3052, 3096, 421, 3017/PA-99-1192, related to approval and consummation of the merger. The Parties agree to expressly represent to the Minnesota Public Utilities Commission that they recommend acceptance of the accompanying Stipulation and Agreement without reservation, and agree not to engage in any advocacy to the contrary or in support of any additional conditions in the USWC/Qwest merger proceeding.

17. It is expressly agreed by and between the Parties that nothing contained in this Stipulation, shall be deemed an admission or declaration against the interests of any of the Parties, or shall in any way prejudice the rights or positions of any of the Parties in

any other administrative or judicial proceeding of any sort. The Parties also agree that any documents, materials, or statements made in furtherance of this agreement, shall not be admissible as evidence in any regulatory or judicial proceeding, and will not be discussed or described in any way with any person or persons not currently employed by the parties, except to enforce this agreement.

18. This Stipulation applies to each of the parties and shall be binding on the successors and assigns of the parties.

19. The provisions of this Stipulation shall take effect upon execution and will terminate on March 17, 2002.

20. This Stipulation may be executed in identical counterparts with the same effect as if a single copy were executed.

Trade Secret Data Ends]

US WEST COMMUNICATIONS, INC.

Dated: February __, 2000

By: _____
Title: _____

ADVANCED TELECOMMUNICATIONS, INC.

Dated: February 23, 2000

By: _____
Title: Chief Operating Officer/Chief Financial Officer

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EXHIBIT

# TRIAL AGREEMENT

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This Trial Agreement (the "Agreement") is entered into by and between QWEST Corporation (formerly U S WEST Communications, Inc.) ("QWEST") and Eschelon Telecom, Inc. (formerly Advanced Telecommunications, Inc. dba Cady Communications, Inc., Cady Telemanagement, Inc., American Telephone Technology, Inc., Electro-Tel, Inc. and Intellecom, Inc.) (collectively "Eschelon"). On a Trial basis, QWEST and Eschelon (collectively the "Parties") have agreed to locate a dedicated provisioning team at Eschelon's facility at 5117 11TH Avenue South, Suite 340, Minneapolis, MN 55415 (the "Facility"), and Eschelon has agreed to pay the incremental and extraordinary costs associated with the dedicated provisioning team.

Eschelon agrees to be a Trial Participant for the QWEST Market Trial ("Trial") of the Products and Services that are set forth on Attachment 1 (collectively, the "Services"), which is incorporated herein by this reference. Section 3 of Attachment 1 provides an overview of the Trial and describes goals of the Trial.

Eschelon understands and acknowledges that the Agreement is a Trial, and that this Trial does not commit either Party to provide a dedicated provisioning team outside the context of the Trial or to continue providing a dedicated provisioning team after conclusion of the Trial. Eschelon also understands and acknowledges that, other than this Agreement, there is no legal, regulatory, or contractual requirement that QWEST locate a dedicated provisioning team at a competitive local exchange provider's facility. This Trial will be conducted under the following Terms and Conditions, including Attachment 1.

1. **ABOUT THE SERVICE.** The respective responsibilities of QWEST and Eschelon are described in Attachment 1.

2. **TERM.** The Parties have agreed that this Agreement is effective as of May 1, 2000 and will expire one (1) year from this date.

3. **PAYMENT AND CHARGES.**

   3.1 Eschelon shall pay QWEST the sum of $9,206 each month for the term of the Agreement. Such charges do not include applicable taxes imposed by law.

   3.2 Eschelon shall pay each bill thirty days after receipt of the invoice. Late payments are subject to a charge of one and one-half percent (1-1/2%) per month, or the maximum allowed by law, whichever is less.

4. **TERMINATION.** Either Party may terminate this Agreement for cause provided written notice specifying the cause for termination and requesting correction within thirty (30) days is given the other Party and such cause is not corrected within such thirty (30) day period. Cause is any material breach of the terms of this Agreement.

5. **LIMITATION OF LIABILITY.** QWEST SHALL NOT BE LIABLE TO ESCHELON FOR ANY INCIDENTAL, INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES OR ANY KIND INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS, LOSS OF PROFIT, OR LOSS OF INFORMATION OR DATA. IN NO EVENT SHALL

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QWEST LIABILITY TO ESCHELON FOR ANY DAMAGES RELATED TO SERVICE EXCEED AN AMOUNT EQUAL TO THE TOTAL AMOUNT THAT WOULD HAVE BEEN CHARGED TO ESCHELON FOR SERVICE NOT PERFORMED OR IMPROPERLY PERFORMED. REMEDIES OF ESCHELON UNDER THIS AGREEMENT ARE EXCLUSIVE AND LIMITED TO THOSE EXPRESSLY DESCRIBED IN THIS AGREEMENT.

5. PERSONAL INJURY; PROPERTY DAMAGE. Each Party shall be responsible for any actual physical damages it directly causes in the course of its performance under this Agreement, limited to damages resulting from personal injuries, death, or property damage arising from negligent acts or omissions; PROVIDED HOWEVER, THAT, EXCEPT AS PROVIDED IN SECTION 4.2.1.4 OF ATTACHMENT 1, NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR SPECIAL DAMAGES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS, LOSS OF PROFIT, OR LOSS OF INFORMATION OR DATA.

7. DISCLAIMER OF WARRANTIES; LIMITED REMEDY. QWEST MAKES NO WARRANTY OF ANY KIND, WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. In the event of an error, delay, defect, breakdown, or failure in Service or QWEST platform, QWEST's sole obligation shall be limited to the use of reasonable diligence under the circumstances to restore Service. Eschelon's sole and exclusive remedy in the event of an error, delay, defect, breakdown or failure in Service shall be limited to a daily prorated credit of any monthly service fee Eschelon paid for Service during the period of said event. No credit shall be available for difficulties such as Eschelon equipment failure, slow dial tone, busy circuits, any local telephone company or long distance company network failures or other causes beyond QWEST's reasonable control. Nothing in this section in any way affects or limits the rights Eschelon has under other agreements with QWEST or in consequence of any statute, regulation, or rule to service quality and performance guarantees, credits, penalties, or compensation of any kind.

8. UNCONTROLLABLE CIRCUMSTANCES. Neither Party shall be deemed in violation of this Agreement if it is prevented from performing any of the obligations under this Agreement by reason of severe weather and storms; earthquakes or other natural occurrences; strikes or other labor unrest; power failures; nuclear or other civil or military emergencies; acts of legislative, judicial, executive or administrative authorities; or any other circumstances which are not within its reasonable control.

9. CONFIDENTIALITY, PRESS RELEASES. The terms of this Agreement are confidential, contain trade secret information and shall not be disclosed unless pursuant to a lawful Order compelling such disclosure. In such event that production is compelled, neither Party shall disclose the terms of this Agreement without first notifying the other Party. Neither Party shall use the other's name in any press releases, sales promotions, or other publicity matters relating to the Trial or the Services without written approval from the other Party. Nothing in this section in any way affects or limits rights and obligations of the Parties relating to confidentiality and nondisclosure under other agreements with one another.

10. **DISPUTE RESOLUTION.** If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents should arise, and the Parties do not resolve it in the ordinary course of their dealings (the "Dispute"), then it shall be resolved in accordance with the then-current rules of the American Arbitration Association ("AAA"). A single arbitrator engaged in the practice of law and knowledgeable about the subject matter of the dispute shall conduct the arbitration. The Federal Arbitration Act, 9 U.S.C. Sections 1-16, not state law, shall govern the arbitrability of the Dispute. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees, and shall share equally in the fees and expenses of the arbitrator. The arbitration proceedings shall occur in the Minneapolis, Minnesota metropolitan area or in another mutually agreeable location. It is acknowledged that the Parties, by mutual, written agreement, may change any of these arbitration practices for a particular, some, or all Dispute(s).

11. **LAWFULNESS.** This Agreement and the Parties' actions under this Agreement shall comply with all applicable federal, state, and local laws, rules, regulations, court orders, and governmental agency orders. Any provision not in compliance is void. This Agreement shall be governed by the laws of the state where Service is purchased.

12. **SEVERABILITY.** In the event that a court, governmental agency, or regulatory agency with proper jurisdiction determines that this Agreement or a provision of this Agreement is unlawful, this Agreement, or that provision of the Agreement to the extent it is unlawful, shall terminate. If a provision of this Agreement is terminated but the Parties can legally, commercially and practicably continue without the terminated provision, the remainder of this Agreement shall continue in effect.

13. **HUMAN RELATIONS.**

13.1 Eschelon will not attempt to manage, supervise, or otherwise direct the performance of QWEST employees, including the Coach and the Service Delivery Coordinator ("SDC").

13.2 Eschelon agrees that during the term of the Agreement and for a period of 12 months thereafter, without the prior written consent of QWEST, Eschelon will not actively solicit for employment any employee of QWEST, including the Coach and SDC, working in its Facility.

13.3 Eschelon agrees that it will abide by and support in every respect the QWEST Code of Conduct, related policies and procedures, and applicable state and federal laws, as the same relate to the working conditions of the Coach and the SDC working in its Facility. Eschelon's agreement to so abide specifically includes but is not limited to the QWEST Non-Discrimination, Workplace Violence, Sexual Harassment, and Safety and Hygiene policies, abbreviated copies of which are attached as Attachment 2.

14. **RESPONSIBILITY FOR ENVIRONMENTAL CONTAMINATION.** Neither Party shall be liable to the other for any costs whatsoever resulting from the presence or release of any

environmental hazard that either Party did not introduce to the affected work location. Both Parties shall defend and hold harmless the other, its officers, directors and employees from and against any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including reasonable attorneys' fees) that arise out of or result from (i) any environmental hazard that the indemnifying Party, its contractors or agents introduce to the work locations or (ii) the presence or release of any environmental hazard for which the indemnifying Party is responsible under applicable law.

## 15. GENERAL.

15.1 Eschelon shall not assign or transfer any interest in this Agreement without the prior written consent of QWEST, which consent shall not be unreasonably denied or delayed. QWEST may assign or transfer this Agreement to any parent, subsidiary, successor or affiliated company without the prior written consent of Eschelon.

15.2 This Agreement constitutes the entire understanding between Eschelon and QWEST with respect to the Service provided herein and supersedes any prior Agreement or understanding(s).

15.3 If either Attachment conflicts with any terms or conditions stated in the body of this Agreement, this Agreement shall govern the Parties' relationship with respect to such conflict. If the terms and conditions of this Agreement conflict with any other document, the terms and conditions stated in this Agreement shall govern the Parties' relationship with respect to such conflict.

15.4 This Agreement benefits Eschelon and QWEST. There are no third Party beneficiaries.

15.5 Failure or delay by either Party to exercise any right, power, or privilege hereunder, will not operate as a waiver hereto.

15.6 If a Party returns this Agreement by facsimile machine, the signing Party intends the copy of this authorized signature printed by the receiving facsimile machine to be its original signature.

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16. EXECUTION. The Parties have read, understand and agree to all of the above terms and conditions of this Agreement and hereby execute and authorize this Agreement as of the latest date shown below.

Trade Secret Data Ends]

| | |
|---|---|
| **Eschelon Telecom, Inc. (formerly Advanced Telecommunications, Inc. dba Cady Communications, Inc., Cady Telemanagement, Inc., American Telephone Technology, Inc., Electro-Tel, Inc. and Intellecom, Inc.)** | QWEST Corporation (formerly U S WEST Communications, Inc.) |
| Authorized Signature | Authorized Signature |
| J. Jeffery Oxley<br>Name Typed or Printed | Jasmin T. Espy<br>Name Typed or Printed |
| Executive Director - Law and Policy<br>Title | Vice President - Marketing<br>Title |
| 7/14/00<br>Date | 7-21-00<br>Date |
| 730 Second Avenue South, Suite 1200<br>Minneapolis, MN 55402<br>Address for Notices | Elizabeth J. Stamp<br>1801 California Street, Suite 2410<br>Denver, CO 80202<br>Address for Notices |

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4.2.1.5 Eschelon agrees to hold in strict confidence all Confidential Information received from QWEST as a result of this Agreement and to use such information solely for the purposes of this Agreement. Eschelon agrees to treat such Confidential Information as confidential unless otherwise agreed to in writing by both parties. In handling the Confidential Information, Eschelon agrees: (a) not to copy any such Confidential Information; (b) not to make disclosure of any such Confidential Information to anyone; and (c) to appropriately notify its employees and subcontractors not to make disclosure of any such Confidential Information to anyone. The obligations set forth herein shall be satisfied by Eschelon through the exercise of at least the same degree of care used to restrict disclosure of its own information of like importance. Upon termination of this Agreement for any reason or upon request by QWEST, Eschelon shall return to QWEST all Confidential information received from QWEST as a result of this Agreement or certify that it has destroyed all Confidential Information received from QWEST as a result of this Agreement.

4.2.2 QWEST shall perform the following activities:

4.2.2.1 QWEST Coach shall participate on conference calls between Eschelon and QWEST as appropriate.

4.2.2.2 The QWEST Coach and SDC shall investigate on a daily basis:

- Reject and other issues arising from Eschelon provisioning activities
- Orders that have not been issued/typed by QWEST
- Confirm information for Firm Order Commitments
- Outstanding issues such as CRM, customer notifications and other issues with QWEST representatives

4.2.2.3 The QWEST Coach and SDC shall collect data for Eschelon's pending orders.

4.2.2.4 The QWEST Coach and SDC shall use the data to conduct root cause analysis and identify trends for issues, including:

- Order Provisioning issues (orders, interaction with center processes, policies)
- Request Rejects
- Line Validation (PIC issues, conversions, features)
- Billing Inquiries (including verifying Eschelon CSRs)
- Escalations/expedites
- Chronic Repair and Service issues (as they relate to order provision functions)

4.1.1.4 Eschelon will provide badges for the Coach and the SDC. These badges will provide access to the two main doors at the Facility from 6:30 am to 6:30 pm.

4.1.1.5 Eschelon will provide parking at the Facility free of charge.

4.1.2 QWEST shall provide the following equipment so it can provide the services identified in this Agreement.

4.1.2.1 QWEST will provide 2 computers and 2 printers solely for the use of the Coach and SDC.

4.1.2.2 QWEST will install the computers in the secured office provided by Eschelon and connect the computers via dial-up access to appropriate QWEST systems.

4.2 Duties and Services

4.2.1 Eschelon shall perform the following activities:

4.2.1.1 Eschelon will perform normal order provisioning activities (i.e., order issuance, order updates, and error resolution).

4.2.1.2 Eschelon will escalate and seek the expedition of orders/repairs as it considers appropriate.

4.2.1.3 Eschelon and QWEST will consider the adequacy of assigned human resources every ninety (90) days.

4.2.1.4 Eschelon recognizes that QWEST has an obligation to protect the confidentiality of the data in its computer systems. Eschelon agrees that it shall not, under any circumstances, attempt to access the computers provided by QWEST that allow access to QWEST's computer systems. Inappropriate or unauthorized access by Eschelon to QWEST's computer systems through the computers provided by QWEST is grounds for the immediate termination of this Agreement with cause. Eschelon further agrees to release, indemnify, defend and hold harmless QWEST 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, costs and attorneys' fees, whether suffered, made, instituted, or asserted by any other Party or person, for invasion of privacy, personal injury to or death of any person or persons, or for loss, damage to, or destruction of property, whether or not owned by others, resulting from the breach of this section by Eschelon or any its officers, directors, employees, agents, or subcontractors.

Retaliation against an employee who complains about or reports discrimination or who participates in an investigation concerning alleged discrimination is prohibited.

Not only must managers and supervisors conduct themselves in a manner consistent with this policy, they are also responsible for establishing and maintaining a work environment free of sexual harassment and unlawful discrimination. Managers and supervisors must identify potential incidents of discrimination immediately and report them to the EEO Hotline (1-800-336-4536) or Human Resources.

The interpretation and examples in this policy are illustrative and not intended to be all-inclusive.

## Workplace Violence

Employees shall not use violence or threats of violence at work.

QWEST prohibits violence or threats of violence at work. This prohibition includes threatening language, both verbal and written, threatening gestures or behavior, and/or actual physical fighting by any employee. Firearms and/or weapons of any kind are prohibited on Company property, in the work place, in Company vehicles or in an employee's possession while on Company property or on Company business. It is the responsibility of each employee to be aware of, and to adhere to, this policy and report any violations to the appropriate management representative.

Management is responsible to take appropriate action whenever threats of violence or physical violence are observed by or reported to management.

## Safety & Industrial Hygiene

QWEST recognizes the importance of providing employees with a safe and healthful workplace free of recognized hazards. To accomplish this, QWEST aims to conduct its operations in a manner that reasonably minimizes the risk of occupational injury and illness, reasonably minimizes property damage, and complies with applicable laws and regulations. In addition, QWEST adopts detailed compliance plans for managing safety risks as necessary.

Employees must understand and adhere to all applicable occupational safety and health requirements, and promptly report unsafe acts, hazardous conditions, or suspected violations of the law.

The rules for QWEST operations and state and federal occupational safety and health laws are complex, and your Environmental Health and Safety (EHS) group has developed detailed compliance plans for various tasks and operations. These plans help managers and employees understand what their occupational safety and health responsibilities are.

Employees must be aware of occupational safety and health requirements, and be alert and responsive to potential violations and hazards. Each QWEST employee must understand and follow those detailed compliance plans that apply to their work and should seek training and

- FOC timeliness
- Order timeliness/completion

4.2.2.5 The QWEST Coach and SDC shall use the data, root cause analysis and identified trends to:

- Recommend training (as appropriate) to QWEST and/or Eschelon
- Propose process/policy change (as appropriate) to QWEST and/or Eschelon
- Present quarterly reviews of the on-site team's status, successes, and failures to senior management of both Eschelon and QWEST
- Recommend action plans to senior management of both Eschelon and QWEST
- Implement action plans approved by senior management of both Eschelon and QWEST
- Provide feedback (as appropriate) to QWEST and/or Eschelon

4.2.2.5 The QWEST Coach and SDC will act as a liaison with QWEST on other service and order provisioning issues that are not resolved through normal operations and provisioning processes.

4.2.2.6 The QWEST Coach and SDC will provide ongoing support to Eschelon in understanding QWEST's normal operating and provisioning processes.

4.2.2.7 On-Site Reporting:

- For the term of this Agreement, the QWEST Coach and SDC will report and be located at the Facility with occasional return to QWEST for meetings/ongoing training.
- The QWEST Coach or SDC will generally be available on-site during regular business hours.
- The QWEST Coach will provide a schedule to Eschelon to ensure that Eschelon is aware of the Coach's and SDC's planned availability.

4.2.2.8 QWEST and Eschelon will consider the adequacy of assigned human resources within sixty (60) days after this Agreement is signed.

4.2.2.9 QWEST agrees to hold in strict confidence all Confidential Information received from Eschelon as a result of this Agreement and to use such information solely for the purposes of this Agreement. QWEST agrees to treat such Confidential Information as confidential unless otherwise agreed to in writing by both parties. In handling the Confidential Information, QWEST agrees: (a) not to copy any such Confidential Information; (b) not

ATTACHMENT 2
TO
TRIAL AGREEMENT

## Non-Discrimination

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It is the policy of QWEST to provide equal employment opportunity for employees and applicants in connection with employment decisions. Unlawful discrimination against an individual based on race, gender, age, sexual orientation, religion, national origin, disabilities, or "covered veteran" status, or any other form of unlawful discrimination or harassment, is contrary to QWEST policy and strictly prohibited. Each QWEST employee is responsible for promoting a workplace free of unlawful discrimination. Because laws protecting an individual's right to non-discrimination based on sexual orientation only exist on a state or local basis, the Non-Discrimination Policy of the Company with respect to sexual orientation extends to all employees, regardless of whether or not a state or local law applies.

QWEST is committed to a policy of affirmative action to employ and to advance in employment minorities, women, qualified individuals with disabilities, special disabled veterans and veterans of the Vietnam War.

Generally, non-discrimination means making employment decisions without regard to a person's race, gender, age, sexual orientation, religion, national origin, disabilities, or "covered veteran status".

Examples of employment decisions include, but are not limited to: evaluating employees' performance; making recommendations on hires, transfers, and promotions; recommending discipline, corrective action and termination.

In some instances, a disability or a required religious practice may need to be taken into account when the individual is otherwise qualified. An individual may be disabled under Federal or state law if he or she has an ongoing physical or mental condition or impairment that substantially limits his or her life activities. A disability may, but does not necessarily, include ongoing conditions such as epilepsy, diabetes, HIV/AIDS, cancer, etc. The legal duty of nondiscrimination may include a duty to make a reasonable accommodation.

Harassment on the basis of race, gender, age, sexual orientation, religion, national origin, disabilities, or "covered veteran" status will not be tolerated and can be illegal. Epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to a basis described above can constitute harassment.

Written or graphic material placed on walls, bulletin boards or elsewhere in the employer's premises, or circulated in the workplace that denigrates or shows hostility toward an individual or group on the basis described above can also constitute harassment.

If you have a violation to report, or if you feel that you have been discriminated against, you should contact your supervisor or manager, the EEO Hotline (1-800-336-4636), or the Human Resources Department.

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CONTAINS TRADE SECRET DATA

help where necessary. Employee compliance and reports of hazards are vital to making QWEST an even safer place to work.

Employees must immediately obtain the approval of their EHS group prior to allowing any governmental agency, including the Occupational Safety and Health Administration (OSHA), access to Company facilities. If served with a subpoena or search warrant or if a serious accident occurs involving multiple injuries or a fatality, your EHS group and the EHS lawyer in the QWEST Law Department must be contacted immediately. In either case, call UniCALL, 800-654-2525.

## Sexual Harassment

Sexual Harassment, a form of sex discrimination, is illegal, contrary to QWEST policy, and strictly prohibited. Each QWEST employee is responsible for promoting a workplace free of unlawful sexual harassment.

Unlawful Sexual Harassment: The federal government has defined sexual harassment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of employment;
- Submission or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment may include a range of subtle and not-so-subtle behaviors. Examples of sexual harassment are: unsolicited verbal sexual comments or jokes; subtle pressure for sexual activity; repeated unwelcome flirtations, advances or propositions; graphic remarks about a person's body or sexual activities; or patting, pinching or unnecessary touching.

Sexually oriented gestures, noises, remarks or rumors about a person's sexuality or sexual experience directed at or made in the presence of any employee can be sexual harassment. Engaging in such behavior is unacceptable, whether at the workplace or at any work-related setting outside the workplace, such as a business trip or business-related social event.

Displaying pictures, reading or viewing posters, calendars, graffiti, objects, promotional materials, reading materials, or other materials that are sexually suggestive, sexually demeaning, or pornographic, can also be a form of sexual harassment, and, in any event, is prohibited.

Managers and supervisors have special responsibilities with respect to this sexual harassment policy. Not only must managers and supervisors conduct themselves in a manner consistent with this policy, they are also responsible for establishing and maintaining a workplace free of unlawful sexual harassment. They must identify suspected incidents of sexual harassment

immediately to their assigned Human Resources Representative and/or the EEO Hotline (1-800-336-4636).

QWEST will not tolerate behavior in violation of this sexual harassment policy of, or by, non-employees, such as customers, dealers/contractors, visitors, or others.

Concerns will be reviewed and investigated as appropriate. Even conduct that does not rise to the level of unlawful sexual harassment may nonetheless constitute poor business judgment and be grounds for discipline.

If you believe that you have been subjected to sexual harassment, promptly contact either your supervisor, the Human Resources Department, or call the EEO Hotline (800/336-4636).

Trade Secret Data Ends]

Qwest
1801 California Street
Suite 5200
Denver, CO 80202
Telephone: 303-992-2787
Facsimile: 303-992-2788

Greg Casey
Executive Vice President
Wholesale Markets

November 15, 2000

CONFIDENTIAL AGREEMENT

VIA ELECTRONIC MAIL AND FACSIMILE

Richard A. Smith
President and Chief Operating Officer
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, Minnesota 55402

Re: Escalation procedures and business solutions

Dear Rick:

**[Trade Secret Data Begins**

As a result of ongoing discussions between Eschelon and Qwest in recent days, the parties have addressed numerous proposals intended to better the parties' business relationship. In principle, the parties have agreed to: (1) develop an implementation plan by which to mutually improve the companies' business relations and to develop a multi-state interconnection agreement; (2) arrange quarterly meetings between executives of each company to address unresolved and/or anticipated business issues; and (3) establish and follow escalation procedures designed to facilitate and expedite business-to-business dispute solutions.

1. IMPLEMENTATION PLAN

By no later than December 31, 2000, the parties agree to meet together (via telephone, live conference or otherwise), and as necessary thereafter, to develop an Implementation Plan. The purpose of the Implementation Plan ("Plan") will be to establish processes and procedures to mutually improve the companies' business relations and to develop a multi-state interconnection agreement. Both parties agree to participate in good faith and dedicate the necessary time and resources to the development of the Implementation Plan, and to finalize an Implementation Plan by no later than April 30, 2001. Any necessary escalation and arbitration of issues arising during development of the Plan must also be completed by April 30, 2001.

During development of the Plan, and thereafter, if an agreed upon Plan is in place by April 30, 2001, Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreements. Both before and after April 30, 2001, Eschelon reserves the right, after notice to Qwest, to participate in regulatory cost proceedings or dockets regarding the establishment of rates. Notwithstanding any other provision of this agreement, if no Plan is agreed upon by April 30, 2001, the Parties will have all remedies available at law and equity in any forum.

## QUARTERLY MEETINGS

Beginning in 2001 and continuing through the end of 2005, the parties agree to attend and participate in quarterly executive meetings, the purpose of which will be to address, discuss and attempt to resolve unresolved business issues and disputes, anticipated business issues, and issues related to the Parties' Interconnection Agreements, Implementation Plan, and other agreements. The meetings will be attended by executives from both companies at the vice-president and/or above level.

## 2 ESCALATION PROCEDURES

The parties wish to establish a business-to-business relationship and agree that they will resolve any and all business issues that may arise between them, including but not limited to, their Interconnection Agreements and Amendments, in accordance with the escalation procedures set forth herein. The parties agree, subject to any subsequent written agreement between the parties, to: (1) utilize the following escalation process and time frames to resolve such disputes; (2) commit the time, resources and good faith necessary to meaningful dispute resolution; (3) not proceed to a higher level of dispute resolution until either a response is received or expiration of the time frame for the prior level of dispute resolution; (4) grant to one another, at the request of the other party, reasonable extensions of time at Levels 1 and 2 of the dispute resolution process to facilitate a business resolution; and (5) complete Levels 1, 2 and 3 of dispute resolution before seeking resolution through arbitration or the courts.

| Level | Participants | Time frame for discussions |
|---|---|---|
| LEVEL 1 | Vice Presidents (Judy Tinkham/Dave Kunde, Lynne Powers, Bill Markert, or successors) | 10 business days |
| LEVEL 2 | Senior Vice Presidents (Greg Casey/Rick Smith, or successors) | 10 business days |
| LEVEL 3 | CEOs (Joe Nacchio/Rick Smith, or successors) | 10 business days |

LEVEL 4 Arbitration according to the provisions of the Parties' Interconnection Agreements and/or other agreements (to be expedited and completed within 90 days, upon request of one of the Parties)

| | | |
|---|---|---|
| LEVEL 5 | CEOs (Joe Nacchio/Rick Smith, or successors) | 10 business days |

LEVEL 6 If a dispute is not resolved in Levels 1 through 5, either party may initiate litigation in federal or state court, with all questions of fact and law to be submitted for determination to the judge, not a jury. The parties agree that the exclusive venues for civil court actions initiated by Eschelon are the United States District Court for the District of Minnesota or a court of the State of Minnesota and the exclusive venues for civil court actions initiated by Qwest are the United States District Court for the Districts of Minnesota or Colorado or the courts of the State of Minnesota or Colorado. When a court issues a final order, no longer subject to appeal, the prevailing party shall be awarded reasonable attorneys' fees and expenses. In the event that either party files an action in court, the parties waive: (a) primary jurisdiction in any state utility or service commission; and (b) any tariff limitations on damages or other limitation on actual damages, to the extent that such damages are reasonably foreseeable and acknowledging each party's duty to mitigate damages.

If the parties agree with the terms set forth above, they will each execute a copy of this letter in the signature spaces provided on the last page. Upon signature of both parties, the parties will be bound by the terms set forth herein. This letter agreement may be executed in counterparts and by facsimile.

**Trade Secret Data Ends]**

Very truly yours,

Greg Casey
Executive Vice President
Wholesale Markets

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CONTAINS TRADE SECRET DAT

QT100

TERMS OF LETTER AGREEMENT ACCEPTED BY:

QWEST CORPORATION

[name]

[title]

11-15-00
[date]

Approved as to legal form

NOV 15 2000

ESCHELON TELECOM, INC.

[name]

[title]

[date]

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CONTAINS TRADE SECRET DATA

Q110039

TERMS OF LETTER AGREEMENT ACCEPTED BY:

QWEST CORPORATION

[name]

EVP

[title]

11-15-00

[date]

Approved as to legal form

NOV 15 2000

ESCHELON TELECOM, INC.

[name]

[title]

[date]

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CONTAINS TRADE SECRET D

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EXHIBIT

SUBJECT TO RULE OF EVIDENCE 408

## CONFIDENTIAL AMENDMENT TO CONFIDENTIAL/TRADE SECRET STIPULATION

[Trade Secret Data Begins

This Amendment to the Confidential/Trade Secret Stipulation Between ATI and U S WEST ("Agreement"), is hereby entered into by Qwest Corporation ("Qwest"), formerly known as U S WEST, Inc., and Eschelon Telecom, Inc. ("Eschelon"), formerly known as Advanced Telecommunications, Inc., d/b/a Cady Communications, Inc., Cady Telemanagement, Inc., American Telephone Technology, Inc., Electro-Tel, Inc., and Intellecom, Inc., (hereinafter referred to as the "Parties" when referred to jointly) on this 15th day of November, 2000. This Amendment adds terms to the Confidential/Trade Secret Stipulation Between ATI and U S WEST dated February 28, 2000. The Parties acknowledge the recitals and terms contained in the Confidential/Trade Secret Stipulation Between ATI and U S WEST and seek to resolve differences which existed between the Parties as of that date, and continue as of the date of this Agreement, including differences relating to service quality.

### ADDITIONAL RECITALS

1 Disputes have arisen between the Parties as to the effective date of Eschelon's ability to provide services through the unbundled network element ("UNE") platform. Eschelon claims that it was eligible to receive platform rates as of March 1, 2000.

2 Qwest believes that Eschelon was unable to provide services through the unbundled network element platform as of March 1, 2000.

3. In an attempt to finally resolve the issues in dispute and to avoid delay and costly litigation, the Parties voluntarily enter into this Confidential Agreement to resolve all disputes, claims and controversies between the Parties, as of the date of this Confidential Agreement that relate to the matters addressed herein, and Eschelon releases Qwest from any claims regarding the issue as described herein.

### CONFIDENTIAL AGREEMENT

1. The Parties enter into this Agreement in consideration for the terms described below, and Eschelon's release of any claims that can or could have been brought against Qwest because Eschelon was providing services through resale of finished services instead of providing service through unbundled network elements. Eschelon claims that it had the right to elect platform prices as of March 1, 2000, while Qwest disagrees with Eschelon's claim, as described above

2. Eschelon agrees to purchase from Qwest, under this agreement or any other agreement between the parties, at least $15 million (fifteen million dollars) of telecommunication services and products between October 1, 2000 and September 30, 2001. In consideration for Eschelon's agreement to make such purchases and for such other good and valuable consideration set forth in this agreement and documented in Qwest's November 15, 2000 letter, Qwest agrees to pay Eschelon $10 million by no later than November 17, 2000 to resolve all issues, outstanding through the date of execution of this agreement, related to the UNE platform and switched access. Further, Qwest will pay to Eschelon the revenue Qwest billed to IXCs at Qwest's established switched access rates for Eschelon platform end users for usage for the month of October 2000. Qwest will pay this amount to Eschelon within 30 days of the date Qwest receives WTN information for Eschelon for all of October 2000. For any month (or partial month), from November 1, 2000 until the mechanized process is in place, during which Qwest fails to provide accurate daily usage information for Eschelon's use in billing switched access, Qwest will credit Eschelon $13.00 (or pro rata portion thereof) per Platform line per month as long as Eschelon has provided the WTN information to Qwest. After the mechanized process is in place, Eschelon and Qwest will use the established escalation procedures if a dispute arises. Qwest will credit the IXC and other companies for daily usage traffic that Qwest provides to Eschelon to bill to the IXC (to eliminate double billing).

In the event that Eschelon does not purchase, under this agreement or any other agreement, $15,000,000.00 (fifteen million dollars) in telecommunications services and/or products within the time frame set forth above, Eschelon shall, by December 31, 2001, make a pro rata refund of the payment received from Qwest.

3. Eschelon shall provide to Qwest consulting and network-related services, including but not limited to processes and procedures relating to wholesale service quality for local exchange service ("Services"). These Services will address numerous items, including loop cutover and conversion, repair, billing and other items agreed upon by the Parties. The Services may include all lines of business and methods of local market entry used by Eschelon. Eschelon agrees to utilize knowledgeable and experienced personnel for the Services. Eschelon further agrees to assign, upon request, up to two full time representatives dedicated to working with the Qwest account team or other Qwest organizations to facilitate handling of provisioning issues. The Parties agree to meet together (via telephone, live conference, or otherwise) as necessary to facilitate provisioning of the Services. Executives from both companies agree to address and discuss the progress of the Services at quarterly meetings to begin in 2001 and continue through the end of 2005. In consideration of Eschelon's agreement to provide Services and for such good and valuable consideration set forth in this agreement, Qwest agrees to pay

Eschelon an amount that is ten percent (10%) of the aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through December 31, 2005. Eschelon will invoice Qwest annually. Payment is due within 30 days of the invoice date. In the event that the Confidential Purchase Agreement between Eschelon and Qwest (as of the same date as this Agreement) is terminated, this paragraph of this Agreement also terminates simultaneously with termination of that Confidential Purchase Agreement and any payments made pursuant to this paragraph as of the date of termination will be promptly returned to Qwest. In addition, if Eschelon fails to meet its purchase commitments under sections 2, 2.1, 2.2, 2.3, 2.4 or 2.5 of the Confidential Purchase Agreement, Eschelon will promptly return to Qwest any payments made pursuant to this section.

4. If the Parties fail to finalize the Implementation Plan by April 30, 2001, as required by the Parties' Escalation Procedures Agreement, they agree to immediately terminate the Purchase Agreement, the Confidential Billing Settlement Agreement, this Amendment to the Confidential/Trade Secret Stipulation, the Escalation Procedures Agreement, and the Interconnection Agreement Amendment, all dated November 15, 2000, and cooperate in good faith to determine and promptly return to each other all of the economic benefits each received from the other in consequence of those Agreements. Moreover, all of the claims, whether in law or in equity, that either Party released or discharged in those Agreements shall be restored to them.

5. The Parties will address in their quarterly meetings appropriate price adjustments for the telecommunications services and products purchased by Eschelon and Qwest in the preceding quarter.

6. For valuable consideration mentioned above, the receipt and sufficiency of which are hereby acknowledged, Eschelon does hereby release and forever discharge Qwest and its associates, owners, stockholders, predecessors, successors, agents, directors, officers, partners, employees, representatives, employees of affiliates, employees of parents, employees of subsidiaries, affiliates, parents, subsidiaries, insurance carriers, bonding companies and attorneys, from any and all manner of action or actions, causes or causes of action, in law, under statute, or in equity, suits, appeals, petitions, debts, liens, contracts, agreements, promises, liabilities, claims, affirmative defenses, offsets, demands, damages, losses, costs, claims for restitution, and expenses, of any nature whatsoever, fixed or contingent, known or unknown, past and present asserted or that could have been asserted or could be asserted in any way relating to or arising out of the disputes/matters addressed in "Additional Recitals" paragraphs 1 and 2 above, including all disputes related to the UNE platform and switched access.

# CONTINUATION

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7. The terms and conditions contained in this Confidential Agreement shall inure to the benefit of, and be binding upon, the respective successors, affiliates and assigns of the Parties.

8. Eschelon hereby covenants and warrants that it has not assigned or transferred to any person any claim, or portion of any claims which is released or discharged by this Confidential Agreement.

9. The Parties agree that they will keep the substance of the negotiations and/or conditions of this settlement and the terms or substance of this Confidential Agreement strictly confidential. The Parties further agree that they will not communicate (orally or in writing) or in any way disclose the substance of the negotiations and/or conditions of this settlement and the terms or substance of this Agreement to any person, judicial or administrate agency or body, business, entity or association or anyone else for any reason whatsoever, without the prior express written consent of the other Party unless compelled to do so by law or unless Eschelon pursues an initial public offering, and then only to the extent that disclosure by Eschelon is necessary to comply with the requirements of the Securities Act of 1933 or the Securities Exchange Act of 1934. In the event Eschelon pursues an initial public offering, it will: (1) first notify Qwest of any obligation to disclose some or all of this Confidential Agreement; (2) provide Qwest with an opportunity to review and comment on Eschelon's proposed disclosure of some or all of this Confidential Agreement; and (3) apply for confidential treatment of the Confidential Agreement. It is expressly agreed that this confidentiality provision is an essential element of this Confidential Agreement and negotiations, and all matters related to these matters, shall be subject to Rule 408 of the Rules of Evidence, at the federal and state level.

10. In the event either Party initiates arbitration or litigation regarding the terms of this agreement or has a legal obligation which requires disclosure of the terms and conditions of this Confidential Agreement, the Party having the obligation shall immediately notify the other Party in writing of the nature, scope and source of such obligation so as to enable the other Party, at its option, to take such action as may be legally permissible so as to protect the confidentiality provided in this Agreement.

11. This Confidential Agreement constitutes an agreement between the Parties and can only be changed in a writing or writings executed by both Parties. Each of the Parties forever waives all right to assert that this Confidential Agreement was the result of a mistake in law or in fact.

12. This Confidential Agreement shall be interpreted and construed in accordance with the laws of the State of Minnesota, and shall not be interpreted in favor or against any Party to this Agreement.

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CONTAINS TRADE SECRET D

13. The Parties have entered into this Confidential Agreement after conferring with legal counsel.

14. In the event that any provision of this Confidential Agreement should be declared to be unenforceable by any administrative agency or court of law, either Party may initiate an arbitration under the provisions of section 15 below within 90 days of such declaration, to determine the impact of such declaration on the remainder of this Confidential Billing Settlement Agreement. The arbitrator shall have the authority to determine the materiality of the provision and any appropriate remedies, including voiding the agreement in its entirety. If neither Party initiates such an arbitration within 90 days, the remainder of the Confidential Agreement shall remain in full force and effect, and shall be binding upon the Parties hereto as if the invalidated provisions were not part of this Confidential Agreement.

15. Any claim, controversy or dispute between the Parties in connection with this Confidential Agreement shall be resolved by private and confidential arbitration conducted by a single arbitrator engaged in the practice of law under the then current rules of the American Arbitration Association. The arbitration shall be conducted in Minneapolis, Minnesota. Each Party shall have the right to seek from a court of appropriate jurisdiction equitable or provisional remedies (such as temporary restraining orders, temporary injunctions, and the like) before arbitration proceedings have been commenced and an arbitrator has been selected. Once an arbitrator has been selected and the arbitration proceedings are continuing, thereafter the sole jurisdiction with respect to equitable or provisional remedies shall be remanded to the arbitrator. Any arbitrator shall be a retired judge or an attorney who has been licensed to practice for at least ten (10) years and is currently licensed to practice in the state of Minnesota. The arbitrator shall be selected by the Parties within fifteen (15) business days after a request for arbitration has been made by one of the Parties hereto. If the Parties are unable to agree among themselves, the Parties shall ask for a panel of arbitrators to be selected by the American Arbitration Association. If the Parties are unable to select a sole arbitrator from the panel supplied by the American Arbitration Association within ten (10) business days after such submission, the American Arbitration Association shall select the sole arbitrator. The Federal Arbitration Act, 9 U.S.C §§ 1-16, not state law, shall govern the arbitratibility of all disputes. The arbitrator shall only have the authority to determine breach of this Agreement and award appropriate damages, but the arbitrator shall not have authority to award punitive damages. The arbitrator's decision shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees and shall share equally in the fees and expenses of the arbitrator, except that the arbitrator shall have the discretion award reasonable attorneys' fees and costs in favor of a Party if, in the opinion of the arbitrator, the dispute arose because the other Party was not acting in good faith.

16. The Parties acknowledge and agree that they have a legitimate billing dispute about the issues described in this Confidential Agreement and that the resolution reached in this Agreement represents a compromise of the Parties' positions. Therefore, the Parties agree that resolution of the issues contained in this Agreement cannot be used against the other Party, including but not limited to admissions.

17. This Confidential Agreement may be executed in counterparts and by facsimile.

Trade Secret Data Exempt

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CONTAINS TRADE SECRET I

IN WITNESS THEREOF, the Parties have caused this Confidential Agreement to be executed as of this 15th day of November 2000.

Eschelon Telecom, Inc.

By: _____

Title: President - CEO

Date: 11/15/00

Qwest Corporation

By: _____

Title: _____

Date: _____

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CONTAINS TRADE SECRET DATA

IN WITNESS THEREOF, the Parties have caused this Confidential Agreement to be executed as of this 15th day of November 2000.

| | |
|---|---|
| Eschelon Telecom, Inc. | Qwest Corporation |
| By: _____ | By: _____ |
| Title: _____ | Title: EVP |
| Date: _____ | Date: 11.15.00 |

Approved as to legal form

NOV 15 2000

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CONTAINS TRADE SECRE

ride the light

Qwest.

Qwest
1801 California Street, Suite 2350
Denver, Colorado 80202
Phone 303-896-5851
Facsimile 303-896-7473

Audrey McKenney
Senior Vice President
Wholesale Markets Business Development

EXHIBIT
5

CONFIDENTIAL AND PRIVILEGED
SUBJECT TO RULE OF EVIDENCE 408

July 3, 2001

Richard A. Smith
President and Chief Operating Officer
Eschelon Telecom, Inc.
730 Second Avenue South
Suite 1200
Minneapolis, MN 55402

Re: Status of Switched Access Minute Reporting

Dear Rick:
[Trade Secret Data Begins

Over time, Eschelon has added switches in additional markets and has started to move away from resale to Unbundled Network Element Platform ("UNE-P") for customers not served by those switches. In the course of adding switches and increasing the number of its customers served by those switches in multiple states within Qwest's region, Eschelon has noted a discrepancy between the access minutes recorded for Eschelon customers served by Eschelon's switches (Eschelon's On-Net customers) and the access minutes reported to Eschelon by Qwest for Eschelon UNE-P customers served by Qwest's switches (Eschelon's Off-Net customers). Although Qwest believes that it has accurately recorded switched access minutes, we have agreed to work with Eschelon to verify the accuracy of such records and to determine the reasons why the parties' systems are reporting a different number of switched access minutes. Factors that could potentially be causing the discrepancy include, among other factors, different usage characteristics of Eschelon's On-Net and Off-Net customers, recording and reporting differences between Eschelon's and Qwest's switches, inaccurate reporting by Eschelon to Qwest of Eschelon's Off-Net WTNs, and under reporting of Off-Net access minutes by Qwest.

Eschelon, Inc. has asserted that the tapes which Qwest Corporation provides to Eschelon recording switched access minutes going on the ports of its platform services are lower than the minutes that Eschelon is experiencing based on minutes going through Eschelon's switch. Based on Eschelon's concern, and

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Qwest's desire to ensure that its recordings are accurate. Qwest has agreed to perform an audit with Eschelon.

Since November 2000, as an interim measure, Qwest has been paying Eschelon each month an Interim Amount, which is the difference between thirteen dollars ($13) per line per month and the amount that Eschelon was able to bill IXCs for switched access, per line, based upon the switched access minutes reported to Eschelon by Qwest. Eschelon has devoted substantial internal and external resources to switched access issues, including resources associated with the audit, traffic studies, and hiring of personnel with expertise in access issues. In consideration for this, as of January 1, 2001 and continuing until Qwest and Eschelon agree to do otherwise, Qwest will increase the Interim Amount to the difference between $16 per line per month and the amount that Eschelon is able to bill IXCs for switched access, based upon the switched access minutes reported to Eschelon by Qwest.

In order to determine whether Qwest's reporting of access minutes has been correct, the parties are undertaking a joint analysis, including an audit of the switched access minutes reported by Qwest and Eschelon (the "Audit"). The Audit will proceed in accordance with the scope of work previously agreed to by the parties. Once the Audit is completed, the parties have agreed to true up the difference between $13 per line and the actual amount that Eschelon should have been able to bill to its carrier customers as calculated above (less any amount that Eschelon is able to backbill to its carrier customers) based on its tariffed rate.

Eschelon has also noted an issue relating to access records for Qwest's intraLATA toll traffic terminating to customers served by an Eschelon switch. The ongoing analysis and resources expended by Eschelon and Qwest will also address this issue. As of June 1, 2001, until the Parties agree that the issue is resolved, Qwest will pay Eschelon $2.00 per line per month for such traffic.

Using the results of the Audit, the parties will also negotiate the terms and conditions of any subsequent analysis or procedures to be followed, and for resolution of future discrepancies between the switched access minutes indicated by Qwest and the minutes recorded or believed to be accurate by Eschelon.

Qwest and Eschelon want to avoid complaints and find business solutions to their problems. In working on service issues, while the audit is occurring and depending upon the results of the audit and the negotiations, Eschelon agrees that it will not seek payment of sums due from Qwest to Eschelon, if any, related to the Direct Measures of Quality ("DMOQs") in Minnesota pursuant to the Stipulation and Agreement entered into by the Parties on February 29, 2000. The Parties will meet upon the findings of the audit and will determine whether the DMOQs are appropriate at that time.

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We look forward to working with Eschelon and completing the audit process.[1]

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Sincerely,

Audrey McKenney

[Trade Secret Data Begins

[1] Notwithstanding anything herein to the contrary, we also acknowledge that both parties may rely upon, and make use of the contents of this letter as accurately setting forth the matters agreed upon. Trade Secret Data Ends]

ride the light
Qwest.

eschelon
telecom, inc.

EXHIBIT
1

# QWEST/ESCHELON
# IMPLEMENTATION PLAN

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## 1. IMPLEMENTATION PLAN OVERVIEW AND OBJECTIVES

1.1. Eschelon Telecom, Inc., and its subsidiaries, ("Eschelon") and Qwest Corporation ("Qwest") (collectively, the "Parties") have agreed to develop an Implementation Plan ("Implementation Plan") to document and establish processes and procedures to mutually improve Qwest's and Eschelon's business relations.

1.2. The objective of the Implementation Plan is to give structure as to how Qwest and Eschelon will work as business partners to arrive at mutually satisfying business solutions and settlements.

## 2. RESOLUTION OF BUSINESS ISSUES

2.1. Qwest has established a service account team for Eschelon. Other organizations within Qwest also interact directly with Eschelon personnel. Each functional area has specific functional support responsibilities. (See, for example, Attachment 1).

2.1.1. The Qwest Service Management team will hold weekly meetings with Eschelon to identify and resolve service-related issues.

2.1.2. As desired, the Qwest Service Management team will continue to facilitate other meetings with subject matter experts within Qwest to address Eschelon's service-related issues.

2.1.3 Qwest will provide Eschelon policy and process change information electronically through the use of a centrally maintained database. Detailed Eschelon-specific information will be provided to Eschelon through the Service Management Account Team.

2.2. Qwest has provided Eschelon with an escalation chart and process to follow (Attachment 2) in identifying the names and telephone numbers of the persons at Qwest (or their successors) that Eschelon may contact to escalate service-related issues. Qwest and Eschelon may agree to revise the escalation chart and process from time to time, provided the level of support to Eschelon is not decreased.

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2.3 Each quarter until December 31, 2005, or as otherwise agreed by the Parties, Dana Filip and/or her designee or successor and Rick Smith and/or his designee or successor agree to meet together (via telephone, live conference or otherwise) to review the status of Eschelon's service-related issues.

2.5 The Parties agree to attend and participate in quarterly executive meetings. The purpose of these meetings will be to address, discuss, and attempt to resolve unresolved business issues, anticipated business issues, and issues related to the Parties' interconnection agreements, Implementation Plan, and other agreements. The meetings will be attended by executives from both companies at the vice-president level or above. The parties may agree to meet less frequently.

## 3. TREATMENT OF LOCAL USAGE ASSOCIATED WITH UNE-P SWITCHING FOR ESCHELON'S TOLL TRAFFIC.

3.1 The Parties have agreed that Qwest will calculate local usage charges associated with Unbundled Network Element Platform ("UNE-P") switching on Eschelon's interLATA and intraLATA toll traffic, and Eschelon will pay undisputed amounts within 30 days from Eschelon's receipt of the monthly invoice from Qwest. (See Attachment 3.2, ¶III(B) of Interconnection Agreement Amendment Terms, Nov. 15, 2000). Qwest will calculate local usage charges in accordance with the procedures set forth on Attachment 3 to this Implementation Plan.

## 4. SERVICE MANAGEMENT AND METRICS

Eschelon has alleged that Qwest has failed at times to promptly provide services. In order to ascertain Qwest's service levels, the parties have agreed to the following:

4.1. Qwest and Eschelon will track and report performance measurements designed to monitor Qwest's levels of service.

4.2 Representatives from Qwest and Eschelon will hold monthly working meetings to review and discuss the measurements. Quarterly executive level meetings will also be held to review results, performance trends, and set service improvement priorities.

4.3 A jointly developed action plan will be created, implemented and reviewed at the monthly meetings to facilitate the service excellence expected by both Parties.

## 5. COORDINATION REGARDING COMMON ISSUES

5.1 Appropriate representatives of Eschelon and Qwest will meet and confer as needed to communicate and to minimize conflicts which arise between the Parties. Further, the Parties will work with each other as issues of dispute and conflict arise and will seek in good faith to obtain resolution of those issues.

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## 6. INTRALATA TOLL

6.1 Eschelon and Qwest agree to negotiate in good faith to obtain an agreement, by September 1, 2001, regarding terms and conditions relating to Qwest's end-user customers who choose Qwest as their retail intraLATA toll carrier.

## 7. MODIFICATION AND TERM OF IMPLEMENTATION PLAN

7.1 This Implementation Plan is subject to modification as mutually agreed upon, in writing, by the Parties whose signatures are included on this agreement or their designated representatives.

7.2 This Plan becomes effective and will remain in effect until December 31, 2005, unless otherwise mutually terminated or extended by the Parties in writing.

## 8. COORDINATION FOR CONVERSIONS

Qwest has undertaken certain enhancements to the UNE-P and is in the process of implementing such enhancements. Qwest agrees to take commercially reasonable efforts to ensure that service provided to Eschelon's end-user customers is not adversely affected during the conversion to UNE-P. Qwest will provide notice to Eschelon before changes relating to the conversion are made, plan the conversion jointly with Eschelon, and use a phased approach to converting customers over time on an agreed upon schedule.

Trade Secret Data

**QWEST/ESCHELON IMPLEMENTATION PLAN TERMS ACCEPTED BY:**

| Eschelon Telecom, Inc. | Qwest Corporation |
|---|---|
| Signature | Signature |
| Richard A Smith<br>Name Printed/Typed | Audrey McKenney<br>Name Printed/Typed |
| President and COO<br>Title | SVP - Wholesale Mkt<br>Title |
| July 31, 2001<br>Date | July 31, 2001<br>Date |

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ATTACHMENT 1

Business Issue Resolution Categories

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| Service Center | Service Management | Sales |
|---|---|---|
| • Preorder inquiry<br>• Order status<br>• Critical date management<br>• Order expedites [less than standard interval requests]<br>• Tier 1 and 2 order escalation<br>• Delayed order management<br>• CNR [customer-not-ready] notification and management<br>• Order writing process<br>• Order flow process<br>• Center operational issues [i.e., lack of response, service order quality and timeliness issues]<br>• System availability | ◦ Proactive management of service<br>◦ Tier 3 and 4 order escalation [i.e., failure of center to accelerate critical dates to satisfaction of customer]<br>◦ Interface on major outages [i.e., switch failures, natural disasters]<br>• Service performance reporting<br>• Action planning with appropriate internal organizations on service performance differences<br>◦ Lead meetings on resolving priority service and business issues [PSBI]<br>◦ Document progress of PSBI team and escalate issues as necessary<br>• Gather trends in service quality and timeliness and conduct post mortems/root cause analysis<br>• Manage interconnection agreements and subsequent amendments<br>◦ Answer product questions and facilitate modification requests<br>◦ Serve as customer liaison with Project management, Sales, Service Center, and all other internal organizations | • Account status and growth opportunities<br>• Coordinate forecasting with project management<br>• New product introduction an use<br>◦ Lead meetings on account sta and growth<br>• Funding and costing inquiry |

The center structure is as follows:
Service Delivery Coordinators
Customer Service Managers
Sr Customer Service Manager
Sr Director
Vice President

Performance related issues regarding the responsibilities within the Service Center should be handled by the appropriate level in this structure.

The Service Management structure is as follows:
Service Manager
Sr Service Manager
Director - Customer Service
Sr Director - Customer Service
Vice President
Sr Vice President

Performance related issues regarding the responsibilities within Service Management should be handled by the appropriate level in this structure.

The Sales Management structure is as follows:
Sales Director
Regional Sales Director
Regional VP Sales
Sr VP Sales

Performance related issues regarding the responsibilities within Sales Management should be handled by the appropriate level in this structure.

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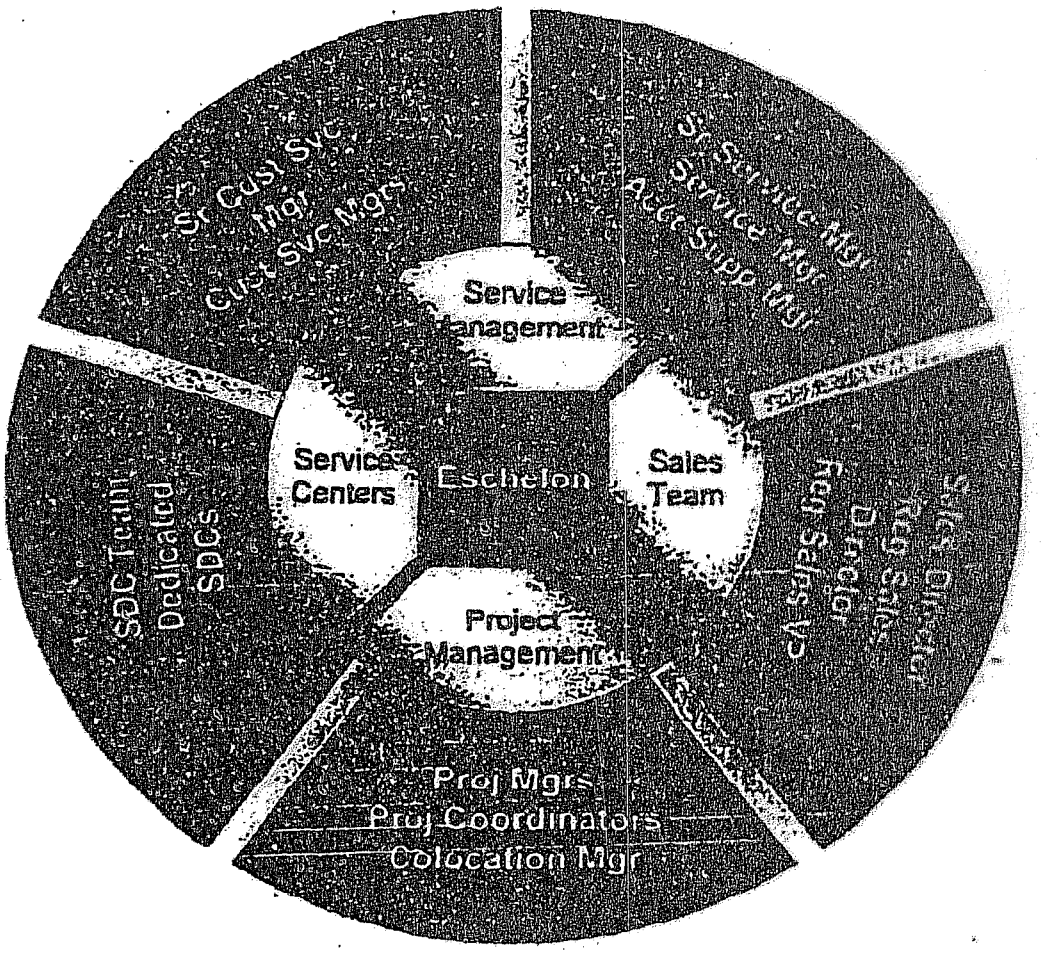
Attachment 1

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Qwest

Attachment 2

Eschelon
Escalation Tier Contact Information

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| Tier | Contacts | Functions |
|---|---|---|
| | Des Moines Service Center | |
| 0 | N/A | |
| 1 | Private Line<br>800-246-1271<br><br>LIS<br>800-537-0002<br><br>Delayed Orders<br>800-340-9629 | • Handle Customer Calls<br>• ASR Order Status<br>• Queries on Completion Dates<br>• Questions on Due Dates<br>• FOC questions/Resends of FOC's<br>• Assisting with ASR prep<br>• Answer Questions on Rejects/Delayed Orders.<br>• Manage Critical Dates, Due Date Changes, VP Expedites, Out of Service Conditions, Feature Discrepancies, Delays at Test and Turn up and General Delayed Order Questions<br>• Timely Customer updates, meet call back commitments |
| 2 | All Products<br>515-286-4067<br><br>Duty Pager<br>800-759-8888<br>Pin 829-3082<br><br>Duty pager is covered during and after center hours | • Respond to missed commitments from TIER 1<br>• Assist TIER 1 with unresolved Customer issues<br>• Resolve issues with other departments<br>• Document details in appropriate databases<br>• Timely Customer updates, meet call back commitments<br>• If further escalation is necessary, a commitment is made for a call back from next level |
| 3 | Service Manager<br><br>Pat Levene<br>612-663-5265 | • Receive escalations on a variety of service order related issues from Service Delivery Coordinators (SDC) and/or directly from the customer<br>• Respond to missed commitments or |

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| | | |
|---|---|---|
| | | calls for assistance from TIER 2<br>• Evaluate and Manage special circumstances requiring VP expedites<br>• Resolve issues with other departments<br>• Timely Customer updates, meet ca back commitments<br>• Document details in the appropriat databases<br>• If further escalation is necessary, commitment is made for a call bac from next level |
| 4<br><br><br><br>5<br><br><br>6<br><br><br>7 | Senior Service Manager<br>Steve Sheahan<br>612-663-7527<br><br><br>Director<br>Joan Masztaler<br>303-896-8331<br><br>Sr Director<br>Toni Dubuque<br>612-288-3831<br><br>Vice President<br>Christie Doherty<br>303-896-0848 | Tier 4, 5, 6,7 would become involved service order escalation:<br><br>• Major network outage<br>• After normal process of tiered escalations failed to resolve the issu to the customer's satisfaction<br><br>It is the role and responsibility of each level to support the decision of the previous level unless another alternat that has not been investigated presen itself. If the resolution of the issue is possible or implementation of the ord can not be accelerated for whatever reason, a clear and complete explanation of the circumstances is necessary so that the customer can respond to the end user with authoriz |

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Qwest

Attachment 2

Echelon

Escalation Tier Contact Information

| Tier | Contacts | Functions |
|---|---|---|
| | Minneapolis Service Center | |
| 0 | N/A | |
| 1 | Centrex<br>800-279-8806<br><br>Complex Resale<br>800-636-8746<br><br>Delayed Orders<br>888-796-9087 | • Handle Customer Calls<br>• LSR Order Status<br>• Queries on Completion Dates<br>• Questions on Due Dates<br>• FOC questions/Resends of FOC's<br>• Assisting with LSR prep<br>• Answer Questions on Rejects/Delayed Orders.<br>• Manage Critical Dates, Due Date Changes, VP Expedites, Out of Service Conditions, Feature Discrepancies, Delays at Test and Turn up and General Delayed Order Questions<br>• Timely Customer updates, meet call back commitments |
| 2 | All Products<br>800-366-9974<br>Duty Pager<br>612-622-3624<br><br>Delayed Orders<br>303-787-6503<br>Duty Pager<br>800-946-4646<br>Pin 141-4422<br><br>Duty pager is covered during and after center hours | • Respond to missed commitments from TIER 1<br>• Assist TIER 1 with unresolved Customer issues<br>• Resolve issues with other departments<br>• Document details in appropriate databases<br>• Timely Customer updates; meet call back commitments<br>• If further escalation is necessary, a commitment is made for a call back from next level |
| 3 | Service Manager | • Receive escalations on a variety of service order related issues from |

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CONTAINS TRADE SECRET DATA

| | | |
|---|---|---|
| | Pat Levene<br>612-663-6265 | Service Delivery Coordinators (SD and/or directly from the customer<br>• Respond to missed commitments calls for assistance from TIER 2<br>• Evaluate and Manage special circumstances requiring VP expedites<br>• Resolve issues with other departments<br>• Timely Customer updates, meet c back commitments<br>• Document details in the appropria databases<br>• If further escalation is necessary, commitment is made for a call ba from next level |
| 4<br><br><br><br>5<br><br><br>6<br><br><br>7 | Senior Service Manager<br>Steve Sheahan<br>612-663-7527<br><br>Director<br>Joan Masztaler<br>303-896-8331<br><br>Sr Director<br>Toni Dubuque<br>612-288-3831<br><br>Vice President<br>Christie Doherty<br>303-896-0848 | Tier 4, 5, 6,7 would become involves service order escalation:<br><br>• Major network outage<br>• After normal process of tiered escalations failed to resolve the iss to the customer's satisfaction<br><br>It is the role and responsibility of eac level to support the decision of the previous level unless another alterna that has not been investigated presen itself. If the resolution of the issue i possible or implementation of the or can not be accelerated for whatever reason, a clear and complete explanation of the circumstances is necessary so that the customer can respond to the end user with author |

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Qwest

Attachment 2

Eschelon

Escalation Tier Contact Information

| Tier | Contacts | Functions |
|---|---|---|
| | Denver Service Center | |
| 0 | Call Center<br>888-796-9087 | • Handle Customer Calls<br>• LSR/Order Status<br>• Queries on Completion Dates<br>• FOC questions/Resends of FOC's<br>• Assisting with LSR prep<br>• Answer questions on Rejects/Delayed orders<br>• Document details in appropriate databases |
| 1 | Warm transfer from the call center as appropriate | • Receive warm transfer from Call Center using ticketing process<br>• Resolve missed FOC intervals<br>• Manage Critical Dates, Due Date Changes, VP Expedites, Out of Service Conditions, Feature Discrepancies, Delays at Test and Turn up and General Delayed Order Questions<br>• Timely Customer updates, meet call back commitments<br>• Resolve Issues with other departments<br>• Document details in appropriate databases |
| 2 | Duty Pager<br>303-201-4939<br>[during Center hours]<br>800-423-3641<br>[after Center hours]<br><br>Delayed Orders<br>303-787-6503<br>Duty Pager<br>800-946-4646<br>Pin 141-4422<br><br>Duty pager is covered during and after Center | • Respond to missed commitments from TIER 1<br>• Assist TIER 1 with unresolved Customer issues<br>• Resolve issues with other departments<br>• Document details in appropriate databases<br>• Timely Customer updates, meet call back commitments<br>• If further escalation is necessary, a commitment is made for a call back from next level |

| | hours | |
|---|---|---|
| 3 | Service Manager<br><br>Pat Levene<br>612-663-6265 | • Receive escalations on a variety of service order related issues from Service Delivery Coordinators (SDC and/or directly from the customer<br>• Respond to missed commitments o calls for assistance from TIER 2<br>• Evaluate and Manage special circumstances requiring VP expedites<br>• Resolve issues with other departments<br>• Timely Customer updates, meet co back commitments<br>• Document details in the appropriat databases<br>• If further escalation is necessary, s commitment is made for a call bac from next level |
| 4<br><br>5<br><br>6<br><br>7 | Senior Service Manager<br>Steve Sheahan<br>612-612-663-7527<br><br>Director<br>Joan Masztaler<br>303-896-8331<br><br>Sr Director<br>Toni Dubuque<br>612-288-3831<br><br>Vice President<br>Christie Doherty<br>303-896-0848 | Tier 4, 5, 6,7 would become involved i service order escalation:<br><br>• Major network outage<br>• After normal process of tiered escalations failed to resolve the issu to the customer's satisfaction<br><br>It is the role and responsibility of each level to support the decision of the previous level unless another alternat that has not been investigated presen itself. If the resolution of the issue is possible or implementation of the ord can not be accelerated for whatever reason, a clear and complete explanation of the circumstances is necessary so that the customer can respond to the end user with authority |

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Omaha Service Center

| | |
|---|---|
| New Coordinated Install Group | 800 486-3986 |
| Exsisting Hot Cut Group | 800 697-0772 |
| IPG (Integrated Pair Gain) Group | 888 286-1666 |
| Warranty Group (Technician Testers) | 888 304-5777 |
| Toll Free Fax | 888 307-3999 |
| Emergency QCCC Pager | 888 274-4069 |
| Team Leader Dana Frenking | 402 591-6026 Pager 888 827-2717 |
| Director James Mackie | 402 591-5600 Pager 888 243-2906 |
| VP Scott Simanson | 303 703-2100 Pager 877 616-5044 |

**ACCOUNT MAINTENANCE SUPPORT CENTER (AMSC) Call Center**
**CREATE/STATUS/ESCALATIONS LIST** 8-1-01

| | | Non Design Services | Designed Services | Info To Provide |
|---|---|---|---|---|
| | | Type of Service CNTX, LNP | Type of Service: HI-CAP (DS1,DS3) DSO Type 2 Trunking | |
| 1 | Qwest AMSC Initial Trouble Report | 800-223-7881 | 800-223-7881 | Non Design Telephone Number<br><br>Designed Services Circuit ID,CLLI Code, 2/6 code or Trunk Group # |
| 2 | Status | 800-223-7881 | 800-223-7881 | Non Design Telephone Number<br><br>Designed Services Qwest Ticket Number |
| 3 | Escalations *Note: The appropriate Escalation Manager's Name & Number will be provided after the Designed Test Center is contacted* | 800-223-7881 | 800-223-7881 | Non Design Telephone Number Designed Services Qwest Ticket Number |

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| | | | | |
|---|---|---|---|---|
| 4 | AMSC Call Center On-Call Duty Manager (On-Call duty 7x24 rotates, please call center to have appropriate Manager contacted.) | 800-223-7881 | 800-223-7881 | Non Design Telephone Number<br>Designed Services Qwest Ticket Number |
| 5 | AMSC Team Leader | Nina Gable 719-444-9900 | Nina Gable 719-444-9900 | Non Design Telephone Number<br>Designed Services Qwest Ticket Number |
| 6 | AMSC Director | Sheila Thompson 208-385-8783 | Sheila Thompson 208-385-8783 | Non Design Telephone Number<br>Designed Services Qwest Ticket Number |
| 7 | AMSC VP Manager | Rob Williams 303-308-7380 | Rob Williams 303-308-7380 | Non Design Telephone Number<br>Designed Services Qwest Ticket Number |
| | 911 Trunks | 800-357-0911 | 911 Trunks | Circuit ID or 2/6 Code |
| | Resold 1FR & 1FB - POTS | 800-405-0083 | 1FR & 1FB | Telephone Number |

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ATTACHMENT 3

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Qwest will calculate local usage charges associated with UNE-P switching on Eschelon's interLATA and intraLATA toll traffic as follows:

1. Qwest will utilize the Originating and Terminating long distance minutes of use on Eschelon's UNE-P lines monthly as reported in the switched access minutes of use provided to Eschelon by Qwest. Qwest will identify the usage by state, so appropriate state rates can be applied to each minute of usage.

2. Qwest's invoice will show the rates used to calculate the usage charges. The rate elements applicable to this traffic are local switching ("LS") and shared transport ("ST") as set forth in the Interconnection Agreements between the Parties (not access tariffs). Charges will reflect any rate reductions subsequently made by Qwest either voluntarily or upon regulatory or court order. If there are such reductions after the effective date of this Amendment, Qwest will use any such new rates in the monthly calculation when the rates become effective.

3. Routing of traffic will determine the appropriate rates to apply to each minute. Certain assumptions will be made as to the percent of traffic originating and terminating from a tandem versus traffic routed directly to and from end offices (e.g., Direct End Office Trunking, "DEOT"). The calculations for each revenue stream to Qwest are as follows:

a. Total Originating Local Switching Revenue is equal to Revenue from End Office Routed Traffic plus Revenue from Tandem Routed Traffic (i + ii = Total Originating Local Switching Revenue)

i. Revenue from End Office Routed Traffic is:–

% DEOT Routed Originating Minutes of Use ("MOUs") x Originating MOUs x LS rate element

ii. Revenue from Tandem Routed Traffic is:

[(1 - % DEOT Routed Originating Traffic) x Originating MOUs x LS rate element] + [(1 - % DEOT Routed Originating Traffic) x Originating MOUs x ST rate element]

b. Total Terminating Local Switching Revenue is equal to Revenue from End Office Routed Traffic plus Revenue from Tandem Routed Traffic.

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i. Revenue from End Office Routed Traffic is:

% DEOT Routed Terminating MOUs x Terminating MOUs x LS rate element

ii. Revenue from Tandem Routed Traffic is:

[(1 - % DEOT Routed Terminating Traffic) x Terminating MOUs x LS rate element] + [(1 - % DEOT Routed Terminating Traffic) x Terminating MOUs x ST rate element]

c. Total Local Switching Revenue = (a) Originating Revenue + (b) Terminating Revenue

4. As reflected in the above calculation, the LS rate is applied to all traffic, while the ST rates are only applied to traffic that is routed through an access tandem.

5. The following weighting factors for DEOT and Tandem traffic will be used until the Parties agree to new weighting factors or actual weightings can be obtained.

a. Originating:

i. DEOT Routed: AZ (59.5%); CO (60.0%); MN (47.5%); OR (57.0%); UT (58.5%); WA (58.0%)

ii. Tandem Routed: AZ (41.5%); CO (40.0%); MN (52.5%); OR (43.0%); UT (41.5%); WA (42.0%)

b. Terminating:

i. DEOT Routed: AZ (57.5%); CO (55.5%); MN (50.0%); OR (54.0%); UT (53.5%); WA (54.5%)

ii. Tandem Routed: AZ (42.5%); CO (44.5%); MN (50.0%); OR (46.0%); UT (46.5%); WA (45.5%)

If actual weightings can be obtained, actual weightings will be used.

6. In the event that usage, routing, or network configuration patterns change, the Parties agree to negotiate any material changes to the assumptions in the above calculation.

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EXHIBIT 7

April 19, 2000

# U S WEST Service Level Agreement with Covad Communications Company

## Unbundled Loop Services

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U S WEST is committed to provide its customers excellent service. In an effort to meet Covad's request, and to provide increased service to other co-providers, U S WEST agrees to make demonstrable improvements to its provisioning service performance on unbundled loops, in order to reach within a reasonable time the following service quality standards in the metropolitan areas where Covad provides to U S WEST wire center forecasts. These quality standards would apply under normal operating conditions, but they would not establish a level of performance to be achieved during periods of emergency, catastrophe, natural disaster, severe storm or other events affecting large numbers of telecommunications customers. These standards would not apply under extraordinary or abnormal conditions of operations such as those resulting from work stoppage or slowdown, or during periods of civil unrest. They would not apply during events outside the control or responsibility of U S WEST, such as cable cuts by third parties, vandalism, or conditions prompted by vendors or suppliers. The parties have agreed that U S WEST's performance will increase on step-level increments with a commitment to reach these service levels within 90 days.

### 1. FOC Process

U S WEST will provide 90% of Covad's Firm Order Confirmation (FOC) dates within 48 hours of receipt of properly completed service requests for POTS unbundled loop services. It is understood that these POTS services will not require loop conditioning activity of any sort (load coil or bridged tap removal). U S WEST will notify Covad of any facilities shortage issues for DSL capable, ISDN capable and DS1 capable services within this same 48-hour time period.

For DSL capable, ISDN capable and DS1 capable unbundled loop services, U S WEST will provide 90% of Covad's FOC dates within 72 hours of receipt of properly completed service requests. As part of the 72-hour FOC process, U S WEST will dispatch a technician to verify the existence of suitable facilities prior to providing Covad an FOC date.



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2. Service Intervals

When facilities are available, U S WEST will provide Covad with unbundled loop service that does not require loop conditioning consistent with U S WEST's published Standard Interval Guide, as of March 31, 2000 at least 90% of the time. The standard intervals will not apply if Covad requests a later completion date, or if the order is delayed for customer cause, or reasons outside U S WEST's control. U S WEST will provide Covad with line sharing service (access to the high frequency spectrum network element) at least 90% of the time within the interval set forth in any line sharing agreement between Covad and U S WEST.

3. New Service Failures

U S WEST recognizes the need for a quality provisioning process, and is committed to providing circuits which are properly conditioned, tested and released right the first time. U S WEST will reduce the incidence of failure on new Covad circuits to less than 10% failure within the first 30 calendar days. For purposes of measurement, "failures" would be defined as U S WEST troubles, or troubles attributed to U S WEST facilities and central office equipment, or to U S WEST employees. "Failures" would not include repair tickets which are informational in nature, or troubles isolated outside the U S WEST network.

4. Facilities Problems

Covad service requests which are accepted, but can not be completed due to lack of facilities, would be resolved through the U S WEST "held order" process. For those service requests held due to line conditioning, U S WEST will provide Covad the option of paying for the line conditioning at the appropriate rate approved by the relevant State Commission, which U S WEST will complete in 24 days or less 90% of the time. Where U S WEST has committed to bulk conditioning in certain localities, U S WEST will provide Covad the additional option of retaining those service requests until U S WEST has completed the bulk conditioning in that locality. U S WEST will then process the service request and not charge Covad for the line conditioning. In those situations where the end user customer is served by digital loop carrier or off pair gain, U S WEST will notify Covad of that situation and provide it the option of submitting a service request for an ISDN capable loop compliant with TR-393 standards and U S WEST Technical Publication 77389. U S WEST will, where technically feasible, either install an appropriate ISDN card for those end user customers served by digital loop carrier or provide another ISDN option for those served off of pair gain in 10 days or less 90% of the time. Where it would not impact a current end user customer, U S WEST will perform a line and station transfer in order to provision the Covad service request in 10 days or less 90% of



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the time. In a parallel effort, U S WEST will resolve those orders already being held for lack of facilities within the next 60 days in the manner described in this paragraph for new service requests. For all service requests for which facilities cannot be made available in the manner described in this paragraph, U S WEST will notify Covad of that fact and, at the option of Covad, either place the service request on a service inquiry list or cancel or reject the service request.

Based on U S WEST's commitment to meet these service performance standards, Covad commits to withdrawing its opposition to the U S WEST/Qwest merger. U S WEST acknowledges that the restrictions reached in this service level agreement are for settlement purposes only and do not necessarily represent the position that Covad would take if it continued to litigate this proceeding. This service level agreement is not intended to modify, alter or waive any existing or future legal or contractual requirements that U S WEST provide service in shorter intervals or at a higher success rate than set forth in this agreement. Covad specifically reserves the right to take positions contrary to the resolutions agreed to in this service level agreement in any future proceeding before any state or federal regulatory, judicial or administrative body and to argue for entirely different results in any future proceeding before any state or federal regulatory, judicial or administrative body.

Trade Secret Data Ended

Dated: April 19, 2000

Ken G Marcotte

Vice President,
U S WEST Network Complex Services

Catherine Hemmer

Executive Vice President,
Covad Communications Company



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EXHIBIT

CONFIDENTIAL STIPULATION BETWEEN SMALL CLECS AND U S WEST

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WHEREAS, HomeTown Solutions, LLC; Hutchinson Telecommunications, Inc.; Mainstreet Communications, LLC; Onvoy Communications Corporation; NorthStar Access, LLC; Otter Tail Telcom, LLC; Paul Bunyan Rural Telephone Cooperative; Telstar Communications, Inc.; VAL-ED Joint Venture, LLP and WETEC LLC, all of whom are small, rural competitive local exchange carriers ("Small CLECs") and U S WEST Communications, Inc. ("U S WEST"), have reached a settlement agreement that resolves certain business issues and disputes between the Small CLECs and U S WEST (collectively "Parties"), as outlined below:

WHEREAS, the Confidential Stipulation between the Parties includes both regulatory and non regulatory components; and

WHEREAS, as a result of this Confidential Stipulation and Agreement, the Small CLECs have agreed to withdraw their opposition to and to encourage the expeditious processing of the review of the proposed merger between U S WEST, Inc. and Qwest Communications International, Inc. ("Qwest"); and

NOW, THEREFORE IT IS AGREED THAT:

1. Toll Services.

U S WEST agrees to be a toll provider (intraLATA and interLATA when it is allowed) for Small CLEC end user customers in Minnesota exchanges where U S WEST is also providing toll services. U S WEST will be the toll provider only when the Small CLEC end user customer specifically requests that U S WEST be the end user's toll provider for toll service. This obligation does not impact or address U S WEST's obligation to be a toll provider to end user customers of incumbent LECs and is subject to all of the following conditions:

a. The individual Small CLEC end user customer that receives local service from the Small CLEC, and requests U S WEST as their toll provider, is identified as the U S WEST customer of record for toll;

b. The Small CLEC cooperates with U S WEST in the Small CLEC provisioning of Billing Name and Address ("BNA") and originating call detail in EMR/EMI format as necessary for U S WEST to identify and bill any end user(s) who have requested U S WEST as their toll provider;

c. At U S WEST's request, the Small CLEC provides U S WEST with originating call detail records (recording service) for all Small CLEC end office originating toll traffic for which U S WEST is the toll provider;

d. If requested by U S WEST, the Small CLEC provides recording, rating, message processing, billing, collection functions and bill inquiry services (B&C) to U S WEST at rates mutually agreed to by U S WEST and the CLEC. If the Small CLEC performs the B&C functions for U S WEST, the Small CLEC agrees to make reasonable modifications to such billing system in order to bill optional toll calling plans, volume discounts, etc., as requested by and at no additional charge to U S WEST. To the extent the Small CLEC is unwilling or unable under a B&C agreement to make such modifications, the Small CLEC would agree not to contest in any public, regulatory or legal forum, U S WEST offering such calling plans to current or future Small CLEC end users selecting U S WEST as their toll provider; and

e. The Small CLEC works cooperatively with U S WEST to identify on a timely basis past due accounts and to disconnect U S WEST toll service due to non-payment.

f. The intrastate access rates for the Small CLECs shall be those access rates approved by the Commission.

U S WEST will begin accepting IntraLATA customers served by the Small CLECs effective the first day of the first month after signing this Agreement, subject to the above

conditions including the successful negotiations of traffic routing details, billing and collection agreements and/or agreements on providing customer and call detail information, including rates/processes etc. U S WEST's obligation to provide toll service pursuant to this Confidential Stipulation will expire July 1, 2003, at which time U S WEST's obligation to provide toll service to the Small CLECs in Minnesota will be based upon existing obligations under current federal and state law at that time, if any.

2. Operational Support Systems ("OSS").

a. U S WEST agrees to enhance IMA to permit Internet access no later than April 30, 2001. Effective the first day of the first month after the closing of the merger between U S WEST, Inc. and Qwest, reasonable and customary charges specifically associated with any T1s between the Small CLECs and either the Denver or Omaha U S WEST computer center used to access IMA and receive billing and usage data (as designated by U S WEST as the appropriate computer center to be used by Small CLECs) will be waived or reimbursed by U S WEST until U S WEST completes the system modifications necessary to allow the small CLECs to access IMA and receive billing and usage data over the Internet.

b. U S WEST will meet with each interested CLEC (together or separately) within 90 days of jointly signing this agreement to (a) provide more detailed information regarding the following interface options, and (b) to establish a joint plan for conversion to the following desired interface:

i. Resale usage records are available in EMI/EMR format via an NDM Windows 95 compatible protocol now.

ii. Resale summary bill will be available via email in ASCII format by the fourth quarter 2000.

iii. Category 11 (Interexchange, CMRS/Wireless, CLEC and ILEC Transit.)

and billable toll and local records in EMI/EMR format via secure Internet access is being

studied and is scheduled for availability in 2000.

c. U S WEST agrees that the IMA Graphical User Interface ("GUI") will be

modernized at a level that provides the same pre-order and ordering functionality as IMA EDI.

The nonrecurring charges for using IMA GUI and EDI will be the same. Until IMA GUI is

available through Internet access, the nonrecurring charges for manual orders shall be the same

as for IMA GUI and EDI orders.

2. Subject to the closure of the Merger, effective March 17, 2002, and subject to

technical feasibility, U S WEST will permit all Small CLECs operating in Minnesota the ability

to adopt the terms of any effective interconnection agreements that were voluntarily negotiated

and entered into by U S WEST and CLECs in any other state in U S WEST's operating territory,

subject to the following conditions:

a. This provision does not apply to terms that were ever reached as the result of an

arbitrated decision or any other decision in a contested case action, unless the terms

which the CLEC seeks to adopt are present in interconnection agreements in a minimum

of four other states in U S WEST's territory; and

b. The prices for all services should, however, be determined based on Minnesota

specific costs. Where no rate exists for the services in Minnesota, the rate approved in

the originating state should be applied as an interim rate until a Minnesota specific rate

can be determined; and

c. This provision does not apply to those determinations made by a state

Commission which are based upon fact specific characteristics of a provider (e.g.

geographic scope and functionality of a specific provider in determining and offer or tandem treatment).

The provisions in paragraph 3, 3.a., 3.b., and 3.c. shall remain confidential between US WEST and the Small CLECs and shall be implemented through an interconnection agreement amendment to be filed and effective on March 17, 2002, and which will expire on December 31, 2003. The requirements of confidentiality expire on March 17, 2002.

## GENERAL TERMS AND CONDITIONS

A. In light of the provisions of this Confidential Stipulation, the Small CLECs agree to withdraw their opposition to the Merger and to encourage the expeditious processing of all proceedings before the MPUC.

B. This Confidential Stipulation and Agreement applies to each of the Parties and shall be binding on the successors and assigns of the Parties, and each will support this Confidential Stipulation and Agreement before all Minnesota regulatory agencies with jurisdiction and before all Minnesota and federal courts.

C. This Confidential Stipulation and Agreement is effective immediately pursuant to the terms and conditions contained herein. For a period of one year after the effective date of this Agreement, Small CLECs agree not to challenge this Confidential Stipulation or to request any other conditions to the Merger.

E. The Parties acknowledge that this Confidential Stipulation is the product of negotiations and compromise and shall not be construed against any Party on the basis that it was the drafter of any or all portions of this Confidential Stipulation. This Confidential Stipulation constitutes the Parties' entire agreement on all matters set forth herein, and it supersedes any and

all prior oral and written understandings or agreements on such matters that previously existed or occurred in this proceeding, and no such prior understanding or agreement or related representation shall be relied upon by the parties.

F. This Confidential Stipulation and Agreement shall be enforceable as a Commission Order under Minn. Stat. §§ 237.27 and 237.461; and

G. This Confidential Stipulation may be executed in counterparts and by facsimile.

[Trade Secret Data Ends]

Dated: April 6, 2000

U S WEST COMMUNICATIONS, INC.

By: J. M. Tinkham

Title: Vice President - Wholesale

Dated: April 6, 2000

MOSS & BARNETT, A Professional Association

By: Michael J. Bradley

Attorneys on behalf of HomeTown Solutions, LLC; Hutchinson Telecommunications, Inc.; Mainstreet Communications, LLC; Onvoy Communications Corporation; NorthStar Access, LLC; Otter Tail Telcom, LLC; Paul Bunyan Rural Telephone Cooperative; Tekstar Communications, Inc.; VAL-ED Joint Venture, LLP and WETEC LLC

EXHIBIT

SUBJECT TO RULE OF EVIDENCE 408

[Trade Secret Data Begins

# CONFIDENTIAL BILLING SETTLEMENT AGREEMENT

This Confidential Billing Settlement Agreement ("Agreement"), dated April 25, 2000, is between U S WEST Communications, Inc. ("U S WEST") and McLeodUSA Inc. ("McLeodUSA") who hereby enter into this Confidential Billing Settlement Agreement with regard to the following:

## RECITALS

1. U S WEST is an incumbent local exchange provider operating in the states of Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

2. McLeodUSA is a competitive local exchange provider that will soon operate in all fourteen states of U S WEST's operating region.

3. Whereas both U S WEST and McLeodUSA have entered into interconnection agreements pursuant to the federal Telecommunications Act of 1996 ("Act"), under Section 251 and 252 of that Act, and those agreements have been approved by the appropriate state commissions where those agreements were filed pursuant to the Act. U S WEST and McLeodUSA operate under those agreements in certain states, as well as various state and federal tariffs.

4. McLeodUSA has intervened in the U S WEST/QWEST merger proceedings that have been or are being conducted by several states within U S WEST's 14-state region, including Arizona, Minnesota, Montana, Utah, Washington and Wyoming.

5. Disputes between the parties have arisen in a number of states under

both the interconnection agreements and tariffs regarding a number of billing issues, including nonblocked Centrex service, subscriber list information charges, reciprocal compensation and interim pricing.

6. In an attempt to finally resolve those issues in dispute, including McLeodUSA's opposition to the merger, and avoid delay and costly litigation, the parties voluntarily enter into this Confidential Billing Settlement Agreement to resolve all disputes, claims and controversies between the parties, as of the date of this Agreement that relate to the matters addressed herein and release all claims related to these matters.

## CONFIDENTIAL BILLING SETTLEMENT AGREEMENT

1. In consideration for McLeodUSA's withdrawal from the merger dockets, and within five (5) business days after McLeodUSA has withdrawn its opposition to the merger in all states and dismissed its pending FCC complaint regarding subscriber list information charges, U S WEST will pay McLeodUSA $4.2 million to resolve the nonblocked Centrex service and subscriber list information billing disputes. The form of payment will consist of bill credits (if payment has not been made) or cash payments to McLeodUSA.

2. Effective upon merger closure and subject to the additional terms described below, U S WEST will pay McLeodUSA $25.5 million to resolve miscellaneous billing disputes. The form of payment will consist of a cash payment to McLeodUSA, payable within five (5) business days following merger closure.

a. Nonblocked Centrex Service: Subject to McLeodUSA's withdrawal from the merger dockets and dismissal of its FCC complaint, McLeodUSA and U S WEST agree

that upon payment to McLeodUSA of the $4.2 million described in paragraph 1, all disputed Centrex related charges incurred through March 31, 2000 have been fully resolved and all claims for such charges are released. Effective immediately, for Centrex service charges incurred on a going-forward basis, the parties will continue to negotiate, in good faith, a business-to-business resolution.

b. Subscriber List Information Charges: Subject to McLeodUSA's withdrawal from the merger dockets and dismissal of its FCC complaint, U S WEST and McLeodUSA agree that upon payment to McLeodUSA of the $4.2 million described in paragraph 1, all disputed amounts incurred through March 31, 2000 have been fully resolved and all claims for such charges are released. McLeodUSA agrees to immediately dismiss its pending FCC complaint regarding subscriber list information charges. Effective immediately, on a going-forward basis, McLeodUSA will pay the $.04 (per listing for initial load) and $.06 (per listing for updates) rates for subscriber list information or such other final rates as may be established by any cost docket proceedings or rates the parties may negotiate, in good faith, on a business-to-business basis. Both parties reserve the right to participate fully in future rate determination proceedings.

c. Compensation for Traffic Exchange: Upon payment to McLeodUSA of the $4.2 million described in paragraph 1, in all existing and future states, for the period of March 1, 2000 through December 31, 2002, the parties agree to immediately amend their existing interconnection agreements to change the reciprocal compensation terms from a usage-based system to a "bill and keep" arrangement for local and Internet-related traffic, and to incorporate such a bill and keep arrangement into any future

interconnection agreements in any of U S WEST's fourteen states. Subject to merger closure, both parties agree not to bill usage to one another in any existing or future state between March 1, 2000 and the date of merger closure. However, in the event that the merger between U S WEST and QWEST does not close, U S WEST will retroactively bill McLeodUSA for the true-up for reciprocal compensation for usage through February 29, 2000 at the appropriate state commission-approved rates. Both parties may bill each other retroactively for the usage not billed between March 1, 2000 and the date on which it is officially announced that the merger will not close, based on appropriate state commission-approved rates or the currently existing interconnection agreement(s). U S WEST and McLeodUSA agree to pay the undisputed portion of such retroactive usage billing at the appropriate state commission-approved rates within five (5) business days of receiving each other's invoices for the same. In addition, if the merger does not close, the parties will immediately amend their existing interconnection agreements accordingly.

d. Interim Pricing: Subject to merger closure and in consideration for the bill and keep arrangement agreed upon above, U S WEST and McLeodUSA agree that all interim rates, except reciprocal compensation rates, will be treated as final and any final commission orders entered in any of the 14 states in U S WEST's territory through April 30, 2000, and on a going-forward basis through December 31, 2002, (except as such orders may relate to reciprocal compensation rates for the period between March 1, 2000 and December 31, 2002—reciprocal compensation is addressed in paragraph 2.c. of this agreement) will be applied prospectively to McLeodUSA, and not retroactively. In addition, U S WEST agrees that this settlement term will apply throughout the terms

of the parties' existing interconnection agreements. Thus, both Parties agree not to bill each other for any true-ups associated with final commission orders that affect interim prices and release claims for such true-ups.

e. Centrex Service Agreements: For McLeodUSA's five-year Centrex Service Agreements that expire before December 31, 2002, the Parties agree to extend the terms and pricing of those agreements until December 31, 2002.

3. For valuable consideration mentioned above, the receipt and sufficiency of which are hereby acknowledged, McLeodUSA and U S WEST do hereby release and forever discharge the other and the other's associates, owners, stockholders, predecessors, successors, agents, directors, officers, partners, employees, representatives, employees of affiliates, employees of parents, employees of subsidiaries, affiliates, parents, subsidiaries, insurance carriers, bonding companies and attorneys, from any and all manner of action or actions, causes or causes of action, in law, under statute, or in equity, suits, appeals, petitions, debts, liens, contracts, agreements, promises, liability, claims, affirmative defenses, offsets, demands, damages, losses, costs, claims for restitution, and expenses, of any nature whatsoever, fixed or contingent, known or unknown, past and present asserted or that could have been asserted or could be asserted in any way relating to or arising out of the billing disputes/matters addressed herein.

4. The terms and conditions contained in this Confidential Billing Settlement Agreement shall inure to the benefit of, and be binding upon, the respective successors, affiliates and assigns of the Parties.

5. McLeodUSA hereby covenants and warrants that it has not assigned or

transferred to any person any claim, or portion of any claim which is released or discharged by this Confidential Billing Settlement Agreement.

6 . The Parties expressly agree that they will keep the substance of the negotiations and or conditions of the settlement and the terms or substance of this Confidential Billing Settlement Agreement strictly confidential. The parties further agree that they will not communicate (orally or in writing) or in any way disclose the substance of negotiations and/or conditions of the settlement and the terms or substance of this agreement to any person, judicial or administrative agency or body, business, entity or association or anyone else for any reason whatsoever, without the prior express written consent of the other party unless compelled to do so by law. It is expressly agreed that this confidentiality provision is an essential element of this Confidential Billing Settlement Agreement. The parties agree that this Confidential Billing Settlement Agreement and negotiations, and all matters related to these two matters, shall be subject to the Rule 408 of the Rules of Evidence, at the federal and state level.

7 . In the event either Party has a legal obligation which requires disclosure of the terms and conditions of this Confidential Billing Settlement Agreement, the Party having the obligation shall immediately notify the other Party in writing of the nature, scope and source of such obligation so as to enable the other Party, at its option, to take such action as may be legally permissible so as to protect the confidentiality provided for in this agreement.

8 . This Confidential Billing Settlement Agreement constitutes the entire agreement between the Parties and can only be changed in a writing or writings executed by both of the Parties. Each of the Parties forever waives all right to assert

that this Confidential Billing Settlement Agreement was a result of a mistake in law or in fact.

9. This Confidential Billing Settlement Agreement shall be interpreted and construed in accordance with the laws of the State of Colorado, and shall not be interpreted in favor or against any Party to this agreement.

10. The Parties have entered into this Confidential Billing Settlement Agreement after conferring with legal counsel.

11. If any provision of this Confidential Billing Settlement Agreement should be declared to be unenforceable by any administrative agency or court of law, the remainder of the Confidential Billing Settlement Agreement shall remain in full force and effect, and shall be binding upon the Parties hereto as if the invalidated provision were not part of this Confidential Billing Settlement Agreement.

12. Any claim, controversy or dispute between the Parties in connection with this Confidential Billing Settlement Agreement shall be resolved by private and confidential arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Bar Association. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, not state law, shall govern the arbitrability of all disputes. The arbitrator shall only have the authority to determine breach of this agreement, but shall not have the authority to award punitive damages. The arbitrator's decision shall be final and binding and may be entered in any court having jurisdiction thereof. Each party shall bear its own costs and attorneys' fees and shall share equally in the fees and expenses of the arbitrator.

13. The Parties acknowledge and agree that they have a legitimate billing

dispute about the issues described in this Confidential Billing Settlement Agreement and that the resolution reached in this agreement represents a compromise of the Parties' positions. Therefore, the Parties agree that resolution of the issues contained in this agreement cannot be used against the other Party. .

14. This Confidential Billing Settlement Agreement may be executed in counterparts and by facsimile.

IN WITNESS THEREOF, the Parties have caused this Confidential Billing Settlement Agreement to be executed as of this day, 28th of April 2000.

McLeodUSA, Inc.

By: _____

Title: PRESIDENT

Date: 4/28/2000

U S WEST Communications, Inc.

By: _____

Title: _____

Date: _____

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dispute about the issues described in this Confidential Billing Settlement Agreement and that the resolution reached in this agreement represents a compromise of the Parties' positions. Therefore, the Parties agree that resolution of the issues contained in this agreement cannot be used against the other Party.

14. This Confidential Billing Settlement Agreement may be executed in counterparts and by facsimile.

IN WITNESS THEREOF, the Parties have caused this Confidential Billing Settlement Agreement to be executed as of this day, 27th of April 2000.

McLeodUSA, Inc.

By: _____

Title: PRESIDENT

Date: 4/28/2000

U S WEST Communications, Inc.

By: _____

Title: President - Wholesale Mkt

Date: 4/28/00

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Qwest
1801 California Street
Suite 5200
Denver, CO 80202
Telephone: 303-992-2787
Facsimile: 303-992-2789

Greg Casey
Executive Vice President
Wholesale Markets

EXHIBIT

October 26, 2000

CONFIDENTIAL AGREEMENT

VIA ELECTRONIC MAIL AND FACSIMILE

Blake Fisher
McLeodUSA
6400 C Street SW
Post Office Box 3177
Cedar Rapids, Iowa 52506-3177

Re: Escalation procedures and business solutions

Dear Blake:

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As a result of ongoing discussions between McLeodUSA and Qwest in recent days, the parties have addressed numerous proposals intended to better the parties' business relationship. In principle, the parties have agreed to: (1) develop an implementation plan by which the parties agree to implement their Interconnection Agreements; (2) arrange quarterly meetings between executives of each company to address unresolved and/or anticipated business issues; and (3) establish and follow escalation procedures designed to facilitate and expedite business-to-business dispute solutions.

1. IMPLEMENTATION PROCESS

By no later than November 15, 2000, the parties agree to meet together (via telephone, live conference or otherwise), and as necessary thereafter, to develop an Implementation Process. The purpose of the Implementation Process will be to establish processes and procedures to better implement the parties' Interconnection Agreements. Both parties agree to dedicate the necessary time and resources to the development of the Implementation Process, and to finalize an Implementation Process by no later than December 15, 2000.

2. QUARTERLY MEETINGS

Beginning in 2001 and continuing through the end of 2003, the parties agree to attend and participate in quarterly executive meetings, the purpose of which will be to address, discuss and attempt to resolve unresolved business issues and disputes, adjustments to the Purchase Agreements, if any, the Implementation Process, and any anticipated business issues. The meetings will be attended by executives from both companies at the vice-president and/or above level.

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3. ESCALATION PROCEDURES

The parties wish to establish a business-to-business relationship and agree that they will resolve any and all business issues and/or disputes that arise between them in accordance with the escalation procedures set forth herein. The parties agree, subject to any subsequent written agreement between the parties, to: (1) utilize the following escalation process and time frames to resolve disputes; (2) commit the time, resources and good faith necessary to meaningful dispute resolution; (3) not proceed to a higher level of dispute resolution until expiration of the time frame for the prior level of dispute resolution; and (4) complete all levels of dispute resolution before seeking resolution from the American Arbitration Association or any regulatory or judicial forum.

| Level | Participants | Time frame for discussions |
|---|---|---|
| LEVEL 1 | Vice Presidents (Stacey Stewart/Judy Tinkham or successors) | 10 business days |
| LEVEL 2 | Senior Vice Presidents (Blake Fisher/Greg Casey or successors) | 10 business days |
| LEVEL 3 | CEOs | 10 business days |
| LEVEL 4 | Arbitration according to the provisions of the parties' Interconnection Agreements | |
| LEVEL 5 | CEOs | 5 business days |

LEVEL 6A If a dispute is not resolved in Levels 1 through 5, and involves either a technical telecommunications issue requiring telecommunications expertise or an interpretation of legislative or regulatory requirements, and does not involve a determination of penalties or damages, then each party has the right to take such disputes, unresolved after arbitration, to the appropriate state or federal regulatory body for resolution.

LEVEL 6B If a dispute is not resolved in Levels 1 through 6A, either party may initiate litigation in federal court, with all questions of fact and law to be submitted for determination to the judge, not a jury. The parties agree that the exclusive venue for civil court actions initiated by McLeodUSA is the United States District Court for the District of Colorado and the exclusive venue for civil court actions initiated by Qwest is the United States District Court for the District of Iowa. If a court issues a final order of dismissal or summary judgment and such order is not reversed on appeal, then the party bringing the action (in the case of dismissal) or the party that did not prevail on summary judgment shall be responsible for reimbursement to the other party of the reasonable attorneys' fees incurred by the other party. In the event that either party files an action in court, the parties waive : (a) primary jurisdiction in any state utility or service commission, and (b) any tariff limitations on damages or other limitation on actual damages, to the extent that such damages are reasonably foreseeable and acknowledging each party's duty to mitigate damages; and the Interconnection Agreements are hereby amended accordingly.

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If the parties agree with the terms set forth above, they will each execute a copy of this letter in the signature spaces provided on the last page. Upon signature of both parties, the parties will be bound by the terms set forth herein.

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Very truly yours,

Greg Casey

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TERMS OF LETTER AGREEMENT ACCEPTED BY:

QWEST COMMUNICATIONS INTERNATIONAL, INC.

[name]

[title]

[date]

MCLEODUSA INCORPORATED

[name] Blake O. Fisher, Jr.

[title] Vice President

[date] 10/31/2000

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Q110113

TERMS OF LETTER AGREEMENT ACCEPTED BY:

QWEST COMMUNICATIONS INTERNATIONAL, INC.

[name]

EXEC. V.P.
[title]

10-25-00
[date]

MCLEODUSA INCORPORATED

[name]

[title]

[date]

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EXHIBIT

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U S WEST Communications, Inc.
Wholesale Markets
[illegible]
Minneapolis, MN 55402
Telephone (612) 963-7377

Patricia A. Kline
General Manager-Eastern Region

July 14, 1999

Michael J. Bradley, Esq.
Moss & Barnett
90 South Seventh Street, Suite 4800
Minneapolis, Minnesota 55402-4129

Re: In the Matter of a Complaint and Request for Expedited Proceeding by USLink, Inc. and InfoTel Communications, LLC Against U S WEST Communications, Inc. Regarding Extended Area Service, MPUC Docket No. P421/C-99-724

Dear Mr. Bradley:

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On June 4, 1999, USLink, Inc. ("USLink") and InfoTel Communications, LLC ("InfoTel") filed a complaint against U S WEST Communications, Inc. ("U S WEST") before the Minnesota Public Utilities Commission ("Commission"), which is assigned case number P421/C-99-724 (hereinafter "Complaint"). In the Complaint, USLink and InfoTel ("Complainants") sought the ability to use local tandem functionality at certain U S WEST end offices to transport calls to and from Extended Area Service ("EAS") calling areas. U S WEST and Complainants, by means of executing this letter, hereby resolve their disputes and USLink and InfoTel agree to withdraw the complaint under the following terms and conditions:

1. USLink and InfoTel shall be allowed to utilize local tandem switching functionality and transport from and to U S WEST end offices in the exchanges listed

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below (hereinafter "Requested Exchanges") to transport calls within the Requested Exchanges and the exchanges included in Commission approved EAS calling areas for those exchanges. U S WEST will allow USLink and InfoTel to utilize the Requested Exchanges as local tandem switches:

A. Requested Exchanges:

Brainerd; (includes Nisswa remote)
Duluth;
Fargo (includes Moorehead/West Fargo);
Fergus Falls;
Grand Rapids;
Hibbing;
Little Falls;
Owattona
Rochester;
St. Cloud;
Wadena; and
Willmar.

2. In those Local Calling Areas in Minnesota where USLink and InfoTel operate and where U S WEST has an official Local Tandem, as listed in the Local Exchange Routing Guide ("LERG"), USLink and InfoTel may interconnect at the local tandem (including the Metropolitan EAS area).

3. USLink and InfoTel may request to utilize tandem switching functionality and transport to originate or terminate local traffic within the Requested Exchanges, or in other U S WEST end office exchanges. Except for the exchanges listed in paragraphs 1 and 2, such a request will not impose any obligation on U S WEST. Where U S Link and InfoTel make such a request, U S WEST may consider such requests on an individual case basis. U S WEST may request compensation for any costs imposed, including but not limited to up front recovery of any reconfiguration costs.

and/or switch upgrades, resulting from USLink's or InfoTel's use of the Requested Exchanges listed in paragraph 1, or any additional requests, as local tandems. Under U S WEST's policy, U S WEST is not obligated to agree to such a request since U S WEST does not use its end offices for tandem office functionality for provision of local calling services to itself. It shall remain U S WEST's policy that competitive local exchange providers or commercial mobile radio service providers shall use only designated official local tandems identified in the LERG as local tandems where they exist, otherwise, such provider must direct connect to each end office in such local calling area. Under this policy, a provider may not designate a U S WEST end office as a local tandem where such switch is not identified in the LERG as a local tandem. If the parties are unable to reach agreement, they may resort to the Dispute Resolution provisions of the applicable Agreement for Local Wireline Network Interconnection and Service Resale ("Interconnection Agreement").

4. In those instances where USLink and InfoTel may use tandem switching functionality and transport in an end office to terminate local EAS traffic, they shall pay U S WEST the usage rate elements, established in the Interconnection Agreement, including: 1) local switching for calls completed within the requested exchange end office; 2) tandem switching, transport (billed at the common transport rate), and local switching for calls completed to another U S WEST end office in the same EAS; 3) tandem switching and appropriate portion of transport (billed at the common transport rate) for calls to other carriers' end office(s) in that EAS. Calls originated by U S WEST end users in the Local Calling Area which route through the requested exchange end offices to terminate to USLink or InfoTel are subject to reciprocal compensation.

Likewise, calls originated by USLink or InfoTel end users which route through the requested exchange end offices to terminate to U S WEST are subject to reciprocal compensation. U S WEST reserves the right to assess USLink and InfoTel up front for any unforeseen costs, as noted in number 3 above, incurred by U S WEST. Should USLink or InfoTel dispute the propriety of such costs, the parties agree to negotiate the matter and may resort to the Dispute Resolution provisions of the applicable Interconnection Agreement. USLink and InfoTel also reserve the right to elect to provide their own EAS facilities and thereby avoid such charges. Further, USLink and InfoTel are responsible for negotiating interconnection agreements for traffic with a terminating provider for traffic which terminates on that provider's network and only transits the U S WEST network. U S WEST, USLink and InfoTel also agree that U S WEST is not responsible for the relationship between USLink and InfoTel and other terminating providers.

5. In no case will USLink or InfoTel originate or terminate InterLATA or IntraLATA toll traffic of any sort through a U S WEST end office dedicated for local or EAS traffic, regardless of whether an end office has tandem switching functionality. Further, the 512 ccs restriction found in the Interconnection Agreements in Attachment 3, Appendix A, Section, 2.4.4, shall also apply to the Requested Exchanges.

6. Based on the terms of this settlement, USLink, InfoTel, and U S WEST (the "Parties") agree that the Complaint will be withdrawn immediately and no further action by the Commission with regard to that complaint is requested. Because the Complaint involves a dispute under an interconnection agreement, the Parties agree that a voluntary resolution of the dispute does not require Commission approval.

However, the Parties agree to appear before the Commission to support approval of this agreement should the Commission so request.

7. Nothing contained herein, and no action taken by the Parties with regard to this agreement, shall be construed as an admission by any of these Parties as to liability regarding the matters herein, nor speculation as to the outcome had the matter been fully litigated before the Commission.

8. This agreement shall be construed in accordance with the laws of the State of Minnesota.

9. The Parties agree that until the Commission determines that paging, or Internet Service Provider traffic should be treated like local EAS traffic, the Parties retain the option of pursuing an appropriate remedy with respect to such traffic. Until such time as the Commission determines the appropriate compensation mechanism for paging and Internet Service Provider traffic, the parties may withhold payment for paging and Internet Service Provider traffic. The Commission, to date, has not determined Internet Service Provider traffic and paging traffic to be local traffic for purposes of reciprocal compensation. The party rendering the bill for reciprocal compensation will cooperate with the other party to make a good faith effort to identify paging traffic and ISP traffic.

10. This agreement is the entire agreement between the Parties regarding resolution of the Complaint. Prior oral and written agreements are superceded by the agreement herein and this agreement may be modified only if agreed to in writing, signed by the Parties to this complaint.

# EXHIBIT C

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# MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered into by and between Qwest Corporation ("Qwest") and Z-Tel Communications, Inc. _____ ("Z-Tel") this ___ day of May, 2001 (the "Effective Date"). The purpose of this Memorandum of Understanding is to confirm the intent of Qwest and Z-Tel to negotiate in good faith Sections 251 and 252 interconnection agreements under the federal Telecommunications Act of 1996, to agree work towards resolution on other operational issues, and to work towards reaching agreement which will govern the parties business relationship in the future.

## Interconnection Agreements

The Parties currently have effective interconnection agreements in the states of Arizona, Colorado, Minnesota, Oregon, Utah, and Washington. Z-Tel wishes to enter into Sections 251 and 252 interconnection agreements for the states of Idaho, Iowa, Montana, Nebraska, New Mexico, North Dakota, South Dakota, and Wyoming on an expedited basis. In order to accomplish this, the Parties agree that Z-Tel shall opt-into Qwest's template agreement for the above-mentioned states at rates available on Qwest's website as of the execution date of this agreement (*i.e.*, "Exhibit A of SGAT Agreement"). After those agreements are signed, Qwest will work with Z-Tel so that Z-Tel can place orders to test its systems and processes and provide service on a limited basis. Qwest shall implement the arrangements in those agreements upon signature of both Parties. After those agreements are effective, Qwest will work with Z-Tel to amend those agreements, as necessary and appropriate.

## Operational and Business Issues

The Parties want to establish a good business relationship. Such a relationship will include an escalation process to resolve issues that arise between the Parties and can't be easily resolved, before either Party can seek resolution from a third party, or in any forum. In order to understand the Parties' needs, the Parties will engage in a good faith negotiations for a period of 60 days to attempt to enter into a mutually beneficial business-to-business relationship which shall govern the Parties' future relationship. The Parties shall memorialize that arrangement, and file appropriate interconnection agreement amendments as necessary.

## Litigation Stand-Down

The Parties shall dedicate sufficient resources to implement the provisions of this Memorandum of Understanding. The Parties shall engage in good faith negotiations for the next 60 days to arrive at amendments to their interconnection agreements for the above mentioned states, and to arrive at a business-to-business arrangement which is mutually beneficial. During that 60 day period, Z-Tel shall not file any documents (including, but not limited to complaints, ex parties, etc.) or advocate in any forum (including, but not limited to, regulatory, judicial, or legislative) during this 60 day period ("litigation stand-down") anything which is disparaging or critical of Qwest while the Parties attempt to reach resolution on outstanding

issues, and arrive at appropriate amendments to the Section 251 and 252 interconnection agreements, and reach agreement on an appropriate business arrangements between the Parties.

## Confidential Information

This document, and the documents, materials and other information ("Confidential Information") that are, have been, or will be shared pursuant to this Memorandum of Understanding are to remain confidential in accordance with the terms and conditions of the non-disclosure agreements in place between the two companies. Confidential Information that is shared by and between the companies during the process to implement this Memorandum of Understanding are only to be used for the purpose of implementing this Memorandum of Understanding. Confidential Information only may be disclosed to those representatives who need to know such information for the purpose of implementing this Memorandum of Understanding.

## General Terms of Memorandum of Understanding

Unless and until a formal, binding agreement between Qwest and Z-Tel with respect to this contemplated transaction is executed by both Parties, neither Party will be under any legal obligation of any kind whatsoever with respect to such a transaction by virtue of this or any written or oral expression except for the matters specifically agreed to in this Memorandum of Understanding. Each party reserves the right, in its sole and absolute discretion, to reject all proposals and to terminate discussions and negotiations with the other party at any time. Further, no joint venture, partnership or other fiduciary relationship shall be deemed to exist or arise between Qwest and Z-Tel with respect to this Memorandum of Understanding or any possible transaction. The understandings set forth in this Memorandum of Understanding may be modified or waived only by a separate writing signed by Qwest and Z-Tel.

This Memorandum of Understanding shall be governed by and subject to the laws of the State of Colorado, without regard to choice of law rules thereof, and represents the intent and understanding of Qwest and Z-Tel regarding the proposed transactions. Acceptance of this Memorandum of Understanding and the terms outlined herein is signified by the parties' signatures below. Trade Secret Data Ends]

Z-Tel COMMUNICATIONS, INC

By: _____
Title: _____
Date: 7/13/01

QWEST CORPORATION

By: _____
Title: _____
Date: _____



NONPUBLIC DOCUMENT

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[Trade Secret Data Begins

issues, and arrive at appropriate amendments to the Section 251 and 252 interconnection agreements, and reach agreement as to appropriate business arrangements between the Parties.

## Confidential Information

This document, and the documents, materials and other information ("Confidential Information") that are, have been, or will be shared pursuant to this Memorandum of Understanding are to remain confidential in accordance with the terms and conditions of the non-disclosure agreement in place between the two companies. Confidential Information that is shared by and between the companies during the process to implement this Memorandum of Understanding are only to be used for the purpose of implementing this Memorandum of Understanding. Confidential Information may only be disclosed to those representatives who need to know such information for the purpose of implementing this Memorandum of Understanding.

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Unless and until a formal, binding agreement between Qwest and Z-Tel with respect to this contemplated transaction is executed by both parties, neither party will be under any legal obligation of any kind whatsoever with respect to such a transaction by virtue of this or any written or oral expression except for the matters specifically agreed to in this Memorandum of Understanding. Each party reserves the right, in its sole and absolute discretion, to reject all proposals and to terminate discussions and negotiations with the other party at any time. Further, no joint venture, partnership or other fiduciary relationship shall be deemed to exist or arise between Qwest and Z-Tel with respect to this Memorandum of Understanding or any possible transaction. The understandings set forth in this Memorandum of Understanding may be modified or waived only by a separate writing signed by Qwest and Z-Tel.

This Memorandum of Understanding shall be governed by and subject to the laws of the State of Colorado, without regard to choice of law rules thereof, and represents the entire understanding of Qwest and Z-Tel regarding the proposed transaction. Acceptance of this Memorandum of Understanding and the terms outlined herein is signified by the parties' signatures below. Trade Secret Data Ends]

Z-Tel COMMUNICATIONS, INC

By: _____
Title: _____
Date: _____

QWEST CORPORATION

By: [signature]
Title: [illegible]
Date: [illegible]

# EXHIBIT D

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

| | |
|---|---|
| IN RE:<br>AT&T CORPORATION,<br>Complainant,<br>v.<br>QWEST CORPORATION,<br>Respondent. | DOCKET NO. FCU-02-2 |

**ORDER MAKING TENTATIVE FINDINGS, GIVING NOTICE FOR PURPOSES OF CIVIL PENALTIES, AND GRANTING OPPORTUNITY TO REQUEST HEARING**

(Issued May 29, 2002)

## PROCEDURAL HISTORY

On February 27, 2002, AT&T Corporation (AT&T) filed with the Utilities Board (Board) a letter alleging that Qwest Corporation (Qwest) may have entered into a series of interconnection agreements granting preferential treatment to some competitive local exchange carriers (CLECs). AT&T stated that the Minnesota Department of Commerce (Minnesota Department) had recently filed a complaint before the Minnesota Public Utilities Commission alleging Qwest has entered into secret agreements with various CLECs to provide preferential treatment for those CLECs; that the agreements were characterized as amendments to existing interconnection agreements; and that Qwest had not filed the agreements with the

Minnesota Public Utilities Commission as required by 47 U.S.C. §§ 251(c) and 252(a)-(i). AT&T alleged that the allegations in Minnesota show there is good cause to believe similar agreements exist in Iowa, requiring a close examination of Qwest's practices.

On March 11, 2002, Qwest filed a letter with the Board which intended to provide background information regarding the Minnesota proceedings. Qwest asserted it exercised good faith in deciding when a particular contract arrangement with a CLEC requires a state agency filing. Qwest argued the § 252 mandatory filing requirements may be ambiguous, but negotiations with CLECs to resolve past disputes or define administrative business procedures do not require filing under § 252. Qwest included two attachments with its letter; first, a copy of Qwest's answer to the Minnesota Department complaint and second, copies of three agreements identified by the Minnesota Department that involve CLECs operating in Iowa.

On March 25, 2002, Qwest filed its answer to AT&T's complaint letter and a motion to dismiss. In its motion to dismiss, Qwest argued that AT&T had not offered any facts or law to support the statements in its letter, but instead invited the Board to commence an investigation "in an area in which the law is still developing." Qwest argued it was not appropriate or necessary to commence such an investigation.

On April 1, 2002, the Board issued an order docketing AT&T's complaint letter for investigation and denying Qwest's motion to dismiss. The Board found that while the issues surrounding the various Qwest-CLEC agreements may ultimately require

investigation, it would be more efficient to begin this docket by addressing a legal question, *viz*, the scope of the obligation to file interconnection agreements pursuant to federal law. Accordingly, the Board established a briefing schedule, inviting the parties to use the agreements Qwest filed with its letter of March 11, 2002, to illustrate their arguments, along with any other agreements obtained through discovery or already in the possession of a party.

Pursuant to the schedule set by the Board, initial and reply briefs were filed by AT&T, Qwest, and the Consumer Advocate Division of the Department of Justice (Consumer Advocate).

On April 23, 2002, AT&T filed a motion asking the Board to issue subpoenas to Qwest and to all CLECs operating in Iowa that have entered into an interconnection agreement with Qwest or that purchase interconnection services pursuant to Qwest's statement of generally-available terms (SGAT). AT&T seeks a subpoena issued by the Board and in the Board's name, rather than a subpoena that would permit AT&T to conduct its own discovery.

On May 2, 2002, Qwest filed a copy of a public notice issued by the Federal Communications Commission (FCC) on April 29, 2002, establishing a pleading cycle for a petition Qwest filed with the FCC on April 23, 2002. In the petition, Qwest asks that the FCC issue a declaratory ruling concerning which types of negotiated contractual arrangements between an ILEC and a CLEC are subject to the

mandatory filing and 90-day state commission pre-approval requirements of § 252(a)(1).

On May 8, 2002, Qwest filed a statement in opposition to AT&T's motion for issuance of subpoenas. Qwest argues AT&T's request is premature because it would be inefficient to conduct discovery before the legal issues have been addressed. Qwest also argues AT&T's request is overly broad because it seeks production of agreements that are not currently at issue from CLECs that are not currently parties to this proceeding.

On May 16, 2002, Qwest filed a motion to stay this docket until the FCC rules on Qwest's petition for declaratory ruling.

## ANALYSIS[4]

### A. The Definition Of "Interconnection Agreement" And The Obligation To File

A legal duty of all carriers to interconnect with competing carriers is established in 47 U.S.C. § 251. An incumbent local exchange carrier (ILEC), such as Qwest, has additional duties to negotiate in good faith the terms and conditions of interconnection agreements, including access to unbundled network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, and collocations, pursuant to 47 U.S.C. § 251(b) and (c). When

[4] While the Board has reviewed and considered all of the briefs, this analysis relies to a great extent on the Consumer Advocate's initial brief, which has been very helpful in this matter.

agreement regarding these matters is reached, whether voluntarily negotiated pursuant to § 252(a)(1) or adopted by arbitration pursuant to §252(b)-(d), the agreement must be submitted to the state regulatory commission (in Iowa, the Board) for approval pursuant to § 252(e). The Board has adopted rules that require the filing of "all interconnection agreements" adopted by arbitration or negotiation. 199 IAC 38.7(4). The requirement applies to both parties to the agreement; neither the statute nor the rule releases either party from the filing obligation.

State approval of each interconnection agreement is required to ensure that an agreement does not discriminate against other carriers that are not parties to the agreement, that implementation of the agreement is in the public interest, and that it conforms to the duties imposed on local exchange carriers by § 251 and the pricing standards imposed by § 252(d). As the Federal Communications Commission (FCC) explained in its First Report and Order[2]:

> As a matter of policy . . . we believe that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.

(Emphasis in original.) After review and approval, the Board is required to make a

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *slip op.* ¶ 167 (August 8, 1996) (First Report and Order).

copy of each agreement available for public inspection and copying pursuant to § 252(h). Each LEC is then required to "make available any interconnection, service, or network element provided under an agreement approved under [§ 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." § 252(i). The FCC identified the policy behind these requirements as one of preventing discrimination:

> Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i).

The terms "agreement" and "interconnection agreement" are not defined in the federal statute or the Board's rules and may not be susceptible of a single, specific definition that will adequately address all future circumstances. Still, one federal court has defined "interconnection agreement" as follows: "An 'interconnection agreement' under the act consists of detailed technological and monetary provisions that may be arrived at through voluntary negotiation." TCG Milwaukee, Inc., v. Public Service Comm. of Wisconsin, 990 F. Supp. 992 (W.D. Wis. 1997). That definition incorporates the statutory components of an interconnection agreement: It must be binding, it must relate to a request for interconnection, services, or network elements

pursuant to § 251; and it must include a schedule of itemized charges for interconnection and each service or network element included in the agreement. Section 252(a)(1).

The term "network element" is broadly defined in the statute. It includes "a facility or equipment used in the provision of a telecommunications service" and "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 telecommunications services." 47 U.S.C. § 153(9).

Given the breadth of these definitions, and the broad public purposes served by the filing and approval requirements of § 252(e), it would appear that any binding arrangement or understanding between an ILEC and a competitive local exchange carrier (CLEC) about any aspect of the interconnection between the two carriers, or the provision of services or network elements which in turn are used to provide a telecommunications service, should qualify as an interconnection agreement under § 252(a)(1) and should be filed with the Board for approval.

This interpretation is supported by the language used by Congress in the relevant statutes. Section 252(e)(1) requires filing of "any interconnection agreement," while § 252(i) requires that "any interconnection service or network element provided under an agreement" must be made available to any other carrier.

The statute does not recognize or create any exceptions; "any" agreement must be filed, not just selected ones.

The FCC has offered this explanation for the broad reach of this statute (albeit in a discussion of why pre-Act agreements should be filed and approved):

> In addition, we believe that having the opportunity to review existing agreements may provide state commissions and potential competitors with a starting point for determining what is "technically feasible" for interconnection. Conversely, excluding certain agreements from public disclosure could have anticompetitive consequences. For example, such contracts could include agreements not to compete.

First Report and Order, ¶¶ 167-68. While the quoted language relates to agreements that pre-date the 1996 Act, the reasoning applies equally to post-Act agreements. Competitors will be assisted in their negotiations if they can determine that a particular service or configuration is technically feasible for interconnection or that a particular business arrangement is available because it has already been made available to another CLEC. Similarly, a post-Act agreement might include anti-competitive provisions, just as a pre-Act agreement might have.

Thus, for present purposes the Board will define an interconnection agreement that must be filed with the Board pursuant to § 252(a)(1) as a negotiated or arbitrated contractual arrangement between an ILEC and a CLEC that is binding, relates to interconnection, services, or network elements, pursuant to § 251, or defines or affects the prospective interconnection relationship between two LECs. This definition includes any agreement modifying or amending any part of an existing

interconnection agreement. This is not intended to be an exclusive or all-encompassing definition; it is difficult, if not impossible, to predict all of the various types of future arrangements that may implicate the public policies of the Act and, therefore, be appropriately considered interconnection agreements. However, this definition appears to be sufficient for present purposes, and the Board adopts it for this proceeding and for the future guidance of interested entities.

**B. Application To The Agreements Filed March 11, 2002**

Applying this definition and the underlying principles to the agreements filed by Qwest in this docket on March 11, 2002, as discussed in detail below, it appears those agreements include interconnection agreement provisions that should have been filed with the Board pursuant to § 252. Because these provisions speak for themselves and appear to fall within the definition set forth above, in the absence of a material issue of fact the Board is able to proceed to apply the law to the documents and can conclude that Qwest has violated its obligations under § 252 and 199 IAC 38.7(4). If Qwest disagrees with the Board's tentative conclusions, set forth below, Qwest can request a hearing to further explore the facts, but any such request for hearing must identify a disputed issue of material adjudicative fact and explain how that issue will best be resolved by means of a hearing. Mere disagreement with the tentative finding that the following agreements are interconnection agreements will not justify a hearing.

### 1. The Covad Agreement

The first agreement attached to Qwest's March 11, 2002, filing involves Qwest, U S WEST Communications, Inc. (U S WEST), and Covad Communications Company (Covad) (hereinafter the Covad Agreement). It specifies certain service quality standards relating to Qwest's Firm Order Commitment (FOC) process, service intervals, new service failure rates, and facilities problems. The agreement then provides that, "Based on U S WEST's [Qwest's predecessor's] commitment to meet these service performance standards, Covad commits to withdrawing its opposition to the U S WEST/Qwest merger." (Covad Agreement at page 3 of 3.)

The Covad Agreement includes several specific interconnection performance standards. For example, U S WEST (and, as a result of the subsequent merger, Qwest) agrees to provide 90 percent of Covad's FOC dates within 48 hours of receipt of a service request for regular unbundled loop services and within 72 hours of a service request for DSL-capable, ISDN-capable, and DS-1-capable unbundled loop services. (Covad Agreement, § 1.) U S WEST agreed to provide Covad with unbundled loop service consistent with U S WEST's Standard Interval Guide at least 90 percent of the time. (Id., § 2.) U S WEST agreed to reduce the failure rate for new service orders to less than 10 percent within 30 calendar days. (Id., § 3.) Finally, U S WEST agreed to specific procedures for handling Covad service requests that are accepted but cannot be completed due to lack of facilities or need for line conditioning. A variety of options are made available to Covad in these

situations. (Id., § 4.) Each of these service quality standards relates to interconnection, would have been of interest to other CLECs negotiating with U S WEST in the relevant time frame, and may still be of interest to other CLECs negotiating with Qwest today.

Qwest argues that the Covad Agreement is "simply an articulation of Covad's desires and expectations for Qwest's service levels rather than an obligation for Qwest to attain particular standards,"[3] but that argument ignores the plain language of the Covad Agreement, quoted above. Qwest committed to meet certain service performance standards applicable to important interconnection matters such as FOCs, service intervals, new service failure rates, and facilities problems. It appears there can be no serious argument that performance standards of this nature are not properly considered a part of an interconnection agreement, as they are a necessary part of defining the interconnection services that Qwest is agreeing to provide. Thus, the Covad Agreement should have been filed with the Board, pursuant to § 252 and the Board's rules. Qwest's failure to do so is a violation of the statute and the rules.

**2. McLeod Agreement No. 1**

The other two agreements filed by Qwest on March 11, 2002, are with McLeodUSA Incorporated (McLeod). The Board tentatively concludes that they are also interconnection agreements that should have been filed with the Board. The first agreement (McLeod Agreement No. 1), entitled "Confidential Billing Settlement

[3] See Qwest's "Verified Answer To The Complaint Of The Minnesota Department Of Commerce," filed in this docket by Qwest on March 11, 2002.

Agreement," is dated April 28, 2000. McLeod Agreement No. 1 begins by recognizing that U S WEST and McLeod have entered into interconnection agreements pursuant to §§ 251 and 252 which "have been approved by the appropriate state commissions where those agreements were filed pursuant to the Act." (McLeod Agreement No. 1, page 1, ¶ 3.) The agreement then proceeds to amend those existing, filed, and approved interconnection agreements.

For example, the parties agreed to the going-forward rates McLeod would pay to U S WEST for subscriber list information. (Id., page 3, ¶ 2.b.) U S WEST also agreed to amend its existing interconnection agreements with McLeod to incorporate bill-and-keep in place of reciprocal compensation. (Id., page 3, ¶ 2.c.) The parties further agreed that, following closure of the U S WEST–Qwest merger, all interim rates (other than reciprocal compensation rates) would be treated as final and any final commission orders entered in any of the 14 U S WEST states through April 30, 2000, would be applied to McLeod on a prospective basis only, not retroactively, apparently regardless of the terms of the commission order. (Id., page 4, ¶ 2.d.) Each of these provisions is an amendment of one or more of the existing, approved interconnection agreements between U S WEST and McLeod.

In its answer to the Minnesota Commission, Qwest argues that the provision making interim rates final was a resolution of a bona fide business dispute regarding the application of the resale discount rate in Minnesota. The Minnesota Commission reduced the resale discount from 21.5 percent to 17.66 percent by oral order on

January 11, 2000, and U S WEST and McLeod disagreed regarding the retroactive effect of that order. They settled the dispute on the terms described above, giving McLeod the benefit of the greater interim discount through April 30, 2000. Qwest argues that other carriers buying services for resale in Minnesota were required to pay the reduced final discount rate beginning on February 8, 2000, "and thus McLeod did not receive favorable treatment."

It appears there can be no real argument that this change in the rates for Qwest's wholesale services is anything other than an interconnection agreement. Some of the rates are specific to Minnesota, but other provisions purport to apply in all 14 Qwest states, including Iowa. McLeod Agreement No. 1 amends the terms of the existing interconnection agreements between McLeod and Qwest in all of these states; by itself, this fact appears to be sufficient to establish that the new contract is an interconnection agreement.

Even Qwest's own proposed test for determining whether an agreement is an "interconnection agreement" recognizes that the rates for resold and unbundled services are a part of an interconnection agreement, and this agreement determines the rates for those services in all 14 Qwest states. McLeod Agreement No. 1 is an interconnection agreement that had to be filed with the appropriate state commissions for review, approval, and public filing, even under the test proposed by Qwest.

Moreover, Qwest's statements appear to show that as a result of this agreement Qwest discriminated against other CLECs in favor of McLeod, at least in Minnesota. Other CLECs that purchased services for resale apparently began paying higher rates on February 8, 2000, but McLeod was permitted to continue to purchase those same services at the lower interim rates for several more weeks. It was a form of discrimination to extend this favored treatment to McLeod and not to other CLECs. This discrimination would not have been possible if the agreement had been filed with the various state commissions where it was intended to have effect (all 14 Qwest states). Because the agreement was not filed in any state, Qwest was able to extend uniquely favorable treatment to McLeod, in return for which McLeod dropped its opposition to the Qwest-U S WEST merger. Thus, Qwest's failure to file McLeod Agreement No. 1 violated both the letter and the purpose of the statute and the Board's rule.

Moreover, if the issue had been presented to the Board at the appropriate time, the Board might have concluded that it is against public policy for the parties to agree in advance that "any final commission orders entered in any of the 14 states in U S WEST's territory through April 30, 2000, and on a going-forward basis through December 31, 2002, . . .will be applied prospectively to McLeodUSA, and not retroactively." (McLeod Agreement No. 1 at page 4.) The Board need not decide this question now, but it is possible that a reasonable agency could conclude that the parties to an interconnection agreement are not entitled to insulate one CLEC from

# CONTINUATION

# [6.]

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the possible retroactive effects of future agency decisions while other CLECs doing business with Qwest would continue to be subject to those orders, especially if the result of this agreement is that Qwest might have to violate future Board orders in order to honor Qwest's agreement with McLeod.

**3. McLeod Agreement No. 2**

Qwest also filed in this docket a second agreement with McLeod, dated October 26, 2000 (McLeod Agreement No. 2), through which the parties agree to (a) "establish processes and procedures to better implement the parties' Interconnection Agreements" (page 1, ¶ 1), (b) "attend and participate in quarterly executive meetings, the purpose of which will be to address, discuss and attempt to resolve" issues involving the implementation of the interconnection agreements (Id., page 1, ¶ 2), and (c) establish escalation procedures to facilitate dispute resolution. (Id., page 2, ¶ 3.) Qwest argues that these provisions "are integrally connected to how Qwest and a CLEC manage their business-to-business relationship with one another," but also argues that because CLECs vary, it is "impracticable to make such procedures and arrangements 'generic.'" Qwest asserts that because the agreement relates to the detailed implementation of a business-to-business relationship, it is not an interconnection agreement and need not be filed.

Again, Qwest's own arguments establish that McLeod Agreement No. 2 is an interconnection agreement that must be filed with the Board. As Qwest notes, these provisions are "integrally connected to how Qwest and a CLEC manage" their

interconnection issues. A plan for implementation and dispute resolution procedures are logical and necessary parts of a comprehensive interconnection agreement, and any CLEC is likely to need similar provisions in its interconnection agreement with Qwest. It may be that a particular CLEC will want to negotiate different arrangements, but each CLEC has a right to know of the procedures Qwest has agreed to in other agreements in order that the CLEC can determine, for itself, if it wants to opt into the same procedures. Qwest's argument would force every CLEC to negotiate these important provisions from a blank page, without knowing what Qwest has agreed to in the past. This interpretation would undermine the pick-and-choose and nondiscrimination features of the Act and should be rejected.

## C. TENTATIVE CONCLUSIONS

Overall, it appears there are no material factual disputes regarding application of the definition of "interconnection agreement" delineated in this order to the agreements that Qwest has filed. Applying that definition, it appears the Covad Agreement and both McLeod agreements are interconnection agreements. If no material factual disputes are presented, then the Board can conclude that Qwest violated § 252 and 199 IAC 38.7(4) by failing to file these interconnection agreements in a timely manner.

Based on that conclusion, the Board can also find that Qwest violated a Board rule and, pursuant to Iowa Code § 476.51, the Board can give Qwest written notice,

by order, that it has violated 199 IAC 38.7(4). If Qwest violates that rule again, it will be subject to civil penalties pursuant to § 476.51.

Further, it is possible that Qwest has entered into more agreements which Qwest did not believe to be interconnection agreements, but which meet the definition of "interconnection agreement" as clarified by the Board in this order. The Board will allow Qwest 60 days to identify and file any other interconnection agreements that are effective in Iowa without subjecting itself to civil penalties.

The Board will make these findings as tentative conclusions, based upon the tentative conclusion that there are no material issues of adjudicative fact. Qwest will be given 20 days to request a hearing, if it believes there are such issues. Any request for hearing must specifically identify the material issues and explain, in reasonable detail, the effect that resolution of those issues would have on the Board's tentative conclusions.

## OTHER ISSUES

### A. AT&T's request for subpoena

Because the Board is ordering Qwest to file all of its unfiled interconnection agreements within 60 days of the date of this order, AT&T's request for a subpoena to discover what other agreements there may be is moot and will be denied.

For the future guidance of the parties, the Board notes that it typically uses orders, rather than subpoenas, to obtain information from public utilities. In fact, the Iowa Supreme Court has held that the legislative grant of subpoena power in

§§ 476.2 and 17A.13(1) does not limit the Board to using subpoenas to compel production of documents, see Iowa Power and Light Co. v. Iowa Utilities Board, 448 N.W.2d 468, 470 (Iowa 1989). The Board will issue agency subpoenas to parties upon request, as required by Iowa Code § 17A.13(1), but it does not normally rely upon subpoenas for its own information requirements.

**B. Validity of non-filed agreements**

In its initial brief, Qwest argues that the Board should not adopt an "overbroad application" of § 252 because it would "implicate the validity of any non-filed ILEC-CLEC agreements." (Initial Brief at page 14.) Qwest reasons that if the non-filed agreements, were required to be filed they would be valid only after approval by the Board. As a result, any contract provisions that should have been filed but were not "were never actually valid." Qwest argues that requiring that it file past agreements that were not filed would be contrary to the public interest and detrimental to the settled contractual expectations of both ILECs and CLECs.

Qwest's argument relies upon its past failure to comply with the statute and the rules as a justification for continued noncompliance. The possible consequences of non-filing are something that Qwest (and the other parties to the agreements) should have considered when it decided not to file these agreements; those possible consequences do not amount to a reason to adopt an overly narrow interpretation of the filing requirement for all future agreements. The Board must define "interconnection agreement" in a manner that is consistent with the nondiscrimination

and pick-and-choose provisions of the Act, not in a manner designed to minimize the consequences of Qwest's own decisions.

Moreover, it does not necessarily follow that the non-filed agreements are *void ab initio* in total. When the Act was passed, the FCC required the filing of pre-Act interconnection agreements as public documents so that they would be available for pick-and-choose purposes and in the interests of preventing unreasonable discrimination. That requirement did not render the pre-Act agreements void. While the circumstances are not identical, it appears that otherwise lawful provisions of these non-filed agreements could possibly be treated in the same manner.

**C. Motion To Stay**

The Board will deny Qwest's motion for a stay of these proceedings while the FCC considers Qwest's petition for declaratory ruling. Qwest's main justification for a stay is the claim that it might preserve the Board's resources, depending upon the action taken by the FCC, but the fact is that the Board has already expended the majority of the resources required to decide this matter, as described above. Moreover, the Board can now submit its order to the FCC to show the FCC how the Board's definition of "interconnection agreement" applies to the three agreements already filed in this docket.

## CONCLUSION OF LAW

For purposes of this proceeding, the phrase "interconnection agreement" as used in 47 U.S.C. §§ 251(c) and 252(a) through (i) and 199 IAC 38.7(4) should be

defined to include, at a minimum, a negotiated or arbitrated contractual arrangement between an ILEC and a CLEC that is binding; relates to interconnection, services, or network elements, pursuant to § 251, or defines or affects the prospective interconnection relationship between two LECs. This definition includes any agreement modifying or amending any part of an existing interconnection agreement.

## FINDINGS OF FACT

1. The Board tentatively finds the Covad Agreement, which includes Qwest's binding commitment to meet certain interconnection service quality standards specified therein, is an interconnection agreement for purposes of 47 U.S.C. §§251(c) and 252(a) through (i) and for purposes of 199 IAC 38.7(4).

2. The Board tentatively finds McLeod Agreement No. 1, which includes provisions setting interconnection rates and reciprocal compensation rates, is an interconnection agreement for purposes of 47 U.S.C. §§251(c) and 252(a) through (i) and for purposes of 199 IAC 38.7(4).

3. The Board tentatively finds McLeod Agreement No. 2, which includes provisions regarding implementation of interconnection agreements, regular meeting requirements concerning interconnection issues, and dispute resolution procedures for interconnection issues, is an interconnection agreement for purposes of 47 U.S.C. §§251(c) and 252(a) through (i) and for purposes of 199 IAC 38.7(4).

4. The Board tentatively finds that Qwest's failure to file with the Board the interconnection agreements identified in Findings of Fact Nos. 1 through 3 is a violation of 47 U.S.C. §§ 251(c) and 252(a) through (i) and 199 IAC 38.7(4).

## ORDERING CLAUSES

**IT IS THEREFORE ORDERED:**

1. Findings of Fact Nos. 1 through 4 are adopted as the tentative findings of the Board. If any party disagrees with the Board's tentative conclusions, that party can request a hearing to further explore the facts, but any such request for hearing must identify a disputed issue of material adjudicative fact and explain how that issue will best be resolved by means of a hearing. Any such request must be filed within 20 days of the date of this order. If the party desires a stay of any of the requirements of this order pending a ruling on the request for hearing, it should specifically request one. If no request for hearing is filed within 20 days of the date of this order, then the tentative findings set forth above will become the final, binding decision of the Board.

2. Qwest Corporation is hereby given written notice that it has violated Board rule 199 IAC 38.7(4) by its failure to file the interconnection agreements identified above and any other interconnection agreements that have effect in Iowa and that Qwest has entered into and failed to file. Qwest shall have 60 days from the date of this order to file any other non-filed interconnection agreements with the Board for public notice, review, and approval. Any future violation of rule

199 IAC 38.7(4) may subject Qwest to civil penalties pursuant to Iowa Code § 476.51.

3. The motion for subpoena filed in this docket by AT&T Communications of the Midwest, Inc., on April 23, 2002, is denied.

4. The motion to stay this docket filed by Qwest Corporation on May 10, 2002, is denied.

**UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 29th day of May, 2002.

# EXHIBIT E

The Commission, in its Order of April 30, 2001,[4] among other things, granted certain temporary relief and referred the matter to the Office of Administrative Hearings for a contested case proceeding. The Commission deferred any decision on penalties until after receipt of the Administrative Law Judge's (ALJ's) report.

The April 30, 2001 Commission Order also set forth a 7-day period from the ALJ's report being submitted to the Commission for the parties to file exceptions. The Commission indicated that there were to be no replies to the exceptions.

Hearings were held by the ALJ on July 9-11 and July 26-27, 2001. Post-hearing briefs were filed by AT&T on August 31 and by Qwest and the DOC on September 4, 2001. Post-hearing reply briefs were filed September 21 by the DOC and September 24, 2001 by Qwest and AT&T. The record was closed October 1, 2001.

On February 25, 2002, the ALJ filed his Findings of Fact, Conclusions of Law, and Recommendation. The ALJ concluded, among other things, that Qwest committed a knowing, intentional and material violation of its obligation to engage in cooperative testing under the ICA from September 14, 2000 to May 11, 2001. The ALJ also concluded that substantial penalties were appropriate and recommended assessing penalties against Qwest of $5,000 per day for 239 days, a total of $1,195,000.

Exceptions were filed by AT&T and Qwest on March 4, 2002.

On March 20, 2002, Qwest filed a Notice of Supplemental Authority with the Commission.

At the Commission's March 21, 2002, agenda meeting, the parties declined an opportunity to file replies to exceptions. The DOC moved to strike Qwest's March 20, 2002 filing of Notice of Supplemental Authority.

On March 27, 2002, AT&T filed its Reply to Qwest's Notice of Supplemental Filing.

On April 4, 2002 and April 9, 2002 these matters came before the Commission.

## FINDINGS AND CONCLUSIONS

### I. Summary of AT&T's Complaint

In its complaint against Qwest, AT&T claimed that Qwest violated the terms of the Qwest/AT&T ICA as well as state and federal law by failing to participate in a cooperative trial test of the unbundled network element platform (UNE-P) ordering and provisioning in Minneapolis. AT&T argued that Qwest's refusal to participate in this test would hinder AT&T's ability to determine whether it is feasible for it to offer residential local exchange services in Minnesota through the combination of Qwest's unbundled network elements (UNEs). Without the testing AT&T would not be in a position to offer residential service in Minnesota.

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[4] ORDER GRANTING TEMPORARY RELIEF AND NOTICE AND ORDER FOR HEARING, April 30, 2001.

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).

Ibid. ¶ 13.

....

Qwest failed to act in good faith and committed knowing, intentional, and material violations of its obligations to act in good faith under the ICA and under Section 251(c) of the Act...

Ibid. ¶ 14.

## III. Commission Analysis and Action

### A. Acceptance of the ALJ's Report

The Commission, after reviewing the record and the ALJ's Findings of Fact and Conclusions of Law and Recommendation as well as considering the exceptions brought by both parties adopts and hereby incorporates the ALJ's Findings of Fact and Conclusions of Law and Recommendation with two exceptions: 1) the starting date of the penalty period and 2) the amount of the penalty, each of which will be discussed below.

The Commission recognizes that the ALJ, having heard the testimony and read and considered the documents and filings by the parties, was in the best position to determine the credibility of witnesses, the weight to be given the testimony and documents submitted and to make a reasoned decision based on the record. The Commission is persuaded that the ALJ's Findings of Fact and Conclusions of Law reasonably reflect the record, with the exceptions stated above.

### B. The Date of the Violations

The Commission will alter the period of time that the ALJ found Qwest to be acting in bad faith. The ALJ found the period of violation to be from September 14, 2000, the date that AT&T informed Qwest of its intention to test the ordering and provisioning of the unbundled network element platform (UNE-P), until May 11, 2001, when Qwest stated it would do the testing requested by AT&T.

While hindsight and subsequent developments might raise questions about Qwest's good faith from the start, the Commission concludes that on balance the record does not demonstrate that Qwest was acting in bad faith from the very day it received AT&T's testing request. The testing request was comprehensive and complex and to begin testing various practical matters had to be resolved.

The Commission finds that there is ample evidence in the record to support Qwest's contention that during the period from September 14, 2000 through January 11, 2001, there were continuing discussions between AT&T and Qwest that were aimed at moving forward with the testing. There were numerous meetings and exchanges of information between AT&T and Qwest during this

time.[5] The Commission, after considering the series of communications and interchanges between Qwest and AT&T from September 14th through January 11, 2001, concludes that during this time the parties were actively engaged in making reasonable efforts to proceed with the testing.

The Commission, however, agrees with the ALJ that beginning January 12, 2001, Qwest took deliberate steps to put unnecessary hurdles and delays into the negotiation process. Qwest's actions after the January 12, 2001 date were much more than business negotiations. Rather, it was clear that Qwest was intentionally putting numerous hurdles in the way of AT&T's moving forward with its testing program and that Qwest was acting in a manner that would preclude the testing that AT&T requested.

The evidence demonstrates that from at least January 12th, Qwest made numerous changes to the testing agreement after virtually all legitimate differences between the companies had been worked out. This clearly marked a change from give-and-take negotiating between the two companies to Qwest's acting in a deliberate manner that was designed to keep AT&T from doing what it believed was necessary to enter the market. For these reasons, the Commission finds that the period of a willful violation by Qwest began on January 12, 2001 and continued until May 11, 2001, when Qwest indicated its willingness to do the testing as specified by AT&T.

### C. Reserving Judgment on the Amount of Penalty

The ALJ made a specific recommendation of the amount of the penalty to be assessed Qwest. The Commission has accepted the ALJ's Findings of Fact and Conclusions of Law (with the two exceptions stated above) and recognizes that Qwest is subject to penalties under Minnesota statutes.[7] The Commission, however, believes that before setting any penalty amount, it requires more information from the parties.

For this reason, the Commission will give the parties an opportunity to supplement the record on the matter of penalties. The Commission, at the April 9, 2002 Agenda meeting, directed the parties to supplement the record on the following items, set forth in Minn. Stat. § 237.462 subd. 2(b):

(2) the gravity of the violation, including the harm to customers or competitors;
(5) the economic benefit gained by the person committing the violation;
(6) any corrective action taken or planned by the person committing the violation;
(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.

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[5] Findings of fact 41-69, *Findings of Fact, Conclusions of Law and Recommendation* of the ALJ, February 22, 2002.

[6] Ibid. Finding of fact 72.

[7] Minn. Stat. § 237.462, Subd. 2, provides that the Commission may assess a penalty between $100 and $10,000 per day after considering factors set forth in § 237.462 Subd. 2(b)(1) through (9).

Further the Commission directed parties to comment on the issues highlighted by Commissioner Garvey in a document distributed at the April 9, 2002 hearing.[8] The parties were given three weeks from the date of the Commission meeting (April 9, 2002) to file their comments and replies.

## IV. Exceptions by the Parties to the ALJ Report

### A. AT&T

AT&T took exception to the amount of fine which the ALJ recommended be imposed against Qwest. AT&T argued that the maximum penalty of $10,000 per day (for the 239 day period set forth by the ALJ) should be imposed upon Qwest in order to punish Qwest's misconduct and deter future anticompetitive behavior to the fullest extent.

### B. Qwest

Qwest claimed that there were four fundamental flaws in the ALJ's findings of fact:

a. There was no support in the record for the proposition that Qwest impeded AT&T's UNE-P entry into the Minnesota market. Qwest argued that the ALJ erred by making findings including: that Qwest outright refused to test, and that Qwest's standardized testing was insufficient for market entry purposes. Further the ALJ made omissions by not including evidence that AT&T refused to conduct any test other than the one it formulated, and that AT&T would have delayed the test to coincide with the Regional Oversight Committee (ROC) tests so results could be used for 271 advocacy purposes.[9]

b. The test and the complaint have been premised on AT&T's professed interest in entering the local market by offering UNE-P. Qwest was not allowed any discovery into whether that claim was legitimate. Qwest was not allowed to offer evidence that AT&T's claimed interest in market entry was a sham.

c. Qwest was not allowed to call Steve Davis as a witness to rebut AT&T's testimony regarding Davis' statements, actions and mind set. Qwest argued that this error was sufficiently prejudicial to taint the proceedings and subsequent findings. Further, Qwest argued, the ALJ substituted his own assumptions of what Davis said, did and thought, rather than hearing the testimony.

d. The ALJ erred by ignoring Qwest's claim of bad faith against AT&T. The ALJ report focuses on allegations raised by AT&T, and dismisses Qwest's arguments, without any finding of fact, in a single conclusory paragraph.

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[8] Paragraph M of *Thoughts by Commissioner Edward Garvey Regarding the UNE-P Complaint of AT&T Against Qwest*, P-421/C-01-391.

[9] Section 271 of the 1996 federal Telecommunications Act (the Act) sets forth the conditions to be met by Regional Bell Operating Companies (RBOCs) in order to enter interLATA long distance markets

Qwest also claimed that AT&T and Qwest had reached a settlement and that the ALJ erred in ruling that it had been withdrawn.

Further, Qwest objected to the penalty recommended by the ALJ.

## V. Qwest's Exceptions

### A. Qwest's Claim that AT&T's Testing Request was a Sham

#### 1. Qwest's Position

Qwest argued that the testing negotiations were tainted by AT&T's false assertion that the testing it requested was intended to lay the groundwork for AT&T's entry into the market. Qwest argued that it was prejudiced by its being unable to inquire into the legitimacy of AT&T's claim in this regard.

Further, Qwest argued that the ICA does not require Qwest to conduct any test that AT&T demands. Rather, Qwest argued that testing under Qwest's standard processes, supplemented as necessary by data provided by the Regional Oversight Committee- Operational Support System (ROC-OSS) testing could meet all of the objectives stated by AT&T for market entry.

#### 2. AT&T

At&T argued that it was not required to reveal to Qwest its business plans. It asserted that it had entered the UNE-P market in a number of states and that Minnesota had been identified by AT&T's Vice President as a promising market for UNE-P. It argued that there are numerous factors that enter into a company's decision to enter a market and it had the right to test to determine whether to enter this particular market.

#### 3. ALJ's Determination

Qwest had requested discovery of AT&T's business plans in order to assess AT&T's motives for conducting the test and its need to do so. The ALJ ruled that discovery of business plans would not be permitted. The ALJ did, however, allow the deposition of one technical employee at AT&T regarding the issue of why Qwest's 1-2-3 test[10] would not be adequate for AT&T's purposes.

The ALJ found that AT&T acted in good faith in requesting the UNE-P test. The ALJ found that AT&T's legitimate interests and business intent could be found in AT&T's status as a large communications provider, its entry using UNE-P in other states, its projections of 1,000 UNE-P orders per month to Qwest, and AT&T's representations to the Commission and the ALJ that it intended to enter the market in a substantial way if the test proved successful.[11]

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[10] Qwest's standard certification testing.

[11] ALJ's First Prehearing Order, ¶ 8.

Further, the ALJ found that whether AT&T intended to use the results in Qwest's 271 hearings was irrelevant given that the1996 Telecommunications Act[12] (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 the ILEC to enter the long distance market. AT&T therefore could use a negative test result to obtain corrections by Qwest, and, if such corrections were not made, could use the results in a 271 proceeding to show Qwest's lack of compliance.[13]

#### 4. Commission Action

The Commission concurs with, accepts, and adopts the ALJ's findings and conclusions on these issues. They are well-developed, thoughtful, and supported by the weight of the evidence.

Many of Qwest's arguments go to the credibility of the witnesses' testimony and the weight given to testimony and documentation submitted. The Commission will not second guess the ALJ's judgment in these matters. The ALJ was in the best position to determine issues of credibility of witnesses and the Commission will defer to the ALJ's determinations.

As the ALJ pointed out, even if AT&T's state of mind were relevant to Qwest's obligation to comply with a testing request within AT&T's contract rights – which is doubtful – there is no evidence that AT&T's testing request was a sham. AT&T's claim that it was investigating the possibility of using UNE-P to enter the market in Minnesota was reasonable on its face and corroborated by the Company's use of UNE-P to enter the market in other states. Without tangible evidence of bad faith, there were no reasonable grounds to grant AT&T's competitor, Qwest, the requested access to AT&T's business plans.

In short, the Commission agrees with the ALJ that AT&T, under the ICA, had the right to test and Qwest had an obligation to cooperate with AT&T in this. The ALJ properly allowed Qwest to conduct discovery into the question of the reasonableness of the test. Further, the Commission agrees that Qwest's obligation to cooperate in AT&T's request should not be dependent on Qwest's evaluation of the reason for the testing.

### B. The Testimony of Steve Davis[14]

#### 1. Qwest

Qwest argued that its case was substantially impaired because Mr. Davis was not allowed to testify. It argued that the ALJ's Findings contain numerous substantive mentions of Mr. Davis, each with an inference of improper intent, and that it was prejudicial not to allow Mr. Davis to testify.

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[12] Pub.L.No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

[13] See footnote 11, supra and ALJ's Findings of Fact, ¶ 112.

[14] Qwest Senior Vice President for Policy and Law.

### 2. Position of the Parties

#### a. Qwest

Qwest argued that a May 8, 2001 Memorandum of Understanding (MOU) entered into by Qwest and AT&T was a settlement of this matter. Qwest argued that the ALJ's ruling that the parties had withdrawn and abandoned the agreement was in error when either of the parties still had the right, under the terms of the agreement, to take the matter to the Commission.

Qwest moved the ALJ to certify the ruling on whether the MOU was enforceable to the Commission.

#### b. AT&T

AT&T argued that there was no settlement agreement, only a MOU that contemplated a final settlement agreement. Terms and conditions for a settlement were never agreed on.

#### c. DOC

The DOC refused to agree to the terms of the MOU because the DOC required that there be an admission by Qwest of anti-competitive behavior and that penalties should be assessed against Qwest.

### 3. ALJ's Determination

The ALJ denied Qwest's motion to certify the issue of the enforceability of the MOU to the Commission[15] and found that any settlement agreement between Qwest and AT&T had been withdrawn and abandoned by the parties.[16] The ALJ found that when counsel for the DOC stated its position regarding the MOU, Qwest's counsel announced that it was an all or nothing deal and therefore the agreement was off.[17]

### 4. Commission Action

The Commission supports and agrees with the ALJ's finding that the MOU was abandoned by the parties when Qwest indicated it could not accept the DOC's terms and it was an all or nothing deal.

## VI. The DOC's Motion to Exclude Supplementary Evidence

### A. Qwest's Notice of Supplementary Authority

Qwest stated that the purpose of the Notice of Supplemental Authority was to bring to the Commission's attention pertinent decisions and recommendations from other jurisdictions that

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[15] ALJ's Second Prehearing Order, June 28, 2001.

[16] ALJ's Findings of Fact, ¶ 114.

[17] ALJ's First Prehearing Order ¶ 12, June 6, 2001.

Qwest believes contradict the ALJ's findings on the issues raised before the Commission: 1) whether Qwest was obligated to provide the testing requested by AT&T and 2) whether Qwest's concerns regarding the purpose and method of that test were raised in good faith.

On March 20, 2002, Qwest submitted a report dated August 20, 2001, and a subsequent report dated October 22, 2001, both issued by the facilitator appointed by seven of the states considering Qwest's application to provide long distance services pursuant to section 271 (Antonuk Report). Qwest also submitted a December 21, 2001 Report of the Oregon Public Utilities Commission. Qwest argued that the facilitator rejected the very arguments that AT&T raised before this Commission and also rejected the argument that Qwest acted in bad faith.

### B. Position of the Parties

#### 1. AT&T

AT&T argued that Qwest's Notice of Supplemental Authority should be stricken from the record because it violated the procedural schedule in this docket, it improperly attempts to introduce new factual arguments into the record, and it is irrelevant to this proceeding.

Exceptions to the ALJ's report were to be filed within seven days of its submission to the Commission,[18] therefore, AT&T argued, Qwest's March 20, 2002 filing was late.

Further, AT&T argued, the Antonuk Report addresses a different issue and is irrelevant. The Antonuk Report addresses the question of the adequacy of Qwest's SGAT for Section 271 purposes. The issue in the current case arises under a Minnesota Commission-approved Interconnection Agreement and addresses the question of obligations arising under the Interconnection Agreement.

#### 2. DOC

At the March 21, 2002 Commission Agenda meeting the DOC made a motion to strike Qwest's March 20, 2002 filing of Notice of Supplemental Authority.

### C. Commission Action

The Commission finds that the Notice of Supplemental Authority submitted by Qwest was not only untimely but addresses the issue of the adequacy of Qwest's SGAT for Section 271 purposes, an issue that is not relevant herein. The relevant issue herein arises under a Commission-approved Interconnection Agreement and addresses the question of the obligations arising thereunder. Because of its untimeliness and its lack of relevance, the Notice of Supplemental Authority submitted by Qwest and the parties responses thereto will not be included in the record of this proceeding.

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[18] The ALJ's Findings of Fact, Conclusions of Law and Recommendation was received by the Commission on February 25, 2002.

## ORDER

1. The Commission adopts and incorporates herein the ALJ's report consisting of the ALJ's Findings of Fact, Conclusions of Law and Recommendation with the exception of the starting date (of the violation) as discussed herein and the amount of penalty to be assessed, which is reserved for further judgment.

2. The Commission finds a knowing, intentional and material violation on the part of Qwest starting January 12, 2001 and ending May 11, 2001.

3. The DOC's motion to strike Qwest's March 20, 2002 filing of Notice of Supplemental Authority is granted. Qwest's Notice of Supplemental Authority and parties' responses to said notice shall not be included in the record of this proceeding.

4. Qwest's Counterclaim against AT&T is hereby dismissed with prejudice.

5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(SEAL)

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

| | |
|---|---|
| Gregory Scott | Chair |
| Edward A. Garvey | Commissioner |
| Marshall Johnson | Commissioner |
| LeRoy Koppendrayer | Commissioner |
| Phyllis A. Reha | Commissioner |

In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation

ISSUE DATE: June 18, 2002

DOCKET NO. P-421/C-01-391

ORDER ASSESSING PENALTIES

## PROCEDURAL HISTORY

On the same date herein the Commission issued its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS in which the Commission accepted and adopted the Administrative Law Judge's (ALJ's) conclusion that Qwest knowingly and intentionally violated its Interconnection Agreement with AT&T as well as state and federal law in its response to AT&T's request for testing of Qwest's network.

In that Order, the Commission modified the ALJ's findings as to the period of the violation and found a knowing and intentional violation on the part of Qwest for the period from January 12, 2001 through May 11, 2001. Further, the Commission did not accept the ALJ's recommendation as to the amount of penalty to be assessed but reserved judgment on this issue

At the hearing on April 4, continued on April 9, 2002, the Commission directed the parties to supplement the record on certain specific items related to penalties set forth in Minn. Stat. § 237.462 subd. 2(b) as well as comment on certain questions raised by Commissioner Garvey.

On April 19, 2002, comments on penalties were filed by the Department of Commerce (DOC), AT&T and Qwest.

On April 19, 2002, Eschelon Telecom, Inc. (Eschelon) submitted an affidavit of J. Jeffrey Oxley.

On April 30, 2002, DOC, AT&T and Qwest filed reply comments.

This matter came before the Commission on May 14, 2002.

## FINDINGS AND CONCLUSIONS

The only issue addressed in this Order is the assessment of penalties.

### I. The Legal Standard

Minn. Stat. § 237.462, Subd 2 provides that the Commission may assess a penalty of between $100 and $10,000 per day for each violation.

Minn. Stat. § 237.462, Subd. 2(b) directs the Commission, in determining the amount of penalty, to consider:

> (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.

Minn. Stat. § 237.462 also provides:

> Subd. 3. Burden of proof. The commission may not assess a penalty under this section unless the record in the proceeding establishes by a preponderance of the evidence that the penalty is justified based on the factors identified in subdivision 2.

Subd. 4. Contents of order. An order assessing an administrative penalty under this section shall include:

(1) a concise statement of the facts alleged to constitute a violation;

(2) a reference to the section of the statute, rule, or order that has been violated;

(3) a statement of the amount of the administrative penalty to be imposed and the factors upon which the penalty is based; and

(4) a statement of the person's right to review of the order.

Subd. 5. Penalty stayed. A penalty imposed under this section shall not be payable sooner than 31 days after the commission issues its final order assessing the penalty. The person subject to the penalty may appeal the commission's penalty order under sections 14.63 to 14.68. If the person does appeal the commission's penalty order, the penalty shall not be payable until either all appeals have been exhausted or the person withdraws the appeal.

## II. The Violation

### A. Factual Summary[1]

On or about September 14, 2000, AT&T informed Qwest that AT&T would be making a request for UNE-P testing in Minnesota. The purpose of the AT&T UNE-P[2] testing was for AT&T to test the Qwest-AT&T interface involved with UNE-P provisioning. The information gained from this testing and the problems corrected would be used by AT&T in evaluating and making a UNE-P offering in Minnesota.

During the period from mid-September 2000 until January 11, 2001, there were continuing discussions between AT&T and Qwest that were aimed at moving forward with the testing. Beginning January 12, 2002, however, Qwest took deliberate steps to put unnecessary hurdles and

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[1] The Commission adopted the February 22, 2002, Findings of Fact and Conclusions of Law of the ALJ with two exceptions as set forth in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS, June 18, 2002.

[2] UNE-P is a method for a Competitive Local Exchange Carrier (CLEC) to provide competitive local exchange service. Under UNE-P, the CLEC purchases from the Incumbent Local Exchange Carrier (ILEC) a specific group of unbundled network elements, including the loop, the network interface device, a switch port, switching functionality and transport. With this platform of unbundled network elements, the CLEC can provide basic local exchange service to residential and small business customers.

delays into moving forward with the testing process. Qwest's actions had the effect of precluding the testing that AT&T required. Finally, on May 11, 2001, Qwest agreed to proceed with the testing plan as specified by AT&T.

### B. Law and Statutes Violated

In the period between January 12, 2001 and May 11, 2001, Qwest knowingly and intentionally violated:

1) Minn. Stat. 237.121(a)(4) which prohibits a telephone company from refusing to provide a service, product, or facility to a telecommunications carrier in accordance with a contract;

2) Minn. Stat. § 237.121 (a)(1) which prohibits a telephone company from failing to disclose necessary information;

3) Section 14.1 of the Interconnection Agreement between AT&T and Qwest setting forth Qwest's obligation to engage in cooperative testing; and

4) the Interconnection Agreement and Section 251 (c)(1) of the 1996 Telecommunications Act (the Act)[3] requiring Qwest and AT&T to act in good faith.

### C. The Penalty Imposed

The Commission, in this Order, will impose a penalty of $7500 per day for the period from January 12, 2001 through May 11, 2001. The factors upon which this penalty is based will be discussed below.

### D. Right to Review

The parties have a right to judicial review of the final decision of the Commission under Minn. Stat. § 237.25 as well as Minn. Stat. § § 14.63 to 14.68. See Minn. Stat § 237.462, subd. 5. The parties may also ask the Commission for reconsideration of its final decision under Minn. Rules Part 7829.3000.

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[3] Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

## III. Factors Considered by the ALJ in Assessing a Penalty

The ALJ found that:[4]

1) The violations were knowing and intentional.

2) The violations were serious in that Qwest's conduct delayed by several months AT&T's ability to enter the local service market using UNE-P. This harmed AT&T financially and also harmed Minnesota consumers by delaying significant competition in the local service market.

3) There was one significant violation, a continuing pattern of conduct, and several lesser individual violations consistent with that pattern.

4) Qwest's conduct was for the purpose of protecting its entry into the long-distance market through the Section 271[5] process. Long-distance will provide very substantial revenue to Qwest.

5) Qwest ultimately agreed to cooperate in AT&T's UNE-P test, but only after AT&T had initiated this complaint proceeding.

6) Qwest has enormous assets, but is suffering revenue problems in the current economy. It has the financial ability to pay significant penalties.

7) Qwest's actions would be appropriate in a competitive market. But this is a regulated market where Qwest's actions are subject to the Telecommunications Act of 1996 (the Act) and state law. Its actions were anti-competitive and cannot be condoned under the Act and state law.

ALJ's Conclusions of Law, ¶ 15.

## IV. The Parties' Positions Regarding Penalties

### A. DOC

#### 1. Willfulness of the Violation

The DOC stated that, based on the Findings of Fact and Conclusions of the ALJ as adopted by the Commission, Qwest's actions were willful and intentional with regards to the AT&T test request. It argued that Qwest's conduct was the very type of anti-competitive behavior that the Commission should punish. It was the DOC's opinion that the maximum penalty could be assessed based on this factor alone.

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[4] Adopted by the Commission in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS, June 18, 2002.

[5] Section 271 of the 1996 federal Telecommunications Act sets forth the conditions to be met by Regional Bell Operating Companies (RBOCs) in order to enter interLATA long distance markets.

### 2. Gravity of Violation/Harm to Customers or Competitors

The DOC recognized that the harm to consumers and to competitors by Qwest's behavior is not easily quantifiable. Even though AT&T ultimately got the testing it requested, the DOC argued that the anti-competitive behavior itself is per se harmful to competition, and therefore to consumers, and should be recognized.

### 3. History of Past Violations

The DOC believes that the Commission need not focus on this factor in assessing a penalty in this case. The DOC argued that the Commission could assess the maximum penalty without a record of past violations.

### 4. The Number of Violations

The DOC argued that there was one violation that was not only willful and intentional but went on for 120 days. The statute provides for a per day/per violation assessment of penalties and the DOC argued that the maximum penalty for one violation should be assessed against Qwest for the time period of anti-competitive behavior adopted by the Commission.

### 5. Economic Benefit to Violating Party

The DOC argued that the reason Qwest would not conduct the test requested by AT&T was to protect its own economic interests, specifically with regard to its 271 agenda. It was not going to conduct a test for AT&T that provided AT&T additional data that could be used to oppose Qwest's 271 agenda. The DOC argued that when assessing penalties the Commission should rely heavily on the fact that Qwest was attempting to protect its own economic interests at the expense of its obligation to open its network to competitors.

### 6. Corrective Action by the Violator

The DOC argued that although Qwest did eventually agree to conduct the test, there was a cost to AT&T in terms of time and effort. The DOC viewed Qwest's agreement to conduct the test in May of 2001 as only thinly "corrective."

### 7. Financial Ability to Pay the Penalty

The DOC argued that Qwest should pay the maximum penalty under the law. The ALJ's findings that Qwest had "the financial ability to pay significant penalties" are well supported in the record, the DOC argued, and should be considered by the Commission in assessing the maximum penalty.

### 8. Other Factors that Justice May Require

The DOC stated that Qwest's tactics in this docket warrant consideration, under this factor, by the Commission for penalty assessment. It argued that Qwest created false premises for rejecting the AT&T request, failed to disclose a principal decision maker, Mr. Davis, and failed to disclose relevant e-mails from Mr. Davis in response to AT&T's discovery requests. The DOC argued that these actions demonstrated an intent to keep relevant information from the Commission. Such actions, the DOC argued, compromise the integrity of the Commission's complaint and hearing process and should be given considerable weight in assessing a penalty.

## B. AT&T

AT&T requested that Qwest be fined the maximum penalty of $10,000 per day for the 120 day period set forth by the Commission. AT&T stated it supported the DOC's position that the record already developed in this case is sufficient to enable the Commission to determine a penalty amount based on the relevant statutory factors. AT&T had the following comments on the statutory factors to be considered:

### 1. The Gravity of the Violation

AT&T stated that the company believed that the record compiled by the ALJ fully supports a maximum penalty against Qwest. It argued that Qwest's offenses merit the maximum penalty because Qwest has broken the most fundamental prerequisites of competition: 1) allowing testing of systems that support interconnection; 2) negotiating in good faith; and 3) disclosing information that makes competitive local service possible.

### 2. Economic Benefit Gained

AT&T argued that Qwest put its 271 initiative ahead of everything else because it has a lot to gain by doing so. Qwest stands to gain enormous revenue in the long distance market if its 271 initiative succeeds.

### 3. Corrective Action Taken

Other than agreeing to do the testing, Qwest has not taken any action to correct its behavior.

### 4. The Size of Qwest's Revenue and Assets

AT&T stated that the purpose of the statute is to punish and deter violations of state law. Given Qwest's enormous revenue and assets only the maximum penalty can act as a deterrent to Qwest. This factor alone calls for a severe penalty.

### 5. Qwest Could be Penalized for Multiple Violations

AT&T argued that there were at least three discrete violations which warrant punishment under the statute: 1) willfully refusing to perform cooperative testing 2) violating its duty of good faith, and 3) refusing to disclose information that would allow AT&T to compete. Because there were three discrete violations, AT&T argued that Qwest could be assessed the maximum for each violation. Fining Qwest $10,000 per day for a single violation for the period set forth is therefore not truly the maximum penalty and would be generous to Qwest in these circumstances.

## C. Qwest

Qwest stated that Minnesota law provides that penalties may be assessed and argued that given the record in this case, the Commission should use its discretion and impose no penalty.

### 1. The Gravity of the Violation

Qwest stated that Minn. Stat. § 237.462 requires an assessment of whether there has been harm to the competitor or to customers. Qwest argued that AT&T was not adversely affected by Qwest's actions because AT&T was neither willing nor able to conduct UNE-P testing during the period of time Qwest was purportedly delaying the process.

Qwest may not have immediately assented to the unique style of testing that AT&T was demanding, but that does not rise to the level of a grave violation justifying the fine proposed.

Qwest argued that there has been no harm to consumers in that the UNE-P market in Minnesota today is the same as before AT&T completed its testing. It is the same as it would have been if AT&T conducted the UNE-P test in January, 2001 or even September, 2000. Because there has been no harm to consumers, no penalty should be assessed under this factor.

### 2. Corrective Action Taken

Qwest argued that once the Commission's preference became clear, Qwest worked diligently to perform the requested testing.

### 3. Economic Benefit

Qwest argued that there is no evidence in the record to support AT&T's implication that Qwest's position on the testing accelerated the Section 271 approval process and therefore Qwest has realized some economic benefit.

### 4. Other Factors

Qwest argued that the fact that six other state commissions have validated the very approach that Qwest took in this instance is powerful "other evidence" that Qwest should not be penalized for attempting to ensure that AT&T had some reasonable purpose for the test.

## V. Commission Action

The Commission, in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS accepted and adopted the ALJ's Findings of Fact and Conclusions of Law. In accepting the ALJ'S report, the Commission adopted, among other things, the conclusion that Qwest violated terms of the interconnection agreement with AT&T as well as state and federal law. The Commission concurs with the ALJ and finds that such violations of law warrant a penalty.

The Commission has reviewed the record, including the filings by the parties specifically on penalty issues, in light of the factors the statute directs it to consider in setting penalties under Minn. Stat. § 237.462, subd.2. Having completed this review, the Commission will assess a penalty of $7500 per day for the period from January 12, 2001 through May 11, 2001. The Commission bases this penalty on the following considerations:

### A. Willfulness or Intent of the Violation

The Commission in its ORDER ACCEPTING AND ADOPTING ALJ'S REPORT WITH TWO MODIFICATIONS adopted, among other things, the ALJ's conclusions that Qwest committed a knowing, intentional and material violation of its obligation to engage in cooperative testing under the Interconnection Agreement with AT&T by its refusal to conduct the UNE-P testing requested by AT&T. The ALJ specifically found that beginning January 12, 2001, Qwest took deliberate steps to put unnecessary hurdles and delays into the negotiation process.[6]

The ALJ also found that such action by Qwest constituted a knowing and intentional refusal to provide a service, product or facility to a telecommunication carrier in accordance with a contract under Minn. Stat. § 237.121(a)(4). The Commission agrees with the ALJ that the violations by Qwest were knowing and intentional violations of law.

The ALJ also concluded that 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 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 on Qwest's retail business interests; 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...; and c) sending the letter of August 29, 2001, to AT&T making false and misleading statements.[7] The Commission agrees with the ALJ that Qwest actions were in bad faith.

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[6] See ALJ's Findings of Fact and Conclusions of Law, Finding No. 72.

[7] See id. Conclusions of Law ¶ 14.

Further, the ALJ stated, and the Commission agrees, that Qwest did not fail to act in good faith when it attempted to determine for itself its obligations under the interconnection agreement. 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 that testing for market entry was not simply a mistaken interpretation of its obligation under the Interconnection Agreement. It was not supported by the terms of the Interconnection Agreement but was a position developed and used by Qwest to prevent AT&T from developing data that AT&T could use to present to regulatory officials in opposition to Qwest's 271 applications.[8] The Commission recognizes that this was a further example of bad faith on Qwest's part.

### B. Gravity of the Violation, Including the Harm to Customers or Competitors

The violation was grave in that it goes to the very heart of competition, which is facilitating network access by competitors. Qwest's conduct delayed AT&T's ability to enter the local market by several months, thereby causing harm to consumers by delaying competition in the local service market. Qwest's actions also caused financial harm to AT&T by delaying its market entry and forcing AT&T to use time and resources to bring the matter to the Commission for resolution. Finally, the competitive market was also harmed. Qwest's delaying the testing and causing difficulty for AT&T to get access to crucial pre-entry information that did not conform to what Qwest was willing to offer has the effect of discouraging others from entering the market. Qwest's obstructionist behavior toward AT&T presumably raised the costs of UNE-P entry in the minds of other potential competitors, discouraging investment in the Minnesota market.

Although it is clear that there was harm caused by Qwest's conduct, the exact amount of harm is not readily quantifiable.

### C. History of Past Violations and Related Factors

This is the first time the Commission has ruled on the merits that Qwest's conduct warrants a penalty under the competitive enforcement statute. This militates against assessing the maximum penalty. The Commission agrees with the parties that since other issues regarding Qwest's behavior are currently being addressed in current contested case proceedings under the jurisdiction of the Office of Administrative Hearings, the Commission need not focus on those issues in this proceeding.

### D. Number of Violations

There was one significant continuing violation arising out of one set of facts continuing over an extended period of time. Such a situation merits a significant penalty. The Commission agrees with the ALJ's recommendation to consider a penalty for only the one significant violation involving the bad faith pattern of conduct.

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[8] See id. Conclusions of Law ¶ 12.

### E. Economic Benefit Resulting from the Violation

While the degree to which Qwest benefitted economically from its bad faith pattern of conduct is undetermined, Qwest provides an essential service to a largely captive market-it clearly benefits economically each time a competitor's market entry is delayed or prevented. Equally clearly, it benefits whenever it can increase the entry costs of its would-be competitors. Further the ALJ found, and the Commission concurs, that this violation was motivated at least in part by Qwest's economic interest in offering long distance service in Minnesota and other states in which it is the incumbent local carrier. Under federal law, it cannot offer long distance in those states unless its interconnection practices and procedures meet certain standards. The testing requested by AT&T carried the risk of demonstrating that Qwest was not meeting those standards. The violation at issue, therefore, was both economically motivated and more than likely resulted in economic gain for Qwest.

### F. Attempts to Correct Violation

Qwest did ultimately comply with AT&T's testing request. This could be a mitigating factor in assessing penalties. However, there was no evidence presented by Qwest that it would do anything significantly different in the future if faced with a similar request. There was nothing to show that there was any change in Qwest's attitude or approach.

Qwest did eventually comply with AT&T's request. However, this was due to Qwest's recognition that compliance would be required. Since Qwest did not comply until it had become clear that the Commission would require compliance, and there was no evidence of a change in attitude or approach, significant penalties remain appropriate.

### G. Annual Revenue/Financial Ability to Pay the Penalty

The Commission agrees with the ALJ that Qwest has significant financial assets and has the financial ability to pay any penalties assessed.

### H. Other Factors that Justice May Require

Qwest acted unilaterally to delay the testing AT&T requested and eventually determined not to do the testing at all, offering only to do its standard testing. Qwest, as the monopoly power making the decision to proceed in this manner was acting not only to delay AT&T's entry into the market but was effectively keeping AT&T out of the market by dictating what testing was appropriate for AT&T and giving no heed to AT&T's stated testing needs. This was clearly not a [illegible] role for Qwest. Not only did it impact AT&T but it also impacted any other CLEC that needed information that Qwest deemed was not necessary for it to have.

The Commission also notes its concern that Qwest made unilateral decisions without asking the Commission for guidance or assistance. Qwest clearly did not want the Commission involved. It made its own determination of what it was required to provide AT&T without involving the Commission. At one point in the negotiations, AT&T requested that Qwest come to the Commission for a tariff waiver. Qwest refused to ask for such a waiver and subsequently asserted the tariff as a reason for not providing the residential lines AT&T requested. The ALJ found that this reason was "bogus" because Qwest was fully aware of the regulatory process and knew that it was possible to get the waiver. Rather than seeking Commission guidance, Qwest was dictating what could and could not be done by a CLEC to enter the market. This is not acceptable.

In conclusion, the Commission will not assess the maximum penalty in this instance, recognizing that Qwest did ultimately cooperate in the testing, thereby mitigating the harm done. However the Commission finds that the serious nature of this occurrence, combined with the harm to consumers and considering the serious effect Qwest's behavior could have on competition, compel the Commission to assess a penalty designed to have an impact on Qwest. For these reasons, the Commission will assess Qwest a penalty of $7500 per day for the period beginning January 12, 2001 through May 11, 2001.

## VI. Affidavit filed by Eschelon

### A. Background

On April 19, 2002, in response to the Commission's request for comments on specific factors related to the assessment of penalties, Eschelon[4] submitted an Affidavit of Jeffrey Oxley (the Affidavit). The purpose of the Affidavit was for Mr. Oxley to testify to facts that show harm to Eschelon, other competitive local exchange carriers (CLECs), and customers by Qwest's delaying AT&T's UNE-P test.

The issue addressed by the Commission is whether the Affidavit should be entered into the record in this proceeding.

### B. Position of Qwest

Qwest was the only party to comment on the issue of admissibility of the Affidavit.

Qwest viewed Eschelon's filing as an attempt by Eschelon to bring in completely new and misleading facts. Qwest argued that this was procedurally improper and denied Qwest the opportunity to develop facts in rebuttal. It argued that Eschelon's contentions will serve only to confuse the issue.

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[4] Eschelon is not a party in this proceeding and has not participated in this proceeding prior to this submission.

Qwest argued that Eschelon was seeking to raise its own independent claims against Qwest which involve matters wholly distinct from the substance of the matter currently before the Commission. This was an attempt by Eschelon to circumvent procedural safeguards and the submission should be declined.

Further, Qwest argued, if the Affidavit were to be admitted, Qwest should be allowed to conduct reasonable discovery into the claims made and it should be permitted to conduct cross examination of the affiant.

### C. Commission Action

The Commission will not allow the Affidavit filed by Eschelon, nor any responses to that filing, into the record. The filing addresses Eschelon's own experience with Qwest under [illegible] an interconnection agreement between Eschelon and Qwest and is not relevant to the matter herein. Further, it attempts to introduce into the record new factual arguments which have not been developed under the procedural protections available in an adversarial proceeding. For these reasons the Affidavit will not be admitted into the record.

## ORDER

1. The Affidavit of J. Jeffrey Oxley filed by Eschelon, and any responses to that filing, are hereby excluded from the record in this case.

2. Qwest shall pay a penalty of $7500 per day for the period from January 12, 2001 through May 11, 2001.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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# EXHIBIT F

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
SUITE 350
121 SEVENTH PLACE EAST
ST. PAUL, MINNESOTA 55101-2147

| | |
|---|---|
| **Greg Scott** | **Chair** |
| **Edward Garvey** | **Commissioner** |
| **Marshall Johnson** | **Commissioner** |
| **LeRoy Koppendrayer** | **Commissioner** |
| **Phyllis A. Reha** | **Commissioner** |

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|---|---|---|
| In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements | ) ) ) ) | Docket No. P-421/C-02-197 |

**SECOND AMENDED VERIFIED COMPLAINT**

**Expedited Proceeding Requested**

**Temporary Relief Requested**

The Minnesota Department of Commerce ("Department") brings this Verified Complaint before the Minnesota Public Utilities Commission (the "Commission") against Qwest Corporation ("Qwest"), seeking relief for Qwest's violation of its obligations under state and federal law. Qwest's unlawful conduct has hindered and continues to hinder competition in the local exchange markets in Minnesota. In support of this Complaint, the Department alleges:

**PARTIES**

1. Under Minn. Stat. § 216A.07, the Department is charged with investigating and enforcing Chapter 237 and Commission orders made pursuant to that chapter. The Department's local address in Minnesota is Golden Rule Building, 85 East 7th Place, Suite 500, St. Paul, MN 55155.

2. The Department is represented in this proceeding by its attorneys:

Mike Hatch
Attorney General
State of Minnesota

Steven H. Alpert
Assistant Attorney General
525 Park Street, #200
St. Paul, Minnesota 55103-2106
(651) 296-3258 (telephone)
(651) 282-2525 (TTY)

3. Respondent Qwest is a Delaware corporation with its principal place of business in Denver, Colorado, with offices in Minnesota at 200 South Fifth Street, Minneapolis, Minnesota. Qwest provides switched local exchange service in a number of Minnesota exchanges, and is regulated by the Commission under Minn. Stat. ch. 237 as a "telephone company." Minn. Stat. § 237.01, subd. 2. As a major provider of local exchange service in Minnesota, Qwest controls approximately two million out of the approximately two million seven hundred thousand telephone lines in Minnesota.

4. The Department believes that Qwest is represented in Minnesota by its attorney:

Jason Topp
Qwest Corporation
Law Department
200 South 5th Street, Room 395
Minneapolis, MN 55402
(612) 672-8905 (telephone)
(612) 672-8911 (facsimile)

## JURISDICTION

5. The Department's investigation into certain agreements entered into by Qwest, and described more particularly below, establishes that Qwest's behavior violates federal and state law.

6. The Commission has jurisdiction over this Complaint pursuant to 47 U.S.C. §§ 252(e) (authority of state commissions to enforce interconnection agreements), 251(c)(2) (duty of incumbent carriers to interconnect with CLECs); Minn. Stat. §§ 237.081 (Commission investigations); and, 237.462 (competitive enforcement).

## OVERVIEW

### Qwest's Legal Obligations

7. Qwest is the successor in interest to U S WEST Communications, Inc. ("U S WEST"). At all times relevant to this complaint, either U S WEST or its successor Qwest operated as an incumbent local exchange carrier in Minnesota.

8. The Department is informed and believes and on this basis alleges that, upon its merger with U S WEST, Qwest assumed the obligations and the benefits of every agreement described in this complaint to which U S WEST was a party. For purposes of this complaint, both Qwest and U S WEST are referred to as Qwest.

9. As an incumbent local exchange carrier, Qwest has a number of legal duties set forth in 47 U.S.C. § 251(c). Among those duties are:

a. The duty to negotiate in good faith the particular terms and conditions of agreements for interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, and collocation. 47 U.S.C. § 252(c)(1).

b. The duty to provide interconnection with Qwest's network on rates, terms and conditions that are just, reasonable and non-discriminatory. 47 U.S.C. § 251(c)(2)(D).

c. The duty to provide nondiscriminatory access to network elements on an unbundled basis on rates, terms and conditions that are just, reasonable and nondiscriminatory. 47 U.S.C. § 251(c)(3).

10. Pursuant to 47 U.S.C. § 252(a), Qwest may negotiate the terms of any agreement to provide interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, and collocation with the CLEC requesting such items or services. The agreement entered into by Qwest "shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C. § 252(a)(1).

11. Qwest and numerous CLECs are parties to Interconnection Agreements ("ICAs") which have been approved at various times by this Commission pursuant to 47 U.S.C. § 252(e).

12. Qwest is required to make available any interconnection, service, or network element provided under an agreement approved by this Commission pursuant to 47 U.S.C. § 252(e) to which Qwest is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. 47 U.S.C. § 252(i). This requirement is also known as the "most favored nation" or "pick and choose" rule.

13. In the *Local Competition First Report and Order*, the FCC explained the importance of the filing requirement in 47 U.S.C. § 252(a)(1) and its relation with 47 U.S.C. § 252(i):

> As a matter of policy, moreover, we believe that requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest. In particular, preexisting agreements may include provisions that violate or are inconsistent with the pro-competitive goals of the 1996 Act, and states may elect to reject such agreements under section 252(e)(2)(A). Requiring all contracts to be filed also

> limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i). In addition, we believe that having the opportunity to review existing agreements may provide state commissions and potential competitors with a starting point for determining what is "technically feasible" for interconnection.

*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, para. 167 (1996) (emphasis in original).

**The Secret Agreements**

14. The Department is conducting an investigation into potential anti-competitive conduct by Qwest, in part to determine whether Qwest has engaged in a practice of entering into secret agreements with some CLECs that violate Qwest's obligations under 47 U.S.C. § 251(c) and/or 47 U.S.C. § 252(a)(1).

15. On June 20, 2001 the Department sent an information request to Qwest asking it to produce every agreement with a CLEC not filed with the Commission entered into by Qwest over the last five years. After discussions with Qwest, the scope of Qwest's production was narrowed to agreements entered into on or after January 1, 2000.

16. The facts set forth below have been determined by the Department based on the agreements and information provided by Qwest in Docket P421/DI-01-814.

17. The Department's investigation revealed that Qwest has entered into numerous secret agreements with CLECs to provide interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation and/or collocation to the CLEC (the "Secret Agreements"). The Secret Agreements are discussed in more detail below and attached as exhibits to this complaint.

18. The Secret Agreements either modify or augment the terms and conditions set forth in the ICAs between Qwest and the CLECs that are party to them.

19. 47 U.S.C. § 242(a)(1) requires that these Secret Agreements be submitted for Commission approval pursuant to 47 U.S.C. § 252(e).

20. Qwest has not submitted the Secret Agreements for Commission approval pursuant to 47 U.S.C. § 252(e).

21. In addition to failing to submit the Secret Agreements to this Commission for approval, Qwest included confidentiality provisions in the agreements that, in many cases, precluded access to the Secret Agreements by other CLECs, the Department, or this Commission to the Secret Agreements.

22. The Department is informed and believes and on this basis alleges that the terms of these Secret Agreements described below do not appear in any ICAs approved by the Commission under 47 U.S.C. § 252(e), to which Qwest is a party.

23. As a result, the terms of these Secret Agreements described below remain unknown to the CLECs that are not party to these agreements and are not available for adoption by other CLECs pursuant to 47 U.S.C. § 252(i).

24. By entering into the Secret Agreements, Qwest is providing discriminatory treatment in favor of the CLECs that are party to these agreements and to the detriment of CLECs that are not.

25. Because these Secret Agreements either modify or create entirely new terms and conditions of interconnection, access to network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation and/or collocation, Qwest's failure to make these terms generally available to all CLECs violates 47 U.S.C. § 251(c).

26. As set forth in greater detail below, the ongoing and repeated behavior of Qwest in entering into these secret agreements was, and is, anti-competitive and in violation of federal and state law.

## SPECIFIC FACTUAL ALLEGATIONS

## THE ESCHELON AGREEMENTS

27. Today and at all times described below, Eschelon Telecom, Inc. and/or its predecessor in interest, Advanced Telecommunications, Inc. (collectively, "Eschelon") is and was licensed and certificated to operate as a CLEC in Minnesota.

28. Today and at all times described below, Eschelon is and was party to an ICA with Qwest that was approved by the Commission under 47 U.S.C. § 252(e).

29. Between February 28, 2000 and July 31, 2001, Qwest entered into a series of secret agreements with Eschelon.

### Eschelon Agreement I

30. On February 28, 2000 Qwest entered into the *Confidential/Trade Secret Stipulation Between ATI and U S WEST* ("Eschelon Agreement I"). A true and correct copy of Eschelon Agreement I provided to the Department by Qwest is attached as Exhibit 1 to this complaint.

31. As set forth more specifically below, Eschelon Agreement I sets out terms and conditions for reciprocal compensation, interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit Eschelon Agreement I to the Commission for approval under 47 U.S.C. § 252(e).

32. To date, Qwest has not submitted Eschelon Agreement I to the Commission for approval under 47 U.S.C. § 252(e).

33. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

34. In abrogation of its duty of non-discrimination and in defiance of the requirements of 47 U.S.C. § 252(a)(1), Qwest included a confidentiality clause in Eschelon Agreement I that prevented other CLECs, the Commission and the Department from discovering the existence of the agreement and the specific terms of interconnection and access to unbundled network elements described below.

35. The confidentiality clause in Paragraph 1 of Eschelon Agreement 1 reads as follows:

> The terms of this agreement are confidential, contain trade secret information, and shall not be disclosed unless pursuant to a lawful Order compelling such disclosure. In such event that production is compelled, neither Party shall disclose the terms of this agreement without first notifying the other Party.

36. Eschelon Agreement I provides in Paragraph 7 as follows:

> [Eschelon] has asserted that USWC must pay reciprocal compensation for internet related terminating traffic under its Interconnection Agreements and under applicable state and federal law. USWC has asserted that it has no legal obligation to pay reciprocal compensation for such traffic. Notwithstanding these differences and without waiving their positions, the parties agree that for settlement purposes that reciprocal compensation for terminating internet traffic shall be paid at the most favorable rates and terms contained in an agreement executed to date by USWC.

37. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provision as Paragraph 7 of Eschelon Agreement I. Qwest did not identify any such ICA.

38. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains a term giving the CLEC the ability to obtain the most favorable rates and terms for reciprocal compensation for terminating internet traffic contained in an agreement executed as of February 28, 2000 by U S WEST.

39. By providing this term to Eschelon and to no other CLEC, Qwest discriminated against other CLECs and violated 47 U.S.C. § 251(c).

40. Eschelon Agreement I provides in Paragraph 10 as follows:

> With respect to termination liability assessments (TLA) and while the Minnesota Commission continues to have an open docket on this issue, USWC agrees to continue to suspend such assessments in Minnesota when a USWC customer converts to an ATI customer on a resale basis and to credit ATI with any such TLA payments ATI has made in Minnesota.

41. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provision as Paragraph 10 of Eschelon Agreement I. Qwest did not identify any such ICA.

42. The Department is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same term as Eschelon Agreement I.

43. By providing this term to Eschelon and to no other CLEC, Qwest discriminated against other CLECs and violated 47 U.S.C. § 251(c).

44. Eschelon Agreement I provides in Paragraphs 11 and 12 as follows:

> USWC agrees to dedicate Aimee Croatt as a Coach and locate her at ATI's offices at 511 11th Avenue South in Minneapolis for a period of at least six months. If Ms. Croatt is not available for assignment, USWC will provide another Coach who is knowledgeable and experienced in working with all the different groups and functions within USWC related to provisioning. ATI must approve the assignment of any Coach other than Ms. Croatt. USWC will also utilize a service delivery coordinator (SDC) to assist the Coach. The parties recognize that the Coach and the SDC will need to complete training before the requirements in paragraph 11 and paragraph 12 can be fully implemented. All properly input orders that, for one reason or another, are not flowing through the accepted process would be the responsibility of the Coach or SDC. The Coach would have access to all USWC's systems and would work within the USWC organization and using USWC's processes to resolve issues as quickly as possible. The Coach would track the reasons for problem orders to aid in defining and refining current processes for both USWC and ATI. ATI will provide any facilities requested by USWC for the Coach. ATI has also indicated that it will work cooperatively with

USWC to identify and pay the incremental and extraordinary costs associated with the dedicated provisioning team.

At the appropriate time, USWC agrees to dedicate a provisioning team to work with the Coach and handle all interaction with ATI on order processing. After spending two months on site with the ATI provisioning team, the Coach and/or the SDC should have the criteria and information available to make a decision as to how many U S West provisioners will be needed to oversee the ATI orders. The provisioning team will be physically located at the 511 11th Avenue South location. The parties agree to evaluate the dedicated provisioning team requirement in 12 months after the effective date of this agreement.

45. The Department is informed and believes and on this basis alleges that the dedicated provisioning team referred to in these paragraphs is still in operation at Eschelon.

46. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provision as Paragraphs 11 and 12 of Eschelon Agreement I. In response, Qwest identified only Section 2.10 to Amendment 8 to the Eschelon ICA.

47. On December 6, 2000 Eschelon submitted Amendment 8 to its ICA with Qwest to the Commission for approval pursuant to 47 U.S.C. § 252(e). Section 2.10 of the amendment says, "For at least a one-year period, Eschelon agrees to pay Qwest for the services of a Qwest dedicated provisioning team to work on Eschelon's premises." This Section 2.10 does not obligate Qwest to provide a dedicated provisioning team and does not set out, in detail, the scope of the provisioning team's work as set forth in Eschelon Agreement I.

48. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the terms set forth in Paragraphs 11 and 12 of Eschelon Agreement I.

49. By providing this term to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

50. Eschelon Agreement I provides in Paragraph 14 for an extensive dispute resolution agreement that creates additional ways for resolving disputes between Qwest and Eschelon beyond the methods set forth in their ICA. The preamble to Paragraph 14 reads as follows:

> In the event of future disputes between the Parties, in addition to the dispute resolution mechanism provided under the Interconnection Agreement, the Parties agree to use the following alternative dispute resolution procedures as their preferred remedy; provided, however, that in the event the negotiations referenced below do not resolve the dispute within thirty (30) Business Days of the initial written request, unless the Parties mutually agree to a different time frame. Either party may elect, before filing a claim or response in arbitration (as the case may be) to submit an otherwise arbitrable dispute to the Commission, the FCC or a court of appropriate jurisdiction. [sic]

51. Paragraph 14 of Eschelon Agreement I goes on to set out very specific parameters for negotiations, arbitrations, expedited arbitration procedures and allocation of cost.

52. Dispute resolution provisions are an essential part of an ICA because they define how the parties will settle disputes that arise over interconnection, unbundled network elements, and other telecommunication products and services that Qwest is required to provide under 47 U.S.C. § 251.

53. The October 1, 2001 *Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services and Resale of Telecommunications Services Provided by Qwest Corporation in the State of Minnesota* ("SGAT") contains 14 paragraphs and subparagraphs devoted to dispute resolution (Para. 5.18 *et seq.*). In addition, dispute resolution is mentioned in 23 paragraphs outside of the 14 devoted to the topic.

54. The SGAT does not contain all the terms and conditions found in Eschelon Agreement I. For example, SGAT Paragraph 5.18.3.2 states "There shall be no discovery except for the exchange of documents deemed necessary by the Arbitrator to an understanding and

determination of the dispute." Paragraph 14 of Eschelon Agreement I provides for written discovery and one oral deposition.

55. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provision as Paragraph 14 of Eschelon Agreement I. Qwest did not identify any such ICA.

56. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same dispute resolution terms found in Paragraph 14 of Eschelon Agreement I.

57. By providing these terms to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

**Eschelon Agreement II**

58. On July 21, 2000 Qwest entered into the *Trial Agreement* with Eschelon ("Eschelon Agreement II"). Eschelon Agreement II was, by its terms, made effective as of May 1, 2000. A true and correct copy of Eschelon Agreement II provided to the Department by Qwest is attached as Exhibit 2 to this complaint.

59. As set forth more specifically below, Eschelon Agreement II sets out terms and conditions for interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit Eschelon Agreement II to the Commission for approval under 47 U.S.C. § 252(e).

60. To date, Qwest has not submitted Eschelon Agreement II to the Commission for approval under 47 U.S.C. § 252(e).

61. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

62. In abrogation of its duty of non-discrimination and in defiance of the requirements of 47 U.S.C. § 252(a)(1), Qwest included a confidentiality clause in Eschelon Agreement II that prevented other CLECs, the Commission and the Department from discovering the existence of the agreement and the specific terms of interconnection and access to unbundled network elements described below.

63. The confidentiality clause in Paragraph 9 of Eschelon Agreement II reads as follows:

> **CONFIDENTIALITY, PRESS RELEASES.** The terms of this Agreement are confidential, contain trade secret information and shall not be disclosed unless pursuant to a lawful Order compelling such disclosure. In such event that production is compelled, neither Party shall disclose the terms of this Agreement without first notifying the other Party. Neither Party shall use the other's name in any press releases, sales promotions, or other publicity matters relating to the Trial or the Services without written approval from the other Party. Nothing in this section in any way affects or limits rights and obligations of the Parties relating to confidentiality and nondisclosure under other agreements with one another.

64. Eschelon Agreement II sets out, in full detail, all the terms and conditions of providing the dedicated provisioning team agreed to and described in Eschelon Agreement I. For example, Paragraph 3 requires Eschelon to pay Qwest $9,206 each month for the dedicated provisioning team over the term of the agreement.

65. The specific responsibilities for the dedicated provisioning team, Eschelon's commitments for the team and Qwest's commitments for the team are set out in more than 30 paragraphs and subparagraphs in Attachment 1 to Eschelon Agreement II.

66. The Department is informed and believes and on this basis alleges that the primary responsibility of the dedicated provisioning team is to help Eschelon obtain access to unbundled network elements.

67. Although Eschelon Agreement II is labeled a "trial" agreement that, by its terms, expired on May 1, 2001, the Department is further informed and believes and on this basis alleges that the dedicated provisioning team remains in place at Eschelon today and continues to operate on the same or similar terms and conditions as set forth in Eschelon Agreement II.

68. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as Eschelon Agreement II. In response, Qwest identified only Section 2.10 of Amendment 8 to the Eschelon ICA.

69. Section 2.10 of Amendment 8 to the Eschelon ICA says, "For at least a one-year period, Eschelon agrees to pay Qwest for the services of a Qwest dedicated provisioning team to work on Eschelon's premises." This Section 2.10 does not obligate Qwest to provide a dedicated provisioning team and does not set out, in detail, the scope of work set forth in Eschelon Agreement II.

70. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same terms found in Eschelon Agreement II.

71. By providing these terms to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

**Eschelon Agreement III**

72. On November 15, 2000 Qwest entered into a *Confidential Agreement* ("Eschelon Agreement III"). A true and correct copy of Eschelon Agreement III provided to the Department by Qwest is attached as Exhibit 3 to this complaint.

73. As set forth more specifically below, Eschelon Agreement III sets out terms and conditions for interconnection and access to unbundled network elements. As such, 47 U.S.C.

§ 252(a)(1) requires Qwest to submit Eschelon Agreement III to the Commission for approval under 47 U.S.C. § 252(e).

74. To date, Qwest has not submitted Eschelon Agreement III to the Commission for approval under 47 U.S.C. § 252(e).

75. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

76. Eschelon Agreement III provides in Section 2 as follows:

> Beginning in 2001 and continuing through the end of 2005, the Parties will agree to attend and participate in quarterly executive meetings, the purpose of which will be to address, discuss and attempt to resolve unresolved business issues and disputes, anticipated business issues, and issues related to the Parties' Interconnection Agreements, Implementation Plan, and other agreements. The meetings will be attended by executives from both companies at the vice-president and/or above level.

77. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as Section 2 of Eschelon Agreement III. In response, Qwest identified only Section 1.3 of Amendment 8 to the Eschelon ICA.

78. Section 1.3 of Amendment 8 to the Eschelon ICA says "The Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This Section 1.3, however, does not require Qwest to attend quarterly meetings and does not require Qwest to provide an executive from the vice-president or above level for such meetings.

79. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same term as Eschelon Agreement III.

80. By providing this term to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

81. Eschelon Agreement III provides in Section 3 for specific, six-level escalation procedures for resolving any and all business issues between them, including ICA issues. The preamble to Section 3 reads as follows:

> The parties wish to establish a business-to-business relationship and agree that they will resolve any and all business issues that may arise between them, including but not limited to, their Interconnection Agreements and Amendments, in accordance with the escalation procedures set forth herein. The parties agree, subject to any subsequent written agreement between the parties, to: (1) utilize the following escalation process and time frame to resolve such disputes; (2) commit the time, resources and good faith necessary to meaningful dispute resolution; (3) not proceed to a higher level of dispute resolution until either a response is received or expiration of the time frame for the prior level of dispute resolution; (4) grant to one another, at the request of the other party, reasonable extensions of time at Levels 1 and 2 of the dispute resolution process to facilitate a business resolution; and (5) complete Levels 1, 2 and 3 of dispute resolution before seeking resolution through arbitration or the courts.

82. Under the escalation procedures set out in Eschelon Agreement III, Level 1 involves Vice Presidents. Level 2 involves Senior Vice Presidents. Level 3 involves CEOs. Level 4 is arbitration. Level 5 is a return to CEOs, and Level 6 is litigation in state or federal courts. Levels 1, 2, 3 and 5 are assigned 10 business days for completion. Level 4 allows either party to request expedited arbitration to be completed within 90 days.

83. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same escalation provisions as Section 3 of Eschelon Agreement III. In response, Qwest identified only Section 1.3 of Amendment 8 to the Eschelon ICA.

84. Section 1.3 of Amendment 8 to the Eschelon ICA says "The Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This Section 1.3, however, does not

set out the specific escalation steps described in Eschelon Agreement III and certainly does not commit Vice Presidents, Sr. Vice Presidents or Qwest's CEO to participate in issue escalations.

85. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same escalation process as Eschelon Agreement III.

86. By providing this term to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

87. Eschelon Agreement III further provides in Section 3 that if a dispute reaches Level 6:

> In the event that either party files an action in court, the parties waive (a) primary jurisdiction in any state utility or service commission; and (b) any tariff limitations on damages or other limitation on actual damages, to the extent such damages are reasonably foreseeable and acknowledging each party's duty to mitigate damages.

88. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same waiver provisions as Section 3 of Eschelon Agreement III. In response, Qwest identified only Section 1.3 of Amendment 8 to the Eschelon ICA.

89. Section 1.3 of Amendment 8 to the Eschelon ICA says "The Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." Section 1.3 does not address any of the waiver issues addressed in Section 3 of Eschelon Agreement III.

90. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(c) with Qwest as a party contains the same waiver provisions as this term of Eschelon Agreement III.

91. By providing this term to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

**Eschelon Agreement IV**

92. On November 15, 2000 Qwest entered into a *Confidential Amendment to Confidential/Trade Secret Stipulation* ("Eschelon Agreement IV"). Eschelon Agreement IV amends and adds terms to Eschelon Agreement I. A true and correct copy of Eschelon Agreement IV provided to the Department by Qwest is attached as Exhibit 4 to this complaint.

93. As set forth more specifically below, Eschelon Agreement IV sets out terms and conditions for interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit Eschelon Agreement IV to the Commission for approval under 47 U.S.C. § 252(e).

94. In particular, Eschelon Agreement IV describes a complex "consulting" arrangement that has the net effect of reducing the cost of unbundled network elements and related telecommunications services to Eschelon as compared to other CLECs.

95. To date, Qwest has not submitted Eschelon Agreement IV to the Commission for approval under 47 U.S.C. § 252(e).

96. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

97. In abrogation of its duty of non-discrimination and in defiance of the requirements of 47 U.S.C. § 252(a)(1), Qwest included a confidentiality clause in Eschelon Agreement IV that prevented other CLECs, the Commission and the Department from discovering the existence of the agreement and the specific cost reductions and terms of interconnection and access to unbundled network elements described below.

98. The confidentiality clause in Paragraph 9 of Eschelon Agreement IV reads as follows:

> The Parties agree that they will keep the substance of the negotiations and/or conditions of this settlement and the terms or substance of this Confidential Agreement strictly confidential. The Parties further agree that they will not communicate (orally or in writing) or in any way disclose the substance of the negotiations and/or conditions of this settlement and the terms or substance of this Agreement to any person, judicial or administrate [sic] agency or body, business, entity or association or anyone else for any reason whatsoever, without the prior express written consent of the other Party unless compelled to do so by law or unless Eschelon pursues an initial public offering, and then only to the extent that disclosure by Eschelon is necessary to comply with the requirements of the Securities Act of 1933 or the Securities Exchange Act of 1934. In the event Eschelon pursues an initial public offering, it will (1) first notify Qwest of any obligation to disclose some or all of this Confidential Agreement; (2) provide Qwest with an opportunity to review and comment on Eschelon's proposed disclosure of some or all of this Confidential Agreement, and (3) apply for confidential treatment of this Confidential Agreement. It is expressly agreed that this confidentiality provision is an essential element of this Confidential Agreement and the negotiations, and all matters related to these matters shall be subject to Rule 408 of the Rules of Evidence, at the federal and state level.

99. Eschelon Agreement IV provides in Paragraph 3 as follows:

> Eschelon shall provide to Qwest consulting and network-related services, including but not limited to processes and procedures relating to wholesale service quality for local exchange services ("Services"). These Services will address numerous items, including loop cutover and conversion, repair, billing and other items agreed upon by the Parties. The Services may include all lines of business and methods of local market entry used by Eschelon. Eschelon agrees to utilize knowledgeable and experienced personnel for the Services. Eschelon further agrees to assign, upon request, up to two full time representatives dedicated to working with the Qwest account team or other Qwest organizations to facilitate handling of provisioning issues. The parties agree to meet together (via telephone, live conference, or otherwise) as necessary to facilitate provisioning of the Services. Executives from both companies agree to address and discuss the progress of the Services at quarterly meetings to begin in 2001 and continue through the end of 2005. **In consideration of Eschelon's agreement to provide Services and for such good and valuable consideration set forth in this agreement, Qwest agrees to pay Eschelon an amount that is ten percent (10%) of the aggregate billed charges for all purchased made by Eschelon from Qwest from November 15, 2000 through December 31, 2005.** Eschelon will invoice Qwest annually. Payment is due within 30 days of the invoice date. In the event that the Confidential Purchase Agreement between Eschelon and Qwest (as of the same date as this Agreement) is terminated, this

paragraph of this Agreement also terminates simultaneously with termination of that Confidential Purchase Agreement and any payments made pursuant to this paragraph as of the date termination will be promptly returned to Qwest. In addition, if Eschelon fails to meet its purchase commitments under sections 2, 2.1, 2.2, 2.3, 2.4 or 2.5 of the Confidential Purchase Agreement, Eschelon will promptly return to Qwest any payments made pursuant to this section. [Emphasis added.]

100. The net effect of Paragraph 3 is to reduce the cost of every unbundled network element, telecommunications product and/or service purchased by Eschelon from Qwest by 10% as compared to the Commission-approved rates charged by Qwest to other CLECs.

101. In addition, as Paragraph 3 makes clear, the amount Eschelon is to receive for the purported "Services" is in no way tied to the value of the "Services" or the time spent by Eschelon, if any, rendering such "Services."

102. Instead, the amount Eschelon is to receive is determined solely by the amount of money spent by Eschelon on unbundled network elements, telecommunications products and/or services purchased from Qwest.

103. Moreover, regardless of the actual value of the "Services" provided by Eschelon to Qwest, Eschelon must return all of the money paid by Qwest under this agreement if Eschelon does not meet certain purchase commitments set forth in a separate agreement.

104. The Department discovered during its investigation that the amount owed by Qwest to Eschelon under this agreement for the time period between November 15, 2000 and August 31, 2001 is $2,540,017 (two million five hundred forty thousand seventeen dollars).

105. The Department further is informed and believes and on this basis alleges that the "Services" provided by Eschelon under this agreement require work no different than the work that any CLEC would do to improve Qwest's provisioning of services to it, if given the opportunity.

120. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same rate refund agreement as the third paragraph of Eschelon Agreement V. Qwest did not identify any such ICA.

121. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains this term.

122. By providing this term to Eschelon and to no other CLEC, Qwest discriminated against other CLECs and violated 47 U.S.C. § 251(c).

123. The fifth paragraph of Eschelon Agreement V reads as follows:

> Eschelon has also noted an issue relating to access records for Qwest's intraLATA toll traffic terminating to customers served by Eschelon's switch. The ongoing analysis and resources expended by Eschelon and Qwest will also address this issue. As of June 1, 2001, until the parties agree that the issue is resolved, Qwest will pay Eschelon $2.00 per line per month for such traffic.

124. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provision as the fifth paragraph of Eschelon Agreement V. Qwest did not identify any such ICA.

125. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains this term.

126. By providing this term to Eschelon and to no other CLEC, Qwest discriminated against other CLECs and violated 47 U.S.C. § 251(c).

**Eschelon Agreement VI**

127. On July 31, 2001 Qwest entered into the *Qwest/Eschelon Implementation Plan* ("Eschelon Agreement VI"). A true and correct copy of Eschelon Agreement VI provided to the Department by Qwest is attached as Exhibit 6 to this complaint.

START

OF

RETAKE

paragraph of this Agreement also terminates simultaneously *with termination of this Confidential* Purchase Agreement and any payments made pursuant to this paragraph as *of the date termination will be promptly* returned to Qwest. In addition, if Eschelon fails to meet its purchase *commitments under sections* 2, 2.1, 2.2, 2.3, 2.4 or 2.5 of the Confidential Purchase Agreement, Eschelon will promptly return to Qwest any payments made pursuant to this section. [Emphasis added.]

103. The net effect of Paragraph 3 is to reduce the cost of every unbundled network element, telecommunications product and/or service purchased by Eschelon from Qwest by 10% as compared to the Commission-approved rates charged by Qwest to other CLECs.

104. In addition, as Paragraph 3 makes clear, the amount Eschelon is to receive for the purported "Services" is in no way tied to the value of the "Services" or the time spent by Eschelon, if any, rendering such "Services."

105. Instead, the amount Eschelon is to receive is determined solely by the amount of money spent by Eschelon on unbundled network elements, telecommunications products and/or services purchased from Qwest.

106. Moreover, regardless of the actual value of the "Services" provided by Eschelon to Qwest, Eschelon must return all of the money paid by Qwest under this agreement if Eschelon does not meet certain purchase commitments set forth in a separate agreement.

107. The Department discovered during its investigation that the amount owed by Qwest to Eschelon under this agreement for the time period between November 15, 2000 and August 31, 2001 is $2,540,017 (two million five hundred forty thousand seventeen dollars).

108. The Department further is informed and believes and on this basis alleges that the "Services" provided by Eschelon under this agreement require work no different than the work that any CLEC would do to improve Qwest's provisioning of services to it, if given the opportunity.

106. Based on the foregoing, the Department is informed and believes and on this basis alleges that the entire "consulting" arrangement described in Paragraph 3 of Eschelon Agreement IV has either the intended or unintended effect of disguising Qwest's agreement to provide Eschelon with rates for unbundled network elements, telecommunications products and/or services that are below the Commission-approved rates Qwest provides to other CLECs.

107. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same refund or consulting provision as Paragraph 3 of Eschelon Agreement IV. Qwest did not identify any such ICA.

108. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the rate reduction agreement described in Paragraph 3 of Eschelon Agreement IV.

109. By providing this term and these rates to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

110. Eschelon Agreement IV provides in Paragraph 2 as follows:

> For any month (or partial month) from November 1, 2000 until the mechanized process is in place, during which Qwest fails to provide accurate daily usage information for Eschelon's use in billing switched access, Qwest will credit Eschelon $13.00 (or pro rata portion thereof) per Platform line per month as long as Eschelon has provided the WTN information to Qwest. After the mechanized process is in place, Eschelon and Qwest will use the established escalation procedures if a dispute arises. Qwest will credit the IXC and other companies for daily usage traffic that Qwest provides to Eschelon to bill to the IXC (to eliminate double billing).

111. On December 6, 2000 Eschelon submitted Amendment 8 to its ICA with Qwest to the Commission for approval pursuant to 47 U.S.C. § 252(e). Attachment 3.2 to Amendment 8 sets out rates for the Platform referred to in Eschelon Agreement IV. Amendment 8 does not contain the rate refund agreement described in Paragraph 2 of Eschelon Agreement IV.

112. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same rate refund provision as Paragraph 2 of Eschelon Agreement IV. Qwest did not identify any such ICA.

113. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the rate refund agreement described in Paragraph 2 of Eschelon Agreement IV.

114. By providing this term to Eschelon and to no other CLEC, Qwest discriminated against other CLECs and violated 47 U.S.C. § 251(c).

**Eschelon Agreement V**

115. On July 3, 2001 Qwest entered into a written letter agreement regarding its reporting of switched access minutes on UNE-P lines leased by Eschelon ("Eschelon Agreement V"). A true and correct copy of Eschelon Agreement V provided to the Department by Qwest is attached as Exhibit 5 to this complaint.

116. As set forth more specifically below, Eschelon Agreement V sets out terms and conditions for interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit Eschelon Agreement V to the Commission for approval under 47 U.S.C. § 252(e).

117. To date, Qwest has not submitted Eschelon Agreement V to the Commission for approval under 47 U.S.C. § 252(e).

118. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

119. The third paragraph of Eschelon Agreement V increases the UNE-Platform credit set out in Eschelon Agreement IV, Paragraph 2, from $13 per line per month to $16 per line per month.

120. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same rate refund agreement as the third paragraph of Eschelon Agreement V. Qwest did not identify any such ICA.

121. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains this term.

122. By providing this term to Eschelon and to no other CLEC, Qwest discriminated against other CLECs and violated 47 U.S.C. § 251(c).

123. The fifth paragraph of Eschelon Agreement V reads as follows:

> Eschelon has also noted an issue relating to access records for Qwest's intraLATA toll traffic terminating to customers served by Eschelon's switch. The ongoing analysis and resources expended by Eschelon and Qwest will also address this issue. As of June 1, 2001, until the parties agree that the issue is resolved, Qwest will pay Eschelon $2.00 per line per month for such traffic.

124. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provision as the fifth paragraph of Eschelon Agreement V. Qwest did not identify any such ICA.

125. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains this term.

126. By providing this term to Eschelon and to no other CLEC, Qwest discriminated against other CLECs and violated 47 U.S.C. § 251(c).

**Eschelon Agreement VI**

127. On July 31, 2001 Qwest entered into the *Qwest/Eschelon Implementation Plan* ("Eschelon Agreement VI"). A true and correct copy of Eschelon Agreement VI provided to the Department by Qwest is attached as Exhibit 6 to this complaint.

END

OF

RETAKE

128. As set forth more specifically below, Eschelon Agreement VI sets out terms and conditions for interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit Eschelon Agreement VI to the Commission for approval under 47 U.S.C. § 252(e).

129. To date, Qwest has not submitted Eschelon Agreement VI to the Commission for approval under 47 U.S.C. § 252(e).

130. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

131. Eschelon Agreement VI provides in Paragraph 2.1 et seq. as follows:

> 2.1. Qwest has established a service account team for Eschelon. Other organizations within Qwest also interact directly with Eschelon personnel. Each functional area has specific functional support responsibilities. (See, for example, Attachment 1).
>
> 2.1.1. The Qwest Service Management team will hold weekly meetings with Eschelon to identify and resolve service-related issues.
>
> 2.1.2. As desired, the Qwest Service Management team will continue to facilitate other meetings with subject matter experts within Qwest to address Eschelon's service-related issues.
>
> 2.1.3. Qwest will provide Eschelon policy and process change information electronically through the use of a centrally maintained database. Detailed Eschelon-specific information will be provided to Eschelon through the Service Management Account Team.

132. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as Paragraphs 2.1 et seq. of Eschelon Agreement VI. Qwest did not identify any such ICA.

133. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains these terms.

134. By providing this term to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

135. Eschelon Agreement VI provides in Paragraph 2.2 as follows:

> Qwest has provided Eschelon with an escalation chart and process to follow (Attachment 2) in identifying the names and telephone numbers of the persons at Qwest (or their successors) that Eschelon may contact to escalate service-related issues. Qwest and Eschelon may agree to revise the escalation chart and process from time to time, provided the level of support to Eschelon is not decreased.

136. Attachment 2 to Eschelon Agreement VI provides detailed information regarding service escalation procedures, including contact information for service related issues. These escalation procedures differ from the escalation procedures set out in Section 3 of Eschelon Agreement III, described above.

137. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same waiver provisions as Paragraph 2.2 and Attachment 2 of Eschelon Agreement VI. In response, Qwest identified only Section 1.3 of Amendment 8 to the Eschelon ICA.

138. Section 1.3 of Amendment 8 to the Eschelon ICA says "The Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." Section 1.3 does not address the specific escalation procedures set forth in Paragraph 2.2 and Attachment 2 of Eschelon Agreement VI.

139. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains similar escalation procedures or information.

140. By providing this term to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

141. Eschelon Agreement VI provides in Paragraph 2.3 as follows:

> Each quarter until December 31, 2005, or as otherwise agreed by the Parties, Dana Filip and/or her designee or success or and Rick Smith and/or his designee or successor agree to meet together (via telephone, live conference or otherwise) to review the status of Eschelon's service –related issues.

142. Dana Filip is a Senior Vice President at Qwest. The Department is informed and believes and on this basis alleges that Richard Smith is the President and Chief Operating Officer of Eschelon.

143. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains a requirement that a person with equal or greater title to Ms. Filip meet with the CLEC on a quarterly basis. In response, Qwest identified only Section 1.3 of Amendment 8 to the Eschelon ICA.

144. Section 1.3 of Amendment 8 to the Eschelon ICA says "The Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." Section 1.3 does not require quarterly meetings of any kind.

145. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains a similar requirement for quarterly meetings by a Senior Vice President at Qwest to discuss service related issues.

146. By providing this term to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

147. Eschelon Agreement VI provides in Paragraph 3.1 as follows:

> The Parties have agreed that Qwest will calculate local usage charges associated with Unbundled Network Element Platform ("UNE-P") switching on Eschelon's interLATA and intraLATA toll traffic, and Eschelon will pay undisputed amounts within 30 days from Eschelon's receipt of the monthly invoice from Qwest. (See Attachment 3.2, ¶III (B) of Interconnection Agreement Terms, Nov. 15, 2000). Qwest will calculate local usage charges in accordance with the procedures set forth on Attachment 3 to this Implementation Plan.

148. Attachment 3 to Eschelon Agreement VI sets out 6 paragraphs (not including subparagraphs) of detail on the methodology to be used to calculate local usage charges associated with UNE-P switching.

149. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as Paragraph 3.1 and Attachment 3 to Eschelon Agreement VI. Qwest did not identify any such ICA.

150. The Department is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains a similar methodology to be used to calculate local usage charges associated with UNE-P switching.

151. By providing this term to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

152. Eschelon Agreement VI provides in Paragraph 4 et seq. as follows:

> Eschelon has alleged that Qwest has failed at times to promptly provide services. In order to ascertain Qwest's service levels, the parties have agreed to the following:
>
> 4.1 Qwest and Eschelon will track and report performance measurements designed to monitor Qwest's levels of service.
>
> 4.2 Representatives from Qwest and Eschelon will hold monthly working meetings to review and discuss the measurements. Quarterly executive level meetings will also be held to review results, performance trends, and set service improvement priorities.

> 4.3 A jointly developed action plan will be created, implemented and reviewed at the monthly meetings to facilitate the service excellence expected by both Parties.

153. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as Paragraphs 4 et seq. of Eschelon Agreement VI. Qwest did not identify any such ICA.

154. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same requirements for tracking performance measurements as set forth in Eschelon Agreement VI.

155. By providing this term to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

156. Eschelon Agreement VI provides in Paragraph 8 as follows:

> Qwest has undertaken certain enhancements to UNE-P and is in the process of implementing such enhancements. Qwest agrees to take commercially reasonable efforts to ensure that service provided to Eschelon's end-user customers is not adversely affected during the conversion to UNE-P. Qwest will provide notice to Eschelon before changes relating to the conversion are made, plan the conversion jointly with Eschelon, and use a phased approach to converting customers over time on an agreed upon schedule.

157. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same requirement that Qwest work with a CLEC on UNE-P conversions as described in Paragraph 8 of Eschelon Agreement VI. Qwest did not identify any such ICA.

158. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same requirements as are set forth in Paragraph 8 to Eschelon Agreement VI.

159. By providing this term to Eschelon and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

## THE COVAD AGREEMENT

160. Today and at all times described below, Covad Communications Company ("Covad") is and was licensed and certificated to operate as a CLEC in Minnesota.

161. Today and at all times described below, Covad is and was party to an ICA with Qwest that was approved by the Commission under 47 U.S.C. § 252(e).

162. On April 19, 2000 Qwest entered into the *U S WEST Service Level Agreement with Covad Communications Company* (the "Covad Agreement"). A true and correct copy of the Covad Agreement provided to the Department by Qwest is attached as Exhibit 7 to this complaint.

163. As set forth more specifically below, the Covad Agreement is an agreement to provide access to unbundled network elements on specified terms and conditions. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit the Covad Agreement to the Commission for approval under 47 U.S.C. § 252(e).

164. To date, Qwest has not submitted the Covad Agreement to the Commission for approval under 47 U.S.C. § 252(e).

165. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

166. The Covad Agreement provides in section 1 as follows:

> U S WEST will provide 90% of Covad's Firm Order Confirmation (FOC) dates within 48 hours of receipt of properly completed service requests for POTS unbundled loop services. It is understood that these POTS services will not require loop conditioning activity of any sort (load coil or bridged tap removal). U S WEST will notify Covad of any facilities shortages for DSL capable, ISDN capable and DS1 capable services within the same 48 hour period.

167. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as section 1 of the Covad Agreement. In response, Qwest identified only section 2.4 of the Eschelon ICA and section 1.3.4 of its ICA with FirstCom.

168. According to Qwest, Section 2.4 of the Eschelon ICA reads as follows:

> U S WEST will provide FOCs (Firm Order Commitments) to CLECs within a reasonable time, no later than 48 hours after receipt of complete and accurate orders. The FOC assumes that there is sufficient network capacity to meet the request in the standard interval. The FOC interval *for all other complex orders* will be within a reasonable time, no later than 8 business days from receipt of complete and accurate orders. The FOC for ICB [individual case basis] orders will reflect an ICB FOC date.

169. According to Qwest, Section 1.3.4 of the FirstCom ICA reads as follows:

> Qwest will provide FOCs to CLECs within a reasonable time, no later than 48 hours after receipt of complete and accurate orders for Regular POTS or Simple Business end-users. The FOC interval for all other complex orders will be within a reasonable time, no later than 8 business days from receipt of complete and accurate orders. The FOC for ICB orders will reflect an ICB FOC date.

170. Neither ICA provision contains the commitment by Qwest to meet the FOC interval standard at least 90% of the time. Neither ICA provision contains the commitment by Qwest to notify the CLEC of any facility shortages for DSL capable, ISDN capable and DS1 capable services within the same FOC period.

171. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains these terms.

172. By providing these terms to Covad and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

173. The Covad Agreement further provides in Section 1 as follows:

> For DSL capable, ISDN capable and DS1 capable unbundled loop services, U S WEST will provide 90% of Covad's FOC dates within 72 hours of receipt of properly completed service requests. As part of the 72-hour FOC process, U S WEST will dispatch a technician to verify the existence of suitable facilities prior to providing Covad an FOC date.

174. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as are set forth here from the Covad Agreement. With respect to the 72 hour FOC obligation, Qwest identified only section 2.4 of the Eschelon ICA and section 1.3.4 of its ICA with FirstCom, as set forth above. Neither ICA provision, however, contains either the 72 hour FOC requirement for DSL capable, ISDN capable and DS1 capable unbundled loops or the 90% commitment by Qwest.

175. With respect to the technician dispatch provision, Qwest identified Section 1, Part C, Para. 6 of the Fourth Amendment to its ICA with New Edge Networks. According to Qwest, that provision reads as follows:

> As part of the FOC process for 2-wire non loaded unbundled loop service where CLEC indicates that they intend to use the 2-wire non loaded unbundled loop for the provision of SDSL service, ISDN-, DS 1- or DSL-capable (excluding ADSL-capable) unbundled loop services, when requested to do so by CLEC, Qwest will dispatch a technician to verify the existence of suitable facilities prior to providing CLEC an FOC date.

176. The New Edge language also includes a footnote, which reads as follows:

> CLEC is willing to limit the above provision to the following market areas: Vancouver, WA; Tucson; Omaha; Cedar Rapids; Albuquerque; Colorado Springs; Minneapolis; Boise; Salt Lake City (Ogden); Eugene; Salem; Spokane, and Des Moines.

177. This provision from the New Edge agreement, however differs significantly from the provision in Section 1 of the Covad Agreement. The New Edge agreement has geographical limitations; the Covad Agreement does not. The New Edge agreement is limited to 2-wire non-loaded loops and excludes ADSL-capable loops. The Covad Agreement does not contain these limitations. Finally, the New Edge agreement only requires technician dispatch when requested

by the CLEC. The Covad Agreement requires dispatch on every DSL capable, ISDN capable and DS1 capable loop order.

178. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains these terms.

179. By providing these terms to Covad and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

180. The Covad Agreement further provides in Section 2 as follows:

> When facilities are available, U S WEST will provide Covad with unbundled loop service that does not require loop conditioning consistent with U S WEST's published Standard Interval Guide, as of March 31, 2000 at least 90% of the time. The standard intervals will not apply if Covad requests a later completion date, or if the order is delayed for customer cause, or reasons outside U S WEST's control. U S WEST will provide Covad with line sharing service (access to the high-frequency spectrum network element) at least 90% of the time within the interval set forth in any line sharing agreement between Covad and U S WEST.

181. The Department is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains these terms.

182. By providing these terms to Covad and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

183. The Covad Agreement further provides in Section 3 as follows:

> U S WEST will reduce the incidence of failure on new Covad circuits to less than 10% failure within the first 30 calendar days. For purposes of measurement, "failures" would be defined as U S WEST troubles, or troubles attributed to U S WEST facilities and central office equipment, or to U S WEST employees. "Failures" would not include repair tickets which are informational in nature, or troubles isolated outside the U S WEST network.

184. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as are set forth here from Section 3 of the

# CONTINUATION

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Covad Agreement. In response, Qwest identified only section 2.4 of the Eschelon ICA and section 1.3.4 of its ICA with FirstCom, as set forth above. Neither ICA provision, however, contains any reference to incidents of failure after a circuit is installed.

185. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains these terms.

186. By providing these terms to Covad and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

187. The Covad Agreement further provides in Section 4 as follows:

> For those service requests held due to line conditioning, U S WEST will provide Covad the option of paying for the line conditioning at the appropriate rate approved by the relevant State Commissions, which U S WEST will complete in 24 days or less 90% of the time.

188. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as are set forth here from Section 4 of the Covad Agreement. In response, Qwest identified only section 2.4 of the Eschelon ICA and section 1.3.4 of its ICA with FirstCom, as set forth above. Neither ICA provision, however, contains any commitments for completing line conditioning.

189. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains these terms.

190. By providing these terms to Covad and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

191. The Covad Agreement further provides in Section 4 as follows:

> In those situations where the end user customer is served by digital loop carrier or off pair gain, U S WEST will notify Covad of that situation and provide it the

by the CLEC. The Covad Agreement requires dispatch on every DSL capable, ISDN capable and DS1 capable loop order.

178. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains these terms.

179. By providing these terms to Covad and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

180. The Covad Agreement further provides in Section 2 as follows:

> When facilities are available, U S WEST will provide Covad with unbundled loop service that does not require loop conditioning consistent with U S WEST's published Standard Interval Guide, as of March 31, 2000 at least 90% of the time. The standard intervals will not apply if Covad requests a later completion date, or if the order is delayed for customer cause, or reasons outside U S WEST's control. U S WEST will provide Covad with line sharing service (access to the high-frequency spectrum network element) at least 90% of the time within the interval set forth in any line sharing agreement between Covad and U S WEST.

181. The Department is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains these terms.

182. By providing these terms to Covad and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

183. The Covad Agreement further provides in Section 3 as follows:

> U S WEST will reduce the incidence of failure on new Covad circuits to less than 10% failure within the first 30 calendar days. For purposes of measurement, "failures" would be defined as U S WEST troubles, or troubles attributed to U S WEST facilities and central office equipment, or to U S WEST employees. "Failures" would not include repair tickets which are informational in nature, or troubles isolated outside the U S WEST network.

184. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as are set forth here from Section 3 of the

Covad Agreement. In response, Qwest identified only section 2.4 of the Eschelon ICA and section 1.3.4 of its ICA with FirstCom, as set forth above. Neither ICA provision, however, contains any reference to incidents of failure after a circuit is installed.

185. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains these terms.

186. By providing these terms to Covad and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

187. The Covad Agreement further provides in Section 4 as follows:

> For those service requests held due to line conditioning, U S WEST will provide Covad the option of paying for the line conditioning at the appropriate rate approved by the relevant State Commissions, which U S WEST will complete in 24 days or less 90% of the time.

188. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as are set forth here from Section 4 of the Covad Agreement. In response, Qwest identified only section 2.4 of the Eschelon ICA and section 1.3.4 of its ICA with FirstCom, as set forth above. Neither ICA provision, however, contains any commitments for completing line conditioning.

189. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains these terms.

190. By providing these terms to Covad and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

191. The Covad Agreement further provides in Section 4 as follows:

> In those situations where the end user customer is served by digital loop carrier or off pair gain, U S WEST will notify Covad of that situation and provide it the

option of submitting a service request for an ISDN capable loop compliant with TR-393 standards and U S WEST Technical Publication 77399. U S WEST will, where technically feasible, either install an appropriate ISDN card for those end users customers served by digital loop carrier or provide another ISDN option for those served off of pair gain in 10 days or less 90% of the time. Where it would not impact a current end user customer, U S WEST will perform a line and station transfer in order to provision the Covad service request in 10 days or less 90% of the time.

192. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same provisions as are set forth here from the Covad Agreement. In response, Qwest identified Section 1, Part C, Para. 5 of the Fourth Amendment to its ICA with New Edge Networks. According to Qwest, that provision reads as follows:

> In those situations where the end user customer is served by digital loop carrier or by pair gain, Qwest will notify CLEC of that situation and provide it the option of submitting a service request for an ISDN capable loop compliant with TR-303 standards and Qwest Technical Publication 77399. Qwest will, where technically feasible, either install an appropriate ISDN card for those end user customers served by digital loop carrier, or provide another ISDN option for those served off of pair gain. Where it would not impact a current customer, Qwest will perform a line station transfer in order to provision a CLEC service request.

193. The New Edge agreement, however, does not provide the same installation intervals and service level commitments as are contained in the Covad agreement.

194. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the terms set forth above from Section 4 of the Covad Agreement.

195. By providing these terms to Covad and to no other CLEC, discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

## THE SMALL CLEC AGREEMENT

196. On April 18, 2000 Qwest entered into the *Confidential Stipulation Between Small CLECS and U S WEST* (the "Small CLEC Agreement"). The Small CLEC Agreement is an agreement between Qwest and the following 10 small CLECS: HomeTown Solutions, LLC.

Hutchinson Telecommunications, Inc.; Mainstreet Communications, LLC; Onvoy Communications Corporation; NorthStar Access, LLC; Otter Tail Telecom, LLC; Paul Bunyan Rural Telephone Cooperative; Tekstar Communications, Inc.; VAL-ED Joint Venture, LLP; and WETEC LLC (collectively, "the Small CLECs"). A true and correct copy of the Small CLEC Agreement provided to the Department by Qwest is attached as Exhibit 8 to this complaint.

197. Today and at all times described below, the Small CLECs are and were licensed and certificated to operate as CLECs in Minnesota.

198. Today and at all times described below, the Small CLECs are and were party to ICAs with Qwest that were approved by the Commission under 47 U.S.C. § 252(e).

199. As set forth more specifically below, the Small CLEC Agreement sets out terms and conditions for interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit the Small CLEC Agreement to the Commission for approval under 47 U.S.C. § 252(e).

200. To date, Qwest has not submitted the Small CLEC Agreement to the Commission for approval under 47 U.S.C. § 252(e).

201. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

202. The Small CLEC Agreement provides in Paragraph 3 as follows:

> Subject to the close of the Merger, effective March 17, 2002, and subject to technical feasibility, U S WEST will permit all Small CLECs operating in Minnesota the ability to adopt the terms of any effective interconnection agreements that were voluntarily negotiated and entered into by U S WEST and CLECS in any other state in U S WEST's operating territory, subject to the following conditions:
>
> > a. This provision does not apply to terms that were ever reached as a result of an arbitrated decision or any other decision in a contested case action, unless the terms which the CLEC seeks to adopt are present in interconnection agreements in a minimum of four other states in U S WEST's territory; and

b. The prices for all services should, however, be determined based on Minnesota specific costs. Where no rate exists for the services in Minnesota, the rate approved in the originating state should be applied as an interim rate until a Minnesota specific rate can be determined; and

c. This provision does not apply to those determinations made by a state Commission which are based upon fact specific characteristics of the provider (e.g. geographic scope and functionality of a specific provider in determining end office or tandem treatment).

The provisions in paragraph 3, 3.a, 3.b and 3.c shall remain confidential between U S WEST and the Small CLECs and shall be implemented through an interconnection agreement amendment to be filed and effective on March 17, 2002, *and which will expire on December 31, 2003. The requirements of* confidentiality expire on March 17, 2002.

203. On November 27, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same opt-in/pick and choose provisions as are described in Paragraph 3 of the Small CLEC Agreement. Qwest did not identify any such ICA.

204. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains *the same ICA opt-in provisions as are set forth in Paragraph 3 of the Small CLEC Agreement.*

205. By providing this term to the Small CLECS and to no other CLEC, discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

## THE MCLEODUSA AGREEMENTS

206. Today and at all times described below, McLeodUSA, Inc. is and was licensed and certificated to operate as a CLEC in Minnesota.

207. Today and at all times described below, McLeodUSA is and was party to an ICA with Qwest that was approved by the Commission under 47 U.S.C. § 252(e).

208. Between April 25, 2000 and February 12, 2001, Qwest entered into a series of secret agreements with McLeodUSA.

**McLeod Agreement I**

209. On April 28, 2000 Qwest entered into a *Confidential Billing Settlement Agreement* with McLeodUSA that related, in part, to the merger between U S WEST and Qwest ("McLeod Agreement I"). A true and correct copy of McLeod Agreement I provided to the Department by Qwest is attached as Exhibit 9 to this complaint.

210. As set forth more specifically below, McLeod Agreement I sets out terms and conditions for interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit McLeod Agreement I to the Commission for approval under 47 U.S.C. § 252(e).

*211. To date, Qwest has not submitted McLeod Agreement I to the Commission for* approval under 47 U.S.C. § 252(e).

212. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

213. In abrogation of its duty of non-discrimination and in defiance of the requirements of 47 U.S.C. § 252(a)(1), Qwest included a confidentiality clause in McLeod Agreement I that prevented other CLECs, the Commission and the Department from discovering the existence of the agreement and the specific terms of interconnection and access to unbundled network elements described below.

214. The confidentiality clause in Paragraph 6 of McLeod Agreement I reads as follows:

> The Parties expressly agree that they will keep the substance of the negotiations and/or conditions of the settlement and the terms or substance of this Confidential Billing Settlement Agreement strictly confidential. The Parties further agree that they will not communicate (orally or in writing) or in any way disclose the substance of the negotiations and/or conditions of the settlement and the terms or substance of this agreement to any person, judicial or administrative agency or body, business, entity or association or anyone else for any reason whatsoever, without the prior express written consent of the other Party unless compelled to

do so by law. It is expressly agreed that this confidentiality provision is an essential element of this Confidential Billing Settlement Agreement. The parties agree that this Confidential Billing Settlement Agreement and negotiations, and all matters related to these two matters, shall be subject to Rule 408 of the Rules of Evidence, at the federal and state level.

215. McLeod Agreement I provides in Paragraph 2.d as follows:

> Subject to merger closure and in consideration for the bill and keep arrangement agreed upon above, U S WEST and McLeod USA agree that all interim rates, except reciprocal compensation rates, will be treated as final and any final commission orders entered in any of the 14 states in U S WEST's territory through April 30, 2000 and on a going-forward basis through December 31, 2002. (except as such orders may relate to reciprocal compensation rates for the period between March 1, 2000 and December 31, 2002 – reciprocal compensation is addressed in paragraph 2.c of this agreement) will be applied prospectively to McLeodUSA, and not retroactively. In addition, U S WEST agrees that this settlement term will apply throughout the terms of the parties' existing interconnection agreements. Thus, both Parties agree not to bill each other for any true-ups associated with final commission orders that affect interim prices and release claims for such true-ups.

216. On December 3, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same terms as described in Paragraph 2.d of McLeod Agreement I. Qwest did not identify any such ICA.

217. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same provisions as are set forth in Paragraph 2.d of McLeod Agreement I.

218. By providing this term to McLeodUSA and to no other CLEC, discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

**McLeod Agreement II**

219. On October 26, 2000 Qwest entered into a *Confidential Agreement* with McLeodUSA ("McLeod Agreement II"). A true and correct copy of McLeod Agreement II provided to the Department by Qwest is attached as Exhibit 10 to this complaint.

220. As set forth more specifically below, McLeod Agreement II sets out terms and conditions for interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit McLeod Agreement II to the Commission for approval under 47 U.S.C. § 252(e).

221. To date, Qwest has not submitted McLeod Agreement II to the Commission for approval under 47 U.S.C. § 252(e).

222. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

223. McLeod Agreement II provides in Section 2 as follows:

> Beginning in 2001 and continuing through the end of 2003, the parties agree to attend and participate in quarterly executive meetings, the purpose of which will be to address, discuss and attempt to resolve unresolved business issues and disputes, adjustments to the Purchase Agreements, if any, the Implementation Process, and any anticipated business issues. The meetings will be attended by executives from both companies at the vice-president and/or above level.

224. On December 20, 2000 McLeodUSA submitted Amendment 8 to its ICA with Qwest to the Commission for approval pursuant to 47 U.S.C. § 252(e). Paragraph 1.3 of the amendment says "The Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This paragraph 1.3, however, does not require Qwest to attend quarterly meetings and does not require Qwest to provide an executive from the vice-president or above level for such meetings.

225. The Department is informed and believes and on this basis alleges that there are no provisions in any McLeodUSA ICA that set forth the quarterly meeting requirements described in Section 2 of McLeod Agreement II.

226. The Department is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same term as McLeod Agreement II.

227. By providing this term to McLeodUSA and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

228. McLeod Agreement II provides in Section 3 for specific, six-level escalation procedures for resolving any and all business issues between them, including ICA issues. The preamble to Section 3 reads as follows:

> The parties wish to establish a business-to-business relationship and agree that they will resolve any and all business issues that may arise between them, including but not limited to, their Interconnection Agreements and Amendments, in accordance with the escalation procedures set forth herein. The parties agree, subject to any subsequent written agreement between the parties, to: (1) utilize the following escalation process and time frame to resolve such disputes; (2) commit the time, resources and good faith necessary to meaningful dispute resolution; (3) not proceed to a higher level of dispute resolution until either a response is received or expiration of the time frame for the prior level of dispute resolution; and (4) complete all levels of dispute resolution before seeking resolution from the American Arbitration Association or any regulatory or judicial forum.

229. Under the escalation procedures set out in McLeod Agreement II, Level 1 involves Vice Presidents. Level 2 involves Senior Vice Presidents. Level 3 involves CEOs. Level 4 is arbitration. Level 5 is a return to CEOs, and Level 6 is litigation in state or federal courts. Levels 1, 2, and 3are assigned 10 business days for completion. Level 5 is assigned 5 business days for completion.

230. Under McLeod Agreement II, Level 6A of the escalation procedures allows the parties to take an unresolved dispute involving technical telecommunications issues or an interpretation of regulatory requirements to the appropriate state or federal regulatory body, so long as the dispute does not involve a determination of penalties or damages. Level 6B allows

either party to initiate a complaint in federal court, with all questions of fact to be determined by a judge and not a jury, for disputes not resolved through escalation Levels 1 through 6A.

231. On December 20, 2000 McLeodUSA submitted Amendment 8 to its ICA with Qwest to the Commission for approval pursuant to 47 U.S.C. § 252(e). Paragraph 1.3 of the amendment says "The Parties wish to establish a business-to-business relationship and have agreed that they will attempt to resolve all differences or issues that may arise under the Agreements or this Amendment under an escalation process to be established between the parties." This paragraph 1.3, however, does not set out the specific escalation steps described in McLeod Agreement II and certainly does not commit Vice Presidents, Sr. Vice Presidents or Qwest's CEO to participate in issue escalations.

232. The Department is informed and believes and on this basis alleges that there are no provisions in any McLeodUSA ICA that set forth the escalation process described in Section 3 of McLeod Agreement II.

233. The Department is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same escalation process as McLeod Agreement II.

234. By providing these terms to McLeodUSA and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

235. McLeod Agreement II further provides in Section 3 that if a dispute reaches Level 6B:

> In the event that either party files an action in court, the parties waive (a) primary jurisdiction in any state utility or service commission; and (b) any tariff limitations on damages or other limitation on actual damages, to the extent such damages are reasonably foreseeable and acknowledging each party's duty to

mitigate damages; and the Interconnection Agreements are hereby amended accordingly.

236. The Department is informed and believes and on this basis alleges that there are no provisions in any McLeodUSA ICA that set forth the waiver provisions described in Section 3 of McLeod Agreement II.

237. The Department is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same waiver provisions as this term of McLeod Agreement II.

238. By providing this term to McLeodUSA and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. § 251(c).

**McLeod Agreement III**

239. On October 26, 2000 Qwest entered into an oral agreement to provide McLeodUSA with an 8% to 10% discount on all purchases made by McLeodUSA from Qwest between October 2, 2000 and December 31, 2003 ("McLeod Agreement III").

240. As set forth more specifically below, McLeod Agreement III sets the rates that McLeodUSA pays for interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit McLeod Agreement III to the Commission for approval under 47 U.S.C. § 252(e).

241. To date, Qwest has not submitted McLeod Agreement III to the Commission for approval under 47 U.S.C. § 252(e).

242. Qwest therefore violated and remains in violation of 47 U.S.C. § 252(a)(1).

243. McLeod Agreement III is an oral agreement pursuant to which Qwest agreed to provide McLeodUSA with an 8% to 10% discount on all purchases made by McLeodUSA from Qwest.

244. The discount applies to all products and services purchased by McLeodUSA from Qwest, including interconnection, access, unbundled network elements, collocation, resale services, and tariffed products and services. The discount applies for all purchases made by McLeodUSA from Qwest inside and outside of Qwest's 14-state territory. The term of the agreement is October 2, 2000 through December 31, 2003.

245. The effect of the discount is to reduce the rates that McLeodUSA pays for, among other things, interconnection, access to network elements, collocation, services for resale and reciprocal compensation by 8% to 10%.

246. No ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same terms as McLeod Agreement III.

247. By providing this rate discount to McLeodUSA and to no other CLEC, Qwest discriminated and continues to discriminate against other CLECs in violation of 47 U.S.C. §§ 251(b) and (c).

## THE USLINK / INFOTEL AGREEMENT

248. Today and at all times described below, USLink, Inc. and InfoTel Communications, LLC are and were licensed and certificated to operate as a CLEC in Minnesota.

249. Today and at all times described below, USLink and InfoTel are and were parties to ICAs with Qwest that were approved by the Commission under 47 U.S.C. § 252(e).

250. On July 14, 1999 Qwest entered into an agreement with USLink, Inc. and InfoTel Communications, LLC (the "USLink Agreement"). A true and correct copy of the USLink Agreement provided to the Department by Qwest is attached as Exhibit 11 to this complaint.

251. As set forth more specifically below, the USLink Agreement sets out terms and conditions for interconnection and access to unbundled network elements. As such, 47 U.S.C. § 252(a)(1) requires Qwest to submit the USLink Agreement to the Commission for approval under 47 U.S.C. § 252(e).

252. To date, Qwest has not submitted the USLink Agreement to the Commission for approval under 47 U.S.C. § 252(e).

253. The USLink Agreement provides in Paragraph 1 as follows:

> USLink and InfoTel shall be allowed to utilize local tandem switching functionality and transport from and to U S WEST end offices in the exchanges listed below (hereinafter "Requested Exchanges") to transport calls within the Requested Exchanges and the exchanges included in the Commission approved EAS calling areas for those exchanges. U S WEST will allow USLink and InfoTel to utilize the Requested Exchanges as local tandem switches:
>
> A. Requested Exchanges
>
> Brainerd; (includes Nisswa remote)
>
> Duluth;
>
> Fargo (includes Moorehead/West Fargo);
>
> Fergus Falls;
>
> Grand Rapids;
>
> Hibbing;
>
> Little Falls;
>
> Owattona;
>
> Rochester;

St. Cloud;

Wadena; and

Willmar.

254. Paragraph 3 of the USLink Agreement goes on to state, "USLink and InfoTel may request to utilize tandem switching functionality and transport to originate or terminate local traffic within the Requested Exchanges, or in other U S WEST end office exchanges. Except for those exchanges listed in paragraphs 1 and 2, such a request will not impose any obligation on U S WEST."

255. On December 3, 2001 the Department asked Qwest to identify an ICA approved by the Commission that contains the same terms as described in the USLink Agreement. Qwest did not identify any such ICA.

256. The Department therefore is informed and believes and on this basis alleges that no ICA approved by the Commission under 47 U.S.C. § 252(e) with Qwest as a party contains the same provisions as are set forth in Paragraphs 1 and 3 of the USLink Agreement.

257. On December 26, 2000 Dakota Telecom, Inc. ("DTI") filed a settlement agreement in Commission Docket No. P421/C-00-373 whereby Qwest provided DTI and multiple intervenor/signatory CLECs (including USLink) the right to utilize tandem switching functionality and transport from and to end offices in the exchanges listed above to transport calls within the Requested Exchanges and the exchanges included in the Commission approved EAS calling areas for those exchanges. Qwest further agreed to make these terms available to any requesting , non-signatory CLECs as well.

258. On July 25, 2001 the Commission issued an order in Docket No. P421/C-00-373 finding that the settlement agreement constituted an amendment to the parties' interconnection agreements. The Commission said:

> The Commission has analyzed the settlement terms and finds that they require Qwest to do things that the Company was not required to do under the existing interconnection agreement. ...
>
> As such, the Settlement Agreement amends the interconnection agreements between Qwest and the CLECs signing the settlement agreement. The parties' interconnection agreements, as amended by the settlement terms, will be available to any CLEC requesting a copy pursuant to Section 252(i) of the Federal Telecommunications Act.

259. Thus the Commission found, as a matter of law, that the terms of the USLink Agreement constitute an amendment to the USLink interconnection agreement. By failing to file a copy of the USLink Agreement with the Commission for approval under 47 U.S.C. § 252(e), Qwest therefore violated 47 U.S.C. § 252(a)(1).

260. Moreover, by providing the right to utilize tandem switching functionality and transport from and to the end offices identified above to USLink and InfoTel only from July, 1999 through December, 2000 Qwest discriminated against other CLECs in violation of 47 U.S.C. § 251(c).

## REQUEST FOR EXPEDITED PROCEEDINGS

261. Qwest's continuing failure to comply with its obligations under state and federal law warrants expedited proceedings, temporary relief and penalties available pursuant to Minn. Stat. § 237.462, which authorizes the Commission to conduct expedited proceedings, impose temporary relief and impose penalties to remedy violations of interconnection agreements and incumbent local exchange carrier obligations under Section 251 of the Act and Minnesota law.

262. Pursuant to Minn. Stat. § 237.462 subd. 6, the Department requests that the Commission conduct an expedited proceeding to resolve this Complaint.

263. Qwest's conduct has inhibited and/or limited CLECs in their ability to compete effectively in Minnesota markets, including the ability to compete in the Minnesota local exchange markets.

264. As a result of Qwest's conduct, Minnesota's end user customers have been denied the benefits of potentially increased competition.

265. Qwest's conduct, as described above, is harmful to the public interest and the public is being denied the benefits of competition, including lower prices and diversity of telecommunications services, contrary to public policy favoring competition. Expedited resolution of this matter will advance the development of competition and, therefore, advance the public interest.

266. Carriers have been hindered in their ability to compete in the local exchange market in Minnesota as a result of Qwest's unlawful behavior.

267. Through such behavior, Qwest benefits by the retention of its dominance over the local exchange markets in Minnesota.

268. Accordingly, the Department requests that the Commission resolve this Complaint as soon as possible, and in no event, no more than 60 days from today.

## REQUEST FOR TEMPORARY RELIEF

269. Minn. Stat. § 237.462, subd. 7 provides for temporary relief pending dispute resolution.

270. Based on the facts as pleaded, the Department is likely to succeed on the merits. State and federal law requires Qwest to submit agreements setting forth terms and conditions of interconnection to this Commission for review and approval and/or to refrain from offering terms and conditions of interconnection in a discriminatory manner.

271. An order for temporary relief is necessary to protect the public's interest in fair and reasonable competition. Despite clear legal obligations to provide non-discriminatory service, and to do so expeditiously, Qwest has refused to comply with the law. Unless the Commission orders Qwest immediately to submit to the Commission for approval those portions of the Secret Agreements that relate to terms and conditions of interconnection, Qwest will continue to provide access to its network and services in a discriminatory and unlawful manner.

272. Without immediate relief, Qwest's secretive tactics will achieve Qwest's goal of limiting competition to itself and, to a lesser degree, some of its wholesale customers of choice. Thus the Act's and this Commission's goal of bringing local exchange competition to the consumers of Minnesota will be further hindered.

273. The Department's proposal to make all terms and conditions of interconnection available to all CLECs in a non-discriminatory manner is technically feasible. Qwest has provided the Department with no evidence to the contrary.

274. Accordingly, under Minn. Stat. § 237.462, subd. 7, the Department hereby requests that the Commission order Qwest immediately to make any and all of the specified terms or conditions of interconnection or service public, and immediately available to any other CLEC who wishes to adopt said provision(s).

## REQUEST FOR PENALTIES

275. Through its conduct as described above, Qwest has willfully refused to comply with its obligations under state and federal law.

276. By its delay in submitting these agreements to this Commission for approval and its refusal to provide non-discriminatory access to services, Qwest has willfully hindered competition in Minnesota.

277. According to Qwest's website, Qwest Communications International, Inc., Qwest Corporation's parent, reported annual revenues of over $20 billion and assets of over $74 billion for the year 2001. With these revenues and assets, Qwest Corporation and its parent have the financial ability to pay any penalty this Commission may impose in this proceeding. The Department asks the Commission to impose the maximum penalty for each violation under the statute.

## RELIEF REQUESTED

Wherefore, the Department requests that the Commission:

278. Pursuant to Minn. Stat. § 237.462, order an expedited hearing to be held before this Commission.

279. Grant the Department temporary relief by making the relevant portions of the contracts public and directing Qwest to immediately provide all requesting carriers the opportunity to pick and choose any of the terms and conditions contained therein.

280. Pursuant to Minn. Stat. § 237.462, make a finding that for each of the contracts described in the Complaint, that Qwest acted in violation of state and/or federal law;

281. Declare that each of Qwest's violations of law were in bad faith and anti-competitive;

282. Pursuant to Minn. Stat. § 237.462, subd. 2, impose penalties on Qwest in the amount of $10,000 per day for each of Qwest's prior failure, and for each day of its continuing failure to comply with the requirements of state or federal law.

383. Grant such other and further relief as the Commission may deem just and reasonable.

Dated: June 14, 2002

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota

STEVEN H. ALPERT
Assistant Attorney General
Attorney Registration No. 1351

525 Park Street, #200
St. Paul, Minnesota 55103-2106
(651) 296-3258 (Voice)
(651) 282-2525 (TTY)

ATTORNEYS FOR MINNESOTA
DEPARTMENT OF COMMERCE

AG: #680158-v1

AFFIDAVIT OF SERVICE BY U.S. MAIL

Re: In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements
Docket No. P-421/C-02-197
OAH Docket No.: 6-2500-14782-2

STATE OF MINNESOTA )
) ss.
COUNTY OF RAMSEY )

SUSAN J. RATLIFF, being first duly sworn, deposes and says that at the City of St. Paul, County of Ramsey and State of Minnesota, on June 14, 2002, she caused to be served the attached Second Amended Complaint of the Department of Commerce, by depositing the same in the United States mail at said city and state, true and correct copies thereof, properly enveloped with prepaid postage addressed to:

BURL HAAR, EXECUTIVE SECRETARY
MN PUBLIC UTILITIES COMMISSION
SUITE 350
121 SEVENTH PLACE EAST
ST. PAUL MN 55101-2147

LINDA CHAVEZ
MINNESOTA DEPARTMENT OF COMMERCE
85 7TH PLACE EAST, SUITE 500
ST. PAUL, MN 55101-2198

STEVEN H. ALPERT
ATTORNEY GENERAL'S OFFICE
525 PARK ST, SUITE 200
ST. PAUL, MN 55103-2106

ALLAN W. KLEIN
OFFICE OF ADMINISTRATIVE HEARINGS
SUITE 1700
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MINNEAPOLIS, MN 55401-2138

JASON TOPP
QWEST CORPORATION
LAW DEPARTMENT, ROOM 395
200 SOUTH FIFTH ST
MPLS MN 55402

THOMAS M. KOUTSKY, VICE PRESIDENT,
LAW & PUBLIC POLICY
Z-TEL COMMUNICATIONS, INC.
1200 18TH ST NW, SUITE 500
WASHINGTON, DC 20036

MARK J. AYOTTE
BRIGGS & MORGAN
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332 MINNESOTA ST
ST PAUL MN 55101

MICHAEL HOFF, ESQ.
ONVOY, INC.
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ONVOY, INC.
10405 6TH AVENUE NORTH
PLYMOUTH, MN 55345

LESLIE LEHR
MCI WORLDCOM
638 SUMMIT AVENUE
ST PAUL MN 55105

SUSAN J. RATLIFF

Subscribed and sworn to before me on
June 14, 2002.

NOTARY PUBLIC

LINDA JEAN THAYER
NOTARY PUBLIC-MINNESOTA
My Comm. Exp. Jan. 31, 2005

AG 602155.v 01

# EXHIBIT G

February 8, 2002

Mr. Joseph P. Nacchio (by email and express delivery)
Chairman and Chief Executive Officer
Qwest
1801 California St.
Denver, Colorado 80202

Re: Level 3 Escalation

Dear Mr. Nacchio:

Pursuant to Level 3 of the Escalation Procedures and Solutions Agreement between Eschelon and Qwest, dated November 15, 2000, I ask you to meet with me and resolve the following issues within 10 business days: Platform/UNE-Eschelon ("UNE-E") pricing and compliance by Qwest with terms of our agreements, including the agreement of July 3, 2001 signed by Ms. Audrey McKenney (attached). More generally, we hope that your involvement will improve the business relationship and change its course.

We have not had the opportunity of meeting yet. In public statements, such as those you have made to the Regional Oversight Committee ("ROC"), you have committed to improving the wholesale business relationship and to treating wholesale businesses as customers. Eschelon is a good customer that pays its bills. Last year, we spent approximately $30 million with Qwest. Qwest has said that this makes us your second largest CLEC wholesale customer. We anticipate that our volume of business with Qwest will only grow. Qwest has several times quoted me in press releases and various publications to the effect that Qwest has a pro-competitive attitude and, unlike its predecessor US West, Qwest is serious about developing its wholesale business with CLECs. Rather than take our service and pricing issues before Commissions, the ROC, legislatures, and the press, Eschelon has attempted to resolve matters on a business basis.

We ask you to resolve this escalation by:

- Adopting promised adjusted UNE-E pricing: Agree to the attached proposed amendment to our existing UNE-E Amendment, Attachment 3.2 (with prices that include "premium" for UNE-E versus UNE-P).

- Honoring existing agreements, including July 3rd letter agreement: Pay to Esche on $2,450,852 for July 3 – Dec. 31, 2001 due under that agreement (by wire transfer for some and agreeing to current adjustments/set offs for remainder).

- Stopping illegal conduct and deal fairly with Eschelon.

730 Second Avenue South • Suite 1200 • Minneapolis, MN 55402 • Voice (612) 376-4400 • Facsimile (612) 376-4411

As executives, we like to keep things short and to the point. Because the escalated issues are complex and have been discussed over many months, however, I need to set out some background for you before we meet. I will devote the rest of this letter, therefore, to providing you information that you need to know before we talk.

Before Qwest would resolve previous legitimate business disputes that were pending late in 2000, Qwest required Eschelon to agree not to oppose Qwest in 271 proceedings. Based on their actions since then, Qwest's Senior Vice Presidents Ms. McKenney and Ms. Dana Filip appear to believe that, by capitulating to Qwest's demand, Eschelon has subjected itself to accepting poor service and surrendering any ability to protest actions proposed or undertaken by Qwest that would harm our business interests. Qwest has gone so far as to try to make resolution of legitimate business issues contingent upon our destruction or surrender of an auditor's documents as well as to require us to submit testimony, regardless of its validity, in legal proceedings if "suitable" to Qwest. Despite Eschelon telling Qwest orally and in writing that it believes this kind of conduct is illegal and unethical, such tactics continue. We hope that this is news to you and that you will change the course of dealings quickly and put them on a legitimate track.

In the face of such tactics, Eschelon has spent months attempting to resolve these two issues: the pricing of our Platform product and Qwest's failure to provide us with complete access records. Eschelon entered into agreements with a five-year term to purchase a Platform product from Qwest on November 15, 2000. We would not have agreed to a five-year term without assurances that the pricing of our product would remain competitive, and we received such assurances from Qwest during and after those negotiations. Although the prices in the UNE-E Amendment reflect averaged rates, the Parties anticipated that changes would be needed to ensure that Eschelon remains competitive if rates declined, as both parties expected they would, principally due to geographic deaveraging, as Eschelon's lines are in densely populated urban areas. Repeatedly throughout the previous negotiations, Ms. McKenney responded to Eschelon's concerns about possible reductions in UNE-P rates by stating that Qwest would keep Eschelon competitive by adjusting UNE-E rates to reflect such factors. For this reason, the First Amendment to the Confidential/Trade Secret Amendment, dated November 15, 2000, states in Paragraph 5 that the Parties will address appropriate price adjustments in quarterly meetings. Despite this, Qwest has failed to adjust the UNE-E rates to reflect changes that have occurred since signing the UNE-E Amendment.

We explored an alternative of attempting to negotiate a conversion to UNE-P instead of adjusting UNE-E prices, but that effort failed when Qwest would or could not even confirm the pricing much less address our other concerns about alleged benefits to us. Therefore, we need to pursue our existing UNE-E contract rights, including Qwest's commitment to adjust the pricing. If Qwest has taken any steps to effectuate the UNE-P conversion, Qwest needs to ensure that those steps are reversed. Please ensure that any plans to convert our base to UNE-P are halted. If we want to move any lines to UNE-P, we will simply do so under our current interconnection agreements. Qwest needs to make good on its initial and repeated commitment to provide us with adjusted UNE-E rates.

Our pricing ask to you is simple: Eschelon and Mr. Arturo Ibarra of Qwest have developed a methodology for determining how our UNE-E rates should be adjusted downward. Attached is pricing that reflects our proposal using that methodology. The proposal is in the form of an amended attachment to the previous UNE-E interconnection agreement amendment. As with the current prices, the adjusted prices would be subject to all of the other terms of the amendment (such as the current revenue commitment, *etc.*). You and I need only settle the issue of Qwest's requested, additional "premium" for advantages that Qwest claims UNE-E offers over UNE-P. Qwest previously proposed $2.00 for the "premium." We believe that Qwest included in that amount some assumed benefit from receiving DSL with UNE-E, but DSL is now also available with UNE-P. In addition, Qwest's proposed "premium" charge reflects an assumption for features that is higher than the $0.75 that Qwest proposed as its estimated cost for features in the Utah cost docket. Therefore, we believe the "premium," if applicable at all, is closer to $1.10. I propose we split the difference and add a "premium" of $1.55 per line, per month. The attached rates reflect this proposal.

Once we resolve the pricing issue, you and I need to re-establish the Qwest-Eschelon relationship on solid ground. Although much of the past and present negotiations have focused on pricing, Eschelon has consistently indicated that quality of service is of paramount importance to our business. We asked Qwest to deal with quality of service through specific commitments in the first set of agreements in 2000, but Qwest would agree only to a general Implementation Plan that was supposed to establish a process for improving quality of service. Although Qwest's service quality has improved in some areas, significant problems remain. Many of these issues are reflected in a monthly Report Card that Eschelon presents to Qwest. From January through November, on average, more than 65% of the measures have been rated as unsatisfactory. We had to remove the billing accuracy measure from our Report Card, because 100% of our UNE-E bills are inaccurate and will be inaccurate until Qwest completes the process necessary to provide UNE-E, rather than resale, bills (which it committed to do by 1Q of last year). Additionally, Qwest has not performed satisfactorily with respect to generating and reporting switched access minutes of use ("MOU"). Qwest has been shorting Eschelon switched access minutes, and Qwest/Arthur Andersen, your auditor, has recognized that. All of these performance problems affect not only our bottom line but also our reputation, and therefore they threaten our ability to compete in the marketplace.

To mitigate our concern that Qwest was denying us essential facilities on reasonable and nondiscriminatory terms, Ms. McKenney executed an agreement on July 3, 2001. That agreement provided Eschelon with $150,000 per month as compensation for poor performance and compensated us for underreported access minutes. We agreed that the performance payment would not stop until both parties agreed that performance had improved sufficiently. The Parties also agreed that the access payments issue would be resolved by a joint audit. The joint audit was to continue until the auditor came to agreement, within plus or minus five percent, of the actual number of access minutes.

Qwest unilaterally terminated the work of its auditors before the audit concluded. Qwest has not paid its obligations under the July 3rd agreement for months. Qwest has made clear its desire to terminate the July 3rd agreement. Eschelon has been willing to accede to Qwest's request, but only if we resolved our pricing, access and service issues. The July 3rd agreement is in full effect, and I expect you to see that Qwest honors its commitments in that letter.

Our access ask to you is simply to bring your payments current under the fully effective and enforceable July 3rd letter agreement. Qwest needs to pay to Eschelon $1,077,461, in addition to the $1,373,391 that Eschelon has had to set off in payments to Qwest, to be current through the end of 2001. Since July 3rd, the only amount that Qwest has paid under that agreement is $450,000. That amount represents only three months (July-September) of the $150,000 in service credits due each month to Eschelon. The total amount due under the July 3rd letter (after subtracting the $450,000 paid to date) is $2,450,852 ($1,373,391 which Eschelon has withheld in billing adjustments) through December 31, 2001. This total amount includes a voluntary downward adjustment for the time period November 1, 2001 through December 31, 2001 that Eschelon offered to Qwest because Eschelon had hoped Qwest would negotiate in good faith and resolve this issue. Although that did not happen and therefore Eschelon could request the higher amount, Eschelon honors its word and has included this downward adjustment in calculation of the amount due.

As to re-establishing our business relationship on a mutually respectful basis, much needs to be done. Qwest's bad conduct has not been inadvertent or unintentional. Qwest has used threats and inappropriately exploited its monopoly power to convey that service will only get worse and Eschelon will suffer if it does not capitulate to Qwest's unreasonable demands. I offer three compelling examples of Qwest's bad conduct:

> Threats and abuse of monopoly power. Ms. Filip, who as Qwest's Executive Vice President for Wholesale holds our lines in her hands, told members of my senior management team that she would make our lives miserable if our employees did not immediately leave a Change Management Re-Design working session. We had every right to be at that session, and we were raising legitimate issues that matter to our everyday business. Given the real harm that someone in Ms. Filip's position could do to a business such as ours, we had no choice but to capitulate. Specifically, on a conference call with the participation of Mr. Greg Casey on October 30, 2001, Ms. Filip threatened that, if our representatives did not leave the meeting immediately, Ms. Filip would *devote all of her energies* to ensuring that Ms. McKenney succeeded in her objectives. This told us two things: (1) that Ms. Kenney's objectives are adversarial to those of Eschelon, even though Ms. McKenney represents that she is attempting to further her customer's interests through a "business-to-business" relationship; and (2) that Ms. Filip would use her position to intentionally harm our business. When we later repeated this incident and Ms. Filip's threat to make our lives miserable on a conference call with Mr. Gordon Martin, Ms. Filip, Ms. McKenney, and Mr. Richard Cobetta, not only did no one deny the incident, but also Mr. Martin expressed no surprise and made no indication that this type of conduct might not

be acceptable to him. Mr. Martin simply said that, while Eschelon agreed to be "passionate" about this issue, he was passionate about other issues.

Request to Destroy and Appropriate Audit Documents. Qwest retained Arthur Andersen, and Eschelon retained PricewaterhouseCoopers (PwC), to determine whether Qwest's reporting of access minutes was accurate. Clearly, Qwest has been shorting Eschelon switched access minutes. Qwest claimed that the flaws would be eliminated if Eschelon moved to a mechanized UNE-E access process. Two weeks after Eschelon moved to that process, however, Qwest said it was not working (and Eschelon had to return to the old process). Before we moved to the new process, Ms. McKenney told me, over many months, that our position on this issue was wrong, because other carriers were using the new process without complaint. She specifically identified McLeod as a carrier using the new process. If that were true, the process would have worked when we moved to it. It did not. In other words, Ms. McKenney's representations were false. Even worse, *Qwest told Eschelon that it would condition payments otherwise legitimately due to Eschelon upon Eschelon's destroying any evidence of Qwest's access problem, including the auditor's records.* Specifically, on a conference call with the participation of Mr. Greg Casey on October 30, 2001, Ms. McKenney told me to destroy the access audit records or give them all to her. The same day, she also faxed to Eschelon proposed written agreements, signed by Ms. McKenney, that required Eschelon to "deliver to Qwest all reports, work papers, or other documents related to the audit process described in" the July 3, 2001 letter agreement within 10 days. These documents belong to Eschelon by virtue of its access audit that was paid for solely by Eschelon. Ms. McKenney made it very clear that she wanted no written evidence of the access results documenting missing switched access minutes. Although we realized that we were at great risk due to Qwest's ability to harm our business, we simply could not participate in such conduct and expose our own business to legal liability.

Attempts to Improperly Influence Testimony. In the same discussions of resolving switched access issues, Qwest also brought into the discussion the outside and unrelated issues of Eschelon's "performance" with respect to regulatory proceedings (on any issue, not merely access). In Qwest's proposed agreements faxed to me on October 30, 2001, Qwest conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)." The document, signed by Ms. McKenney, provided no limitation on Qwest's requests, such as that the testimony requested be true and accurate. The agreement simply contained an offer of a monetary inducement to obtain testimony upon request. The same document required that the agreement remain confidential. Therefore, if Eschelon agreed to the proposal, it would be placed in the position of having to offer testimony without disclosing a fact that would bear on the veracity of that testimony – it had been induced. Again, Eschelon could not agree to participate in such activity and rejected the offer. Also, on November 12, 2001, Rick Smith discussed his concerns about the proposal with Ms. Filip and told her that he believed the proposal was illegal and embarrassing. When, on

January 11, 2002, Eschelon later read the offensive language from the proposed agreement to Mr. Martin, in response to a claim by Ms. Filip that Qwest's conduct in this relationship has been "constructive," Mr. Martin expressed no surprise and made no indication that this type of conduct might not be acceptable to him.

In my first meeting with Mr. Martin, I talked with him, in particular, about my concerns regarding Ms. McKenney's behavior. I asked that she be removed from our account, so that we could deal with someone else. Mr. Martin declined that request and, as these examples show, has not given us any indication that he disapproves of her approach. Unless you condone such conduct, these examples must convey to you the seriousness of these issues, the unacceptable position in which they place Eschelon, and the legal risks that they pose to Qwest.

Despite Qwest's conduct, Eschelon has continued to persevere in its attempts to work with Qwest. Qwest is the only available supplier in virtually all cases. We have cooperated with requests by Qwest to support Qwest with favorable comments, when we believed we could legitimately do so. This has included, for example, statements to the press and a letter to state regulatory commissions supporting aspects of Qwest's PAP. Even in these circumstances, Qwest has turned a potentially positive development into a concern. For example Qwest drafted and published a statement, which Qwest attributed to me, before I ever saw it. Later, I had little choice but to acquiesce, even though I would have phrased the statement differently, if consulted. I asked Qwest to always consult me in the future. Just recently, however, I noticed that Qwest has re-published the previous quote in Qwest's *Lightspeed* publication, without consulting me. Let me make it very clear now that I retract my previous statements in support of Qwest and all authority that Qwest has to use them. A new course needs to be charted for this wholesale business relationship, but until we have done that, I cannot, in all honesty, say anything good about Qwest.

The previous phases of this escalation have taken far too long. We would like to complete this phase within the allotted 10-day time period. We hope to resolve the outstanding issues to avoid bringing the issues to arbitration before the state commissions under our interconnection agreements and before initiating other legal actions, such as an antitrust suit. To do that, we need to move quickly. Please let me know when you are available to meet with me to discuss these escalation issues.

Sincerely,

2/8/02

Mr. Richard A. Smith
President, Chief Operating Officer & Director

cc: Drake S. Tempest (by email & express delivery)
Gordon Martin (by email)
Audrey McKenney (by email)
Dana Filip (by email)
Richard Corbetta (by email)

000055

## AMENDED ATTACHMENT 3.2

PRICES FOR OFFERING

| STATE | PLATFORM RECURRING | ADDITIONAL CHARGE FOR EACH 50 MINUTE INCREMENT > 525 ORIGNATING LOCAL MOU/MONTH PER LINE |
|---|---|---|
| AZ | 20.82 | 0.280 |
| CO | 18.18 | 0.295 |
| ID | 33.50 | 0.295 |
| MN | 21.83 | 0.205 |
| ND | 28.65 | 0.260 |
| NE | 36.39 | 0.300 |
| NM | 27.50 | 0.140 |
| OR | 18.78 | 0.170 |
| UT | 22.52 | 0.270 |
| WA | 18.03 | 0.195 |

Exhibit A sets forth features that are included in the flat-rated UNE-P Business Recurring Rate, in all forms of those features (except as part of an enhanced service).

# EXHIBIT H

Exhibit H

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

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

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# EXHIBIT I

AFTERNOON SESSION

THURSDAY, MAY 21, 1998

(2:45 p.m.)

AGENDA ITEM NOS. 18, 19 & 20

PROJECT NO. 16251 - INVESTIGATION INTO SOUTHWESTERN BELL TELEPHONE COMPANY'S ENTRY INTO IN-REGION INTERLATA SERVICE UNDER SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. 19000 - RELATING TO THE IMPLEMENTATION OF SWBT'S INTERCONNECTION AGREEMENTS WITH AT&T AND MCI.

DOCKET NO. 16189 - PETITION OF MFS COMMUNICATIONS COMPANY, INC., FOR ARBITRATION OF PRICING OF UNBUNDLED LOOPS.

DOCKET NO. 16196 - PETITION OF TELEPORT COMMUNICATIONS GROUP, INC., FOR ARBITRATION TO ESTABLISH AN INTERCONNECTION AGREEMENT.

DOCKET NO. 16455 - PETITION OF SPRINT COMMUNICATIONS COMPANY, L.P., FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, CONDITIONS, AND PRICES FROM SOUTHWESTERN BELL TELEPHONE COMPANY.

DOCKET NO. 17065 - PETITION OF BROOKS FIBER COMMUNICATIONS OF TEXAS, INC., FOR ARBITRATION WITH SOUTHWESTERN BELL TELEPHONE COMPANY.

CHAIRMAN WOOD: All right. We'll go back -- the Commission will come

back on the record to take up Items 18, 19 and 20 on today's agenda sequence. Item 18 is Project 16251, Investigation of Southwestern Bell Telephone Company's Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996.

Before we join in visiting with the staff, do any of you-all have anything you'd like to kind of start off with?

COMM. CURRAN: Well, I've got an opening statement before we get into everything.

COMM. WALSH: I do, too.

COMM. CURRAN: And I think Commissioner Walsh does too. So would you like to go first?

CHAIRMAN WOOD: Great.

COMM. WALSH: I find that Southwestern Bell has not yet met the requirements for in-region interLATA authority under Section 271.

In regard to the issue about Track A, whether there is a competing facilities-based provider to satisfy Track

A I think is debatable, given the minuscule number of residential and business customers served. The de minimis rule becomes an issue. So does whether any of these providers is or can become a true competitive alternative to Southwestern Bell in light of Southwestern Bell's lack of cooperation and efforts to frustrate the CLEC's efforts to enter the market.

The public interest, which is the last issue -- whether Southwestern Bell's entry into long distance is in the public interest is to be determined after the 14 points are met. The record is replete with examples of Southwestern Bell's failure to meaningfully negotiate, reluctance to implement the terms of the arbitrated agreements, lack of cooperation with customers and evidence of behavior which obstructs competitive entry.

As a result, we do not have an open market today with Section 271 as an incentive. The very real danger is that if Southwestern Bell were granted 271 relief now, they would have no incentive to

cooperate with CLECs, and the local market in Texas might never be competitive.

I do not find it in the public interest to support the 271 application today, but I do not believe that we need to reach the Track A or the public interest issues today because the 14 points have not been met, and if we work on curing these deficiencies, then there will be competitive alternatives, and track A will likely be satisfied.

If the 14 points are ultimately met, and if Southwestern Bell is able to adjust its corporate culture to treat the CLECs as valued customers rather than annoying competitors, then the reservations concerning the public interest may also be removed.

So I would propose that we focus on the steps necessary to meet the checklist, but the evidence of uncooperative behavior to date and the difficulties CLECs have had in establishing a competitive foothold as reflected in the dearth of facilities-based customers has

influenced my judgment about what standards we should apply and what evidence we should require before I can say the market is open and, more importantly, that it will stay open and that competition will be irreversible.

We indicated that we would give Southwestern Bell guidelines about what needs to be done to get a recommendation from us. I think we should go over the Staff recommendations on each point in detail, but recognize that any future process will be a dynamic one, and details of these general requirements will develop throughout the process.

I would like to discuss now more general, larger concerns that would have to be satisfied for me to vote yes.

On the question of interconnection, in making its case to satisfy the checklist, Southwestern Bell is relying on the arbitrated interconnection agreements and compliance with their terms and conditions to support compliance with Checklist Items 1, 2 and others. At the

same time, I would take note of appeals of these agreements in both federal and state court. These lawsuits indicate that the so-called agreements were forced on Southwestern Bell and challenge the very validity of the agreements.

The FTA requires that agreements be final and binding. CLECs cannot implement their business plans while the appeals create so much uncertainty. I would not rely on the terms of these agreements to support 271 until all appeals are decided.

Another major issue has been whether competition is irreversible and whether the checklist will continue to be met. There was considerable discussion about what happens when the agreements resulting from the mega arbitrations expire. This issue also creates serious uncertainty which will inhibit market entry. The record suggests that another reluctant negotiation and contentious arbitration is likely.

To ensure that competition is

irreversible, Southwestern Bell needs to commit to extending the effective dates of the mega arbitration contracts for the statutory time required to negotiate and arbitrate new agreements, assuming notice of intent to negotiate occurs nine months prior to the contract expiration. The MFN policy must be spelled out in complete detail.

Non-Discriminatory Access to Network Elements: I think ultimately that Southwestern Bell must provide UNEs at cost-based rates in a manner which allows any CLEC to combine them and provide a competitive service at parity with Southwestern Bell. The five methods proposed by Southwestern Bell do not appear to meet the requirements of the Federal Telecommunications Act.

A satisfactory method should be addressed in any collaborative process with virtual collocation of cross-connects, access to recent change capability, electronic access like DCS, where available, and any other method that would

meet the standard. In the interim, Southwestern Bell must offer to recombine all UNEs for any requesting CLEC at a cost-based recombination charge. The commitment to recombine would continue until acceptable terms and conditions exist for CLECs to do the combining themselves. Parity must be measured against the manner in which Southwestern Bell uses these same elements to provide their retail service.

On Operation Support Systems, Southwestern Bell must meet the schedule for making available EASE for UNE-P ordering, and it must remain available until EDI is fully functional and commercially operational. UNEs ordered with specificity through EASE should not require re-entry of data when EDI is functional. EASE should run in parallel with EDI until EDI is processing actual traffic in commercial volumes.

All systems, EDI, LEX and EASE, must flow through electronically at parity with Southwestern Bell's own use in providing retail service. Problems of

multiple entry of data, disconnection between pre-ordering and ordering, ability to process change orders, high fallout rates, access to numbers and availability of timely and complete billing information must also be resolved.

In connection with performance measures, we must adopt a complete set of performance measures to address all parity issues. They must be available to all CLECs and provide aggregate and individual CLEC comparisons. There must be a sufficient period of actual measurement of data to ensure that the measures are effective and to establish whether or not Southwestern Bell is in compliance with the parity requirements. The measurement period, I think, should be at least three months. There must be self-implementing penalties that do not allow for selective discrimination and which are large enough to be a deterrent.

To mitigate against deterioration after 271 relief is granted, I would recommend that a serious failure to

continuously meet the performance measures would result in a freeze of the right to solicit in-region interLATA customers.

In connection with the 272 affiliate transaction issues, I continue to be concerned that competitive affiliates, like Call Notes, are not providing the same service to customers who are served by CLECs as they do to Southwestern Bell customers. I think any activity on this part is a significant barrier to entry.

I'm also concerned about the level of detail of data required in reporting by the long distance company [illegible]. I think the reports must be readily available and capture relevant data to identify cross-subsidies and anticompetitive activity.

When a BOC and a long distance company affiliate choose a simple structure, then I think the reporting can be pretty straightforward, but in a corporate structure which is as complicated as this one is and when there are three separate BOCs -- and maybe more --

conducting transactions with one or more long distance subsidiaries that do business in-region and out of region. I think following the flow of transactions becomes a lot more complex.

Going back to the issue of doing business with Southwestern Bell in the public interest, I think that, to date, Southwestern Bell has been a reluctant participant in opening the local telecommunications market to competitors. I fully support the development of an instruction manual that gives CLECs complete information on the steps necessary to accomplish all required transactions with Southwestern Bell. I would also require Southwestern Bell to come up with concrete steps for changing the corporate culture to treat CLECs as valued customers. Any such change must be embraced from the top of the organization, acted upon and communicated downward throughout the entire organization to account representatives, repairmen and employees at the top.

Particular areas to be addressed

would be training for all employees who deal with retail customers and CLECs, developing protocols of what service reps can say and do in contacts with customers, structuring information flow from the policy group to account reps and to CLECs so that policy decisions are universally known, establishing incentives for employees based upon CLEC satisfaction and developing an appeals process or ombudsman within Southwestern Bell itself for CLECs to appeal decisions made by the account reps.

At the end of the collaborative process, I think we should have a new survey of CLEC satisfaction to see where we stand in terms of the ease of doing business with Southwestern Bell, and I think at that time the hearing should be reconvened to take supplemental testimony on CLEC experiences to evaluate the real world with the 14 points and the public interest.

CHAIRMAN WOOD: Pat?

COMM. CURRAN: First of all,

I wanted to thank the parties to this proceeding for developing an exhaustive record. It was -- not only, I think, were the issues developed well, but it was informative and educational, and I appreciate that.

The focus in this proceeding and the Staff's comments may very well be directed at things that Southwestern Bell has either done or not -- well, has either not done or has not done well. That is due in large part to the nature of this proceeding. However, there's also evidence in the record that Bell is complying with the majority of the provisions of past interconnection agreements.

In addition, during this investigation process, Bell has agreed to a number of suggestions and recommendations. While competition is not as robust as perhaps it should be by this point in time, it's evident that Bell has come a ways since the first arbitration. While it does not -- while I do not believe that competition is at a sufficient level today

to allow Bell to enter the long distance market, my hope is that the comments that we and the Staff will make today and as a result of the collaborative process that will be recommended -- that Bell will be able to enter the long distance market by following the road map that I hope that we are able to give you.

Even when Bell meets the checklist items, there are still some concerns which lead me to the conclusion that Bell has not met its burden necessary to recommend that it be allowed to enter the long distance market. Those concerns arise under the Track A requirement and the question of whether Bell's application is in the public interest.

On the Track A matter, I have two major problems with any conclusion that Bell has met the Track A requirements. First is the issue of whether it has entered into binding agreements. Secondly is my conclusion that the cumulative number of access lines served by Bell's competitors is insufficient to establish

them as competing providers.

Track A requires that Bell have entered into one or more binding agreements that have been approved specifying the terms and conditions under which it is providing access and interconnection. While Bell has entered into scores of agreements, certain of Bell's actions indicate that it doesn't consistently view all agreements as binding in nature. It has challenged a number of the terms of arbitrated agreements in court proceedings. These legal challenges indicate to me that Bell is not committed to perform under the disputed terms of the agreement, if it can prevail. Its legal challenges, if successful, may render some or all of the disputed terms of the executed agreements void or voidable. These are not characteristics of what is generally understood to be a binding agreement. They also cast serious doubt about the future performance under these agreements.

Certainly Bell has a legal right to exhaust its remedies in court. The

problem such appeals create, however, is the uncertainty in the business arrangement and the impression that it is using the legal process, not to protect its rights, but to thwart the process itself. While the Commission cannot deny Bell its legal remedies, Bell might consider withdrawing some of its pending lawsuits involving disputed interconnection agreements. Such a voluntary offer would alleviate the uncertainty in the business arrangements and would assure the binding nature of existing contracts and would be one indication of Bell's commitment to the competitive marketplace.

Another example of what I consider to be Bell's lack of commitment to the binding nature of certain arbitrated agreements it has executed is its refusal to apply the Commission's rulings in one agreement to all similarly situated agreements. For example, we learned in this hearing that, despite the Commission's clear interpretation that reciprocal compensation provisions apply to ISP

traffic, Bell failed to apply the ruling to identical provisions in other existing contracts. I understand that Bell has now agreed to abide by the Commission ruling in the Time Warner and Waller Creek proceeding and to apply that ruling to all current contracts involving ISP. I would like to and would expect to see the same continuity in other contested provisions. Nevertheless, until Bell shows a consistent policy of applying Commission rulings across the board and a commitment to perform in accordance with the terms of all agreements without constant Commission supervision, I cannot reach the conclusion that binding agreements have been entered.

Track A also requires that these binding agreements be with one or more unaffiliated competing providers of telephone exchange service. The question is, therefore, what constitutes a competing provider? Neither the Act, nor the FCC, require a showing that a competitor or competitors have secured any minimum percentage of market share away from Bell.

However, it stands to reason that to meet the requirement that other providers -- to meet this requirement, other providers must have secured more than a de minimis number of customers.

Here we have a situation where potential competitors have spent enormous time and effort and probably enormous sums of money attempting to gain a foothold in the local telephone market. The regulatory agency has spent untold hours in an effort to establish mechanisms under which the phone customers of Texas will have choice in their local phone service, and this enormous effort has resulted in a movement of just 1 percent of phone customers to competitors. I don't believe the record supports the explanation that this is the result of a lack of interest, either on the part of consumers or on the part of potential competitors.

The 15 CLECs relied upon by Bell to demonstrate there are competing providers I believe simply do not yet rise to the level of providing real competition

to Bell or true commercial alternatives to a sufficient number of phone subscribers in the state. However, on this issue, I would be willing, assuming that the checklist is met and the other public interest issues are met -- I would be willing to set forth the record evidence on this matter and let the FCC decide if it believes a de minimis number of lines in the hands of competitors is sufficient to meet this requirement.

This brings me to the question of whether I believe Bell's application is in the public interest. At this time, I do not believe it is. With the facts before us, I do not believe there is any way to conclude that, in Texas, there is a situation of irreversible local competition. Currently, there are CLECs with de minimis customers, and even these de minimis customers have been secured only with tremendous effort and with Bell resisting at every turn. Will these CLECs and other CLECs be able to retain even this level of customer base into the future, much less to provide a real competitive

option to additional subscribers? Under current practice, it is highly doubtful.

A critical factor to me as well -- and I mirrored Commissioner Walsh's comments on this -- is the term of the contracts. The terms of both the arbitrated and negotiated contracts are for relatively short periods of time. CLECs who have MFNed into existing contracts appear to be forced to adopt the agreement with whatever remaining term exists in the original contract as opposed to even being allowed to secure the same original term as the original party. I find this fact very troubling.

At the end of the term, it is unclear what, if any, right the CLEC will have to expect a continuation of service from Bell, pending the outcome a new agreement. Presumably, once the contract expires, Bell has no obligation to continue providing service until a new contract is executed. This potential termination or disruption in service has obvious business implications for competitors. In order to

achieve a truly competitive marketplace, there must be some assurance from Bell that as to these interconnection agreements, as they expire, that it will continue to operate under the terms of these agreements until new contracts are in place, and to the extent that these agreements require arbitration, the period between the expiration of the current contract and subsequent contracts could be significant.

Moreover, if Bell is already in the long distance market, it will have far less incentive to complete subsequent contract negotiations in a timely manner. In order to expedite future contract negotiations, we could consider the development and adoption of default contracts for various types of interconnection agreements, such as resale or UNE agreements. These default contracts would be available to CLECs without the necessity of any additional negotiations. The provisions of these agreements could be developed through the collaborative process and could be based on sections of

agreements that Bell has already agreed to provide on an MFN basis. For instance, these agreements could include the performance measures attachment as well as provisions of the physical collocation tariff.

Parties selecting a default contract could always negotiate additional terms, but any CLEC entering into an agreement with Bell for the first time or for a subsequent contract period could take advantage automatically of these basic minimum terms. These default agreements could be considered as a substitute for Bell's generic contracts, which they now use to start the negotiation process.

It has been suggested that we would recommend to the FCC that conditions be placed on Bell's entry into the interLATA market. That's all fine and good. However, from a real life point of view, I don't believe that's a realistic remedy if the future -- if, in the future, Bell shows a lack of commitment to the competitive process. Once Bell is in the

market, there may be enormous pressures from all sorts of sources, including the consuming public, to allow it to remain in the long distance market without restriction, even at the expense of competition. A preferable approach in my mind is to assure that -- to assure that robust competition exists before Bell enters the market. Hopefully, that is what a collaborative process can achieve, but by being as specific as possible in providing Bell a road map or outline of what is necessary to obtain a positive recommendation from this Commission, hopefully such conditioned entry will not be necessary.

Finally, with regard to the public interest, no matter what safeguards and protective measures we recommend, we cannot be assured that competition will become irreversible in Texas until Bell is committed to treating CLECs as customers rather than as competitors. This change in business attitude is entirely within Bell's power. This Commission cannot order Bell

to change its attitude. We can, however, provide concrete actions; steps which we believe will result in an open market. But Bell can change its attitude, and it can do that by demonstrating good faith in its negotiations and dealings with CLECs on a going-forward basis. It can demonstrate this good faith by removing barriers that it has put in place and by its commitment to institutionalize clear and non-discriminatory procedures to allow CLECs entry into the market and to sustain new customer relationships.

In addition, Bell can demonstrate its change in attitude by participating in good faith in the collaborative process that I think we'll be discussing throughout the rest of the day. This process, I believe, will remedy the deficiencies that are likely and that we will be discussing and be noted in today's deliberations in Bell's application, and hopefully we'll be able to put in place a mechanism that will assure a truly competitive market in Texas.

CHAIRMAN WOOD: I would

agree that, as of today, the answer to the core question, "Are Southwestern Bell's local markets open to irreversible competition?" would have to be answered "not yet." I would agree with the two of you-all that we do have some work to do here, and I would recommend that the Company not seek to file at the FCC for interLATA authority at this time until we work further with them and with the other parties in the Texas market to solve the concerns that will be -- I've heard you two lay out and that the Staff recommendation will be laying out in more detail this afternoon.

In that regard, I'd propose then we keep the record open over the coming months to work in a collaborative process to flesh out and address the issues that we outline today, to institute workable solutions, to review the data from these revised processes and to supplement the record when Southwestern Bell has made the necessary changes and has the data to show that the solutions have addressed the

issue.

In my mind, there are and have been since we talked about this at our last open meeting some major issues to resolve. Rebundling is one. Operation Support Systems improvements are another. Performance measure is a third. The ease of doing business is a fourth, the actual performance of Southwestern Bell, the Tayloe tandem issue being probably the best example, and then, as I think, Pat, you laid out very adequately, the overhang from pending litigation against the Commission's orders.

In the end, though, the biggest issue is how is there going to be a spirit of cooperation? Because every issue we could lay out could be resolved, but yet the spirit is not captured. I've read the Bell Atlantic-New York's April 6 profiling statement which laid out a series of specific commitments and obligations that they made to the New York Commission in the context of New York's 271 review. There is quite a bit in that document.

If we were to get a similar commitment from Southwestern Bell on all the various issues, big and small, that we'll lay out today, I'm concerned about having the next two years play out like the last two years have done. We personally presided -- you, me and Rob, Judy -- over these lengthy arbitration hearings with Bell and the different parties in excruciating detail in order to resolve these issues once and for all, only to find that we do have a very minimal level of competition in Texas today, most of that being resale, in fact.

If I felt that the lack of competition were from a lack of interest or commitment on the part of new entrants, it would be easy to dismiss their concerns, but for most of the participants in this hearing, it is clear to me -- and has always been -- that that is not the case. This is potentially the richest telecom market in the country. Legal and regulatory barriers to market entry have been eliminated, and we have approved

countless applications for new authority and interconnection agreements, but a piece of paper doesn't mean much if one of the parties isn't interested in making it work.

I found Bell Atlantic's wholesale customer Web page yesterday and gave each of you-all a copy of what's on there. It's www.bell-atl.com/tis. TIS is Telecom Industry Services. This Website included downloadable handbooks -- and we're talking six employees of handbook -- for every aspect of doing business and interconnection, copies of all their correspondence and promotional announcements from the wholesale center to all different types of competitive carriers, but what got me is this statement on the introductory page. Right there below the middle of the -- it says,

> "We view this relationship [wholesale customer relationship] not only as supplier to customer, but as peer to peer. The fact is we are truly in partnership with you as co-providers of

telecommunications services. In fact, we depend on you for our success."

I know that talk is cheap, but while cheap, it is a good first step, and that's why I wanted to get this whole process of doing business addressed at the front end of the collaborative process so we can actually start to see it bear fruit this summer.

We were reminded two weekends ago in Beaumont in the Entergy deliberative poll by a customer on the front row to "trust but verify," and that's what we need to do here. The Company has repeatedly committed verbally to fulfill its responsibilities under the Act, and I will accept that, but I also want to see the data showing that it is actually working. So an important part and, in fact, to me the critical part of the further work over the coming months will be to look at the actual numbers. Is it working?

So I look forward to getting on with the process and trying to get to "yes"

here. So, with that, why don't we move into the checklist items and move over to Staff?

MS. NELSON: Thank you. For the record, I'm Donna Nelson. We've provided you with copies of the Staff recommendation for each 271 item. What I propose is that we go through them by issue, and for some of them, I'll outline some of the recommendations since they're very lengthy, and just for the record, I'd like to indicate that we do intend this to be a road map. It will be filed by next Friday after we've had an opportunity to incorporate the changes that have come from the Commissioners.

Although we -- Staff believes the evidence indicates that Southwestern Bell needs to change its corporate attitude and view the participants as wholesale customers, Staff also believes that many of the problems may be attributable to lack of communication within Southwestern Bell and between Southwestern Bell and participants. Staff also believes that Southwestern Bell

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So I look forward to getting on with the process and trying to get to "yes"

attempted to address some of the problems raised by the participants during the course of the 271 hearing itself. Staff hopes that this response by Southwestern Bell indicates a willingness to address the issues that will get Southwestern Bell to "yes."

With regard to the public interest and the broad -- a broad overview of 271, that crosses over many of the checklist items. Staff recommends that the Commission establish a collaborative process whereby Southwestern Bell, Commission Staff and the participants to this project establish a working system that addresses all of the issues raised in this recommendation.

Southwestern Bell needs to show this Commission and the participants during the collaborative process by its actions that its corporate attitude has changed and that it has begun to treat CLECs like its customers. Southwestern Bell needs to establish better communication between its upper management, including its policy

group and its account representatives.

As a first step, Staff recommends that Southwestern Bell develop policy manuals for its account representatives and put in place a system, such as e-mail notifications, to communicate decisions by the policy group to account representatives and questions or comments back to the policy group from the account representatives. Southwestern Bell needs to establish a consistent policy used by all Southwestern Bell employees in responding to issues raised by CLECs. Toward that end, Staff recommends that Southwestern Bell establish an interdepartmental group whose responsibility is troubleshooting for CLECs engaged in interconnection, purchase of UNE and resale. Staff further recommends that this group be headed by an executive of Southwestern Bell with final decision-making power.

Southwestern Bell needs to commit to resolving problems -- problem issues with CLECs in a manner that will give CLECs

a meaningful opportunity to compete. Southwestern Bell needs to draft a comprehensive manual for CLECs to ensure the timely provision of all aspects of interconnection, provision of UNEs and resale. Staff recommends that the manual be written in a fashion that clearly delineates parties' responsibilities, the procedures for obtaining technical and other practical information and the timeliness -- and the time lines for accomplishing the various steps in interconnection, purchase of UNEs and resale. The manual should also set forth Southwestern Bell's policy with regard to MFN issues.

Southwestern Bell needs to treat CLECs at parity with the way it treats itself or its unregulated affiliates. Southwestern Bell needs to show proof that it has made all the changes it agreed to make during the process of this hearing, all of which have been detailed in the record. Commission Staff, Southwestern Bell and participants need to establish

adequate performance monitoring, including performance standards, reporting requirements and enforcement mechanisms during the collaborative process that will allow self-policing of the interconnection agreements after Southwestern Bell has been allowed to enter the long distance market. Staff recommends also that Southwestern Bell be prohibited from using customer proprietary network information to win back customers lost to competitors.

We'll be adding recommendations consistent with what you-all have discussed, including the binding nature of the agreements and establishing incentives for LEC personnel based on CLEC satisfaction and contract availability to all CLECs.

CHAIRMAN WOOD: What was the second one, Dana?

MS. NELSON: Establishing incentives for LEC personnel --

CHAIRMAN WOOD: I like that a lot.

MS. NELSON: -- based on

CLEC satisfaction. That's something that Commissioner Walsh mentioned.

So do you-all have any other specific comments relating to these issues raised?

CHAIRMAN WOOD: The one I would have added to your earlier list is the litigation overhang issue, and I think -- I don't know. There are a couple of ways to slab at that, but, and I've been thinking about it for a couple of weeks. I know DOJ, I think, in other states has pursued the angle of, regardless of any judicial outcome, that cannot be implemented until such a date certain, which would give parties time to basically react to that change but also have some certainty as to when they need to renegotiate. So it would give us sufficient time for implementation of any adverse ruling by a court.

Of course, I think at the point they are, you've got, you know, really the Supreme Court denying cert or granting the case and denying rehearing -- I mean, that's

# EXHIBIT J

PUC PROJECT NO. 16251

| | | |
|---|---|---|
| INVESTIGATION OF SOUTHWESTERN BELL TELEPHONE COMPANY'S ENTRY INTO THE TEXAS INTERLATA TELECOMMUNICATIONS MARKET | § § § § § | PUBLIC UTILITY COMMISSION OF TEXAS |

## COMMISSION RECOMMENDATION

The Texas Public Utility Commission (the Commission) and the telecommunications industry have worked steadily since the passage of the federal Telecommunications Act of 1996[1] (FTA96) to negotiate and arbitrate interconnection agreements that will facilitate local competition in Texas. Pursuant to FTA96, new entrants have the legal authority to enter the local market in Texas through resale, unbundled network elements (UNEs), and interconnection. FTA96 § 251 (47 U.S.C. § 251).

In order to provide in-region interLATA services, Southwestern Bell Telephone Company (SWBT), a Bell Operating Company (BOC), must establish that the local telecommunications market is irreversibly open to competition.[2] Specifically, Section 271 of FTA96 requires SWBT to establish that

- it satisfies the requirements of either Section 271(c)(1)(A), known as "Track A," or Section 271(e)(1)(B), known as "Track B";
- it is providing the 14 checklist items listed in Section 271(c)(2)(B) pursuant to either a Track A state-approved interconnection agreement or a Track B statement of generally available terms (SGAT);
- the requested authorization will be carried out in accordance with the requirements of Section 272; and
- SWBT's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity." Section 271(d)(3)(C).

Although the Federal Communications Commission (FCC) ultimately determines whether SWBT has established its entitlement to enter the interLATA market pursuant to Section 271, the statute directs the FCC to consult with state commissions. The FCC relies upon state commissions to develop a complete factual record.[3]

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1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.) (FTA96).

2 See e.g., Memorandum Opinion and Order, Docket No. 97-137, In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-region, InterLATA Services in Michigan (August 19, 1997) (Ameritech Michigan Order).

3 Ameritech Michigan Order at ¶ 30.

SWBT filed its application to provide in-region interLATA service in Texas on March 2, 1998 with the Commission. On April 7, 1998, the Commission held an open meeting at SWBT's Local Service Center (LSC) in the Dallas-Ft. Worth area and on April 21st through the 25th, the Commission held an extensive hearing on SWBT's application. Many competitive local exchange companies (CLECs) and other parties participated in the Commission's 271 proceeding.

SWBT has done much in Texas to open the local market to competition. Notwithstanding that fact, if the Commission were asked to give a recommendation to the FCC today, it regrettably would be required on the record before it to say "not yet." The Commission files this Recommendation in an effort to provide SWBT with guidance on what the Commission believes SWBT will need to do in order for this Commission to say that the local market is irreversibly open and SWBT should be allowed to provide in-region interLATA service. The Commission files this Recommendation in the spirit of cooperation and in the hope that SWBT will work with the 271 participants and this Commission to get SWBT to "yes."

Participants presented evidence throughout this Section 271 proceeding that indicated their difficulty in working with SWBT to interconnect, purchase UNEs, and provide resale. Although the Commission believes the evidence may indicate that SWBT needs to change its corporate attitude and view the participants as wholesale customers, the Commission also believes many of the problems may be attributable to lack of communication within SWBT and between SWBT and the participants. The Commission believes that SWBT attempted to address many of the problems raised by the participants during the course of the 271 hearing itself. The Commission hopes that this response by SWBT indicates a willingness to address the issues that will get SWBT to "yes."

## Public Interest

With regard to the public interest aspect of Section 271 (including the "ease of doing business with SWBT") the Commission makes the following recommendations:

1. The Commission shall establish a collaborative process whereby SWBT, Commission staff, and participants to this project establish a working system that addresses all of the issues raised in this recommendation;
2. SWBT needs to show this Commission and participants during the collaborative process by its actions that its corporate attitude has changed and that it has begun to treat CLECs like its customers;
3. SWBT needs to establish better communication between its upper management, including its policy group, and its account representatives. As a first step, SWBT shall develop policy manuals for its account representatives and put in place a system, such as email notifications, to communicate decisions by the policy group to account representatives and questions or comments back to the policy group;
4. SWBT needs to establish consistent policies used by all SWBT employees in responding to issues raised by CLECs. Toward that end, SWBT shall establish an interdepartmental group

whose responsibility is trouble-shooting for CLECs engaged in interconnection, purchase of UNEs, and resale. This group shall be headed by an executive of SWBT with the final decision making power;

5. SWBT needs to establish a system for providing financial or other incentives to LSC personnel based upon CLEC satisfaction;

6. SWBT needs to commit to resolving problem issues with CLECs in a manner that will give CLECs a meaningful opportunity to compete;

7. SWBT shall draft a comprehensive manual for CLECs to ensure the timely provision of all aspects of interconnection, provision of UNEs and resale. The manual shall be written in a fashion that clearly delineates parties' responsibilities, the procedures for obtaining technical and other practical information, and the timelines for accomplishing the various steps in interconnection, purchase of UNEs and resale. The manual should also set forth SWBT's policy with regard to a CLEC's ability to adopt an approved interconnection agreement pursuant to Section 252(i) (this process will be referred to as the "MFN" process);

8. SWBT needs to treat CLECs at parity with the way it treats itself or its unregulated affiliates;

9. SWBT needs to show proof that it has made all the changes it agreed to make during the process of the Commission's 271 hearing, all of which have been detailed in the record;

10. SWBT needs to establish that its interconnection agreements are binding and are available on a nondiscriminatory basis to all CLECs;

11. To the extent SWBT chooses to establish 271 requirements by relying upon interconnection agreements it has appealed, SWBT should consider adopting a statement of generally available terms and conditions;

12. SWBT needs to establish that it is following all Commission orders referenced in this recommendation and that it intends to follow future directives of the Commission;

13. SWBT needs to establish its commitment to offering the terms of current interconnection agreements during any period of renegotiation, even if the negotiations extend beyond the original term of the interconnection agreements;

14. Commission staff, SWBT, and the participants need to establish adequate performance monitoring (including performance standards, reporting requirements, and enforcement mechanisms) during the collaborative process that will allow self-policing of the interconnection agreements after SWBT has been allowed to enter the long distance market;

15. SWBT shall not use customer proprietary network information to "winback" customers lost to competitors.

## Checklist Items

**ITEM ONE:** Has SWBT provided interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1), pursuant to 271(c)(2)(B)(i) and applicable rules promulgated by the FCC?

**RECOMMENDATIONS:** In addition to the recommendations addressed above in the **public interest** section, and the **OSS** and **performance standard** sections addressed below, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. SWBT shall investigate and implement measures to expedite construction and installation activities both at tandem and end office locations and, in order to provide for a reasonably foreseeable demand, SWBT shall engage in cooperative planning of trunking facilities with a view toward providing parity for CLECs;
2. The physical collocation tariff should be amended to be made available to any CLEC that wants to physically collocate in SWBT's facilities. A CLEC should be allowed to use the tariff without going through the MFN process in Section 252(i) of FTA96;
3. SWBT shall implement a cost-based virtual collocation tariff available to all CLECs;
4. SWBT shall allow CLECs to buy equipment from non-SWBT entities, and in turn, sell the equipment to SWBT in order to reduce the CLECs' costs.

**ITEM TWO:** Has SWBT provided nondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1) of FTA, pursuant to 271(c)(2)(B)(ii) and applicable rules promulgated by the FCC?

**RECOMMENDATIONS:** In addition to the recommendations addressed above in the **public interest** section, and the **OSS** and **performance standard** sections addressed below, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. SWBT shall offer at least the following three methods to allow CLECs to recombine UNEs. These three methods attempt to balance SWBT's security concerns with the desire of CLECs to combine UNEs:

--virtual collocation of cross-connects at cost-based rates,

--access to recent change capability of the switch to combine loop port combinations, and

--electronic access such as Digital Cross Connect (DCS) for combining loop and port at cost based rates, where available;

2. SWBT, Commission Staff, and the participants to this proceeding shall explore the following issues during the collaborative process:

--additional methods for recombining UNEs or for allowing CLECs to combine UNEs and the costs associated with such methods;

--whether SWBT is providing any and all individual UNEs required by FTA96;

3. Concerning virtual collocation of cross connects, the Commission recommends that CLECs be able to provide incumbent local exchange companies (ILECs) with rolls of their own wire. When a customer changes carriers from the ILEC to a CLEC, the ILEC would take out a wire from the CLEC's inventory, untie and remove the ILEC's wire, and insert and tie the CLEC's wire. Similarly, if a customer returns to the ILEC, the ILEC must remove the CLECs wire, insert its wire, and return the CLEC's wire to the CLEC's inventory. SWBT, under this scenario, would be able to recover its forward-looking, economic costs and insure the security of the network;

4. Concerns have been raised about the Commission requiring CLECs to obtain right to use licenses, where necessary, when leasing UNEs.[4] Under the current UNE rates, the Commission believes the right to use decision made in the mega-arbitration[5] is appropriate. However, the Commission invites CLECs to seek a UNE-Right to Use adder. This adder would compensate SWBT for costs associated with right to use arrangements. For CLECs choosing to pay the cost-based adder, SWBT would agree to provide the right to use arrangements as a wholesale function. For CLECs choosing not to pay the adder, the Commission's position in the mega-arbitration would apply. The parameters of this issue shall be negotiated in the collaborative process.

ITEM THREE: Has SWBT provided nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by SWBT at just and reasonable rates in accordance with the requirements of section 224 of the Communications Act of 1934 as amended by the FTA96 pursuant to 271(c)(2)(B)(iii), and applicable rules promulgated by the FCC?

RECOMMENDATION: If SWBT implements the Commission's recommendations in the public interest section above, and the **OSS** and **performance standard** sections addressed below, the Commission believes SWBT will meet this checklist item.

ITEM FOUR: Does the access and interconnection provided by SWBT include local loop transmission from the central office to the customer's premises, unbundled from local switching or other services in accordance with the requirements of section 271(c)(2)(B)(iv) of FTA96 and applicable rules promulgated by the FCC?

RECOMMENDATIONS: In addition to the recommendations addressed above in the **public interest** section, and the **OSS** and **performance standard** sections addressed below, Staff recommends the following, the details of which could be established in the collaborative process.

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4 The issue of the rights of third party vendors is currently pending before the FCC.

5 "Mega-arbitration" is the term used to refer to several arbitration dockets, specifically Nos. 16189, 16196, 16226, 16285, 16290, 16455, 17065, 17579, 17587, and 17781, all of which were consolidated into one docket.

Staff believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. SWBT shall publish a technical manual showing CLECs how to use the unbundled loops to provide Asymmetric Digital Subscriber Line (ADSL) and High-Speed Digital Subscriber Line (HDSL) services. Spectrum management of available cable space shall be conducted by SWBT in an expedited manner, upon request from a CLEC who intends to use the unbundled loop for high speed ADSL and/or HDSL services;
2. SWBT shall also allow 4-wire HDSL service on an unbundled loop, provided the subscriber to such service has adequate cable or channel capacity or other means to place 911 calls from the same location;
3. SWBT must demonstrate it is complying with its development/reporting obligations for digital subscriber loops and that CLECs using recombined UNEs will have access to mechanized line testing (MLT) at parity with SWBT before the Commission can recommend that SWBT be found to have met this checklist item. Moreover, to the extent SWBT provides virtual collocation of the cross-connect and/or disconnection by some charge order, the MLT issue may be resolved.

**ITEM FIVE:** Does the access and interconnection provided by SWBT include local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services in accordance with the requirements of section 271(c)(2)(B)(v) of FTA96 and applicable rules promulgated by the FCC?

**RECOMMENDATIONS**: In addition to the recommendations addressed above in the **public interest** section, and the **OSS** and **performance standard** sections addressed below, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. SWBT shall be required to provide the multiplexar and the unbundled dedicated transport (UDT) as a UNE;
2. SWBT shall be required to demonstrate that it is complying with the order in Docket No. 18117 and that it is providing two-way trunks upon request to CLECs. Although the Commission concurs with SWBT that the mere existence of a past dispute that has been resolved by the Commission does not disqualify SWBT from satisfying a checklist requirement, it is necessary for SWBT to demonstrate that it is, in fact, complying with the Commission's orders.

**ITEM SIX:** Does the access and interconnection provided by SWBT include local switching unbundled from transport, local loop transmission, or other services in accordance with the requirements of section 271(c)(2)(B)(vi) of FTA96 and applicable rules promulgated by the FCC?

**RECOMMENDATIONS:** In addition to the recommendations addressed above in the **public interest** section, and the **OSS** and **performance standard** sections addressed below, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. SWBT shall be required to expedite the design process to implement measurement capability in its switching and billing systems for terminating access/originating 800 usage data for the unbundled switch or provide sufficient evidence to demonstrate why expediting this development is not feasible. The Commission further recommends that this issue, including interim compensation solutions, be explored in more detail during the collaborative process among SWBT, the participants, and Commission staff;
2. As an alternative recommendation, in the event SWBT is allowed to provide in-region interLATA service before providing a technical solution to this problem, the Commission could recommend to the FCC that SWBT interLATA relief be limited to originating, non-800 type interLATA service until SWBT has demonstrated that it provides CLECs usage data for these type of calls;
3. If a party wishes to obtain customized routing by using line-class codes, SWBT shall be required to provide such option. The appropriate rates for such service shall be based on forward looking costs. To the extent that no CLEC is interested in obtaining customized routing by using line-class codes at cost-based rates, SWBT may still be considered as "providing" such customized routing in compliance with this checklist item.

**ITEM SEVEN:** Has SWBT provided nondiscriminatory access to the following, pursuant to section 271(c)(2)(vii) and applicable rules promulgated by the FCC: (a) 911 and E911 services; (b) directory assistance services to allow the other telecommunications carrier's customers to obtain telephone numbers; and, (c) operator call completion services?

**RECOMMENDATIONS:** In addition to the recommendations addressed above in the **public interest section**, and the **OSS** and **performance standard** sections addressed below, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. SWBT shall provide a compare file to each CLEC so the CLEC can verify the accuracy of 911 database information it has submitted with the actual entry by SWBT. Additionally, SWBT shall include a parity performance measure that would indicate the number of records that were entered incorrectly for its own customers, each CLEC's customers, and all CLEC

customers. SWBT shall file these reports for a minimum of three months with the parties and the Commission staff to determine if parity performance violations have occurred. Until such determination is made SWBT has not met the burden of proof that it is indeed providing parity performance;

2. Pursuant to the Mega-Arbs, SWBT shall not remove customer data from the directory assistance (LIDB) database when a new customer is served through UNEs;

3. SWBT shall collaborate with the CLECs and Commission staff to create a procedure to establish non-discriminatory procedures for customers that have been won back;

4. In addition, SWBT has denied access to ILEC directory assistance listings claiming that the ILECs have not given SWBT permission to release their customer's information. At the hearing, SWBT stated that these listings would be released as soon as that permission was received. Tr. at 1055. SWBT and the participants shall coordinate their efforts to acquire the ILECs' permission through the use of a standard release.

**ITEM EIGHT:** Has SWBT provided white pages directory listings of customers of other telecommunications carrier's telephone exchange service, pursuant to section 271(c)(2)(B)(viii) of FTA96 and applicable rules promulgated by the FCC?

**RECOMMENDATIONS**: In addition to the recommendations addressed above in the **public interest** section, and the **OSS** and **performance standard** sections addressed below, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. SWBT shall be required to provide CLEC resellers with the opportunity to review and correct white pages directory listings prior to the date white pages directory listings are published in telephone directories to sustain its burden of proof with regards to the nondiscriminatory access standard between and among carriers;

2. SWBT shall allow CLECs to choose whether their white page listings are interspersed with SWBT listings or whether they are separate from SWBT's listings;

3. SWBT shall allow CLEC resellers the same options as facilities-based CLECs for distribution of white page telephone directories;

4. SWBT shall institute a procedure to permit CLECs to adhere advertisements to the white pages directory.

**ITEM NINE:** Has SWBT provided nondiscriminatory access to telephone numbers for assignment to the other telecommunications carrier's telephone exchange service customers, pursuant to section 271(c)(2)(B)(ix) of FTA96 and applicable rules promulgated by the FCC?

**RECOMMENDATION:** The Commission concludes that SWBT has satisfied the requirements of this checklist item with no further action.

**ITEM TEN:** Has SWBT provided nondiscriminatory access to databases and associated signaling necessary for call routing and completion, pursuant to section 271(c)(2)(B)(x) of FTA96 and applicable rules promulgated by the FCC?

**RECOMMENDATION:** The Commission concludes that SWBT has satisfied the requirements of this checklist item with no further action.

**ITEM ELEVEN:** Has SWBT provided number portability, pursuant to section 271(c)(2)(B)(xi) of FTA96 and applicable rules promulgated by the FCC?

**RECOMMENDATIONS**: In addition to the recommendations addressed above in the **public interest** section, and the **OSS** and **performance standard** sections addressed below, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. SWBT shall take corrective measures to minimize the manual intervention of its mechanized process in the provision of interim number portability (INP). SWBT shall provide at least three months of data beginning May 15, 1998, to this Commission and to the participants to ensure that CLEC customers do not lose service during the INP process;
2. The Commission has concerns relating to SWBT's delayed implementation of permanent number portability (PNP) as well. Delays in the implementation of PNP place competitors at a disadvantage, because interim solutions do not provide parity; staff, therefore, recommends that some measure be taken to address the potential for further delays in PNP implementation and the consequent detrimental effect on competition and that this issue be explored in more detail in the collaborative process;
3. SWBT shall set forth its policy on route indexing and other forms of INP, including the terms and conditions upon which it is offered;
4. SWBT shall demonstrate that it has an approved tariff providing for PNP.

**ITEM TWELVE**: Has SWBT provided nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of FTA96, pursuant to section 271(c)(2)(B)(xii) and applicable rules promulgated by the FCC?

**RECOMMENDATIONS**: In addition to the recommendations addressed above in the **public interest** section, and the **OSS** and **performance standard** sections addressed below, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. In areas where SWBT offers optional two-way extended area service (EAS) arrangements, CLECs should have the opportunity to negotiate the interconnection rates, terms, and conditions for similar two-way arrangements with SWBT. SWBT shall be required to complete calls placed by its customers to a CLEC's two-way EAS customers as local calls provided SWBT and the CLEC have negotiated appropriate compensation for such traffic;
2. In SWBT's intraLATA dialing parity docket, Commission staff had requested that SWBT be required to file "written procedures regarding carrier-neutral, administrative and other processes it will use to implement customer selection of another intraLATA toll carrier and to provide intraLATA toll dialing parity." At this time, however, SWBT has not yet provided the Commission with any guidelines or scripts SWBT plans to use for intraLATA PIC (primary interexchange carrier) selection. SWBT has merely stated that it plans to use the same processes that have been in place for interLATA PICs, and that it has no additional details of its carrier selection process for intraLATA PIC. This issue needs to be resolved before SWBT can satisfy this checklist item.

**ITEM THIRTEEN:** Has SWBT provided reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of FTA96 pursuant to section 271(c)(2)(B)(xiii), and applicable rules promulgated by the FCC?

**RECOMMENDATIONS**: In addition to the recommendations addressed above in the **public interest** section, and the **OSS** and **performance standard** sections addressed below, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. SWBT shall be required to abide by the Commission's ruling on compensation for internet service provider (ISP) traffic in Docket No. 18082 with respect to other CLECs. ISP traffic shall be classified as local traffic and compensated at the local interconnection rates contained in the specific SWBT-CLEC agreement, unless the agreement specifically classifies ISP traffic as non-local traffic. SWBT's obligation to pay reciprocal compensation should not be conditioned on any terms, nor should the CLECs be required to seek arbitration to receive such compensation;
2. Appropriate traffic records shall be exchanged between SWBT and CLECs to facilitate the payment of mutual compensation for calls;
3. Compensation for expanded local calling service (ELCS) traffic shall be consistent with the Commission's decision in the mega-arbitration. EAS traffic, including ELCS traffic, shall be subject to the lesser of the cost-based interconnection rates or the interconnection rates in effect between SWBT and other incumbent LECs for such traffic.

**ITEM FOURTEEN:** Has SWBT provided telecommunications services available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of FTA96, pursuant to 271(c)(2)(B)(xiv) and applicable rules promulgated by the FCC?

**RECOMMENDATIONS**: In addition to the recommendations addressed above in the **public interest** section, and the **OSS** and **performance standard** sections addressed below, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to an affirmative answer on this checklist issue.

1. SWBT shall develop procedures to assure that the provision of voice mail and other unregulated services provided by a SWBT affiliate will continue uninterrupted during the transition from one local telephone provider to another. This process will necessitate coordination with SWBT's voice mail subsidiary to assure that voice mail is not disconnected, unless a CLEC or customer requests disconnection of the voice mail service. Should the voice mail subsidiary find this process unreasonable, the subsidiary can always verify with the customer or CLEC the need to continue the provision of voice mail, without undue harm to the subsidiary;
2. SWBT shall revise its procedures to ensure that all promotions of its telecommunications services are done only after adequate notification has been provided to CLECs. Adequate notification includes the provision of notice, at least thirty days in advance of the proposed implementation date for any promotion. Additionally, SWBT shall communicate with all its CLEC customers to obtain information indicating which department or principal should receive promotional material. This would ensure the timely receipt of information provided by SWBT to the department that is required to act on behalf of the CLEC for such promotions. Finally, SWBT shall provide promotional material to all CLECs in a consistent matter, regardless of whether they are purchasing resold services as a result of an interconnection agreement or tariff;
3. The Commission agrees that most of the rulings related to customer specific contracts must be decided during the docketed proceeding. However, the FCC determined in its decision in BellSouth/South Carolina, that an RBOC must provide customer specific contracts for resale at a wholesale discount in order to meet this checklist item. To the extent SWBT wants to provide proof that it is meeting this checklist item, SWBT shall change its policy to reflect compliance with the FCC's decision;
4. At the hearing, SWBT indicated it would provide a discount on ALL promotions, regardless of duration, *e.g.*, 30-day promotions. SWBT shall provide documentation of such.

## Performance Measures

**RECOMMENDATIONS**: In addition to the recommendations addressed above in the **public interest** and **checklist item** sections, and the **OSS** sections addressed below, the Commission recommends the following measures and requirements as a beginning point, the details of which could be established in the collaborative process.

1. The Commission recommends that the concept of broad, outcome-based performance measures be explored for interconnection, UNEs, and resale;
2. The Commission shall consider the appropriateness of monetary penalties, including discounts to rates, as a sanction for nonperformance to the extent SWBT misses due dates in the future. The monetary penalties shall be set a level sufficient to discipline non-compliance and to insure self-enforcement;
3. SWBT shall establish that it has a consistent policy and time deadlines in responding to CLEC inquiries, as well as trouble and repair reports, and should design performance monitoring to measure its responsiveness to CLECs;
4. The Commission concurs with SWBT that the required measurement for E911 is the length of time required to clear an error; however, the definition and details of the measure should be established during the collaborative process;
5. SWBT shall provide measurements with regard to the timeliness of E911 database updates to establish that the 911 service provided to the CLECs is equivalent to that which SWBT provides to itself;
6. Benchmarks shall be established and reports made on performance measurement for a period of three months that demonstrate the timeliness of the E911 database updates for the CLECs and for SWBT. Specifically, a measurement shall be developed quantifying the amount of time that elapses between the time a CLEC's customer records are received by SWBT until the time these records have been accepted or rejected from the E911 database. A corresponding analogous measurement showing the timeliness of SWBT's own updates shall be reported for the same three month period;
7. SWBT shall initiate a policy to conduct traffic studies by obtaining busy hour data to know how a trunk group is performing and to know whether that trunk group needs augmenting. As a part of the traffic study, SWBT shall obtain peg overflow and usage counts, to determine the amount of lost traffic into a CLEC's switch from both tandems and end offices. These studies shall be made available to all interconnecting CLECs;
8. SWBT shall provide at least three months of data on all performance measures;
9. SWBT shall establish an Internet site where it will post all of its historical performance measurement reports for non-restricted use by interested parties on a monthly basis;
10. The Commission generally agrees with the supplementation as recommended by the Department of Justice (DOJ). SWBT shall provide those additional performance measures to CLECs, as well as additional measures established by the Commission, FCC, or the DOJ.

Once established, all CLECs shall be allowed to amend or MFN into the supplemented performance measures;

11. The following specific measures shall be established: (1) performance measures related to the access to be offered by SWBT to enable CLECs to combine UNEs; (2) speed of processing requests to accessing poles, conduits, and rights-of-way; and (3) number of days to complete physical collocation facilities;

12. SWBT should establish the following measures: (1) a measurement which would include the average delay days for all SWBT caused missed due dates; and (2) the percentage of all SWBT caused missed due dates greater than 30 days. The Commission also believes that a measure reflecting coordinated conversions should be developed. SWBT shall discuss with CLECs the development of performance measurements that relate to premature disconnect and the coordinated customer conversion process and jointly develop measurements that would enable both parties to track parity in the process;

13. Because the current process for updating directory listings activity for CLECs and independent companies are manual, the Commission concludes that SWBT add the following measures: (1) directory listings database update completion interval; (2) directory listings database update interval; and (3) directory listings electronic interface availability;

14. Because the process employed by SWBT for Operator Services (OS) and Directory Assistance (DA) is the same as that used by CLECs and other independent companies, the measurements proposed by SWBT for OS/DA should provide adequate information making the additional measures unnecessary to ensure parity for this category. The measurements provided in this category shall include: (1) Grade of Service; and (2) Average Speed of Answer. Furthermore, the measures shall be reported aggregated for SWBT and for CLECs;

15. Measures shall be established to assure parity in the provision of interim number portability;

16. The Commission finds that SWBT must provide measurements for interconnection trunks for all CLECs to assure nondiscriminatory treatment. The measurements shall include: (1) Percent Trunk Blockage; (2) Common Transport Trunk Blockage; (3) Distribution of Common Transport Trunk Groups Exceeding 2%; (4) Percent Missed Due Dates; and (5) Average Trunk Restoration Interval along with the standard deviation. The measurements provided shall include data for individual CLECs, all CLECs, and SWBT;

17. SWBT is contractually required to file performance measures for different types of unbundled loops and resale services in the approved AT&T and MCI interconnection agreements. As an additional requirement, the performance measures related to DS-1, DS-3 and higher capacity loops and dedicated transport should be tracked separately;

18. "Average Time to Return Firm Order Commitment" shall also include SWBT's own internal performance in order to compare it with its performance provided to CLEC;

19. SWBT shall provide a measurement of the performance it provides to its own customers as related to "percentage of Trouble Reports Within 10 days of Installation" and "Percentage of Trouble Reports Within 30 Days of Installation;"

20. SWBT shall include an additional measure "Delayed Orders Cleared After 30 Days." This measurement shall be reported for loop by separate capacity category;

21. SWBT shall report comparative data on NXX loaded and tested prior to local exchange routing guide (LERG) effective date, and Mean Time to Repair for NXX Troubles;

22. SWBT's Network Performance measures shall include Ratio of Calls Blocked to Calls Attempted;

23. SWBT should develop a process for simulation modeling for those measures for which actual results are not available or are so limited that a statistical comparison is not feasible;

24. SWBT shall implement TCG's suggestions as far as the kinds of benchmarks to establish to measure SWBT's performance in the area of directory assistance and operator call completion;

25. SWBT's performance data shall be further disaggregated, consistent with the discussions of the Office of Public Utility Counsel (OPC) and the testimony of SWBT witness Dysart;

26. The Commission recommends that a measure reflecting coordinated conversions should be developed. SWBT shall work with the CLECs and Commission Staff to develop measures relating to premature disconnect and the coordinated customer conversion process and develop measurements that would enable all parties to track parity;

27. The issue of auditing shall be addressed further in the collaborative process between SWBT, the participants, and Commission Staff. SWBT must allow CLECs to audit the underlying performance data used in calculating the required measure to provide CLECs the ability to satisfy any concerns that the performance measures "mask" discriminatory treatment, *i.e.*, disparate treatment in a particular exchange. As an initial matter, the Commission believes it is appropriate for the requesting CLEC to bear the costs associated with such an audit. However, if the CLEC demonstrates that SWBT has consistently provided discriminatory and/or lower grade service than it provides to itself, SWBT is required to refund such fees. If necessary, the post-interconnection dispute process may be used to resolve disputes regarding the payment of such fees. In such a process, it may be appropriate to consider attorneys' fees and litigation costs to be part of the overall audit costs;

28. Performance penalty issues need to be resolved. Issues for the collaborative process include the type of penalty, level of penalty, and the appropriateness of any necessary safeguards to protect CLECs from sporadic performance and SWBT from random fluctuations. For any measure, when SWBT's performance substantially deviates from parity, *e.g.*, more than one standard deviation for three consecutive months, the Commission recommends that a root cause analysis be performed to determine the cause of the disparity. In other words, SWBT must investigate exceptionally good and exceptionally bad performance results;

29. In recognition of the New York Public Service Commission's ruling in Bell Atlantic's Section 271 docket and the concerns raised by participants in this docket, the Commission believes that the performance penalty structure in the AT&T and MCI interconnection agreements with SWBT, which was largely negotiated, may not be adequate to assure nondiscriminatory treatment. Instead, during the collaborative process, proposals relating to a reduction in resale/UNE/interconnection rates should be considered if, prospectively, the Commission determines that SWBT has failed to meet the performance requirements, or engaged in discriminatory practices against CLECs;

30. The Commission recommends that additional safeguards be considered if performance penalties are determined to be insufficient to restrain anticompetitive behavior after SWBT obtains § 271 relief. Such a procedure may allow the Commission to issue a cease and desist order affecting SWBT's ability to accept new in-region interLATA customers if the Commission determines that SWBT has provided sub-standard and/or discriminatory service to CLECs, such that CLECs do not have a meaningful opportunity to compete in local markets. This issue is more broadly discussed in the public interest section;

31. SWBT shall be required to allow a CLEC that was not a party to the mega-arbitration to include those performance measures while allowing the CLEC to raise new issues that were not arbitrated or negotiated during the mega-arbitration hearing through further negotiation or arbitration and shall explore development of a tariff containing performance measures and public availability of performance measure data;

32. Consistent with the attachment-by-attachment MFN philosophy, SWBT shall allow a CLEC that was not a party to the mega-arbitration to adopt the performance measures without having to adopt the separate and distinct provision on performance penalties;

33. SWBT shall provide all the performance data required by its interconnection agreements with AT&T and MCI, including the average response time for preorder interfaces, provisioning accuracy, average time to return firm order commitments (FOCs), mean time to return service, order process percent flow-through, LSC speed of answer, billing accuracy, billing timeliness, or any measures with respect to UNEs or design services.

## Operations Support Systems (OSS)

RECOMMENDATIONS: In addition to the recommendations addressed above in the **public interest**, **checklist item**, and the **performance standard** sections above, the Commission recommends the following, the details of which could be established in the collaborative process. The Commission also includes a brief discussion relating to the relationship between interim and permanent interfaces to provide some context for the specific recommendations.

***Relationship between interim and permanent interfaces:***

There are a number of interim and permanent OSS interfaces discussed in these comments. In particular, at least for CLECs willing to move to an EDI (Electronic Data Interexchange solution), EASE (Easy Access Sales Environment) is an interim interface for resale and UNE switch/port combinations, LEX (Local Service Request Exchange System) is an interim solution for resale and UNE orders, VERIGATE (Verification Gateway) and DataGate are interim measures for preordering functions. SWBT's ultimate obligation is to develop a real-time, interactive, EDI gateway based on national standards.

As the final stages of EDI development are in progress, SWBT's § 271 relief should not be rejected on this issue if certain conditions are met indicating that the OSS systems in place

meet the requirements set out by the Commission and the FCC. These conditions include the following:

1. SWBT's interim measures provide flow-through and are modified as discussed in the specific recommendations contained herein;

2. SWBT continues to develop its EDI interface in good faith; this issue should be explored in more detail during the collaborative process. (Some form of adjustment may be necessary to offset the necessity of CLECs to undertake dual entry prior to EDI development being completed to the Commission's satisfaction, if SWBT does not meet its implementation dates for EDI development. Potentially, an interim discount on SWBT's electronic service order charge may be appropriate.); and

3. Sufficient procedures are in place to transition from interim measures to permanent solutions.

***Specific Recommendations:***

1. OSS shall be addressed in the collaborative process. The Commission believes implementation of both the spirit and letter of these recommendations would lead to an affirmative answer on OSS:
2. SWBT shall establish that all of its OSS systems for pre-ordering, ordering, provisioning, maintenance and repair, and billing are at parity;
3. SWBT shall establish that all of its electronic OSS systems for pre-ordering, ordering, provisioning, maintenance and repair, and billing are at parity and provide flow-through without the necessity of manual intervention;
4. SWBT shall conform its technical documents to meet the LEX and EDI interfaces. SWBT's LEX and EDI interface, at the time of the hearing, did not sufficiently follow the technical documentation provided by SWBT to CLECs;
5. SWBT shall modify LEX to better integrate LEX with VERIGATE, a pre-ordering apparatus. SWBT should develop the capability necessary to allow more efficient order preparation, beyond "Cut and Paste" functionality, in order to prevent a CLEC's sales representative from re-keying certain information multiple times when it is not necessary. SWBT's LEX system, at the time of the hearing, could not be used in a manner reasonably comparable to the EASE interface used by SWBT for its retail operations;
6. SWBT shall undertake further development of LEX and EDI to achieve the flow through capabilities for both UNE and Resale orders. LEX and EDI's electronic flow through, at the time of the OSS demonstration, was not sufficiently comparable to that of SWBT's EASE system to provide nondiscriminatory access to CLECs. Further flow through capability is

necessary. SWBT shall provide data on the rejection rate for orders processed to demonstrate the new flow through capability achieved through Phase I implementation;

7. SWBT shall demonstrate that improved flow through capability enables SWBT's OSS to handle commercial volumes;

8. SWBT shall provide further explanation regarding the disparity in EASE flow through rates in order to ascertain whether EASE is provided in a nondiscriminatory manner;

9. SWBT shall complete the development of EASE for UNE switch/port combinations;

10. Further review of SWBT's OSS training is necessary to determine whether SWBT is providing sufficient training for CLECs to effectively use the interfaces provided by SWBT;

11. Delays relating to LEX and EDI batch processes need to be reduced and transitioned to real time. SWBT shall demonstrate that such delays have been reduced;

12. SWBT needs to develop the procedures to provide timely, accurate information regarding order errors, jeopardies, and CLECs' access order status information;

13. SWBT needs to implement adequate safeguards to assure timely, efficient, parity performance for the manual orders processed by the LSC and CLEC questions directed to LSC. The Commission, therefore, recommends that this issue be explored in more detail during the collaborative process among SWBT, the participants, and Commission Staff. Further review of performance measures may be necessary to provide such a safeguard;

14. SWBT shall either improve the preordering interfaces available to CLECs to provide sufficient access to customer information and/or clarify the record to show that CLECs have parity access to customer service records, *e.g.*, ISDN, complex services and design services;

15. To the extent SWBT's access to the PREMIS database is at the customer service representative level, SWBT shall provide sufficient access to that database system's information and functionality in order to provide parity access;

16. SWBT shall provide access to SORD (Service Order Retrieval Distribution) and LFACS (Local Facilties Access System) at cost-based rates, terms, and conditions. As discussed previously, SWBT would have to provide training necessary to allow CLECs obtain parity access to SORD and LFACs;

17. SWBT shall be required to demonstrate, by providing at least three months of data, that it is providing CLECs with service that meets the performance standards established in this proceeding and in its interconnection agreements;

18. The Commission finds that SWBT does not make available the ability for a facilities-based CLEC to supplement pending service orders or receive timely jeopardy notifications, error notifications, or workflow confirmations. SWBT must either make this capability available to CLECs electronically or demonstrate that SWBT's customer service representatives do not have such access;

19. To provide necessary notifications, SWBT shall fully develop the jeopardy notification function into its EDI interface. This development should also be incorporated into the Order Status Toolbar function;

20. Although fax rejects may be appropriate when a CLEC provides its orders via fax, SWBT shall provide an electronic means for such notification when a CLEC uses an electronic means to place its orders with SWBT;

21. SWBT does not provide data as to the amount of time it takes SWBT to process and transmit reject notifications to CLECs. Moreover, SWBT could not provide specific goals and procedures in response to questioning from the Commissioners so actual performance could be measured against a benchmark. SWBT shall implement such goals and procedures so CLECs can regularly receive this information timely enough to correct such errors without affecting customer service. Such goals and procedures provide a CLEC with the ability to smoothly convert a customer to its service;

22. SWBT must make clear to CLECs the effect of the various stages of an order's "completion" to avoid confusion. To the extent this issue is one of communication, this issue can be addressed in the policy manual discussed in the public interest section of these comments;

23. The Commission, like the FCC, believes that actual commercial usage is the most probative evidence concerning a system's ability to handle large commercial volumes. The Commission recommends, to the extent there is no actual commercial usage or third party testing, alternative means for assessing system performance be developed in the collaborative process. For example, as greater flow-through is developed, commercial volume concerns may be eased as the representative hours necessary to input orders directly into SORD will be lessened. However, even after the potential manual "bottleneck" issue is resolved, there may remain a need to stress test SWBT's OSS systems before an affirmative recommendation is made on this issue;

24. A record on billing issues should be developed further during the collaborative process. The FCC determined that this information is necessary because "competing carriers that use the incumbent's resale services and unbundled network elements must rely on the incumbent LEC for billing and usage information. The incumbent's obligation to provide timely and accurate information is particularly important to a competing carrier's ability to serve its customers and compete effectively." A BOC must also provide detailed evidence to support its claim that it is providing billing on terms and conditions that are nondiscriminatory, just and reasonable. This information should include measures that compare the BOCs performance in delivering daily usage information for customer billing to both its own retail operation and that of competing carriers;

25. SWBT must resolve the double-billing and other billing issues raised during this proceeding and bring forth proof that such problems have been adequately addressed;

26. SWBT shall either limit requirement that a single CLEC obtain multiple OCNs (operating company numbers) or AECNs (alternate exchange company number) or demonstrate a necessity for such requirement;

27. SWBT shall provide CLECs with sufficient definition or information to decipher the downloads of information that a CLEC needs to validate addresses, determine calling scope, and determine feature availability without having to access SWBT's systems;

28. SWBT shall provide parity access to consolidated CSRs for business customers that have more than 30 lines or that have any design services such as Centrex. SWBT must enhance

the ability of its interfaces to handle these order types or demonstrate that parity is provided at this time;

29. SWBT shall demonstrate that its back-end systems are operationally ready, to assure performance parity between CLECs and SWBT's retail operations for POTS (plain old telephone service) order completion, FOCs, installation intervals, trouble reports, design services, billing accuracy, or billing timeliness.

## Section 272 Compliance

**SECTION 272 COMPLIANCE:** Pursuant to section 271(d)(3)(B), has SWBT demonstrated that the requested authorization will be carried out in accordance with the requirements of section 272?

**RECOMMENDATIONS:** The Commission recommends the following, the details of which could be established in the collaborative process. The Commission believes implementation of both the spirit and the letter of these recommendations would lead to compliance with Section 272.

1. Although SWBT has established a separate affiliate to provide interLATA services in Texas, the actual corporate structure must be clarified. The Commission cannot determine from the record which SBC subsidiary and/or d/b/a will be used to provide interLATA services in Texas. SWBT shall supplement the record with the necessary information;
2. It is the Commission's position that the independence and separation of the SBLD board and officers from SWBT is not absolutely clear in the record. The record on this issue shall be further developed and clarified so that a determination can be made as to whether SBLD's officers, directors, and employees are separate from SWBT and its corporate chain of command;
3. SWBT's postings on the internet do not clearly delineate the services which are provided by SWBT to SBLD, the identified interLATA affiliate. The internet postings shall clearly identify this information. Additionally, the internet postings shall be revised to indicate which of the services are provided by SWBT to SBLD for Texas, for Oklahoma, or any other state served by the three SBC BOCs, or services provided by SWBT to support SBCS in its other activities outside the SWBT service areas;
4. SWBT shall make available public access to information on transactions between the BOC and the interLATA affiliate at the BOC's headquarters. After the hearing, SWBT in an affidavit reported it would move the records to San Antonio, Texas during the month of June 1998. SWBT should file a follow-up affidavit once the records are available in San Antonio. The Commission must have proof that the records will remain available in San Antonio pursuant to the FCC's order;
5. SWBT shall post on the internet a written description of the asset or service transferred along with the terms and conditions;