BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DIECA Communications, Inc. d/b/a Covad Communications Company Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Verizon Pennsylvania Inc. and Verizon North Inc. Pursuant to Section 252(b) of the Communications Act of 1934	Case Nos. A-310696F7000, A-310696F7001

SUPPLEMENTAL APPENDIX OF DECISIONS CITED IN THE BRIEF ON THE MERITS OF VERIZON PENNSYLVANIA INC. AND VERIZON NORTH INC.

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June 24, 2003

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No. C 97-0670 SI, No. C 97-1756 SI, No. C 97-1757 SI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OFCALIFORNIA

1998 U.S. Dist. LEXIS 17556

September 29, 1998, Decided
September 29, 1998, Filed [*1]

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff telecommunications carriers sought review of a decision by the California Public Utilities Commission (CPUC) that approved the decision of an arbitrator, subject to the CPUC's modifications, which set the terms of interconnection agreements between the telecommunication carriers and defendant incumbent carriers. The parties filed cross motions for summary judgment.

OVERVIEW: The telecommunication carriers alleged that the CPUC's actions regarding various terms of their interconnection agreements with incumbent carriers were not procedurally or substantively in compliance with the Telecommunications Act of 1996 (Act), *47 U.S.C.S. §§ 151*-614. They argued that the CPUC improperly considered record evidence from other CPUC proceedings to resolve unbundled network element rates and wholesale rates in the arbitration. The incumbent carriers challenged the CPUC's pricing methodology. The court held that: (1) the CPUC did not err by considering extra-record evidence during the arbitrations because the evidence was relevant and not precluded by the Act; (2) the access charges imposed on the telecommunication carriers by the incumbent carriers and allowed by the CPUC were unlawful and violative of *47 U.S.C.S. § 252*(d)(1); (3) the CPUC's restrictions on the telecommunication carriers' aggregation of end-user volume were deemed unreasonable because the CPUC used the wrong standard when it determined the reasonableness of resale restrictions; and (4) the CPUC did not act arbitrarily or unlawfully when it used a modified forward-looking cost methodology for pricing.

OUTCOME: The telecommunication carriers' motions for summary judgment related to access charges on unbundled network elements and aggregation of end-user volume were granted. The incumbent carriers' motions for summary judgment challenging the CPUC's pricing methodologies were denied. Several issues were remanded to the CPUC for further decision.

LexisNexis (TM) HEADNOTES - Core Concepts:

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JUDGES: SUSAN ILLSTON, United States District Judge.

OPINIONBY: SUSAN ILLSTON

OPINION: *ORDER REGARDING* PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

The three cases presently before the Court involve challenges to interconnection agreements arrived at pursuant to the Telecommunications Act of 1996, *47 U.S.C. §§ 151*-614. In each case, a telecommunications[*2] carrier (AT&T or MCI) which sought to enter the local telephone market negotiated with an incumbent carrier (Pacific Bell or GTE) to set the terms of an interconnection agreement; when these negotiations failed, the parties submitted to compulsory arbitration. In each case, an arbitrator reached a decision, and the California Public Utilities Commission ("CPUC") approved that decision subject to the CPUC's modifications. Pursuant to *47 U.S.C. § 252*(e)(6), the parties filed suit in this Court.

On February 20, 1998 and May 8, 1998, the Court heard argument on cross motions for summary judgment in these three cases. n1 A fourth case, AT&T v. Pacific Bell, C 97-0080 SI, is related to these actions, and an order regarding the parties' cross motions for summary judgment in that action was issued on May 11, 1998. That order is relevant to the instant cases in several ways. First, that order sets out the background of the Telecommunications Act of 1996 that the Court will not repeat here. Second, the two issues that were resolved in AT&T v. Pacific Bell, C 97-0080 SI -- (1) switched access charges on unbundled network elements and (2) aggregation of end user volume to qualify for[*3] volume discounts -- were raised in each of the instant cases. The Court adopts the reasoning and holdings set forth in AT&T v. Pacific Bell, C 97-0080 SI on these issues for purposes of the instant motions.

n1 Citations to the parties' papers will designate whether the papers were filed in connection with the first or second round of briefing.

Having carefully considered the papers submitted and the arguments of counsel, the Court hereby enters the following order.

STANDARD OF REVIEW

As set forth in greater detail in the Court's May 11, 1998 order in the related case of AT&T v. Pacific Bell, C 97-0080 SI, the Court reviews de novo the question of whether a state PUC's action was procedurally and substantively in compliance with the Act and its implementing regulations. With respect to federal court review of all other issues -- namely issues not involving whether the PUC acted in compliance with the Act and its attendant regulations -- the appropriate standard of review is "arbitrary and[*4] capricious." Under that standard, the "'agency's action is presumed valid if a reasonable basis exists for its decision.'" *U.S. West Communications v. Hix, 986 F. Supp. 13, 18 (D. Colo. 1997)* (quoting *Amisub (PSL), Inc. v. State of Colorado Dept. of Social Servs., 879 F.2d 789, 800 (10th Cir. 1989),* cert. denied, *496 U.S. 935, 110 S. Ct. 3212, 110 L. Ed. 2d 660 (1990)).* Applying this standard of review accords proper deference to the technical expertise of the state PUCs, while still ensuring that the state agencies are appropriately applying federal law.

DISCUSSION

1. The CPUC's Review of, and Reliance on, Extra-Record Evidence in *MCI v. Pacific Bell, C 97-0670 SI and MCI v. GTE, 1998 U.S. Dist. LEXIS 17556,* C 97-1757 SI

In both of its cases, MCI raises a procedural issue which requires discussion before reviewing the parties' substantive arguments. MCI contends that in the arbitration proceedings, the CPUC improperly considered cost studies from other CPUC proceedings in resolving questions concerning unbundled network element rates and wholesale rates in the MCI/Pacific Bell and MCI/GTE arbitrations. MCI argues that § 252 of the Act confines state commission review[*5] to the record of the arbitration proceeding and generally precludes consideration of extra-record evidence. Section 252(b)(4)(A) states that "the State commission shall limit its consideration of any petition ... (and any response thereto) to the issues set forth in the petition and in the response...." MCI contends that state commissions may only consider extra-record evidence in the limited circumstance described in § 252(b)(4)(B), which states,

The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

MCI contends that in both arbitrations the parties complied with the CPUC's requests for information, and therefore the CPUC was precluded from considering extra-record evidence.

The Court rejects MCI's arguments and concludes that the CPUC did not err by considering extra-record evidence[*6] during the arbitrations. The Act permits the CPUC to arbitrate the matters submitted for its consideration, and as another district court ruling on this issue has noted, "[a] hallmark of effective arbitration involves evaluation and circulation of relevant information." *GTE South Inc. v. Morrison, et al., 6 F. Supp. 2d 517, 525 (E.D. Va. 1998).* To preclude the CPUC from considering relevant information simply because the information was not presented to the CPUC in connection with a particular arbitration would be both inefficient and would frustrate the CPUC from successfully performing its important work of reviewing and approving interconnection agreements to ensure that these agreements comply with federal and state law.

2. Access Charges on Unbundled Network Elements: All 3 Cases

In all three cases, the CPUC allowed the incumbents, Pacific Bell and GTE, to impose per-minute interstate and intrastate access charges on AT&T and MCI when they lease the incumbent's unbundled network elements. AT&T and MCI challenge these access charges as violative of the cost-based mandate of § 252(d)(1) of the Act. AT&T and MCI argue that the access charges allow incumbents to[*7] recover costs that are not associated with the "cost ... of providing ... the network element." *47 U.S.C. § 252*(d)(1). GTE and Pacific Bell defend these charges as necessary (1) to allow incumbents to recover the "real costs" not included in the forward-looking unbundled network element rate and (2) to subsidize the costs of providing universal service.

In AT&T v. Pacific Bell, C 97-0080, this Court reviewed the matter de novo and found that these access charges violated § 252(d)(1). The Court noted that the CPUC itself has recognized that the challenged access charges are "not a cost-based item and [do] not recover the costs for any specific transport function." *Re Open Access to Bottleneck Services and a Framework for Network Architecture Development of Dominant Carrier Networks, Dec. 95-12-020, 1995 WL 767850,* at *5 (CPUC Dec. 6, 1995). Additionally, the Court found that the levying of interstate access charges is contrary to binding FCC regulations contained in an FCC order, In the Matter of Access Charge Reform: Price Cap Performance Review for Local Exchange Carriers: Transport Rate Structure and Pricing End User Common Live Charges, P 337, CC Docket No. [*8] 96-262 (Federal Communications Commission, May 7, 1997), codified at 47 C.F.R. §§ 61, 69 [hereinafter "Access Charge Order"]. The Court also rejected Pacific Bell's universal service argument, concluding that Section 252's pricing standard does not allow for incumbents to assess charges to subsidize universal service, and that to allow incumbents to continue to levy access charges to pay the costs of providing universal service runs counter to the Act's specific mandate that hidden subsidies for universal service be replaced with explicit funding. See *47 U.S.C. § 254*(e). Finally, the Court rejected Pacific Bell's argument that the access charges are an appropriate interim measure, noting that the access charges at issue were in place for a significant period of time and that the CPUC had confirmed by this litigation that it did not intend to modify its holdings.

The Court adopts the reasoning and holding articulated in its order in AT&T v. Pacific Bell, C 97-0080 SI, and accordingly finds that the access charges imposed on MCI and AT&T are unlawful. The Court hereby GRANTS the motions for summary judgment on this issue filed by MCI in MCI v. Pacific Bell, C 97-0670 [*9]SI and GTE v. MCI, C 97-1757 SI and filed by AT&T in GTE v. AT&T, C 97-1756 SI, and DENIES all cross motions.

3. Aggregation for Volume Discounts: All 3 Cases

In MCI v. Pacific Bell, C 97-0670 SI and GTE v. MCI, C 97-1757 SI, the CPUC prevented MCI from aggregating its individual end-user volume to qualify for volume discounts when purchasing services for resale from Pacific Bell or GTE. According to the CPUC, MCI could only qualify for volume discounts if the individual end-user would qualify for such a discount on its own. The CPUC imposed an identical restriction in GTE v. AT&T, C 97-1756 SI. In so ruling, the CPUC appears to have relied upon its reasoning approving the AT&T/Pacific Bell interconnection agreement. In that case, the CPUC overturned the arbitrator -- who had allowed AT&T to aggregate its end-user volume to qualify for discounts -- on the ground that a restriction on aggregation was both "reasonable" and "nondiscriminatory."

MCI and AT&T argue that this restriction flatly contradicts binding FCC regulations providing that resale restrictions on volume discounted services are "presumptively unreasonable." See In re Implementation of [*10] *Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996)* [hereinafter "Local Competition Order"] at P 953. According to MCI and AT&T, the CPUC did not address the "presumptively unreasonable standard," and under the FCC regulations, the only way for GTE and Pacific Bell to rebut this presumption was to establish that their avoided costs differ when selling in large volumes. MCI and AT&T assert that GTE and Pacific Bell did not make this showing. GTE and Pacific Bell contend that the CPUC did not ignore the FCC regulations, and moreover that the FCC regulations explicitly recognized that there may be "reasonable" restrictions on resale.

In AT&T v. Pacific Bell, C 97-0080 SI, the Court concluded that the CPUC applied an incorrect standard when deciding the "reasonableness" of the resale restrictions. For the reasons set forth in that order, the Court hereby vacates the CPUC's restrictions on aggregation, and GRANTS the motions for summary judgment on this issue filed by MCI in MCI v. Pacific Bell, C 97-0670 SI and GTE v. MCI, C 97-1757 SI and filed by AT&T in GTE v. AT&T, C 97-1756 SI, and DENIES all cross[*11] motions. However, because the FCC regulations recognize that there are situations in which incumbents can successfully rebut the presumption of unreasonableness that attaches to aggregation restrictions on resale, GTE and Pacific Bell may seek modification from the CPUC by presenting such evidence and the CPUC may evaluate such evidence in accordance with P 953 of the FCC's Local Competition Order.

4. Prices for Unbundled Network Elements: All 3 Cases

The same basic issue is presented in all three cases: does the Act require state commissions to use a particular type of cost model when pricing unbundled network elements? The Court reviews this question de novo. In all three cases, the CPUC purportedly adopted some version of a "forward-looking" cost model for pricing unbundled network elements. Forward-looking costs, also known as "true economic," "replacement," "long-run incremental," or "efficient" costs, reflect the costs that an efficient company constrained by competitive market forces would incur today in providing requested elements. A forward-looking model does not take account of historical costs (also known as "embedded" or "accounting" costs) that incumbents[*12] have incurred in building and investing in the network.

In MCI v. Pacific Bell, C 97-0670 SI and GTE v. MCI, C 97-1757 SI, MCI contends that although the CPUC ostensibly adopted forward-looking cost models, the specific cost models chosen are flawed and do not properly take account of forward-looking costs because the models do not rely on the most current and efficient technology when computing costs Thus, MCI argues that (1) the Act requires the use of forward-looking cost models to price unbundled network elements, and (2) the specific methodologies adopted by the CPUC are not truly forward-looking.

In GTE v. AT&T, C 97-1756 SI and GTE v. MCI, C 97-1757 SI, GTE objects to the CPUC's adoption of forward-looking cost models, arguing that the Act requires state commissions to allow for recovery of historical costs when pricing unbundled network elements. Both AT&T and MCI, while opposing GTE on the merits, first raise a procedural challenge to GTE's claims. AT&T and MCI contend that because GTE never maintained in the proceedings below that the CPUC should use a pricing method that accounted for historical costs, and in fact submitted forward-looking cost models to[*13] the CPUC, GTE should be barred from raising that argument in this Court. In response, GTE claims that because it maintained throughout the arbitration proceedings that the Act required recovery of historical costs, albeit not through pricing of unbundled network elements, the matter is properly before this Court

The Court concludes that GTE is procedurally barred from challenging the CPUC's methodology for pricing unbundled network elements because GTE did not challenge the use of forward-looking methodologies during the arbitrations. Instead, GTE repeatedly contended throughout both arbitrations that the CPUC should adopt an end-user surcharge to ensure that GTE has the opportunity to recover historical costs. n2 This Court's review is limited to the arguments presented and issues raised during the proceedings below, and as such is precluded from reviewing GTE's claims in its two cases.

n2 GTE alleged this "end-user surcharge" claim in its lawsuit against AT&T, see Complaint in GTE v. AT&T, C 97-1756 SI at P 54, but then never advanced arguments in support of this claim in this litigation. Accordingly, the Court considers this claim to be abandoned, and GRANTS AT&T summary judgment on this claim. In GTE v. MCI, C 97-1757 SI, GTE alleged in its complaint that the CPUC had failed to consider GTE's argument that the CPUC must establish some mechanism, such as an end-user surcharge, for recovery of GTE's historical costs. See Complaint in GTE v. MCI, C 97-1757 SI at P 54.

[*14]

In any event, the Court concludes that MCI is correct that the Act requires state commissions to use forward-looking pricing methodologies and precludes the recovery of historical costs, and thus even if GTE had not waived its claims, it would not prevail on the merits. In so concluding, the Court agrees with a recent decision, *GTE South Inc. v. Morrison, 6 F. Supp. 2d 517 (E.D. Va. 1998),* holding that the Act precludes the recovery of historical costs. As set forth below, the Court agrees with the Morrison court that § 252 of the Act is "best read as not allowing historical costs," and moreover that the procompetitive goals of the Act would be thwarted if incumbents were allowed to charge competitors rates that allowed for recovery of historical costs.

Section 252(d)(1) reads in relevant part:

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for the purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section[*15] --

(A) shall be --

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

GTE argues that if Congress had intended to refer only to forward-looking costs, Congress would have expressly inserted such a limitation into § 252. GTE argues that § 252's directive that prices "shall" be based on "cost" means that incumbents must recover their total historical costs. As support, GTE cites to other statutes, such as the Rail Passenger Service Act, *45 U.S.C. § 562*(a)(1), in which Congress has limited recoverable costs to a certain subset of costs.

The Court is not persuaded by GTE's interpretation of § 252. As AT&T argues, "cost" is an inexact standard and not subject to a single, immutable meaning. The Supreme Court has directed courts to refrain from reading a phrase into a statute when Congress has left it out. See *Keene Corp. v. United States, 508 U.S. 200, 208, 113 S. Ct. 2035, 2040, 124 L. Ed. 2d 118 (1993).* Moreover, the Supreme Court has held that[*16] "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17 (1983).* The Court finds it notable that in contrast to § 252(d)(1)(A), § 254(d)(1) of the Act specifies that pole attachment rates may not exceed "the sum of operating expenses and actual capital costs of the utility," and § 543(b)(3) directs the FCC to prescribe rates "on the basis of actual cost ... for installation and lease of the equipment used by subscribers to receive [basic cable services]." *47 U.S.C. § 254*(d)(1) (emphasis added); *47 U.S.C. § 543*(b)(3) (emphasis added). GTE's reliance on other statutes such as the Rail Passenger Service Act is unavailing because, as the Morrison court held rejecting the same argument, "interpretive inferences should be drawn from different sections in the same Act as opposed to different Acts." *Morrison, 6 F. Supp. 2d at 530* (citing Russello). Inconsistently, GTE argues that while this Court should[*17] be influenced by the Rail Passenger Service Act, the Court should not give any weight to the specific references to cost in § 254 or § 543 because these sections -- which together with § 252 are all part of the Communications Act of 1934, as amended -- were not passed at the same time as the Telecommunications Act of 1996. GTE provides no authority for the proposition that the Court should only draw interpretive inferences from provisions enacted at the same time.

GTE also argues that the language in § 252 providing that unbundled network element rates "may include a reasonable profit" requires the recovery of historical costs. *47 U.S.C. § 252*(d)(1)(B). GTE argues that it is impossible for it to receive a "reasonable profit" if it is not allowed to recover historical costs, since profit by definition refers to the excess of returns over costs. GTE contends that to disallow historical costs thus renders this clause meaningless, and that the Court should interpret § 252 in such a way as to give effect to all of its provisions.

The Court does not agree that precluding recovery of historical costs renders the "reasonable profit" language of § 252 superfluous. As AT&T and[*18] MCI argue, forward-looking rates can and do include a reasonable profit -- one that is based on a competitive market. The forward-looking cost models take account of the forward-looking cost of capital. Additionally, the Court notes that the Act only states that unbundled network element prices "may," not "shall," include a reasonable profit, and therefore the Act does not necessarily require that GTE receive a reasonable profit when leasing unbundled network elements.

GTE's final statutory argument is that full recovery of all costs is mandated by the Act's requirement that prices for unbundled network elements be "nondiscriminatory." *47 U.S.C. § 252*(d)(1)(A)(ii). Under this theory, the cost that GTE incurs when it provides the element to serve end users is higher than the cost a competitor incurs when it purchases the element, since the competitor does not have to pay any historical costs associated with the leased unbundled network element. However, if the "cost" to GTE of continuing to use a particular network element is not the historical cost, which is sunk and unavoidable, but rather the value GTE foregoes in the future by not putting the switch to a more productive use or[*19] by selling the switch for its current replacement value, then § 252's nondiscrimination mandate is not violated.

The Court is further persuaded that the Act requires the use of forward-looking price methodologies because these methodologies further the Act's goal of fostering competition in the nation's telecommunications industry. In a competitive market, a firm can recover only its efficient, forward-looking costs. Historical costs, in contrast, stifle competition because they create incentives to operate inefficiently and to adopt costly, rather than the most efficient, investment strategies. GTE argues that the legislative history of the Act supports its position that recovery of historical costs is mandated by the Act. GTE relies on a report discussing the House of Representatives' version of the unbundled network element pricing provision -- a provision GTE contends was "effectively incorporated" into the final version of the Act -- which states that the provision was meant to ensure "full compensation to the [incumbents] for the costs of providing services related to unbundling." House Rep. 204, 104th Cong., 1st Sess. 73 (1995). However, as stated above, GTE's argument [*20]assumes that "costs" means historical costs; if instead "costs" refers only to the forward-looking costs that incumbents incur in providing elements to competitors, the legislative history on which GTE relies is consistent with forward-looking pricing for unbundled network elements.

GTE's final challenge to the CPUC's adoption of forward-looking price methodologies is that the denial of full recovery for embedded costs constitutes a taking in violation of the Fifth Amendment. The Court concludes that GTE's takings claim is not ripe because GTE has not sought compensation through available administrative or judicial remedies. Although both the CPUC and the FCC have indicated that they will entertain claims that incumbents such as GTE are entitled to some form of compensation for unrecovered historical costs, GTE has failed to file claims with these agencies. n3 See Access Charge Order P 49 (stating that the FCC has "recognized the need to examine whether incumbent LECs should be compensated for any historical costs that they have no reasonable opportunity to recover as a result of the transformation from a regulated to a competitive marketplace" and that the FCC will "respond fully [*21]to concerns about historical cost recovery in a subsequent order."); CPUC's First Round Motion 13, 15 (in Local Competition Proceedings the CPUC issued a decision inviting incumbents to file an application to substantiate takings claims). As the Supreme Court has held, "if the government has provided an adequate process for obtaining compensation, and if resort to that process yield[s] just compensation, then the property owner has no claim against the Government for a taking." *Williamson Co. Regional Planning v. Hamilton Bank, 473 U.S. 172, 194, 105 S. Ct. 3108, 3121, 87 L. Ed. 2d 126 (1985)* (internal quotations omitted). Wholly apart from these administrative mechanisms, the Tucker Act, *47 U.S.C. § 1491* "presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute, [and thus] is available to provide compensation for takings that may result from" Congress' prescription of rates based on forward-looking costs. *Riverside Bayview Homes, Inc., 474 U.S. 121, 128-29, 106 S. Ct. 455, 459-60, 88 L. Ed. 2d 419 (1985).* Because GTE has not sought just compensation through existing administrative and statutory[*22] mechanisms, the Court concludes that GTE's takings claim is not ripe, and accordingly the Court does not review its merits.

n3 As of February 1998, GTE had not filed a claim with either the FCC or the CPUC. As the Court has not been informed otherwise, the Court assumes that GTE has not filed administrative claims since February 1998.

For the foregoing reasons, the Court hereby DENIES the motions for summary judgment filed by GTE on its challenges to the CPUC's pricing methodologies in GTE v. AT&T, C 97-1756 SI and GTE v. MCI, C 97-1757 SI. The Court now turns to MCI's claims that the methodologies adopted by the CPUC in MCI v. Pacific Bell, C 97-0670 SI and GTE v. MCI, C 97-1757 SI, although ostensibly "forward-looking," impermissibly allow for recovery of historical costs in violation of the Act.

A. MCI v. Pacific Bell, C 97-0670 SI

In MCI v. Pacific Bell, C 97-0670 SI the arbitrator rejected MCI's proposed cost model, the "Hatfield Model," and instead adopted, subject to[*23] the CPUC's modifications, a cost model that was filed by Pacific Bell in the CPUC's OANAD n4 proceeding known as the Total Services Long Run Incremental Cost Study ("TSLRIC"). The CPUC stated that the rates established by the MCI/Pacific Bell interconnection agreement were interim rates subject to modification based upon later determinations made by the CPUC in the OANAD proceeding.

n4 Prior to the arbitrations that are the subject of the instant cases, the CPUC was in the process of establishing permanent prices for unbundled network elements in its ongoing Open Access and Network Architecture Development Proceeding ("OANAD").

MCI objects to the CPUC's adoption of TSLRIC in the MCI/Pacific Bell arbitration on several grounds. First, MCI argues that the CPUC acted arbitrarily by adopting models from the OANAD proceeding. As discussed earlier, the Court rejects this argument, concluding that the Act does not prevent the CPUC from considering relevant, extra-record evidence when arbitrating and approving interconnection[*24] agreements. Second, MCI argues that the CPUC does not have the authority to establish interim rates. MCI relies on language in § *252*(b)(4)(C) of the Act which provides that a state commission "shall resolve each issue" and "shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request [for negotiation] under this section." *47 U.S.C. § 252*(b)(4)(C). The Court rejects this argument, finding that § 252(b)(4)(C) acts primarily as a time constraint and does not preclude state commissions from issuing interim decisions. Although subject to modification, an interim decision "resolves" the issues presented. The only question on review of an interim decision is whether that decision complies with the requirements imposed by the Act; simply because a decision is designated as interim by the CPUC does not mean that it is per se invalid.

MCI's third challenge to the rates is that the modified TSLRIC methodology adopted by the CPUC is not truly forward-looking because the CPUC did not assess the economic costs of network elements using current costs and current, efficient technology. According[*25] to MCI, a truly forward-looking model would only allow for recovery of costs "that a competitive firm would incur in constructing a local telephone network today using the most efficient available technology." MCI's First Round Motion in C 97-0670 SI at 5-6. MCI requests that the Court remand this issue to the CPUC "for further consideration."

Pacific Bell and the CPUC counter that the modified TSLRIC methodology used by the CPUC is truly forward-looking, and that MCI's own cost model is flawed. In its OANAD proceeding, the CPUC established as a fundamental cost principle that "cost studies shall be forward looking" and shall not reflect "embedded" costs. Re Bottleneck Services and Establishment of Framework for Network Architecture Development of Dominant Carrier Networks, CPUC Dec. No. 95-12-016 (R. 93-04-003; I. 93-04-002) (filed Dec. 6, 1995) [hereinafter "OANAD"]. In fact, as Pacific Bell argues, Pacific Bell urged the CPUC to permit recovery of a portion of its historical costs, but the CPUC did not include such historical costs in the unbundled network element rate structure. The Court rejects MCI's argument that simply because the pricing methodology was based upon an[*26] analysis of Pacific Bell's actual network, as opposed to a hypothetical network using the most current and efficient technology, that the methodology is not necessarily "forward-looking." Thus, the Court concludes that the CPUC did not err by using a modified TSLRIC methodology for pricing Pacific Bell's unbundled network elements. For these reasons, the Court hereby GRANTS MCI's motion to the extent that MCI argues that the Act requires forward-looking pricing methodologies, and DENIES MCI's motion for summary judgment insofar as MCI contends that the particular methodology adopted by the CPUC in the MCI/Pacific Bell arbitration is not truly forward-looking. n5

n5 This conclusion resolves MCI's related argument that it is entitled to a "true up" accounting for the difference between the interim rates and the final rates. Because the Court finds that interim rates are not per se unlawful, and because the Court concludes that the particular interim rates selected by the CPUC comply with the Act, the Court concludes that MCI is not entitled to a "true up."

[*27]

B. MCI v. GTE, C 97-1757 SI

In MCI v. GTE, C 97-1757 SI, the arbitrator adopted a GTE pricing model that it determined "approximates" the TSLRIC methodology. The methodology was originally submitted by GTE in the OANAD proceeding, and was rejected by the CPUC as not being forward-looking. In the OANAD proceeding, the CPUC directed GTE to revise its study in order to bring it into conformance with forward-looking principles. GTE filed two sets of changes to its costing study; MCI was provided with the opportunity to respond to both filings. During the MCI/GTE arbitration, the arbitrator recommended using GTE's revised OANAD cost studies, subject to further revisions by the CPUC. The CPUC agreed, and adopted GTE's OANAD cost studies after modifying them to reflect both "the comments of the parties to the Arbitrator's Report" and "the Telecommunication Division's comprehensive analysis of GTE's OANAD compliance filing." CPUC Decision Approving MCI/GTE Agreement, at 16-17.

In addition to MCI's general objection regarding extra-record evidence, MCI alleges that as a result of these "quick-fixes," MCI had "no opportunity to analyze or comment on the final rates adopted[*28] by the Commission." MCI's First Round Motion in C 97-1757 SI at 23:13-14. A review of the record reveals that MCI was provided with the opportunity to respond in the OANAD proceeding to GTE's revisions, and in any event, MCI could have sought reconsideration of the CPUC's decision. Thus, the Court rejects MCI's argument that it did not have an opportunity to be heard regarding the specific pricing methodology that the CPUC adopted.

MCI's remaining challenge to the pricing methodology is that it is not truly forward-looking. MCI relies on various criticisms of GTE's cost studies. However, as GTE and the CPUC argue, the CPUC modified GTE's cost studies, and therefore these criticisms are not relevant unless MCI can demonstrate that these deficiencies remain in the methodology actually adopted by the CPUC. MCI has failed to make this showing, and accordingly the Court rejects MCI's arguments. For the foregoing reasons, the Court hereby GRANTS MCI's motion to the extent that MCI contends that the Act requires the use of forward-looking pricing methodologies, and DENIES MCI's motion to the extent that MCI alleges that the particular model adopted by the CPUC is unlawful under the Act. [*29]n6

n6 For the same reasons as stated in note 5, supra, the Court rejects MCI's argument that it is entitled to a "true up."

5. Rates for Wholesale Discounts: All 3 Cases

In all three cases, competitor carriers challenge the prices the CPUC set for the wholesale services that incumbents are required to sell competitors. The Act imposes upon incumbents the "duty to offer for resale at wholesale rates any telecommunication service that the carrier provides at retail to subscribers who are not telecommunications carriers." *47 U.S.C. § 251*(c)(4). State commissions are directed to "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." *47 U.S.C. § 252*(d)(3).

A. MCI v. Pacific Bell, C 97-0670 SI

In *MCI v. Pacific Bell*, C 97-0670 SI, the CPUC set a wholesale discount [*30]rate of 17% for all services that Pacific Bell is obligated to sell to MCI. MCI argues that the CPUC arrived at a 17% wholesale discount by reference to studies submitted, and findings made, in an earlier CPUC proceeding, Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, Dec. No. 96-03-020 (Mar. 13, 1996) [hereinafter "Resale Decision I"], and argues that any reference to these other studies was improper. n7 As discussed earlier, in the Court's view the Act does not preclude the CPUC from considering relevant, extra-record evidence when reviewing and approving interconnection agreements. Accordingly, the only question presented to the Court is whether the 17% wholesale rate is consistent with the avoided cost methodology required under the Act, a matter that the Court reviews de novo.

n7 MCI also argues that Pacific Bell did not submit any evidence supporting a 17% wholesale discount rate. Pacific Bell disputes MCI's version of the facts, arguing that Pacific Bell in fact submitted evidence in the arbitration proceeding demonstrating that a 17% discount rate is a reasonable approximation of Pacific Bell's avoided costs. See Testimony of R.L. Scholl on Behalf of Pacific Bell, Declaration of Steven Rathfon in Support of Pacific Bell's First Round Motion in C 97-0670 SI at Exh. E at 353:6-12. It appears from the record that Pacific Bell did present evidence to the CPUC through the testimony of R.L. Scholl supporting a 17% discount rate, and therefore MCI's argument that the 17% rate is not "rationally connected" to the administrative record is incorrect.

[*31]

MCI contends that the avoided cost rates the CPUC established in Resale Decision I-- and that were presumably adopted in the MCI/Pacific Bell arbitration -- are based on a variety of policy considerations that are impermissible under the Act's avoided cost standard. Resale Decision I states:

Wholesale rates should be set high enough that [incumbents] are fairly compensated. Otherwise, this would give resellers an unfair competitive advantage relative to the [incumbents] as well as facilities-based [competitors]. Wholesale rates should be set low enough so that [competitor] resellers are not subject to price squeezes which impede or prevent the [competitors] from offering a competitive price.

Resale Decision I at 21. The CPUC later reaffirmed the wholesale rates set in Resale Decision I on the ground that they "offer the proper competitive balance for interim purposes." Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Services, Dec. No. 97-04-090 at 26-27 (Apr. 23, 1997) [hereinafter "Resale Decision II"]. MCI argues that "under Section 252(d)(3), state commission policy notions regarding 'fair' competition [*32]and 'competitive balance' (regardless of their validity) may not be used as the basis for setting the wholesale discount." MCI First Round Motion in C 97-0670 SI at 39:10-13.

In response, Pacific Bell argues that the interim rates established in Resale Decision I were based on avoided costs, and therefore are consistent with the Act. Pacific Bell quotes from the CPUC's Resale Decision II affirming the wholesale rates, in which the CPUC stated that the rates were "developed from the accounting data presented in evidence [and] ... the record supports the position that all of the incumbent LEC retail telecommunications services authorized for resale should be priced using a uniform discount based upon company-wide average avoided costs." Resale Decision II at 13-14. Pacific Bell contends that contrary to MCI's assertion, the CPUC fully recognized its duty to comply with the avoided cost standard in the Act and explicitly stated so in its Resale Decision II by holding that the discount rates "comply with the legal mandate established under the Act that all services offered for resale must be discounted based on avoided retailing costs." Resale Decision II at 13-14.

The Court concludes[*33] *that although there is some* discussion in the CPUC's Resale Decisions about being attentive to compensating incumbents and preserving competition, the CPUC repeatedly stated that it was basing the interim rates on avoided costs. Accordingly, the Court finds that the CPUC acted in accordance with the Act, and therefore DENIES MCI's motion for summary judgment on this issue, and GRANTS the motions for summary judgment filed by Pacific Bell and the CPUC.

B. GTE v. MCI, C 97-1757 SI

In GTE v. MCI, C 97-1757 SI, the CPUC set wholesale discount rates of 7% for residential services and 12% for other services. n8 MCI challenges these wholesale rates on grounds identical to those raised by MCI in MCI v. Pacific Bell, C 97-0670 SI. For the same reasons described above, the Court rejects these arguments and hereby DENIES MCI's motion for summary judgment on this issue and GRANTS the motions for summary judgment filed by GTE and the CPUC.

n8 In April 1997, the CPUC issued a decision modifying the interim wholesale rates established in Resale Decision I and applied the 12% wholesale discount to all of GTE's services, including residential. See Order Granting a Limited Rehearing of Decision 96-03-020 and Modifying Decision 96-03-020, Dec. No. 97-04-090 (Apr. 23, 1997).

[*34]

C. AT&T v. GTE, C 97-1756 SI

AT&T challenges the wholesale rates set in AT&T v. GTE, C 97-1756 SI on the ground that the method used by the CPUC is inconsistent with the Act's requirement that the wholesale rate be determined "on the basis of the retail rates charged to subscribers." *47 U.S.C. § 253*(d)(3). AT&T argues that the CPUC used the wrong mathematical formula to arrive at a wholesale rate of 12% for all services except residential access rates, and that this error resulted in a decrease of 4%. In arriving at this rate, the CPUC first determined what costs GTE would avoid by providing services at wholesale, as opposed to retail. Next, the CPUC divided that amount by GTE's total operating expenses, including non-retail expenses. AT&T argues that this formula is incorrect for two reasons. First, AT&T contends that the CPUC should have divided the avoided retail costs by the revenues associated with the retail services being provided, as opposed to dividing the avoided retail costs by GTE's total operating expenses. Second, AT&T argues that even if it is proper to divide by total costs, *these costs should be limited to total retail costs*, and should not include[*35] non-retail costs such as those associated with exchange access services. By including non-retail costs, AT&T argues that the denominator was inflated by approximately $600,000,000, and the discount was diluted from 16% to 12%.

The CPUC first responds that AT&T waived these arguments by not raising them during the CPUC's Local Competition Proceedings. However, regardless of whether AT&T raised these arguments during those proceedings, it is clear that AT&T raised these arguments during the arbitration of the interconnection agreement before the CPUC, and thus the Court finds that AT&T has not waived its objections. See Declaration of Lisa Goldberg in Support of AT&T's First Round Motion for Summary Judgment in C 97-1756 SI at Exh. E at 21. With regard to AT&T's first challenge, GTE argues that AT&T has not demonstrated that it was prejudiced by the fact that the CPUC based the discount rate on GTE's total operating expenses rather than on total operating revenues. While the Court makes no finding as to whether GTE's argument is correct, the Court concludes that AT&T has not established that it is inconsistent with the Act to use expenses rather than revenues. Because the Act[*36] is silent on this question, this is a matter on which the Court will defer to the CPUC and will only overturn the CPUC if it acted arbitrarily. The Court concludes that using expenses rather than revenues is reasonable, and therefore rejects AT&T's first challenge to the wholesale rates.

However, AT&T's argument regarding the inclusion of non-retail charges in the calculation of the wholesale discount rate is more persuasive, as the Act specifically provides that the wholesale discount must be based only on the "retail rates charged to subscribers ... excluding the portion thereof attributable to" avoided retailing costs. *47 U.S.C. § 252*(d)(3). The CPUC simply responds that the inclusion of exchange access services in the calculation is a permissible policy decision, without explaining how that decision comports with § 252(d)(3). GTE defends the wholesale discount by arguing that AT&T has not established that these access costs were included in the denominator when calculating the discount. It is clear from the CPUC's opposition papers, however, that such expenses were included in the calculations. Next, GTE argues that AT&T has not demonstrated that, even if such expenses were[*37] included in the denominator, that the numerator was not corrected to account for this error. AT&T responds that the record establishes that the numerator consisted solely of avoided retail costs. See id. at Exh. E, Tab 2 at 2. In any event, GTE did not demonstrate in its papers that the numerator was inflated to correct for any errors.

The Court concludes that by including non-retail costs in fixing the wholesale discount rate, the CPUC violated § 252(d)(3). During the arbitration, GTE conceded in its opening arbitration brief that no access costs would be avoided in the wholesale environment. See id., Exh. F at 39. Section 252(d)(3) provides that the wholesale discount rate is to be determined by excluding avoided costs from the retail rate: if access charges are not costs that will be excluded, then it follows that access costs cannot be a factor in calculating the wholesale discount rate. Accordingly, the Court GRANTS AT&T's motion on this issue, and DENIES the motions of the CPUC and GTE.

6. Denial of GTE's Changeover Costs in GTE v. AT&T, C 97-1756 SI

In approving the GTE/AT&T interconnection agreement, the CPUC eliminated a $17.50 fee that GTE sought[*38] to charge AT&T each time a customer switches its local service provider from GTE to AT&T. The CPUC provided two explanations for the elimination: (1) its belief that GTE had not requested changeover costs during the arbitration and (2) its determination that since it had not provided for changeover costs in the AT&T/Pacific Bell interconnection agreement, it would not do so in this case out of concern for parity. After the CPUC issued its order approving the GTE/AT&T interconnection agreement, it reconsidered the issue of changeover costs in connection with the CPUC's Local Competition Proceedings. In those proceedings, the CPUC determined that incumbents, including GTE, were entitled to changeover costs on an interim basis. GTE argues that the issue of whether the CPUC is required by the Act to provide changeover costs remains viable in this litigation unless and until the CPUC enters a final determination recognizing these costs.

GTE initially argues that the question of changeover costs was extensively arbitrated, and that the CPUC erred by finding to the contrary. The CPUC states that its finding was based upon the fact that GTE did not list changeover costs in GTE's statement[*39] of unresolved issues submitted with the request for arbitration. However, neither the CPUC nor AT&T argues in this litigation that the Court is procedurally foreclosed from considering GTE's claim, and accordingly the Court reviews the claim on its merits.

GTE contends that the Act requires that incumbents be paid changeover costs in order to make incumbents whole with respect to costs involved in providing resale services to competitors, a question that the Court reviews de novo. According to GTE, § 252(d)(3) is designed to "make the [incumbent] indifferent to whether it provides the service at retail or at wholesale; it will receive the same recovery of costs in both instances." GTE's First Round Motion in C 97-1756 SI at 30:8-10. GTE argues that to give effect to this principle, the avoided cost discount must be offset by the additional costs, including changeover costs, that are incurred in connection with the provision of such services to competitors at wholesale.

AT&T argues that nothing in the Act allows for GTE to recover changeover charges. AT&T contends that GTE's arguments are based on a strained interpretation of § 252(d)(3), and that if the Act required recovery[*40] of additional costs incurred in providing resale services to competitors, the Act would do so explicitly.

The Court concludes that while nothing in the Act requires the recovery of changeover costs, nothing precludes such recovery either. Thus, the Court DENIES GTE's motion to the extent that GTE requests the Court to declare that changeover charges are mandated by § 252(d)(3). However, nothing in this ruling precludes the CPUC from authorizing such charges, either on an interim basis or permanently.

7. Written Authorization for Release of Customer Information: MCI v. Pacific Bell, C 97-0670 SI and GTE v. MCI, C 97-1757 SI

In both the MCI/Pacific Bell and MCI/GTE interconnection agreements, the CPUC required that MCI obtain a customer's written authorization before the incumbents are required to give MCI certain information related to the customer's telephone service. The CPUC concluded that this information was "Customer Proprietary Network Information" ("CPNI") and that California Public Utilities Code § 2891 mandates that such information be disclosed only pursuant to written authorization by the customer. MCI argues that this information is not CPNI, and[*41] that in any event, the Act does not require written approval for the release of this information. Moreover, MCI claims that a recent FCC order provides that customer approval for disclosure can be obtained in many ways, including orally. As MCI contends that the CPUC's written authorization violates the Act and FCC regulations, the Court reviews this claim de novo.

The Act defines "customer proprietary network information" as:

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier;

except that such term does not include subscriber list information.

47 U.S.C. § 222(f)(1). MCI identifies the information at issue as including "the customer's correct billing name and address and the current services and features that the customer uses." MCI's Second Round Consolidated[*42] Motion, 19:20-21. MCI contends that this information is not CPNI because to meet the definition of CPNI, the information must be derived from the customer's use of telecommunications services. MCI arrives at this interpretation by arguing that the language "of use" in § 221(f)(1)(A) modifies "quantity, technical configuration, types, and amount."

The Court rejects MCI's reading, finding instead that "of use" only modifies the word "amount." Under MCI's interpretation, if "of use" modified "quantity," then "amount" would be rendered superfluous. It is a fundamental rule of statutory construction that if possible, courts must construe a statute so as to give effect to all of its provisions. See *Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 562, 110 S. Ct. 2126, 2132, 109 L. Ed. 2d 588 (1990)*. As such, § 222(f)(1)(A) includes as CPNI information regarding the "type ... of a telecommunications service subscribed to by any customer" -- the same information MCI wishes to obtain from incumbents without the customer's written authorization. Moreover, the FCC has recognized that CPNI includes "the types of service offerings to which the customer subscribes" as well[*43] as "the extent the service is used." Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order, CC Docket No. 96-115 (FCC rel. Feb. 26, 1998) at P 2. Accordingly, the information at issue constitutes CPNI.

Section 222 of the Act sets forth various protections for CPNI, including the requirement that telecommunications carriers obtain a customer's "approval" before disclosing the customer's confidential information to other parties. Section 222(c) provides in relevant part,

(c) Confidentiality of customer proprietary network information

(1) Privacy requirements for telecommunications carriers

Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, [*44]or used in, the provision of such telecommunications service, including the publishing of directories.

(2) Disclosure on request by customers

A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer.

47 U.S.C. § 222(c)(1)-(2). The circumstances under which MCI would be requesting CPNI from incumbents generally fall under § 222(c)(1). The Court concludes that while the plain language of § 222(c)(1) does not preclude the CPUC's written approval requirement, the FCC's recent order on CPNI suggests that this requirement is unduly restrictive.

On February 26, 1998, the FCC issued Implementation of the Telecommunications Act of 1996:

Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order, CC Docket No. 96-115 (FCC rel. Feb. 26, 1998) [hereinafter "CPNI Order"]. In the CPNI Order, the FCC issued general regulations regarding the use and disclosure of CPNI, and concluded specifically that the "approval" required by § 222(c)(1) could be oral, written, or electronic. [*45] "We find nothing in the language or design of section 222 that limits carriers to obtaining only written approval ...." Id. at P 110. The FCC concluded that § 222(c)(2)'s requirement of "written" approval, in contrast to § 222(c)(1)'s requirement only of "approval," suggests that "Congress did not intend to limit section 222(c)(1) to only written approval." Id. The FCC found that allowing carriers to obtain approval through written, oral or electronic means "comports with the language and design of section 222, and is consistent with the principles of customer control and convenience that are manifested in section 222." Id. at P 109.

GTE argues that the CPUC's requirement of written customer authorization is not inconsistent with the FCC's CPNI Order because the FCC held that oral and electronic authorization are acceptable in addition to written approval. The Court is not persuaded by GTE's argument because the FCC's Order suggests that California Public Utilities Code § 2891 may be preempted by the FCC as inconsistent with the Act. In its CPNI Order, the FCC specifically noted,

Because no specific state regulations are before us, we do not at this time [*46]exercise our preemption authority. Rather, we agree with NYNEX [a telecommunications carrier] that after states have had an opportunity to react to the requirements we adopt in this order, we should then examine any conflicting state rules on a case-by-case basis. State rules that likely would be vulnerable to preemption would include those permitting greater carrier use of CPNI than section 222 and our implementing regulations announced herein, as well as those state regulations that sought to impose more limitations on carriers' use. This is so because state regulations that would permit more information sharing generally would appear to conflict with important privacy protections advanced by Congress through section 222, whereas state rules that sought to impose more restrictive regulations would seem to conflict with Congress goal to promote competition through the use or dissemination of CPNI or other customer information. In either regard, the balance would seemingly be upset and such state regulation thus could negate the Commission's lawful authority over interstate communication and stand as an obstacle to the accomplishment and execution of the full purposes and objectives[*47] of Congress. Other state rules, however, may not directly conflict with Congress' balance or for example, those specifying various information that must be contained in the carrier's notice requirement, that are in addition to those specified in this order.

Id. at P 18. In the Court's view, there is at least a serious question as to whether requiring MCI to provide written customer authorization, as opposed to oral or electronic approval, imposes restrictions on MCI's use of CPNI inconsistent with § 222, as interpreted by the FCC.

The Court concludes that given the FCC's CPNI Order, and specifically given the language quoted above, the wisest course is to remand this matter to the CPUC for reexamination in light of the FCC's CPNI Order. MCI contends that remand is unnecessary because it is clear that the CPUC's decision violates the Act and the FCC's CPNI Order, and therefore that California law is preempted. However the FCC's CPNI Order clearly expresses a preference that the state PUCs be allowed to examine their policies and state laws before the FCC decides whether state laws are preempted. Furthermore, the Court rejects MCI's argument that California Public Utilities[*48] Code § 2891 is automatically and impliedly preempted by the Act, as the FCC explicitly stated that it was not at that time exercising its preemption authority. For the foregoing reasons, the Court hereby REMANDS this issue to the CPUC.

8. Collocation: GTE v. AT&T, C 97-1756 SI and GTE v. MCI, C 97-1757 SI

The Act requires incumbents to provide competitors with interconnection and access to the incumbents' unbundled network elements. See *47 U.S.C. § 251*(c)(2)-(3). Section 251(c)(6) of the Act requires incumbents "to provide ... for physical collocation of equipment necessary for interconnection or access to unbundled network elements at [its] premises." *47 U.S.C. § 251*(c)(6). "Physical collocation" allows an interconnecting competitor to lease segregated space at the incumbent's premises and to set up a mini-facility comprised of its own interconnection equipment in the leased space. The equipment is maintained by the competitor and is typically housed in a "collocation cage." An alternative to physical collocation is "virtual collocation," in which the interconnecting equipment is placed among the incumbent's equipment and operated and maintained by[*49] the incumbent. The Act expresses a clear preference for physical collocation over virtual collocation, allowing virtual collocation only if the incumbent "demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." Id.

As an initial matter, the parties dispute what effect this Court should give to the FCC's rules regarding collocation that were promulgated in the FCC's Local Competition Order. GTE contends that pursuant to *Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997)*, cert. granted, *U.S. , 118 S. Ct. 879, 139 L. Ed. 2d 867 (1998)*, these rules are not binding on either the CPUC or this Court, although they are persuasive. AT&T and MCI, on the other hand, argue that because Iowa Utilities Board did not specifically strike down the FCC's rules regarding collocation, these rules remain in force and are binding.

In Iowa Utilities Board, the Eighth Circuit held that "the FCC's authority to prescribe and enforce regulations to implement the requirements of section 251 is confined to the six areas in this section where Congress expressly called for the FCC's participation." *120[*50] F.3d at 806*. The Iowa Utilities Board court identified those areas as: § 251(b)(2) (number portability); § 251(c)(4)(B) (prevention of discriminatory conditions on resale); § 251(d)(2) (unbundled network elements); § 251(e) (numbering administration); § 251(g) (continued enforcement of exchange access); and § 251(h)(2) (treatment of comparable carriers as incumbents). As GTE correctly notes, the FCC's collocation regulations are promulgated pursuant to § 251(c)(6), a subsection not identified by the Eighth Circuit as within the purview of the FCC.

The Court finds that while Iowa Utilities Board certainly suggests that the FCC's collocation regulations are invalid on jurisdictional grounds, these regulations have not yet been stayed or overturned by a court of competent jurisdiction and are therefore binding on the CPUC and this Court. See *28 U.S.C. § 2342; Anderson Bros. Ford v. Valencia, 452 U.S. 205, 219-20, 101 S. Ct. 2266, 2274, 68 L. Ed. 2d 783 (1981); Sierra Club v. Sigler, 695 F.2d 957, 972 (5th Cir. 1983)*. The Eighth Circuit in Iowa Utilities Board declined a specific request that it "vacate the FCC's entire First Report and Order [Local[*51] Competition Order]," and limited its rejection "only to those [FCC rules] that we have specifically overturned in this opinion." *120 F.3d at 819*. The collocation rules were not among those "specifically overturned" by the Eighth Circuit, and therefore they are presently binding on the CPUC and this Court.

A. GTE v. AT&T, C 97-1756 SI

The AT&T/GTE arbitrator ruled that AT&T "may physically collocate any interconnection-related equipment for which space is available ... including equipment that can perform switching functions as well as interconnection functions so long as such multi-purpose equipment occupies no more floor space than would equipment that only performs interconnection functions." Arbitrator's Report at 9. In its decision approving the Agreement, the CPUC left this requirement undisturbed. GTE contends that the CPUC erred because the agreement requires collocation of "remote switching modules" ("RSMs"), which according to GTE are not "necessary for interconnection or access" as required by § 251(c)(6). GTE cites a long line of FCC authority for the proposition that switches are not necessary for interconnection, and that therefore the CPUC plainly erred[*52] by requiring collocation of this equipment. The Court reviews de novo whether the CPUC's collocation requirement violates the Act.

AT&T responds that GTE's argument is falsely premised on the notion that an RSM is a "switch." AT&T contends that an RSM is a "hybrid device that can be used to both interconnect and provide access to network elements and to perform limited and basic call routing or switching functions for a limited number of customers." AT&T's Second Round Motion/Opposition in C 97-1756 SI at 5:15-17. AT&T argues that the distinction between switching equipment and multipurpose, or hybrid, equipment such as RSMs is a critical one that the FCC recognized in its Local Competition Order. The FCC explained:

Modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute, that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled network elements.

Local Competition Order P 581. Thus, AT&T argues that the FCC has recognized [*53]that hybrid equipment can be collocated if it is "necessary" for interconnection. In defining "necessary," the FCC has held that an incumbent's duty to provide for physical collocation is not limited to equipment that is "indispensable" to interconnection or access, and instead extends to any equipment that is "used" or "useful" for such purposes. Id. at P 579. The FCC explained that a showing that a new entrant "could use other equipment to perform a similar function" does not demonstrate that the specified equipment is not "necessary" within the meaning of § 251(c)(6). Id. Further, the FCC provided that in any collocation dispute, the burden was on the incumbent "to prove to the state commission that such equipment is not 'necessary' as we have defined that term." Id. at P 580.

AT&T argues that the CPUC did not compel collocation of "switches" or "switching equipment," but of "interconnection-related equipment" that is also capable of "performing switching functions." AT&T argues that pursuant to the FCC regulations, the CPUC's decision to permit collocation of hybrid RSMs must be upheld. GTE argues that the effect of the CPUC's decision is to allow AT&T to collocate[*54] RSMs and any other multi-function equipment that could be considered to have one "interconnection-related" function, regardless of whether the equipment is actually used for interconnection. GTE argues that the arbitrator and the CPUC did not determine whether the RSMs are "actually used for interconnection or access to unbundled network elements" as required by the FCC's Local Competition Order. Instead, GTE argues that the CPUC simply issued a general rule that would allow a broad array of multi-function equipment -- including RSMs -- to be collocated. GTE also argues that the RSMs are not "necessary" for interconnection, and thus the Court should enter judgment in favor of GTE on this issue.

The Court concludes that the arbitrator and the CPUC did not determine, as required by P 581 of the FCC's Local Competition Order, whether the RSMs were actually going to be used for interconnection or access to unbundled elements. The Court agrees with AT&T that as a theoretical matter, the FCC regulations permit RSMs and other hybrid equipment to be collocated, provided that such equipment is used for interconnection. GTE is correct, however, that the language of the agreement sweeps too[*55] broadly by requiring collocation of "any interconnection-related equipment" containing at least one "interconnection function." Instead, the CPUC should have examined whether the particular equipment at issue -- RSMs -- are "actually used" for interconnection and access. The arbitrator's report, which the CPUC adopted, does not indicate that the arbitrator conducted this analysis. These questions are questions of fact, and are matters within the expertise of the CPUC. For that reason, the Court hereby REMANDS this narrow issue to the CPUC.

B. GTE v. MCI, C 97-1757 SI

In the GTE/MCI arbitration, the arbitrator concluded:

MCI asks that it be allowed to collocate switching equipment while GTEC refuses to permit this.

The FCC does not require [incumbents] to allow collocation of switching equipment. [citing P 581 of the FCC's Local Competition Order]. Furthermore, the Act only requires collocation of equipment that is "necessary for interconnection or access to unbundled network elements." GTEC has adequately demonstrated in this arbitration that collocation of MCI's switching equipment is not necessary for interconnection or access to [unbundled network[*56] elements]. Therefore, in accordance with both the FCC and the Act, GTEC shall not be required to provide collocation for MCI's switching equipment.

Arbitrator's Report, 51. The CPUC adopted the arbitrator's report on this issue, and the GTE/MCI agreement reads as follows: "MCI[] shall not be allowed to collocate equipment that is equipped to perform switching functions or provide enhanced services." GTE/MCI Interconnection Agreement, Art. IX, P5.1.

MCI contends that the CPUC's decision violates the Act and the FCC's Local Competition Order because it prohibits the collocation of all "switching equipment," regardless of whether such equipment is "necessary" for interconnection. The Court reviews this claim de novo. Specifically, MCI argued in the arbitration that GTE should be required to collocate MCI's RSMs because RSMs are necessary for MCI's interconnection with GTE's facilities. MCI contends that neither the arbitrator nor the CPUC analyzed whether RSMs are "necessary" for interconnection as defined by the FCC, and that the CPUC's decision violates the Act as interpreted by the FCC because it prevents MCI from obtaining collocation for multifunctional equipment, [*57] such as RSMs, that is necessary for interconnection.

The Court concludes that the CPUC's decision broadly prohibits collocation of any equipment "that is equipped to provide switching" in violation of the FCC's Local Competition Order. As discussed earlier, the FCC specifically stated that "multiplexing equipment" can be collocated if it is "used or useful" to interconnection, and in fact is "actually used" for this purpose. Thus, the FCC recognized that equipment that is capable of both switching and interconnection, but that is actually used for interconnection, could be collocated. The CPUC's decision impermissibly prevents any equipment that contains a switching function from being collocated, a result that is at odds with the FCC's Local Competition Order. For the same reasons as described above in connection with the GTE v. AT&T interconnection agreement, the Court hereby REMANDS this issue to the CPUC. On remand, the CPUC shall determine whether MCI's RSMs are "necessary" for interconnection as defined by the FCC.

9. Rebundling: GTE v. AT&T, C 97-1756 SI and GTE v. MCI, C 97-1757 SI

In its original complaints in both cases, GTE alleged that the CPUC[*58] violated the Act by allowing AT&T and MCI to purchase unbundled network elements from GTE and "recombine" these elements into the functional equivalent of full retail services. GTE alleged that such recombination allowed AT&T and MCI to evade the

Act's resale pricing standards. See Complaint in GTE v. AT&T, C 97-1756 SI at P 60; Complaint in GTE v. MCI, C 97-1757 SI at PP 16, 59. On December 15, 1997, GTE filed motions to supplement its complaints in both cases. GTE sought supplementation pursuant to Federal Rule of Civil Procedure 15(d) "in order to clarify legal issues" in light of the Iowa Utilities Board decision, which was issued after GTE's complaints were filed. In that decision, the Eighth Circuit rejected GTE's claim as originally framed in these cases that competitors may not achieve capability to provide telecommunications services completely through access to unbundled network elements. See *Iowa Utilities Board, 120 F.3d at 814.* However, the court also struck down an FCC regulation that required incumbents to provide network elements in an already bundled or pre-combined form. *Id. at 813.* By its motions to supplement, GTE sought to clarify that its[*59] claims included challenges to the CPUC's holdings, in both cases, requiring GTE to provide AT&T and MCI with network elements on an already bundled basis.

AT&T, MCI and the CPUC opposed GTE's motions to supplement, arguing that GTE's "clarifications" were in effect new claims, and that GTE had waived the new claims by failing to object during the arbitrations. While GTE disputed as a factual matter whether it had waived the challenges, GTE contended that that question was not relevant to the Court's decision on GTE's motions to supplement, as the waiver argument concerned the merits of GTE's claim. Rather, GTE argued that the "relevant inquiry is not how GTE would fare on the ultimate merits of the supplemented cause of action, but rather whether supplementing the complaints in response to new events will unfairly prejudice the defendants." GTE's Consolidated Reply in Support of Motion for Leave to File Supplemental Complaints, 1:18-20. The Court agreed with GTE that the focus for purposes of GTE's motions was whether defendants would be prejudiced, and allowed GTE to file supplemental complaints. The parties at that time also requested that the Court defer ruling on GTE's rebundling[*60] claims due to then-pending petitions for modification that GTE had filed with the CPUC on the rebundling issue.

In June 1998, the CPUC filed with this Court a copy of its decision denying GTE's petition to modify in GTE v. MCI, C 97-1757 SI. The CPUC denied GTE's request "since the issue of GTEC's obligation to recombine network elements was not raised during the arbitration ... and hence is not appropriately before us in this docket." Opinion Denying GTEC's Petition to Modify Decision 97-01-045, at 1. The CPUC noted, however, that the matter of *recombining network elements will be* considered by the CPUC in another proceeding to which GTE is a party, and that GTE may seek relief in that forum. Id. Since the parties have not informed the Court otherwise, the Court assumes that GTE's petition for modification in GTE v. AT&T, C 97-1756 SI is still pending before the CPUC. The Court anticipates that, for the reasons set forth in the CPUC's recent order, the CPUC will similarly deny GTE's petition to modify the GTE/AT&T interconnection agreement.

After carefully reviewing the records of both arbitrations, the Court agrees with AT&T, MCI and the CPUC that GTE has waived[*61] its current rebundling claims by not raising them during the arbitrations below. In both arbitrations, GTE repeatedly objected that the competitors should not be allowed to replicate GTE's local telephone service through the purchase of unbundled network elements because doing so allowed competitors to evade the Act's pricing standards. Contrary to GTE's representations, GTE did not object that it should not be responsible for the actual combining of the network elements that AT&T and MCI decide to purchase from GTE.

GTE argues that it would have been futile to challenge the rebundling requirement during the arbitration and before the CPUC because of the then-binding FCC regulation requiring incumbents to provide elements on a combined basis. However, as the competitors note, GTE was one of the parties that successfully challenged the FCC's rule in the Eighth Circuit. If GTE wished to challenge the CPUC's order on this issue in this Court, it should have objected during the proceedings below. The Court similarly rejects GTE's argument -- raised for the first time in its second round consolidated motion for summary judgment, and not contained in its supplemental complaints -- that [*62]these provisions should be stricken from the interconnection agreements because the question of who was responsible for rebundling was never properly arbitrated. The parties extensively arbitrated GTE's obligations to provide unbundled network elements to competitors, and GTE repeatedly raised objections to the arbitrators' determinations. Furthermore, this argument is inconsistent with GTE's position that it opposed the rebundling requirement during the arbitrations.

For the foregoing reasons, the Court hereby DENIES GTE's motions for summary judgment on its rebundling claims in both cases and GRANTS all cross motions on these claims.

10. Incumbents' Reservation of Space on Rights-of-Way: All 3 Cases

In both GTE v. AT&T, C 97-1756 SI and GTE v. MCI, C 97-1757 SI, the CPUC determined that it would constitute discrimination under the Act and FCC regulations to allow GTE, but not its competitors, to reserve space on its poles, ducts, conduits and rights-of-way (generally "rights-of-way") for future use. GTE claims that if it is not allowed to reserve space along its rights-of-way, GTE will not be able to meet its universal service obligations. In MCI v. Pacific [*63] Bell, C 97-0670 SI, MCI alleges that the CPUC violated the nondiscrimination mandates of the Act and FCC rules by allowing Pacific Bell to reserve space on its rights-of-way that have been ear-marked for a specific pending project.

During the briefing on these claims, the CPUC issued a Draft Decision in its industry-wide Local Competition proceedings that directly addresses reservation of space on rights-of-way. See Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, R.95-04-043 (Mar. 30, 1998). The draft decision indicates that the CPUC is asserting jurisdiction over this area and "reverse preempting" the FCC. The decision further provides that while the CPUC will not grant incumbents a general right to reserve space to meet their obligations, the CPUC will permit incumbents to "reclaim" space occupied by competitors when the incumbents need the space to meet universal service obligations. At oral argument on this matter in May 1998, counsel for the CPUC indicated that the CPUC expected to issue its final ruling on the matter in the near future. n9

n9 As of the date of this order, no such final CPUC ruling has been supplied to the Court.

[*64]

GTE, Pacific Bell and the CPUC request that the Court defer ruling on these claims until the CPUC issues its final ruling because the CPUC's ruling may affect GTE's and MCI's claims. MCI is agreeable to the Court deferring its rulings on GTE's claims, but argues that the Court should rule now on MCI's claims against Pacific Bell. However, as MCI recognizes, if California reverse preempts the FCC, the nondiscrimination requirements imposed by § 224(f) and the attendant FCC regulations no longer apply. In the interest of judicial efficiency and comity, the Court will defer ruling on this issue as presented in all three cases until the CPUC issues its final decision. The CPUC's decision will be an industry-wide one, and therefore will affect all parties currently before the Court. Depending on the nature of the CPUC's ruling, there may be no need for the Court to rule on this issue at all. The parties shall inform the Court when the CPUC issues its final ruling and whether any of the parties intend to voluntarily dismiss their claims.

11. Short Term Promotions for Resale: MCI v. Pacific Bell, C 97-0670 SI and GTE v. AT&T,C 97-1756 SI

In the GTE/AT&T arbitration, [*65] the CPUC determined that GTE is obligated to resell to AT&T at promotional rates any promotional offerings that GTE makes available to its customers for 90 days or less. n10 In contrast, the CPUC did not impose an analogous requirement on Pacific Bell in the Pacific Bell/MCI arbitration. n11 In the instant motions, GTE argues that the CPUC erred by imposing this requirement on GTE; MCI argues that the CPUC should have imposed this resale requirement on Pacific Bell. The Court reviews these claims de novo as they allege that the CPUC violated the Act and FCC regulations.

n10 In its report, the arbitrator in the GTE/AT&T arbitration concluded that short term promotional offerings were completely exempt from the Act's resale requirements. The CPUC reversed the arbitrator, concluding:

We agree with AT&T that [the arbitrator's holding] is an overly broad interpretation of the resale restrictions set forth by the FCC. In its first interconnection order [Local Competition Order], the FCC states (in Rule 51.613), that the incumbent need not offer a wholesale discount for such short-term promotional offerings. However, it does not suggest that the offerings could be withheld from resale. Indeed, it emphasizes that an incumbent may place restrictions on resale only if it can prove to the state commission that such a restriction is reasonable and nondiscriminatory. GTEC has not provided a reasonable basis for such a restriction here.

CPUC Decision Approving AT&T/GTE Agreement, 9-10. In reversing the arbitrator, the CPUC required GTE to resell its short term promotional offerings to AT&T at the promotional rate.

[*66]

n11 The CPUC rejected MCI's proposal that Pacific Bell be required to resell its short term promotional services to MCI at the promotional rates. Although the MCI/Pacific Bell interconnection agreement is unclear on this issue, counsel for the CPUC stated at oral argument that under the agreement, Pacific Bell is still required to sell the underlying services to MCI at the ordinary retail rate, less a wholesale discount.

Section 251(c)(4) requires an incumbent to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." *47 U.S.C. § 251*(c)(4)(A). Although the Act does not specifically address whether promotional rates for telecommunications services are subject to § 251(c)(4), the FCC has determined that § 251(c)(4) "makes no exception for promotional or discounted offerings" and therefore that "no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs." Local Competition Order P 948. However, [*67] the FCC distinguished between short term promotional rates lasting 90 days or less and those lasting for more than 90 days. The FCC concluded that promotional rates lasting more than 90 days qualify as "retail rates" that are subject to a wholesale discount for resale. Id. at P 950; *47 C.F.R. § 51.613(a)(2)*. The FCC concluded that this regulation was necessary to ensure that incumbents did not use promotional offerings to evade the wholesale rate obligation imposed by the Act. With respect to promotional prices offered for 90 days or less, the FCC determined that these promotional rates were not "retail rates," and therefore incumbents were not required to provide a wholesale discount from the promotional rate. *See Local Competition Order PP 949-50.*

In addition to the Local Competition Order, the FCC issued regulations governing restrictions on resale that have been codified in the Code of Federal Regulations. The relevant regulation provides:

§ 51.613 Restrictions on resale

(a) Notwithstanding § 51.605(b) [stating incumbents' general obligations to offer services for resale], the following types of restrictions on resale may be imposed: (1) Cross-class [*68] selling . . .

(2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:

(i) Such promotions involve rates that will be in effect for no more than 90 days; and

(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.

47 C.F.R. § 51.613(a)-(b).

GTE and Pacific Bell argue that pursuant to the language contained in § 51.613(a)(2)(ii), promotional offerings of 90 days or less may only be resold at the ordinary retail rate minus a wholesale discount. AT&T and MCI argue for a different interpretation of both the FCC's Local Competition Order and § 51.613, contending instead that these regulations provide that promotions lasting 90 days or less must be offered for resale at the promotional rate. [*69] The competitors rely heavily on the FCC's conclusion in the Local Competition Order that "no basis exists for creating a general exemption from the wholesale requirement for all promotional . . . offerings made by incumbent LECs." Local Competition Order P 948. Because the FCC found that promotional offerings are subject to the Act's resale requirement, MCI argues that this means that incumbents are required to sell these services at the promotional rates to competitors. MCI argues that § 51.613 provides that "if the promotion is for 90 days or less, no wholesale discount shall be taken unless it is taken off the ordinary *rate for the service. But in any case, it is clear that short-*term promotionally priced services must at least be made available for resale, regardless of the application of a wholesale discount . . . ." MCI's Second Round Consolidated Reply, 6:20-7:1.

The Court concludes that the FCC regulations require incumbents to resell short term promotional offerings at their ordinary retail rate less a wholesale discount, not at the promotional rate as AT&T and MCI contend. It is true that the FCC's Local Competition Order held that promotional offerings were not exempt[*70] from the Act's resale requirements. However, the FCC specifically concluded that short term promotional prices offered for 90 days or less "do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." Local Competition Order P 949. MCI and AT&T argue that nevertheless, short term promotions are subject to a general resale requirement. The Court agrees that short term promotions are subject to a general resale requirement, but only one that requires incumbents to "apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate" if "such promotions involve rates that will be in effect for no more than 90 days ...." *47 C.F.R. § 51.613(a)(2)(i)*. In so concluding, the Court has reached the same conclusion as another court that has decided this issue. See *MCI Telecommunications v. Bellsouth Telecommunications, 7 F. Supp. 2d 674, 682 (E.D.N.C. 1998)* (holding MCI has right to purchase short-term promotions at wholesale rate). For AT&T's and MCI's interpretation to be correct, § 51.613(a)(2)(i) should read "An incumbent LEC shall apply the wholesale discount to the ordinary rate for[*71] a retail service or shall resell at the special promotional rate" if "such promotions involve rates that will be in effect for no more than 90 days ...." In the Court's view, the language of § 51.613 does not leave open the interpretation that AT&T and MCI advance. The Court finds that this conclusion is consistent with the FCC's discussion of the "procompetitive ends" that short term promotions serve, and the FCC's belief that "if promotions are of limited duration their procompetitive effects will outweigh any potential anticompetitive effects." Local Competition Order P 949.

For these reasons, the Court concludes that the CPUC's decision requiring that GTE resell its short term promotional offerings to AT&T at the promotional rates violates *47 C.F.R. § 51.613.* AT&T should be permitted to purchase these services at the ordinary retail rate, minus the wholesale discount. Accordingly, in GTE v. AT&T, C 97-1756 SI, the Court GRANTS GTE's motion for summary judgment on this issue, and DENIES the motions filed by AT&T and the CPUC on this matter. With regard to the MCI/Pacific Bell interconnection agreement, although the CPUC incorrectly assumed that the Act required Pacific[*72] Bell to resell its short term promotions at the promotional rate, the CPUC concluded that Pacific Bell was relieved of this obligation in order to allow for Pacific Bell's "marketing nimbleness." As such, the CPUC's result is not incorrect, so long as Bell is still required to offer its short term promotions for resale at the ordinary rate minus a wholesale discount. n12 For this reason, in MCI v. Pacific Bell C 97-0670 SI, the Court hereby DENIES MCI's motion for summary judgment on this issue, and GRANTS the motions filed by Pacific Bell and the CPUC.

n12 At oral argument on May 8, 1998, counsel for Pacific Bell stated that it was Pacific Bell's understanding that it was obligated under the MCI/Pacific Bell interconnection agreement to provide short term promotions for sale at the ordinary retail rate, minus a wholesale discount.

12. Dark Fiber: MCI v. Pacific Bell, C 97-0670 SI and GTE v. MCI, C 97-1757 SI

"Dark fiber" is fiber optic cable that is installed in a telephone network [*73]but is not connected to the necessary electronic equipment to enable it to transmit telecommunications. In both the MCI/Pacific Bell and MCI/GTE interconnection agreements, the CPUC determined that dark fiber was not an unbundled network element because dark fiber is not "currently" in use, and thus the incumbents are not required to provide MCI with unbundled access to dark fiber. MCI contends that the CPUC's rulings in both cases violates §§ 153(29) and 251(c)(3) of the Act, which require incumbents to "provide, to any requesting telecommunications carrier ... nondiscriminatory access" to "facilities or equipment used in the provision of a telecommunications service." *47 U.S.C. §§ 251*(c)(3), 153(29). MCI argues that because the Act requires the unbundling of all network elements that are "used" for telecommunications whether or not they are presently "in use," dark fiber is an unbundled network element as a matter of law.

As an initial matter, Pacific Bell contends that MCI is procedurally barred from asserting this claim in this Court because MCI did not properly raise it as an arbitration issue in its petition for arbitration submitted to the CPUC. Pacific Bell notes that MCI[*74] did not list access to dark fiber in its "List of Arbitration Issues," and merely mentioned dark fiber in several appendices attached to its petition for arbitration. Although Pacific Bell objected on procedural grounds during the arbitration, Pacific Bell did respond on the dark fiber issue, and therefore the arbitrator and the CPUC had before them both parties' positions on the issue. The Court agrees with Pacific Bell that simply listing an issue in an appendix to a petition does not sufficiently "set forth" the issues for arbitration, and accordingly the issue is not properly before the Court. Even accepting MCI's arguments that its challenge is properly before the Court, however, the Court concludes for the reasons set forth below that the CPUC's determination was reasonable and consistent with the Act.

The Act defines network elements as "equipment used in the provision of a telecommunications service." *47 U.S.C. § 153*(29). GTE, Pacific Bell and the CPUC argue that because dark fiber cannot be "used" until the requisite electronics are attached to the ends, the CPUC did not err by determining that dark fiber is not a network element under the Act. These parties contend that[*75] dark fiber is unused inventory, and that the Act does not require that incumbents make their inventory available to competitors. MCI argues that GTE, Pacific Bell and the CPUC are "playing a game of semantics," and that the "used" language in § 153(29) is not the same as "currently used."

The Court concludes that the CPUC's interpretation is consistent with the Act. While MCI is correct that "used" is not the same as "currently used," it does not follow that "used" necessarily means "will be used." In the view of the Court, the CPUC's conclusion is a reasonable one, and one that is not inconsistent with the Act or FCC regulations. Accordingly, the Court DENIES MCI's motions for summary judgment on this issue, and GRANTS the motions filed by GTE, Pacific Bell, and the CPUC.

13. GTE's Claims Regarding "Unarbitrated" Provisions: GTE v. AT&T, C 97-1756 SI and GTE v. MCI, C 97-1757 SI

In both GTE v. AT&T, C 97-1756 SI and GTE v. MCI, C 97-1757 SI, GTE objects to provisions in the interconnection agreements that GTE claims were not arbitrated by the parties. GTE claims that the CPUC acted arbitrarily and capriciously and in violation of the Act by approving[*76] terms that were not presented as issues for arbitration, and that GTE was denied procedural due process as a result.

A. GTE v. AT&T, C 97-1756 SI: Terms re Technical Standards

In the GTE/AT&T arbitration, the CPUC approved an interconnection agreement containing technical specifications for GTE's provision of various facilities and services to AT&T. Prior to the CPUC's approval, GTE raised the same objection that it raises here: because AT&T did not specifically identify technical standards as one of the issues for arbitration in its arbitration petition, their inclusion in the interconnection agreement violates the Act. AT&T argues that it in fact "set forth" the issue of technical specifications by referencing these specifications in a "matrix" attached as an exhibit to its petition for arbitration. In its decision approving the interconnection agreement, the CPUC stated:

The Arbitrator resolved this issue in a reasonable way. After discussions with the parties, he concluded that it is essential to an effective agreement for parties to understand the technical standards governing their performance. However, he declined to require GTEC to meet the standards selected[*77] by AT&T. GTEC can provide references to the standards that it finds most appropriate to replace those proposed by AT&T. AT&T's proposed standards will only be used if GTEC fails to provide standards, or if its standards are not of scope or breadth comparable to AT&T's.

We agree with the Arbitrator that it was appropriate to *include in the agreement provisions that are essential to* effective interconnection. Although the Arbitrator placed such issues in a separate category for the purposes of his analysis, they actually form a subset of matters that were addressed in the Arbitrator's Report, since by definition, the arbitrated issues cannot be effectively arbitrated unless these "essential" issues are addressed.

Declaration of Jacob J. Schatz in Support of AT&T's Second Round Motion, Exh. A at 14-15.

The Court does not decide whether AT&T properly "set forth" the issue of technical specifications because the Court concludes that the CPUC has the authority to approve conditions relating to issues subsidiary to arbitrated matters. Accordingly, the Court finds that the CPUC did not err by approving the technical specifications.

Section 252(b)(4)(C) of the Act empowers state[*78] commissions to "resolve each issue set forth in the petition . . . by imposing appropriate conditions as required to implement subsection (c) of this section." *47 U.S.C. § 252*(b)(4)(C). Section 252(c) authorizes state commissions to impose conditions that "ensure that such resolution and conditions meet the requirements of section 251." Id. at § 252(c)(1). In turn, sections 252(c)(2) and 251(c)(3) require incumbents to provide competitors with interconnection and access to unbundled network elements on "terms and conditions that are just [and] reasonable." Id. at §§ 251(c)(2)(D) and (c)(3). In the Court's view, these provisions authorize state commissions to decide subsidiary issues that are necessary to ensure that the interconnection agreements are workable and comply with the Act.

GTE argues that the CPUC cannot justify its approval of the technical specifications on the ground that such terms are "essential" to a successful interconnection agreement because the CPUC found in the GTE/MCI arbitration that these terms were not essential, but simply one means to accomplishing the goal of ensuring GTE's compliance with its obligations. That the CPUC determined that technical[*79] specifications were "essential" to success in the GTE/AT&T arbitration and that these specifications were "one means" to ensuring GTE's compliance in the GTE/MCI arbitration does not mean that the CPUC acted arbitrarily and capriciously by including these terms in the GTE/AT&T interconnection agreement. In both arbitrations, the CPUC recognized that technical specifications were a subsidiary matter to the question of GTE's obligations to provide access and interconnection, and that these specifications would help ensure a successful interconnection agreement.

Finally, although the Court agrees with GTE that the imposition of unarbitrated conditions could raise procedural due process concerns, no such concerns are raised in the instant case. The record is clear that the arbitrator, and later the CPUC, allowed GTE to substitute its own technical specifications in place of those proposed by AT&T, and that GTE chose not to do so. Thus, GTE cannot plausibly argue that it was deprived of procedural due process. Accordingly, the Court DENIES GTE's motion for summary judgment on this claim, and GRANTS the cross motions on this claim.

B. GTE v. MCI, C 97-1757 SI

GTE raises a much[*80] broader objection to the GTE/MCI interconnection agreement. GTE contends that the arbitrator directed the parties to use MCI's proposal as the default terms of the agreement on the grounds that MCI's terms were presumptively pro-competition and that MCI's form contract contained a more "comprehensive treatment" of the issues in the arbitration. GTE states that the CPUC, in its review of the arbitrated agreement, either modified or eliminated the "vast majority" of MCI's terms that had been adopted by default. However, according to GTE, the CPUC retained three terms that were adopted by default without offering any explanation: (1) a provision giving MCI the right to terminate the agreement on 60 days notice while continuing to obligate GTE to allow interconnection after the termination; (2) an indemnity provision; and (3) a provision limiting liability.

In its motion, GTE requests that the Court order GTE and MCI to renegotiate the arbitrated agreement, rather than simply striking these three provisions. GTE argues that the "practical effect of the Commission's unlawful directive to use MCI's proposal as the default terms of the arbitrated agreement cannot be confined to the particular[*81] provisions that were adopted over GTE's objection and without objection. Rather, the requirement that MCI's position be adopted by default infected the entire process of subsequent negotiation and drafting of the arbitrated agreement." GTE's Second Round Consolidated Motion, 31:10-14. In its reply brief, however, GTE makes no mention of renegotiation and instead simply requests that the unarbitrated terms be stricken from the interconnection agreement.

The Court rejects GTE's general challenge to the arbitration proceedings, finding that GTE has not demonstrated that the proceedings were unfair or infected with bias. As GTE acknowledges, when the CPUC reviewed the arbitrated agreement it "either modified or eliminated the vast majority of terms that were proposed by MCI and adopted by default." GTE's Second Round Consolidated Motion, 28:12-13. The fact that the CPUC rejected many of MCI's proposed terms is directly contrary to GTE's argument that the process was unfair and that GTE was adversely affected as a result.

GTE's specific challenge to the three unarbitrated provisions is more persuasive, however. MCI contends that terms regarding termination, indemnity and limitation of[*82] liability were "set forth" in its petition for arbitration in that the form contract that MCI attached to its petition contained provisions on those issues. MCI acknowledges that these issues were not identified in Exhibit 4 to its petition for arbitration, which according to MCI's petition contained a "detailed listing of the unresolved issues and the positions of the parties." GTE App. 4/24/98, Exh. C at PP 16-17. Unlike the inclusion of technical specifications in the GTE/AT&T interconnection agreement, neither MCI nor the CPUC contends that these three issues are subsidiary to arbitrated matters, or that the issues are "essential" to a successful interconnection agreement. While MCI is correct that the Act simply requires that issues be "set forth" in either a petition or response, the Court concludes that MCI did not "set forth" these three issues by including provisions in a lengthy proposed contract, particularly where Exhibit 4 makes no mention of these three matters. As GTE argues, GTE could not have been placed on adequate notice that these three issues were matters for arbitration. Accordingly, the Court GRANTS in part GTE's motion for summary judgment on this claim and [*83]STRIKES these three provisions.

14. Specific MCI v. Pacific Bell, C 97-0670 SI Issues

A. Rebranding of Operator/Directory Assistance

When a customer calls the operator or directory assistance, a recording states the name of the company providing the service. MCI requested during the MCI/Pacific Bell arbitration that when MCI is reselling Pacific Bell's operator services or directory assistance, Pacific Bell be required to "rebrand" those services with MCI's brand identification. Instead, the CPUC required Pacific Bell to unbrand those services now, and to rebrand them at a later date when it is able to do so. See MCI/Pacific Bell Interconnection Agreement, Attachment 5 at P 4.2.1.1. MCI contends that this decision violates § 251(c)(4) of the Act, which prohibits incumbents from imposing unreasonable limitations on the resale of services, as well as FCC regulations regarding resale. The Court reviews this claim de novo.

Section 251(c)(4) of the Act states that incumbents have the duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of . . . telecommunications services . . . ." *47 U.S.C. §[*84] 251*(c)(4). The FCC elaborated on resale restrictions with respect to branding in its regulations by providing:

(c) Branding Where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller unbranding or rebranding requests shall constitute a restriction on resale.

(1) An incumbent LEC may impose such a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory, such as by proving to a state commission that the incumbent LEC lacks the capability to comply with unbranding or rebranding requests.

47 C.F.R. § 51.613(c)(1).

MCI argues § 51.613(c)(1) and corresponding language in the FCC's Local Competition Order n13 provide that the only exception to the rule requiring rebranding of services is if the incumbent "lacks the capability to comply with unbranding or rebranding requests." MCI contends that because the CPUC did not find that Pacific Bell lacked that capability, the CPUC's decision is unlawful. Moreover, MCI contends that Pacific Bell would not be able to prove that [*85]it lacked the capacity to rebrand because the CPUC has specifically found that another incumbent, GTE, possesses this capacity. Apparently, MCI argues that *Pacific Bell and GTE are equally technically proficient* vis a vis rebranding. MCI argues that the Act and the FCC's regulations prevent the CPUC from bestowing upon an incumbent "the freedom to unilaterally determine if and when it will 'make[] the capabilities available' to rebrand directory assistance and operator services." MCI's Second Round Motion in C 97-0670 SI at 16:20-21.

n13 See Local Competition Order P 971 ("We therefore conclude that where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller branding requests presumptively constitutes an unreasonable restriction on resale. This presumption may be rebutted by an incumbent LEC proving to the state commission that it lacks the capability to comply with unbranding or rebranding requests.")

[*86]

Pacific Bell and the CPUC respond in slightly differing, but not inconsistent ways. Pacific Bell contends that the language "such as" in § 51.613(c) means that technical incapacity to comply with a branding request is simply one example of a permissible restriction, and that therefore MCI is incorrect when it suggests that technical incapacity is the only showing that will rebut the presumption of unreasonableness. However, Pacific Bell then argues that substantial evidence was presented to the CPUC concerning Pacific's ability to unbrand and rebrand its operator and directory assistance services, and that the CPUC concluded *that Pacific Bell* was not required to rebrand until "it makes the capabilities available," thus suggesting that Pacific Bell does not currently possess the technical capability to rebrand services. The CPUC states in its opposition that it concluded, based upon the extensive evidence before it, that Pacific Bell was not immediately capable of offering rebranded services to MCI.

MCI challenges Pacific's and the CPUC's arguments as inconsistent "post hoc" rationales for the CPUC's decision. MCI argues that the CPUC did not make any findings that Pacific Bell[*87] overcame the presumption of unreasonableness. MCI contends that the agreement "has nothing to do with Pacific's ability to rebrand, but rather it relies on Pacific's willingness to rebrand." MCI's Second Round Consolidated Reply, 9:23-26.

The Court concludes that while the CPUC did not explicitly find that Pacific Bell had rebutted the presumption of unreasonableness established by § *51.613(c), the CPUC impliedly found so by stating that* Pacific Bell "will offer rebranding . . . when it makes the capabilities available." MCI/Pacific Bell Interconnection Agreement. FCC regulations explicitly recognize that the presumption of unreasonableness may be rebutted by, inter alia, n14 showing that the incumbent is currently incapable of rebranding. In the Court's view, stating that Pacific will be required to rebrand when it "makes the capabilities available" implies that the CPUC found that Pacific was currently incapable of doing so, not that Pacific was currently unwilling to do so, as MCI argues. The Court does not agree that the CPUC's opposition to MCI's motion offers a "post hoc" rationalization; instead, the Court finds the CPUC's explanation of its decision consistent[*88] with, and supported by, its decision. For these reasons, the Court hereby DENIES MCI's motion on this issue, and GRANTS the motions by defendants Pacific Bell and the CPUC on this matter.

n14 The Court agrees with Pacific Bell that the language of both the FCC's Local Competition Order P 971 and § 51.613(c) suggest that the presumption of unreasonableness can be rebutted in several ways, one of which being that the incumbent lacks the technical capacity to rebrand or unbrand. Paragraph 971 states that the presumption "may be rebutted" by a showing of technical incapacity; § 51.613(c) states that the presumption may be rebutted by proving that the restriction is reasonable and nondiscriminatory, "such as" by showing technical incapacity.

B. Forecasting Requirements

Under the MCI/Pacific Bell interconnection agreement, MCI is required to provide Pacific Bell with forecasts anticipating the volume of orders it will place for Pacific Bell's "links." n15 The agreement also establishes performance standards[*89] that Pacific Bell is required to satisfy in processing MCI's orders, including its orders for links, and imposes penalties on Pacific Bell in the event that these standards are not met. The agreement further provides that if MCI underestimates its annual needs by more than 20%, Pacific Bell will not be required to pay liquidated damages to MCI in the event Pacific Bell fails to meet the specified performance standards. Conversely, if MCI overestimates its annual network element needs by more than 20%, MCI will be subject to monetary penalties.

n15 "Links" are the lines between end-user customers and Pacific Bell's central office.

MCI contends that these provisions violate the Act in two ways. First, MCI argues that the "removal of performance standards" in the event of an underestimation by MCI deprives MCI of its only remedy to ensure that Pacific is not discriminating against MCI in violation of § 251(c)(3) of the Act. Second, MCI argues that the monetary penalties for overestimation inflate the prices [*90]that MCI pays for Pacific's network elements in violation of § 252(d)(1)(A) of the Act.

(1) Underestimation of Need

Section 251 of the Act requires that incumbents "provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements." *47 U.S.C. § 251*(c)(3). The FCC has held the Act's "nondiscriminatory access" clause to mean that incumbents "may not provision unbundled elements that are inferior in quality to what the incumbent provides itself" Local Competition Order P 315. MCI contends that this nondiscrimination mandate is implemented through the performance standards contained in the MCI/Pacific Bell agreement, and that by in effect waiving Pacific's performance obligations and financial liabilities under the agreement when MCI underestimates its needs, the CPUC has "eviscerated" the only available enforcement mechanism for § 251's nondiscriminatory access language. In addition, MCI claims that the underestimation provision is discriminatory because it imposes a penalty on MCI for under-forecasting, whereas Pacific Bell is not similarly penalized when it underestimates its own need. MCI argues, "when Pacific under-estimates its [*91]demand, it can often take mitigating action to avoid any adverse market consequences." MCI's Second Round Consolidated Reply, 10:11-12. However, "should MCI under-estimate its demand, Pacific, using the CPUC's Agreement language as a bludgeon and acting in its own best business interest, will reduce the quality of its service to ensure that MCI pays dearly in the marketplace." Id. at 10:11-14.

Pacific Bell responds that the CPUC's determination in this matter was a permissible exercise of its authority to set terms and conditions of interconnection that are "reasonable and nondiscriminatory." Pacific Bell argues that the underestimation provision does not discriminate against MCI because the agreement imposes significant financial penalties on Pacific Bell if it fails to meet MCI's service demands. As such, Pacific Bell argues that it is fair and reasonable that MCI be required to forecast its expected demands, and that Pacific Bell not be required to pay these penalties in the event that MCI "grossly" underestimates its actual demand. Pacific Bell argues that in the event that MCI underestimates its demand by more than 20%, MCI is not "penalized" -- MCI is simply precluded[*92] from obtaining liquidated damages from Pacific Bell for performance failures. Pacific Bell also argues that contrary to MCI's suggestion, the agreement's liquidated damages provisions which apply if Pacific fails to meet its performance standards are not MCI's only available enforcement mechanism for § 251's nondiscriminatory access mandate. Pacific Bell argues that MCI ignores the fact that, beyond the penalty provisions set out in the agreement, Pacific Bell is obliged by law to provide access to unbundled elements on a nondiscriminatory basis, and that MCI is not foreclosed from seeking relief from the CPUC if Pacific Bell fails to do so.

The Court concludes that the underestimation provision is reasonable and does not discriminate against MCI. The challenged provision does not allow Pacific Bell to provide MCI with network elements of inferior quality, but rather states that Pacific Bell will not be liable for liquidated damages if MCI's demand exceeds its forecasts by more than 20%. MCI assumes that Pacific Bell will provide inferior service if Pacific is not held to the performance standards and corresponding penalties; however, as Pacific Bell and the CPUC note, in that event[*93] MCI can petition the CPUC to take action against Pacific Bell. MCI contends that this option is "extremely cumbersome and of doubtful utility." It is, however, a remedy. For these reasons, the Court hereby

DENIES MCI's motion for summary judgment on this issue, and accordingly GRANTS the motions filed by Pacific Bell and the CPUC on this matter.

(2) Overestimation of Need

MCI argues that the provision in the agreement imposing a financial penalty on MCI in the event that MCI overestimates its need by more than 20% violates § 252 of the Act. The MCI/Pacific Agreement requires that MCI will be penalized:

$10.00 per line or trunk for the amount ordered between 20% and 30% under the forecast[,] $20.00 per line or trunk for the amount ordered between 31% and 40% under the forecast [and] $35.00 per line or trunk for the amount ordered between 41% or more under the forecast.

MCI/Pacific Bell Agreement, Attachment 17 at 15. MCI argues that this provision violates § 252(d), which mandates that the rate charged for network elements "shall be based on the cost ... of providing the interconnection or network element." *47 U.S.C. § 252*(d)(1)(A). MCI argues[*94] that these forecast penalties illegally increase the price of the elements because there is no evidence to suggest that these additions to the prices of elements are in any way related to any cost incurred by Pacific Bell in providing these elements to MCI. MCI argues that a miscalculated forecast by a competitor does not necessarily result in financial harm to the incumbent, and therefore these penalties are completely unrelated to whether Pacific actually suffers an injury as a result of the faulty forecast.

In addition, MCI argues that the imposition of graduated monetary penalties on MCI for overestimation violates § 251(c)(3)'s nondiscrimination requirement. "White MCI is subject to increasingly severe monetary penalties for failing to accurately forecast its needs a year in advance, Pacific is subject only to flat-rated penalties if it fails to achieve its performance standards in meeting MCI's needs." MCI's Second Round Consolidated Motion, 29:6-8.

The CPUC responds that this provision does not violate the cost-based pricing requirement contained in § 252(d)(1)(A) because liquidated damages do not affect the rates charged for unbundled network elements. Rather, the CPUC[*95] argues, these damages are imposed for failure to perform according to the terms of the contract, or when there are gross errors in forecasting. In addition, Pacific Bell and the CPUC argue that these damages are not discriminatory because the overforecasting penalties imposed on MCI and the performance penalties imposed on Pacific Bell were designed to discourage, and compensate for, two entirely different kinds of behavior.

The Court agrees with the CPUC and Pacific Bell that the overforecasting penalties do not violate the Act. As the CPUC argues, these penalties do not violate the Act's cost-based mandate because these penalties are imposed for failure to perform a contract term, and are not intended to compensate for the cost of providing the network element. Similarly, the Court finds that the overforecasting penalties are not discriminatory simply because Pacific Bell is subject to different penalties for different conduct. For these reasons, the Court hereby DENIES MCI's motion on this issue, and GRANTS the motions of defendants Pacific Bell and the CPUC.

C. Alternative Dispute Resolution

The MCI/Pacific Bell interconnection agreement requires that MCI and Pacific Bell[*96] submit most disputes arising under or related to the agreement to arbitration. See MCI/Pacific Bell Agreement P 16. Specifically exempted from the arbitration provision are disputes or matters,

i. for which the total value of the amount in controversy exceeds $750,000,

ii. for which this Agreement or the Telecommunications Act of 1996 specifies a particular remedy or procedure,

iii. for which a Party seeks injunctive relief and/or specific performance in any court of competent jurisdiction, or

iv. which are covered by the Billing Disputes provision ...

MCI/Pacific Bell Agreement, Attachment 3. In addition, the agreement states that nothing in the agreement should be construed to prevent either MCI or Pacific Bell from "during the pendency of alternative dispute resolution, seeking and obtaining temporary equitable remedies, including temporary restraining orders, with respect to [a dispute]." Id. at P 16(ii).

MCI claims that the arbitration provision violates § 252 of the Act because it "strips" the CPUC of its duty under § 252 to enforce arbitration agreements. MCI argues that § 252 expresses the clear intent that state commissions[*97] participate in the interconnection agreement process. Section 252 requires that interconnection agreements be "submitted for approval to the State commission," and that "[a] State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies." *47 U.S.C. § 252*(e)(1). MCI argues that "this detailed involvement with arbitrated interconnection agreements that Congress assigned to state commissions demonstrates that the CPUC is also required to enforce the agreements." MCI's Second Round Consolidated Motion, 30:23-25. MCI contends that the CPUC is abdicating its responsibility to enforce the MCI/Pacific Bell agreement by requiring the parties to submit to arbitration rather than allowing the parties to bring their disputes directly to the CPUC.

Pacific Bell and the CPUC respond that there is nothing in § 252 or elsewhere in the Act that precludes the CPUC from using alternative dispute resolution ("ADR") to settle conflicts arising out of parties' performance under interconnection agreements, and therefore this matter was left to the discretion of the state commissions. Pacific Bell and the CPUC further argue that[*98] the agreement's ADR provision does not violate the Act because the agreement explicitly states that the agreement may not be construed "to prevent either party from ... at any time invoking a remedy required or permitted by the Act or FCC regulations thereunder . . . ." MCI/Pacific Bell Agreement P 16(i).

The Court concludes that the arbitration provision does not violate the Act. The Act does not specify the mechanisms that state commissions are to employ in enforcing interconnection agreements, and therefore the Court agrees with Pacific Bell and the CPUC that state PUCs have discretion in this area. The Court further finds that the CPUC has exercised its discretion in a way that complies with the Act. The specific arbitration provision at issue explicitly states that it will not be construed to prevent a party from invoking a remedy required or permitted by the Act or FCC regulations. For these reasons, the Court hereby DENIES MCI's motion for summary judgment on this issue, and GRANTS the motions for summary judgment filed by Pacific Bell and the CPUC.

D. $25 Million Cap on Damages

Under the terms of the MCI/Pacific Bell interconnection agreement, Pacific Bell's annual[*99] liability to MCI for certain types of damages arising under the contract between the parties is capped at $25,000,000. See MCI/Pacific Bell Agreement P 10.2. This amount represents total potential damages available to MCI, and excludes indemnification for governmental compliance costs, environmental liability and liability to third parties. MCI argues that this provision violates § 251 of the Act by "effectively dismantling Pacific's mandatory market-entry obligations, including everything from interconnection to resale to unbundling." MCI's Second Round Consolidated Motion, 31:14-16. This is so, MCI argues, because Pacific Bell will feel free to ignore its obligations under the Act because Pacific Bell will engage in a cost/benefit analysis and decide that it is worthwhile to pay the $25 million "fine" rather than to comply with the Act.

Pacific Bell and the CPUC respond in several ways. First, Pacific and the CPUC contend that MCI's argument is contrary to common sense and assumes that Pacific Bell will engage in bad faith. Furthermore, MCI ignores the fact that state and federal laws would prevent Pacific Bell from "paying its way out" of compliance with the Act. Second, [*100] Pacific and the CPUC argue that in any event, the $25 million liability limit does not apply to willful or intentional misconduct, as well as gross negligence. See MCI/Pacific Bell Agreement P 10.3(i). Third, defendants argue that nothing in the Act either prohibits limits on liability, or requires Pacific Bell to be subjected to unlimited liability in the event of a breach of contract. In fact, Pacific Bell contends that the limitation on liability is consistent with the Act's requirement that state PUCs ensure that interconnection occurs on terms and conditions that are "just" and "reasonable." *47 U.S.C. §§ 251*(c)(2) and 252(c)(1).

The Court rejects MCI's argument that the $25 million cap on Pacific Bell's liability violates § 251 of the Act. As noted by Pacific Bell and the CPUC, there is nothing in the Act that precludes the imposition of such a cap. The Court finds that the liability cap does not interfere with the Act in such a way as to render that provision unlawful. The Court is not persuaded that Pacific Bell will simply "buy its way out of" complying with the Act's obligations by paying a $25 million fine. For these reasons, the Court hereby DENIES MCI's motion[*101] for summary judgment on this issue, and GRANTS the motions for summary judgment filed by Pacific Bell and the CPUC.

E. Consequential Damages

The interconnection agreement between MCI and Pacific Bell provides that "a defaulting Party's liability shall not be limited in the event the defaulting Party causes reasonably foreseeable material harm to the other Party." MCI/Pacific Bell Agreement P 10.4. Pacific Bell raises two challenges to this provision. First, Pacific raises a procedural challenge, arguing that the CPUC lacked jurisdiction to act on MCI's request that P 10.4 be inserted into the interconnection agreement. Pacific states that although Pacific Bell included a provision generally limiting damages in its draft proposed agreement, that inclusion did not transform the question into an open or unresolved issue. Pacific contends that the provision requested by MCI was raised for the first time in MCI's January 21, 1997 submission to the CPUC, more than a month after the arbitrator issued its report and two days before the CPUC rendered its final decision on the agreement. Pacific argues that P 10.4 "effectively gutted" P 10.3 of the agreement, a section entitled "NO CONSEQUENTIAL[*102] DAMAGES," which had been included in slightly differing forms in both parties' proposed agreements for months.

The Court rejects Pacific's procedural argument, finding that the issue of consequential damages was arbitrated by the parties and in fact introduced into the arbitration by Pacific Bell. As Pacific acknowledges, the parties' proposed agreements contained provisions limiting consequential damages for much of the arbitration. What Pacific objects to is the fact that MCI introduced a new provision regarding consequential damages late in the arbitration process. Pacific alleges that by doing so, MCI violated Pacific's rights to have unresolved issues identified at the beginning of the arbitration process, so as to ensure sufficient notice and opportunity to present evidence on the matter. The Court disagrees, concluding that Pacific was "on notice" of the consequential damages issue throughout the arbitration. With regard to P 10.4 specifically, the record is unclear if Pacific presented evidence in response to MCI's proposal. However, the record is clear that Pacific Bell sought reconsideration of the issue from the CPUC, and that such reconsideration was denied. See Declaration[*103] of Alberto Guerreo in Support of CPUC's Second Round Motion, Exhs. F, H. Accordingly, Pacific Bell was provided with an opportunity to present its concerns to the CPUC.

Pacific Bell also raises several substantive challenges to P 10.4, arguing that this provision violates the Act's requirement that interconnection pricing be cost-based and nondiscriminatory. Pacific argues that consequential damages paid by an incumbent as a result of interconnection would constitute an element of that incumbent's "cost ... of providing the interconnection or network element," but that the arbitrator did not factor consequential damages into its rate computations. Thus, Pacific argues that by allowing for consequential damages, the CPUC imposed a significant additional cost without in any way allowing for its recovery. Pacific alleges that P 10.4 violates the Act's nondiscrimination mandate because it allows MCI to purchase access and unbundled network elements for prices below Pacific Bell's costs, whereas the interconnection agreements between Pacific Bell and AT&T, and Pacific Bell and Sprint, do not contain similar consequential damages provisions. "Thus, it would be discriminatory for MCI to[*104] purchase network access and unbundled network elements at below-cost prices, while its competitors (including AT&T and Sprint) pay prices that more closely reflect Pacific Bell's costs of providing service." Pacific Bell's Second Round Motion, 29:25-28. Finally, Pacific argues that P 10.4 violates the Takings Clause of the Fifth Amendment because imposing liability for consequential damages denies Pacific Bell just compensation for the compelled access to Pacific's property.

The Court reject's Pacific's argument that P 10.4 violates the Act's cost-based mandate. As Pacific itself argued in response to MCI's challenge to the provision allowing for monetary penalties in the event MCI overestimates its needs, the damages at issue will be imposed for failure to perform according to the terms of the contract, and are authorized under the CPUC's authority to "impose conditions necessary to equitably consummate the agreement." Pacific Bell's Second Round Motion, 19:20-22. The Court agrees with MCI that the Act does not authorize recovery of all costs through the prices for unbundled network elements, but only those costs associated with interconnection. Thus, costs associated with damages[*105] for failing to perform according to the interconnection agreement are not recoverable through prices for unbundled network elements.

As for Pacific Bell's nondiscrimination argument, the Court agrees with MCI that the Act's nondiscrimination provisions are directed at preventing incumbents from using their monopoly status to discriminate in their own favor when providing services and network elements to competitors. The Court rejects Pacific's argument that the Act requires that all competitors be treated equally and therefore that all interconnection agreements contain identical terms. In any event, even if Pacific's interpretation of the Act's nondiscrimination provisions was correct, Pacific does not have standing to raise the arguments of AT&T or Sprint.

Finally, the Court rejects Pacific's takings claim. Pacific essentially argues that in order to avoid a taking, MCI should be required to pay Pacific, in the form of higher rates for network elements, in advance for damages that may be caused in the future by Pacific's own breach of the interconnection agreement. As discussed above, the Court concludes that any potential "costs" that Pacific may incur as a result of breaching[*106] the agreement are not included in the "cost ... of providing the interconnection or network element" as required by § 252(d)(1)(A). Thus, the Court finds that Pacific does not have a legal claim to the expenses it may incur as a result of P 10.4 of the interconnection agreement.

For the foregoing reasons, the Court hereby DENIES Pacific Bell's motion for summary judgment on this issue, and GRANTS all cross motions.

15. Joint and Common Costs: All 3 Cases

Joint and common costs are costs incurred by incumbents in the provision of local exchange service that are not directly attributable to a particular element of that service. Common costs are costs that relate to facilities and functions that support all operations of the business, such as accounting, human resources, and the cost of general purpose computers. Joint costs, which are sometimes also referred to as "shared costs," are costs that are incurred in the provision of two or more services.

A. MCI v. Pacific Bell, C 97-0670 SI

In the MCI/Pacific Bell arbitration, the arbitrator and the CPUC adopted the same common cost markup of 16% as developed in the earlier AT&T/Pacific Bell arbitration. In both[*107] arbitrations, MCI and AT&T submitted the same evidence, the Hatfield Model, supporting a 10% markup. MCI cites the arbitrator's report in the AT&T/Pacific Bell arbitration, which states that the arbitrator intended to adopt AT&T's (and MCI's) fixed allocator amount by stating that "Entrant's [AT&T's] evidence as to the fixed allocator is more convincing than Incumbent's [Pacific Bell] because Entrant's witness describes the specific ... data that he relied upon." *AT&T/Pacific Bell Arbitrator's Report, 19-20.* Despite this stated intention, according to MCI the arbitrator applied AT&T's and MCI's proposal incorrectly by including a 6% tax adder. MCI argues that because the 10% common cost allocator proposed by MCI is based on cost, not revenue, taxes do not apply.

Both parties agree that this Court should review the CPUC's determination on this issue under the arbitrary and capricious standard, as MCI does not contend that the common cost allocator is inconsistent with the Act. Pacific Bell argues that it is clear from the AT&T/Pacific Bell decision that the arbitrator assessed both parties' factual submissions on the question of common costs, and although Pacific Bell had suggested[*108] a higher common cost allocator, the arbitrator settled on 16% as the proper adjustment. Neither Pacific Bell nor the CPUC address MCI's specific challenge that the arbitrator and the CPUC erred by including a 6% tax adder. Although the arbitrary and capricious standard is quite deferential, it still requires that an agency's decision be rational. In this case, there is no explanation provided for the disconnect between the arbitrator's apparent intention to adopt MCI's 10% proposal, and the resulting 16% common cost allocator, nor is there any justification for including 6% tax adder onto costs. For these reasons, the Court hereby GRANTS MCI'S motion for summary judgment on this issue, and DENIES all cross motions.

B. GTE v. AT&T, C 97-1756 SI

Both AT&T and GTE object to the CPUC's determination of a 22% markup for recovery of joint and common costs. During the arbitration, AT&T proposed a 10% markup based upon the Hatfield Model, while GTE proposed a 42% markup based upon testimony summarizing costs GTE incurred in 1995. The arbitrator endorsed AT&T's model as the basis for determining the appropriate markup, and noted that GTE's assumptions concerning its joint and common[*109] costs were "deficient" because GTE had "relied on its current common costs, without sufficiently justifying its assumption that forward-looking costs [will] not differ from those experienced today." GTE/AT&T Arbitrator's Report, 13. According to AT&T, the arbitrator misinterpreted the Hatfield Model and concluded that it produced a markup of 16% rather than 10%. The CPUC rejected the arbitrator's determination, and instead set a 22% markup "based on GTEC's analysis of common costs." CPUC Decision Approving AT&T/GTE Agreement, 7. In addition, the CPUC appeared to base its decision, in part, on the fact that "the interconnection prices we have set for Pacific Bell will also allow Pacific Bell to recover a limited amount of shared investment expenses." Id. at 6-7.

AT&T argues that because AT&T's *Hatfield Model* was the only "competent" evidence in the record, it is entitled to summary judgment on its claim that the 22% markup is unlawful. GTE, on the other hand, argues that the CPUC ignored GTE's evidence demonstrating that a 42% markup was appropriate. GTE argues that despite the CPUC's statement that the 22% markup was "based on GTEC's analysis of common costs," the CPUC[*110] offered no explanation as to how GTE's analysis supports the 22% markup. GTE also asserts a separate challenge, contending that the markup should not be applied across the board to all joint and common costs, but rather that different percentage markups should apply depending on the particular cost.

In opposing the motions of AT&T and GTE, the CPUC defends the 22% markup by explaining that while the CPUC determined that GTE's proposed 42% markup was "substantially above cost," there was "merit in the argument that GTE should be allowed to recover a reasonable amount of shared and common expenses, particularly plant and non-plant specific expenses." CPUC's First Round Motion, 17:22-24. The CPUC adjusted GTE's figures to make them more forward-looking, and concluded that the record adequately supported a level of markup between 21% and 24%. The CPUC explains the different markups set for GTE and Pacific Bell as due to the fact that the companies performed their underlying cost studies differently. The

CPUC's explanation is consistent with the rationale contained in its decision in the GTE/AT&T arbitration, which stated,

Though we reject GTEC's argument that prices for interconnection[*111] elements should be established substantially above cost, we do find merit in GTEC's argument that 16% may not allow GTEC to recover certain plan and non-plant specific expenses.

We will also reject AT&T's 10% overhead factor as we conclude that it does not allow GTEC to recover a reasonable share of its joint and common costs. Therefore we will establish the level of markup at 22% which will include 10% for corporate overhead and an additional 12% to capture plant-specific, non-specific and general support expenses. Our conclusion that 22% is an adequate measure of GTEC's shared and common costs is also based on GTEC's analysis of common costs which supports our conclusion that 12% is a reasonable factor to insure recovery of both plant specific, general support expenses and non-plant specific common costs.

CPUC Decision Approving AT&T/GTE Agreement, 7.

The Court concludes that AT&T's challenge -- that the 22% markup is unlawful under the Act because it includes non-forward-looking costs -- is unfounded, because the CPUC adjusted GTE's proposal to bring it in line with the cost-based mandate of the Act. GTE's challenge, which the Court reviews under the arbitrary [*112] and capricious standard because GTE argues that the 22% markup was not rationally connected to the record, is similarly rejected, as the CPUC made clear that its determination of the 22% markup was based upon evidence in the record. Simply because the CPUC stated that the 22% markup was "also based" on GTE's cost studies does not mean that the CPUC must adopt those studies in their entirety. Both the arbitrator and the CPUC identified significant flaws in GTE's studies, and the CPUC attempted to correct those flaws.

The Court finds GTE's other challenge regarding a fixed markup unpersuasive. GTE argues that the CPUC should have used the "M-ECPR" methodology to allow GTE to inflate network element rates by allocating "the maximum possible amount of joint and common costs" to areas in which there is the least competition. Complaint in GTE v. AT&T, C 97-1756 SI at P 46. GTE implicitly acknowledges that the Act does not prohibit a uniform markup, as GTE only argues that the CPUC's fixed markup is arbitrary and capricious. GTE's arguments are not persuasive, and the Court concludes that the CPUC acted reasonably and within its discretion in setting a fixed 22% markup.

For the foregoing[*113] reasons, the Court hereby DENIES the motions for summary judgment filed by GTE and AT&T and GRANTS the motion for summary judgment filed by the CPUC.

C. GTE v. MCI, C 97-1757 SI

In the GTE/MCI arbitration, the arbitrator approved a 16% markup, and the CPUC approved a 22% markup. MCI argues that the proper markup is 10%, while GTE argues that the proper rate is 42%. The parties raise the same challenges, and advance the same arguments, as were raised in GTE v. AT&T, C 97-1756 SI. As in its decision approving the MCI/GTE interconnection agreement, the CPUC stated that,

We find merit in GTE's argument that 16% is insufficient to allow GTE to recover certain plan and non-plant specific expenses. We will therefore use GTE's analysis of its shared and common costs to establish the markup at 22% which is composed of 10% of corporate overhead and an additional 12% to capture plant-specific, non-specific, and general support expenses.

CPUC Decision Approving MCI/GTE Agreement, 11. For the reasons set forth above in connection with AT&T's and GTE's challenges in GTE v. AT&T, C 97-1756 SI, the Court hereby DENIES the motions for summary judgment filed by[*114] MCI and GTE, and GRANTS the motion filed by the CPUC.

CONCLUSION

This order resolves most of the parties' claims in their cross motions for summary judgment. As noted in this order, the Court hereby REMANDS to the CPUC the following issues for further decision:

(1) whether the CPUC's written authorization requirement for CPNI is unlawful in light of the FCC's CPNI Order (MCI v. Pacific Bell, C 97-0670 SI and MCI v. GTE, C 97-1757 SI);

(2) whether AT&T's RSMs are "actually used" for interconnection and access for purposes of physical collocation in AT&T v. GTE, C 97-1756 SI; and

(3) whether MCI's RSMs are "actually used" for interconnection and access for purposes of physical collocation in MCI v. GTE, C 97-1757 SI.

In addition, the Court will defer ruling on the parties' claims regarding incumbents' reservation of space on rights-of-way until the CPUC issues its final ruling on the matter. The parties shall inform the Court when the CPUC issues its ruling.

IT IS SO ORDERED.

Dated: September 29, 1998

SUSAN ILLSTON

United States District Judge

In the Matter of AMERICAN NETWORK, INC. Petition for Declaratory Ruling Concerning Backbilling of Access Charges

FEDERAL COMMUNICATIONS COMMISSION

4 FCC Rcd 550; 1989 FCC LEXIS 52; 65 Rad. Reg. 2d (P & F) 1519

RELEASE-NUMBER: DA 88-2057

January 12, 1989 Released; Adopted December 30, 1988

ACTION: [**1] MEMORANDUM OPINION AND ORDER

JUDGES:

By the Chief, Common Carrier Bureau

OPINIONBY: BROCK

OPINION:

[*550] I. BACKGROUND

1. On October 5, 1987, American Network, Inc. (AmNet) filed a petition for a declaratory ruling concerning the backbilling of access charges by local exchange carriers (LECs), and other matters. Thirty-three initial comments and 17 reply comments were filed. n1 Amnet asks the Commission to issue a declaratory ruling that:

(a) LECs must abide by the provisions of relevant access tariffs requiring them to bill interexchange carriers (ICs) on a prompt and current basis;

(b) irrespective of relevant access tariff provisions, carriers must bill on a current basis;

(c) charges incurred more than 60 days prior to a bill date may not be billed; and

(d) losses incurred due to such disallowed charges must be borne by the billing carrier (i.e., by its stockholders) rather than spread among the carrier's ratepayers.

n1 Comments on the AmNet petition were filed on December 1, 1987, and replies were filed on December 22, 1987. See Public Notice, DA 87-1492, released Oct. 14, 1987; Public Notice, DA 87-1799, released Dec. 11, 1987.

2. AmNet also alleges that facilities-based ICs routinely [**2] backbill for the lease of their facilities and, accordingly, AmNet asks that the Commission declare backbilling by such ICs to be unlawful to the same extent as backbilling by LECs. n2

n2 AmNet Petition at 3 n.4. Accordingly, references in this Order to backbilling by LECs includes backbilling by ICs unless the context otherwise indicates.

3. AmNet generally defines routine backbilling as the repeated failure to bill an IC on a prompt and current basis. n3 According to AmNet, instances of "egregious backbilling" of a year or more are not uncommon. It asserts that sometimes LECs bill as much as two years after charges are incurred. n4 AmNet claims that it encounters such backbilling with each of the LECs with which it interconnects and that such backbilling is widespread. n5

n3 AmNet Petition at 1. AmNet defines "backbilling" more specifically as "the LECs' practice of billing for previously unbilled access services which were rendered more than 60 days prior to the bill date." Id. at n.3.

n4 Id.; id. at iii.

n5 Id. at 4.

4. AmNet submits that several problems arise for ICs as a result of backbilling. First, an IC's ability to bill its own customers in a timely [**3] manner is jeopardized. n6 Second, backbilling by LECs causes ICs to incur unexpected and unplanned costs -- particularly if the backbilled access charges consist of usage sensitive charges. n7 Furthermore, argues AmNet, when such backbilling becomes routine, planning and efficient operation of the IC's business become impossible. AmNet claims in many such cases an IC has no choice but to bear the various costs which have been imposed by the LEC's delay in providing accurate billing information. n8 It also claims that actual and potential competition between LECs and ICs creates an incentive for LECs to hamper IC operations. It suggests that LECs can engage in routine backbilling to achieve this result. AmNet claims these factors discourage LECs from providing ICs with timely, accurate bills and that only Commission intervention will cure the problem. In making these allegations, however, AmNet fails to identify the LECs with which it interconnects or to document the alleged widespread nature of the problem. Nor does AmNet quantify the financial impact of the problem or provide examples of the anti-competitive behavior alleged.

n6 Id. at 15-16.

n7 Id. at 6.

n8 Id. at 14. [**4]

5. AmNet argues that backbilling is prohibited by current tariffs and should therefore be prohibited and penalized by the Commission. AmNet cites the provisions of Section 203(c)(3) of the Communications Act, *47 U.S.C. § 203*(c)(3), which require common carriers to comply with the terms of their tariffs. n9 AmNet then states that, to the best of its knowledge, all LEC access tariffs require that access charges be billed on a "current basis." As LECs do not always bill on a "current basis." AmNet asks the Commission to enforce Section 203(c)(3) by defining the phrase "current basis" to require all LECs to bill on that basis regardless of whether their tariffs contain such language. And, says AmNet, the Commission should penalize LECs who are unable or unwilling to comply.

n9 Section 203(c)(3) of the Communications Act, *47 U.S.C. § 203*(c)(3), provides as follows:

[N]o carrier shall . . . extend to any person any privilege or facilities in such [carrier's] communication, or employ any classifications, regulations, or practices affecting . . . [its] charges, except as specified in such [carrier's tariff]. [**5]

II. COMMENTS IN SUPPORT OF PETITION

6. Seventeen parties filed comments in full or partial support of AmNet's petition. n10 These parties report backbilling problems similar to those noted by AmNet as well as other billing problems. However, except for one example provided by Ad Hoc Alliance, n11 those parties supporting AmNet's petition do not provide any examples of backbilling by LECs or otherwise substantiate their claims.

n10 Supporting comments were filed by: MCI Telecommunications Corp. (MCI); ALC Communications Corporation; Northwest Telecom, Ltd. (Northwest Telecom); Ad Hoc Alliance of Small Interexchange Carriers (Ad Hoc Alliance); LDS-Baton Rouge, Inc.; LDS-Natchez, Inc.; LDS-Alexandria, Inc.; LDS-Monroe, Inc.; LDS-Longview, Inc.; LDS-Oklahoma City, Inc.; LDS-Shreveport, Inc.; LDS-Tulsa, Inc.; Tel America; Express Tel; Communigroup of Kansas City, Communigroup of Jackson, Inc., and Communigroup of the Gulf Coast. With minor variations, the comments of the last 13 parties duplicate the comments of Northwest Telecom. Hereinafter we describe all of these parties as the Northwest Telecom Group.

n11 Ad Hoc Alliance notes that in one instance involving Ohio Bell, the LEC issued an access bill dated October 17, 1987, which contained charges for usage in June and July 1986. While the billing appeared to take over one year in this case, an amount of less than $5.00 was involved. Ad Hoc Alliance Comments at 2. [**6]

7. In lieu of the 60-day rule proposed by AmNet, MCI suggests a 90-day rule and Ad Hoc Alliance suggests an alternate method for penalizing LECs who backbill. The Northwest Telecom Group claims that since some ICs, presumably the smaller ones, are subject to routine backbilling of access charges and that other ICs, presumably the larger ones such as AT&T, do not face the problem, the smaller ICs are subject to discrimination that violates Section 202(a) of the Communications Act, *47 U.S.C. § 202*(a). n12 However, none of these ICs provides any examples or other evidence to document these discrimination claims.

n12 Northwest Telecom Group Comments at 8.

III. OPPOSITIONS TO PETITION

8. Sixteen parties filed comments opposing AmNet's petition. n13 The first substantive claim raised by the opposing commenters is that backbilling is authorized by Section 415 of the Communications Act, *47 U.S.C. § 415*. n14 USTA states that this section allows carriers up to two years to seek recovery of their lawful charges. USTA argues that this provision exists to deal with the situations such as the complex billing arrangements [**7] which are the subject of AmNet's petition, that a 60-day limitation on billing would be unnecessarily restrictive, and that such a limitation would effectively amend Section 415. n15 AT&T, [*551] NYNEX, and Centel make similar arguments with regard to the application of Section 415. n16 Second, several commenters claim that granting some ICs free service as a result of late bills for such service would violate the anti-discrimination provisions of Section 202(a) of the Communications Act, *47 U.S.C. § 202*(a). n17

n13 The following parties filed comments in opposition to AmNet's petition:

American Telephone and Telegraph Company (AT&T); Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West); Southwestern Bell Telephone Company (SWB); Pacific Bell and Nevada Bell (PacTel); New England Telephone and Telegraph Company and New York Telephone Company (NYNEX); Bell Atlantic Telephone Companies (Bell Atlantic); Ameritech Operating Companies (Ameritech); BellSouth Telephone Companies (BellSouth); GTE Telephone Companies (GTOC); United Telephone System Companies (UTS); Contel Corporation (Contel); Central Telephone Company (Centel); Cincinnati Bell Telephone Company (Cincinnati Bell); National Exchange Carrier Association, Inc. (NECA); Rochester Telephone Corporation (Rochester); and the United States Telephone Association (USTA).

n14 Section 415 of the Communications Act, *47 U.S.C. § 415*, provides in relevant part as follows:

All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after.

n15 USTA Comments at 3-4.

n16 AT&T Comments at 2-3; NYNEX Comments at ii, 13-14; Centel Comments at 3-6.

n17 See, e.g., GTOC Comments at 5; BellSouth Reply at 4 n.5; US West Comments at 16. [**8]

9. Third, several commenters caution that AmNet has taken the "current basis" language out of context and that such language was not intended to apply to all access services. n18 Fourth, opposing commenters claim that any backbilling which does in fact occur is not significant n19 or is the fault of others (including in some cases the ICs themselves) n20 and they dispute the existence of any intentional backbilling for anti-competitive or any other purposes. n21 They also assert that AmNet need not rely on LEC access bills for customer billing because it likely has better internal sources of such billing information. n22 LEC commenters argue that backbilling confers a financial benefit on AmNet and other ICs by providing the equivalent of an interest-free loan. n23 Fifth and finally, they submit that the forfeiture provisions of the proposed 60-day rule are confiscatory. n24

n18 See, e.g., UTS Comments at 3-4; US West Comments at 10-12.

n19 See,e.g., US West Comments at 2, 10; NYNEX Comments at i, 3-4.

n20 See NYNEX Comments at 3; Cincinnati Bell Comments at 1-2.

n21 See US West Comments at 3-4; Centel Comments at 4-5.

n22 See Ameritech Comments at 8; BellSouth Comments at 7; Contel Comments at 3; SWB Comments at 6-7.

n23 See PacTel Comments at 5; Ameritech Comments at 3,4; Bell Atlantic Comments at 2.

n24 See Ameritech Comments at 7; US West Comments at 17; Rochester Comments at 12; SWB Comments at 2. [**9]

10. In addition to their substantive opposition, several commenters claim that AmNet erred in petitioning for a declaratory ruling. Such commenters claim that AmNet should first file complaints against the LECs and that a petition for Rule Making is the only proper vehicle to establish a 60-day limit for backbilling because the Commission could not adopt the proposed 60-day rule under Section 205(a) of the Act, *47 U.S.C. § 205*(a), n25 without further notice to interested parties and a full hearing. n26

n25 Section 205(a) of the Communications Act, *47 U.S.C. § 205*(a), provides, in part, as follows:

Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of [the] opinion that any . . . classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe . . . what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

n26 See BellSouth Comments at 4-5; US West Comments at 14. [**10]

IV. REPLIES

11. AmNet and eight other parties filed reply comments supporting the petition. n27 The AmNet reply responds that billing requirements and the statute of limitations included in Section 415 are two separate and distinct matters. n28 In addition, both AmNet and the Northwest Telecom Group note that Section 415 speaks to the collection of "lawful" charges and argue that backbilled charges are not lawful and are therefore not covered by Section 415. n29

n27 The following parties filed reply comments supporting the petition: AmNet, Ad Hoc Alliance, MCI, Northwest Telecom, Communigroup of Kansas City, ExpressTel, TelAmerica, Communigroup of the Gulf Coast, and Communigroup of Jackson. With minor variations the reply comments of the last five parties duplicate the reply comments of Northwest Telecom. We refer to these parties as the Northwest Telecom Group.

n28 AmNet Reply at 33-36.

n29 See id.; Northwest Telecom Group Reply at 3-5.

12. AmNet and others renew their claims that backbilling is "far from insignificant from the standpoint of the affected ICs." n30 In response to assertions that it has not adequately substantiated its damages. AmNet argues, first, [**11] that this is not a complaint proceeding in which damages must be proven and, second, that it is not willing to release competitively sensitive information in this proceeding. n31 However, AmNet does use some of the backbilling percentages provided by a few of the LECs as further support for its claims. While these percentages appear small. AmNet asserts that the dollar amounts involved are often significant and that these amounts have a disproportionate impact on smaller ICs. n32

n30 AmNet Reply at 15-16.

n31 Id. at 12-13.

n32 Id. at 15.

13. AmNet again asserts that the LECs' have anti-competitive motives for backbilling. n33 Its responds to assertions that it need not rely on access bills to bill its own customers, by conceding such assertions are "partially correct," but insists that there is still critical cost information which is only available from such access bills. n34 Next, AmNet rejects the contention that backbilling provides an IC with an interest-free loan. AmNet claims that resellers cannot forecast their access costs with precision. As such, it is not possible for them to set aside cash reserves prior to payment of a late access bill. n35

n33 Id. at 20-22.

n34 AmNet provides two examples of such unique information: first, the actual traffic pattern information needed to apply the premium/non-premium differential and second, the distance-sensitive local transport charge. Id. at 16, 17.

n35 Id. at 19-20. [**12]

14. Finally, Ad Hoc Alliance and Northwest Telecom reject the claims of some commenters that enforcement of the proposed 60-day rule would be confiscatory. These replies observe that any loss incurred by a LEC under such a rule would be attributable to the LEC's own inefficiency and that, while the LECs are to be provided a reasonable opportunity to earn adequate revenues with efficient operations, no particular rate of return is guaranteed. n36 In response to the charge that the proposed 60-day rule would violate Section 202(a) because of alleged discrimination, Ad Hoc Alliance and others argue that only unreasonable discrimination is prohibited by that section. n37

n36 See Ad Hoc Alliance Reply at 5-6; Northwest Telecom Group Reply at 7-8.

n37 See Ad Hoc Alliance Reply at 3-5.

15. AmNet and others also dispute claims that the petition for a declaratory ruling is inappropriate. n38 AmNet defends its pursuit of a declaratory ruling rather than prosecution of complaints or Rule Making because, in AmNet's view, complaints against all relevant LECs would be "unduly burdensome" and a Rule Making is not needed because it is not requesting that the Commission adopt any new rules. [**13] n39 Citing cases, the Ad Hoc Alliance and Northwest Telecom Group reject the claim that Section 205(a) bars granting the petition without further notice and a full hearing. n40

n38 See AmNet Reply at 10-12; Ad Hoc Alliance Reply at 6-8; Northwest Telecom Group Reply at 8-9.

n39 Id. at 10-11.

n40 See Ad Hoc Alliance Reply at 6-7; Northwest Telecom Group Reply at 5-7.

16. Seven LECs n41 filed reply comments in opposition to AmNet's petition. Those replies repeat earlier claims that Sections 202(a) and 415 bar the relief AmNet seeks. n42 Those replies contend that AmNet fails to document the backbilling problems alleged, that the proposed rule would be confiscatory and would confer an unjust windfall on the ICs -- particularly when bills are delayed through no fault of the LECs, and that ICs such as AmNet have or could easily develop internal sources for the usage information contained in access bills. Finally, the LECs again assert that a declaratory ruling is not appropriate and that other procedural remedies are adequate. Some LECs indicate that they are moving unilaterally to improve access billing procedures n43 and that they are willing to negotiate special arrangements [**14] with ICs when significant backbilling occurs. n44

n41 The following LECs filed reply comments in opposition to AmNet's petition: PacTel, SWB, NYNEX, BellSouth, Rochester, US West, and Ameritech.

n42 See, e.g., SWB Reply at 5.

n43 Id. at 6 n.9.

n44 See NYNEX Comments at 6 n.6; Ameritech Comments at 3.

V. *DISCUSSION*

17. While AmNet and others strongly assert that backbilling is a serious problem, this record provides very little concrete evidence to support their claims. Accordingly, we are unable to understand the specific nature and extent of the backbilling problem, much less adopt an appropriate remedy. AmNet offers two explanations for failing to provide such evidence: first, that we do not need such information because this is not a complaint proceeding and, second, that it cannot submit more specific evidence of backbilling because such evidence would include confidential information. We reject each of these explanations.

18. A declaratory ruling may be used to resolve a controversy if the facts are clearly developed and essentially undisputed. The petitioner in such a proceeding must provide sufficient information to enable the Commission to resolve the [**15] controversy in a meaningful manner. AmNet has failed to do so. Moreover, we agree with [*552] commenters who contend that any fixed limit upon all backbilling should be established in a Rule Making proceeding rather than a declaratory ruling proceeding.

19. The pleadings do, however, reveal one relatively concrete controversy that can be resolved through a declaratory ruling. Many carriers apparently believe that Section 415(a) of the Communications Act confers a right to bill for past *services for up two years. AmNet and others contend that this carrier interpretation of Section 415(a) is incorrect.* We agree. Section 415(a) establishes a time limit for filing a court action to recover unpaid bills; it does not establish the time limit for sending an initial bill to the customer for services rendered. n45 A delay of much less than 24 months between the rendering of service and the receipt of an initial bill for such service may be an unjust and unreasonable practice for purposes of Section 201(b) of the Act.

n45 We find nothing in the legislative history to suggest that this section was intended to allow carriers to delay bills for up to two years after services have been rendered. See, e.g., Senate and House Reports on the 1974 amendment extending the limitation period from one to two years. Senate Report 93-796, Apr. 30, 1974, and House Report 93-1421, Oct. 3, 1974 (both reports to accompany S. 1227). [**16]

VI. CONCLUSION

20. Accordingly, we must deny much of the relief requested in the petition without reaching the issues whether backbilling may in some cases violate the Communications Act; whether backbilling of some ICs and not others might constitute unreasonable discrimination in violation of Section 202(a); whether the remedies sought by AmNet and others would be appropriate under applicable laws and regulations; and whether the Commission has the authority to grant the relief requested without a formal Rule Making. However, in response to AmNet's request for clarification in this area, we declare that backbilling may under certain circumstances constitute an unjust and unreasonable practice in violation of Section 201(b) and that Section 415 does not authorize backbilling for any particular period.

21. Accordingly, IT IS ORDERED that the petition for declaratory ruling filed by American Network, Inc., IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock

Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming	)	WC Docket No. 02 - 314
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 2002 **Released: December 23, 2002**

By the Commission: Commissioner Copps issuing a statement; and Commissioner Adelstein not participating.

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APPENDIX J – WYOMING PERFORMANCE METRICS

APPENDIX K – STATUTORY REQUIREMENTS

I. INTRODUCTION

1. On September 30, 2002, Qwest Communications International, Inc. filed this multi-state application on behalf of itself and its subsidiaries, Qwest Corporation and Qwest LD Corporation (collectively "Qwest") pursuant to section 271 of the Communications Act of 1934, as amended,[1] for authority to provide in-region, interLATA service in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming ("Qwest III").[2] Previously, Qwest had filed two multistate applications for in-region, interLATA authority involving those states: (1) on June 13, 2002 for the states of Colorado, Idaho, Iowa, Nebraska, and North Dakota ("Qwest I"); and (2) on July 12, 2002, for the states of Montana, Utah, Washington, and Wyoming ("Qwest II"). In this Order, we grant Qwest's application for the nine states that are the subject of its September 30, 2002 application, based on our conclusion that Qwest has taken the statutorily required steps to open its local exchange markets in these states to competition.

2. Approval of this application, the first one granted for states in the Qwest region, would not have been possible without the extraordinary dedication and creativity displayed by the Colorado Public Utilities Commission ("Colorado Commission"), the Idaho Public Utilities Commission, ("Idaho Commission"), the Iowa Utilities Board ("Iowa Board"), the Montana Public Service Commission ("Montana Commission"), the Nebraska Public Service Commission ("Nebraska Commission"), the North Dakota Public Service Commission ("North Dakota Commission"), the Public Service Commission of Utah ("Utah Commission"), the Washington Utilities and Transportation Commission ("Washington Commission"), and the Wyoming Public Service Commission ("Wyoming Commission") (collectively "state commissions" or "commissions of the nine application states"). We recognize their outstanding commitment to the section 271 process and commend their hard work in bringing the benefits of competition to consumers in their states.

3. The Colorado Commission, Idaho Commission, Iowa Board, Montana Commission, Nebraska Commission, North Dakota Commission, Utah Commission, Washington Commission, and the Wyoming Commission each devoted a significant portion of their resources to this process over a number of years. These states, as well as others in the Qwest

[1] We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as "the Communications Act" or "the Act." *See* 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as "the 1996 Act". *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] For the numerous *ex parte* filings Qwest has made in the instant application, we use Qwest's date references set forth in Index of *Ex Parte* Submissions and Errata, Attach. 6, Qwest III Application (Qwest *Ex Parte* Index) and Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314, Attach. 1-6 (dated Dec. 6, 2002) (Qwest Dec.6 *Ex Parte* Letter).

region, also undertook unprecedented steps to pool resources and work collaboratively in addressing section 271 issues. In particular, the Regional Oversight Committee ("ROC"), a group of state regulatory commissions in the Qwest region, including all nine states covered by this application, worked together on the design and execution of regional operations support systems ("OSS") testing. In addition, Idaho, Iowa, Montana, North Dakota, Utah and Wyoming worked with a number of other states in the Multistate Collaborative Process ("MCP") to address other section 271 issues. Moreover, in a number of instances, regulators in these states have been able to build on the work done by their fellow commissioners in other states to address issues such as pricing, for example, in an efficient manner through individual state proceedings.

4. We also commend Qwest for its extensive work in opening its local exchange markets to competition and bringing this application to fruition. In particular, we recognize the work that Qwest has undertaken in conjunction with the ROC to develop, upgrade and test its OSS and processes in a collaborative manner with competitive local exchange carriers ("LECs"). Approval of this application would not have been possible without these undertakings by Qwest in cooperation with state regulators. Notwithstanding these positive efforts, a number of troubling allegations have been raised in the record regarding such things as the existence of confidential unfiled agreements, accounting issues, and provision of in-region long-distance services without section 271 authorization. As discussed below, we approve these applications for the reasons herein. We anticipate that any past violations of the statute or our rules will be addressed expeditiously through enforcement processes at the Commission or at the State Commissions.

5. The outstanding work of the state commissions in conjunction with Qwest's extensive efforts to open its local exchange network to competition has resulted in competitive entry in each of these states. Qwest estimates that competitive LECs serve approximately 23 percent of all lines in Colorado, including 59,013 UNE-loops and 84,780 UNE-platform lines.[3] Qwest estimates that competitive LECs serve approximately 11 percent of all lines in Idaho, including about 5,606 UNE-loops and 10,515 UNE-platform lines.[4] In Iowa, Qwest estimates that competitive LECs serve approximately 18 percent of all lines, including 37,427 UNE-loops and 98,878 UNE-platform lines.[5] Qwest estimates that competitive LECs serve approximately 6 percent of all lines in Montana, including 3,111 stand alone UNE-loops and 5,085 UNE-platform lines.[6] Qwest estimates that competitive LECs serve approximately 32 percent of all lines in Nebraska, including 17,775 UNE-loops and 4,055 UNE-platform lines.[7] Qwest estimates that competitive LECs serve approximately 22 percent of lines in North Dakota, including 15,247

[3] Qwest III Application App. A, Tab 1, Declaration of David L. Teitzel (Qwest III Teitzel Decl.) at paras. 15, 30.

[4] *Id.; cf.* Idaho Commission Qwest III Hall Aff. at para. 14 (estimating that competing LECs now serve 2.3 percent of residential lines and 13.4 percent of business lines in Idaho).

[5] Qwest III Teitzel Decl. at paras. 15, 30.

[6] *Id.*

[7] *Id.*

UNE-loops and 20,078 UNE-platform lines.[8] Qwest estimates that competitive LECs serve approximately 23 percent of all lines in Utah, including about 28,137 stand alone UNE-loops and 17,667 UNE-platform lines.[9] In Washington, Qwest estimates that competitive LECs serve approximately 19 percent of all lines, including 59,207 stand alone UNE-loops and 52,346 UNE-platform lines.[10] Qwest estimates that competitive LECs serve approximately 12 percent of all lines in Wyoming, including 427 stand alone UNE-loops and 26,613 UNE-platform lines.[11]

6. We are confident that the hard work of the state commissions in conjunction with Qwest to ensure that the local exchange markets in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming are open to competition will benefit consumers by making increased competition in all telecommunications service markets possible in these states. We are also confident that the state commissions, as they address allegations of past violations of the statute and consider any future problems that may develop, will continue to ensure that Qwest meets its statutory obligations.

II. BACKGROUND

7. In the 1996 amendments to the Communications Act, Congress required that the Bell Operating Companies ("BOCs") demonstrate compliance with certain market-opening requirements contained in section 271 of the Act before providing in-region, interLATA long distance service. Congress provided for Commission review of BOC applications to provide such service in consultation with the affected state and the Attorney General.[12]

8. In our examination of this application, we rely heavily on both the individual and collaborative work done by the state commissions. The collaborative ROC process used to address OSS issues, the MCP process used by several of the states to address other section 271

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] The Commission has summarized the relevant statutory framework in prior orders. *See, e.g., Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001); *Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18359-61, paras. 8-11 (2000) (*SWBT Texas Order*); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3961-63, paras. 17-20 (1999) (*Bell Atlantic New York Order*), *aff'd, AT&T Corp v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

issues, as well as the individual state proceedings were open to participation by all interested parties and provide a sound foundation for our review of this application. As the Commission has previously recognized, state proceedings such as these fulfill a vitally important role in the section 271 process.[13] We summarize these proceedings in more detail below.

9. *Regional Oversight Committee and OSS Development and Testing.* In 1999, the ROC initiated a collaborative process to design and execute a third-party OSS test to ensure that Qwest's wholesale support systems would be available to competitive LECs in an open and non-discriminatory manner.[14] The ROC used an open process, with the opportunity for broad participation by interested parties, to design a collaborative governing structure, determine the overall scope of the test, select third-party testers,[15] and design a Master Test Plan ("MTP") and Performance Indicator Definitions ("PIDs").

10. In July 2000, the ROC selected KPMG Consulting, Inc. ("KPMG") and Hewlett-Packard Consulting ("HP") to conduct the third-party tests of Qwest's OSS.[16] KPMG was chosen as the test administrator, and HP was selected to serve as a "pseudo-CLEC" in the testing process.[17] The ROC also created a Technical Advisory Group ("TAG") consisting of representatives of the ROC, state commission staff, test vendors, competitive LECs, industry associations, consumer groups, and Qwest.[18] The TAG provided technical assistance and subject matter planning for the OSS test and assisted in reviewing the results of the test.[19] The TAG also sought comment and reached agreement on the performance measurements, or PIDs, to be used

[13] *See, e.g., Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut,* CC Docket No. 01-100, Memorandum Opinion and Order, 16 FCC Rcd 14147, 14149, para. 3 (2001) (*Verizon Connecticut Order*); *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, 16 FCC Rcd 8988, 8990, para. 2 (2001) (*Verizon Massachusetts Order*).

[14] Qwest I Application App. A, Tab 10, Declaration of Lynn M.V. Notarianni and Christie L. Doherty (Qwest I Notarianni/Doherty Decl.) at para. 19.

[15] Qwest I Application App. A, Tab 34, Declaration of Michael J. Williams (Qwest I Michaels Decl.) at paras. 47-53. In establishing a management structure for the test, the ROC created an Executive Committee, comprised of seven state commissioners, as well as a Steering Committee comprised of various commission staff members from each participating state commission. The Steering Committee oversaw the test process, assisted in developing and implementing the test, and was the first point of escalation for resolving test issues. The Executive Committee reviewed the overall progress of the test and made final decisions on any escalated test issues.

[16] *Id.*

[17] Qwest I Notarianni/Doherty Decl. at para. 27.

[18] *Id.* at para. 23.

[19] *Id.*

to measure Qwest's commercial performance.[20] Through collaborative workshops held in mid-2000, KPMG, with the assistance of the TAG, developed the MTP which set forth the comprehensive plan for how Qwest's OSS would be evaluated.[21]

11. As a prelude to the OSS testing, KPMG conducted a "Regional Differences Assessment" to determine whether Qwest's systems were the same region-wide, and to identify any variations from state to state. As a result of this testing, KPMG and the ROC concluded that Qwest's processes and systems were generally "materially consistent across Qwest's local service region,"[22] and that a regional test could be conducted in a manner that would produce meaningful results.[23]

12. The OSS testing conducted under the auspices of the ROC was broad-based and comprehensive. Throughout the course of the test, KPMG and HP issued 256 "Exceptions" and 242 "Observations" that documented issues of concern.[24] As the result of repeated iterations of Qwest's documentation, systems and processes as well as substantial retesting, Qwest was able to improve its wholesale support systems until only one "Observation" and 14 "Exceptions" were designated "closed /unresolved" by the conclusion of the test.[25] KPMG and HP issued Qwest's OSS Evaluation Final Report ("KPMG Final Report") addressing Qwest's OSS testing performance on May 28, 2002.

13. The ROC also retained Liberty Consulting ("Liberty") to conduct an audit of Qwest's performance data. In order to verify the integrity of Qwest commercial data, Liberty performed a data reconciliation of Qwest and competing carrier data.[26] On September 25, 2001,

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20 *Id.* at para. 30.

21 *Id.* at para. 28.

22 Qwest I Notarianni/Doherty Decl. at paras. 35-36. The exceptions to this finding were that Qwest utilizes three different service order processors and billing systems. None of the commenters has alleged that this regional approach was inappropriate, or that any Qwest OSS feature is too dissimilar to permit such a region-wide evaluation. Department of Justice Qwest I Evaluation at 7.

23 Qwest I Notarianni/Doherty Decl. at paras. 35-36 & Exhibit 4 (KPMG Regional Differences Assessment (Oct. 5, 2000)).

24 Qwest I Notarianni/Doherty Decl. at paras. 37-39.

25 *Id.* at para. 39 n.39.

26 Qwest I Application Att. 5, App. D, Liberty Report. The Iowa Board states that the Liberty data reconciliation process was a long and arduous undertaking by all participants and provided adequate assurance that Qwest's performance reporting is accurate and reliable. Iowa Board Comments at 17. The process involved the ROC TAG reviewing the exceptions and observations that Liberty filed relating to the data reconciliation audit, and noting the changes Qwest implemented, before accepting Liberty's recommendation to close all of the issues. *Id.*; *see also* Qwest Application App. C, Vol. 1, Tab 16, IUB Conditional Statement Regarding Data Reconciliation of Performance Measures in the ROC OSS Test.

Liberty validated each PID measure and concluded that the commercial data were both accurate and reliable.[27]

14. *Multistate Collaborative Process*. The Idaho Commission, Iowa Board, Montana Commission, North Dakota Commission, Utah Commission, and Wyoming Commission also worked with a number of other states through the MCP to address competitive checklist items, section 272 Track A requirements, and public interest issues, including post-entry performance assurance issues.[28] The MCP included numerous collaborative workshops in which competitive LECs, Qwest and state commission staff considered and developed recommendations concerning many difficult issues. Nebraska also reviewed the MCP record, although it was not initially involved in the MCP, and it held hearings to address a number of section 271 and 272 issues.

15. *Individual State Commission Proceedings*. Each of the nine states also conducted independent proceedings to address section 271 issues. The Colorado Commission adopted the performance measures developed through the ROC, developed its own Performance Assurance Plan, and addressed a variety of other section 271 issues. The Colorado Commission also conducted extensive pricing proceedings to establish wholesale rates for unbundled network elements ("UNEs"). Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, and Washington also adopted the performance measurements and standards developed through the ROC and the Qwest Performance Assurance Plan ("QPAP").[29] Each of these states also conducted arbitrations or other proceedings to establish initial UNE rates and subsequently accepted Qwest's adjustment of core UNE rates using the new Colorado rates as benchmarks.[30] As in the prior Qwest section 271 applications, each of the commissions of application states, with the exception of the Montana Commission,[31] endorses Qwest's current application.

A. Department of Justice Evaluation

16. The Department of Justice "recommends approval of Qwest's application" for Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming, if

[27] Qwest I Notarianni/Doherty Decl. at para. 27. The Colorado Commission also concluded that Liberty Consulting's data reconciliation demonstrated that Qwest's performance reporting was correct and reliably reflected Qwest's actual performance. Colorado Commission Comments at 41.

[28] *See* Qwest I Brief at 7; *see also* Department of Justice Evaluation at 8.

[29] The Montana Commission adopted the QPAP after review and modification. *See* Department of Justice Qwest II Evaluation at 5.

[30] *See* Department of Justice Qwest I Evaluation at 8-10; Department of Justice Qwest II Evaluation at 5-6.

[31] The Montana Commission urges us to deny Qwest's application as it pertains to the state of Montana due to a state issue, as discussed more fully below.

the Commission is able to assure itself that the concerns raised by Justice in its Evaluation have been resolved.[32] In particular, the Department of Justice states that:

> With respect to most of the issues about which the Department previously had expressed concern, Qwest's re-filed application demonstrates improvement. The Department reiterates its deference to the Commission's determination whether Qwest's pricing is appropriately cost-based and whether Qwest complies with Section 272. Moreover, the Department urges the Commission to evaluate carefully the allegations pertaining to Qwest's withholding of full information from regulators.[33]

The Department also stated that it "finds the record has improved with respect to the other issues about which it previously had expressed reservations: manual order processing, the provision of electronically auditable wholesale bills, and the testing of line-sharing orders."[34] Each of the issues raised by the Department is fully addressed by the Commission in this Order.

B. Primary Issues in Dispute

17. As in recent section 271 orders, we will not repeat here the analytical framework and particular legal showing required to establish checklist compliance with every checklist item. Rather, we rely on the legal and analytical precedent established in prior section 271 orders, and we attach comprehensive appendices containing performance data and the statutory framework for evaluating section 271 applications.[35] Our conclusions in this Order are based on

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[32] Department of Justice Qwest III Evaluation at 10. Section 271(d)(2)(A) requires us to give "substantial weight" to the Department's evaluation.

[33] *Id.* The Department's statement concerning "allegations pertaining to Qwest's withholding of full information from regulators" refers to allegations that "Qwest personnel 'diminish[ed] the visibility' of certain information [regarding a mechanized loop test ("MLT")] to Commission staff who were visiting the Qwest CLEC Coordination Center." *Id.* at 4. We address the allegations below in our discussion of Qwest's compliance with checklist item 2.

[34] *Id.* at 4.

[35] *See Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long* Distance), *NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Rhode Island,* CC Docket No. 01-324, Memorandum Opinion and Order, 17 FCC Rcd 3300, Apps. B, C, and D (2002) (*Verizon Rhode Island Order*); *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri,* CC Docket No. 01-194, Memorandum Opinion and Order, 16 FCC Rcd 20719, Apps. B, C, and D (2001) (*SBC Arkansas/Missouri Order*); *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc.,* and *Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, Memorandum Opinion and Order, 16 FCC Rcd 17419, Apps. B and C (2001) (*Verizon Pennsylvania Order*).

performance data as reported in monthly performance reports reflecting service in the most recent months before filing (June 2002 through September 2002).

18. In this application, we frequently rely on Qwest's performance in Colorado to supplement our analysis of the commercial readiness of Qwest's OSS in Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming, as well as to make determinations with respect to other checklist items. The Commission has previously found that performance data based on low volumes of orders or other transactions is not as reliable an indicator of checklist compliance as performance based on larger numbers of observations.[36] Therefore, the Commission has previously relied on current higher volumes from an "anchor state" in a prior, successful section 271 application.[37] For some of the performance data associated with this section 271 application, the volume of commercial activity in any one of the nine application states is often too low to rely upon. In this instance, the Commission is faced with a section 271 application covering multiple states from a BOC that has yet to receive approval in any state. Because the Commission has not previously approved a Qwest section 271 application that could provide an anchor state, we shall draw conclusions about Qwest's performance in a particular application state based on the performance in another application state. We note, however, that convincing commercial evidence of discriminatory treatment in a certain applicant state cannot be trumped by convincing evidence of satisfactory treatment in another.[38] Because Qwest uses the same provisioning and maintenance and repair processes in the nine states included in this application, and given the significantly higher volumes in Colorado, we find that it is appropriate to look to Qwest's performance in Colorado even though Colorado is a state included in the current application.[39]

19. We begin our analysis of Qwest's application with the threshold question of whether it qualifies for consideration under section 271(c)(1)(A) (Track A). We then discuss the checklist item that is most in controversy -- checklist item two (unbundled network elements, or UNEs).[40] Next, we address Qwest's compliance with other checklist items: one

[36] Appendix K, para. 11.

[37] Appendix K, para. 14.

[38] Appendix K, para. 13.

[39] KPMG, in its Regional Differences Assessment (RDA), found that Qwest's order management, provisioning, maintenance and repair, and competitive LEC relationship management and infrastructure are materially consistent across the three regions. *See* Qwest I Notarianni/Doherty Decl. at para. 36. We also note that it is appropriate to look to Qwest's performance in Colorado as performance objectives for all nine states (among others) were set by the Regional Oversight Committee for both provisioning and maintenance and repair of unbundled loops. *See* Qwest I Application App A, Tab 14, Declaration of William M. Campbell (Qwest I Campbell Loops Decl.) at para. 5.

[40] We note that the United States Court of Appeals for the District of Columbia Circuit recently opined in two relevant Commission decisions, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*) and *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and (continued....)

(interconnection), four (unbundled local loops), five (transport), six (switching), seven (E911/Operator Services/Directory Assistance) (OS/DA), ten (databases and signaling), eleven (number portability), and fourteen (resale). The remaining checklist items are discussed briefly, as the Commission found no significant patterns of performance problems with regard to these checklist items, and they received little to no attention from commenting parties.[41] Finally, we discuss whether Qwest's requested authorization to provide in-region, long distance will be carried out in accordance with the requirements of section 272 and whether such authorization is consistent with the public interest.

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

20. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, the 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).[42] To meet the requirements of Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."[43] In addition, the Act states that "such telephone service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier."[44] The Commission has concluded that section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers,[45] and that

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Order in CC Doc. No. 98-147 and Fourth Report and Order in CC Doc. No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*). *USTA v. FCC*, 290 F.3d 415 (D. C. Cir. 2002. The court's decision addressed both our UNE rules and our line sharing rules. The Commission is currently reviewing its UNE rules, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781 (2001) (*Triennial Review Notice*). Further, the court stated that "the *Line Sharing Order* must be vacated and remanded." *USTA v. FCC*, 290 F.3d at 429. The court also stated that it "grant[ed] the petitions for review[] and remand[ed] the *Line Sharing Order* and the *Local Competition Order* to the Commission for further consideration in accordance with the principles outlined." *Id.* at 430. On July 8, 2002, the Commission, among others, filed petitions for rehearing and suggestion for rehearing en banc with the D.C. Circuit regarding that opinion. On September 4, 2002, the D.C. Circuit denied petitions for rehearing filed by the Commission and others. *See Order*, Nos. 00-1012 and 00-1015 (D.C. Circuit, filed Sept. 4, 2002).

[41] We note that, in its comments, AT&T lists without elaboration various performance metrics missed by Qwest for particular months. *See* AT&T Qwest III Comments App., Tab F, Declaration of John F. Finnegan (AT&T Qwest III Finnegan Decl.). Because AT&T neither provides specific evidence regarding these missed metrics, nor demonstrates any harm or discrimination resulting from the misses, we do not find that the missed metrics listed by AT&T alter our conclusion that Qwest complies with all of the checklist items.

[42] 47 U.S.C. § 271(c)(1); Appendix K at paras. 15-16.

[43] *Id.*

[44] 47 U.S.C. § 271(d)(3)(A).

[45] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20585, para. 85 (1997) (*Ameritech Michigan Order*); *see also Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region,* (continued....)

unbundled network elements are a competing provider's "own telephone exchange service facilities" for purposes of section 271(c)(1)(A).[46] The Commission has further held that a BOC must show that at least one "competing provider" constitutes "an actual commercial alternative to the BOC,"[47] which a BOC can do by demonstrating that the provider serves "more than a *de minimis* number" of subscribers.[48] The Commission has held that Track A does not require any particular level of market penetration, and the D.C. Circuit has affirmed that the Act "imposes no volume requirements for satisfaction of Track A."[49]

21. We conclude, as did the state commissions, that Qwest satisfies the requirements of Track A.[50] With respect to these states, Qwest relies on interconnection agreements with Alltel (FKA Aliant Midwest), AT&T, AT&T Communications of the Mountain States, AT&T Communications of the Pacific Northwest, Consolidated Communications Networks, Cox Iowa Telcom, Cox Nebraska Telecom, FiberComm, Goldfield Access Networks, IdeaOne Telecom Group, Integra Telecomm of Utah, Laurens Municipal Broadband Communications Utility, Mid-

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InterLATA Services In Louisiana, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20633-35, paras. 46-48 (1998)(*Second BellSouth Louisiana Order*).

46 *Ameritech Michigan Order*, 12 FCC Rcd at 20598, para. 101.

47 *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8695, para. 14 (1997) (*SWBT Oklahoma Order*).

48 *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6257, para. 42; *see also Ameritech Michigan Order* 12 FCC Rcd at 20585, para. 78.

49 *Sprint v. FCC*, 274 F.3d at 553-54; *see also SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) ("Track A does not indicate just how much competition a provider must offer in either the business or residential markets before it is deemed a 'competing' provider.").

50 Qwest II Application App. A, Tab 1, Declaration of Rick Hays (Qwest II Hays Decl.) at para. 74; Qwest II Application App. A, Tab 2, Declaration of Robin L. Riggs (Qwest II Riggs Decl.) at para. 27; Qwest II Application App. A, Tab 3, Declaration of Kirk R. Nelson (Qwest II Nelson Decl.) at paras. 44-46; Qwest II Application App A, Tab 4, Declaration of Michael A. Ceballos (Qwest II Ceballos Decl.) at para. 33; Qwest I Application App. A, Tab 1, Declaration of Paul R. McDaniel (Qwest I McDaniel Decl.) at paras. 70-71; Qwest I Application App. A, Tab 2, Declaration of Jim Schmit (Qwest I Schmit Decl.) at para. 21; Qwest I Application App. A, Tab 3, Declaration of Max A. Phillips (Qwest I Phillips Decl.) at para. 69; Qwest I Application App A, Tab 4, Declaration of Timothy Sandos (Qwest I Sandos Decl.) at para. 61; Qwest I Application App. A, Tab 5, Declaration of Scott A. Macintosh (Qwest I Macintosh Decl.) at para. 22; Qwest I Application App. C, Tab 5, Qwest I Idaho PUC Decision Regarding Track A, Public Interest, and Section 272 at 5-7; Qwest I Application App C, Tab 2, Nebraska Commission Recommendation on Checklist Items 3, 7, 8, 9, 10, 11, 12 and 14 at 56; Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148, 02-189 at 1-3 (dated August 1, 2002) (Qwest Aug. 1 *Ex Parte* Letter); Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148, Attach. at 1-3 (dated July 9, 2002) (Qwest July 9 *Ex Parte* Letter) Montana Commission Qwest II Comments at 11-12; Utah Commission Qwest II Comments at 5; Washington Commission Qwest II Comments at 7-8; Wyoming Commission Qwest III Comments at 5-6; Wyoming Commission Qwest II Comments at 6; Colorado Commission Qwest I Comments at 2 and 10-12; Iowa Board Qwest I Comments at 17-19; North Dakota Commission Qwest I Comments at 6, North Dakota Commission Qwest I Comments, App. at 148-54.

Rivers Telephone Cooperative, Montana Wireless, Project Mutual Telephone Cooperative, Rainier Cable, Silver Star Telephone, Spencer Municipal Communication Utility, Sunwest Communications, Time Warner Telecomm of Washington, XO Communications Idaho, XO Utah, and XO Washington in support of its Track A showing.[51]

22. In Colorado, we find that AT&T Communications of the Mountain States and Sunwest Communications each serve more than a *de minimis* number of end users predominantly over their own facilities and represent "actual commercial alternatives" to Qwest.[52] AT&T provides telephone exchange service to residential and business subscribers predominantly through its own facilities, while Sunwest Communications provides telephone exchange service to residential and business subscribers predominantly through UNE loops.[53]

23. In Idaho, we find that Project Mutual Telephone Cooperative and XO Communications Idaho each serve more than a *de minimis* number of end users predominantly over their own facilities and represent "actual commercial alternatives" to Qwest.[54] Specifically, Project Mutual Cooperative provides telephone exchange services to both residential and business subscribers through its own facilities, while XO provides telephone exchange services to business subscribers predominantly through its own facilities.[55]

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[51] Qwest III Teitzel Decl. at paras. 4-13; Qwest II Application App. L, Interconnection Agreements – Montana, Attach. 5; Qwest II Application App. L, Interconnection Agreements – Utah, Attach. 5; Qwest II Application App. L, Interconnection Agreements – Washington, Attach. 5; Qwest II Application App. L, Interconnection Agreements – Wyoming, Attach. 5; Qwest I Application at 15; Qwest I Application App. L, Interconnection Agreements – Colorado, Attach. 5; Qwest I Application App. L, Interconnection Agreements – Idaho, Attach. 5; Qwest I Application App. L, Interconnection Agreements – Iowa, Attach. 5; Qwest I Application App. L, Interconnection Agreements – Nebraska, Attach. 5; Qwest I Application App. L, Interconnection Agreements – North Dakota, Attach. 5.

[52] Qwest III Teitzel Decl. at paras. 19, 22, 30; Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-CO-1 (citing confidential information); Qwest Aug. 1 *Ex Parte* Letter at 1-3; Qwest July 9 *Ex Parte* Letter, Attach. at 1-3. Qwest estimates that competing LECs now serve approximately 22.9 percent of the access lines in Colorado. Qwest III Teitzel Decl. at para. 30.

[53] Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-CO-1 (citing confidential information).

[54] Qwest III Teitzel Decl. at paras. 19, 22, 30; Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-ID-1 (citing confidential information); Qwest I Application App. C, Book 1, Vol. 1, Tab 5, Idaho PUC Decision Regarding Track A, Public Interest, and 272 Standards at 5-7; Idaho Commission Qwest III Comments, Carolee Hall Affidavit (Idaho Commission Qwest III Hall Aff.) at para. 7; Qwest Aug. 1 *Ex Parte* Letter at 1-3; Qwest July 9 *Ex Parte* Letter, Attach. at 1-3; Qwest III Reply at 68-69. While the Idaho Commission asserts that there are some errors in Qwest's Track A figures for Idaho, Qwest continues to meet the requirements of Track A in Idaho. The Idaho Commission includes Project Mutual Telephone and XO Idaho among their list of competitive LECs that provide local Exchange service to customers in Idaho. The Idaho Commission estimates that competing LECs now serve 2.3 percent of residential lines and 13.4 percent of business lines in Idaho. Qwest estimates that competing LECs serve approximately 10.9 percent of the access lines in Idaho. Qwest III Teitzel Decl. at para. 30; Idaho Commission Qwest III Comments at 3; Idaho Commission Qwest III Hall Aff. at para. 7.

[55] Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-ID-1 (citing confidential information).

24. In Iowa, we find that Cox Iowa Telcom, FiberComm, Goldfield Access Networks, Laurens Municipal Broadband Communications Utility, and Spencer Municipal Communication Utility each serve more than a *de minimis* number of end users predominantly over their own facilities and represent "actual commercial alternatives" to Qwest.[56] Specifically, we find that FiberComm and Goldfield Access provide telephone exchange services to both residential and business subscribers using UNE loops, while Cox Iowa Telcom, Laurens Municipal Broadband Communications Utility, and Spencer Municipal Communications Utility provide telephone exchange services to both residential and business subscribers using their own facilities.[57]

25. In Montana, we find that Mid-Rivers Telephone Cooperative and Montana Wireless each serve more than a *de minimis* number of end users predominantly over their own facilities and represent "actual commercial alternatives" to Qwest.[58] Montana Wireless provides telephone exchange services to both residential and business customers predominantly through UNE loops, while Mid-Rivers Telephone Cooperative provides telephone exchange service to residential and business subscribers predominantly through its own facilities.[59]

26. In Nebraska, we find that Alltel (FKA Aliant Midwest) and Cox Nebraska Telecom each serve more than a *de minimis* number of end users predominantly over their own facilities and represent "actual commercial alternatives" to Qwest.[60] Specifically, we find that Alltel provides telephone exchange service to both residential and business customers over UNE loops and Cox Communications provides telephone exchange services to both residential and business subscribers using its own facilities.[61]

27. In North Dakota, we find that AT&T, Consolidated Communications Networks, and IdeaOne Telecom Group each serve more than a *de minimis* number of residential and business customers predominantly over their own facilities and represent "actual commercial

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[56] Qwest III Teitzel Decl. at paras. 19, 22, 30; Qwest III Teitzel Decl, Ex. DLT-Track A Supp.-IA-1 (citing confidential information); Qwest Aug. 1 *Ex Parte* Letter at 1-3; Qwest July 9 *Ex Parte* Letter, Attach. at 1-3; Qwest I Iowa Board Reply at 1-3. Qwest estimates that competing LECs now serve approximately 17.6 percent of access lines in Iowa. Qwest III Teitzel Decl. at para. 30.

[57] Qwest III Teitzel Decl, Ex. DLT-Track A Supp. -IA-1 (citing confidential information).

[58] Qwest III Teitzel Decl at paras. 19, 22, 30; Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-MT-1 (citing confidential information); Qwest II Reply Comments at 4-5; Qwest Aug. 1 *Ex Parte* Letter at 1-3; Qwest July 9 Ex *Parte* Letter, Attach. at 1-3. Qwest estimates that competing LECs in Montana now serve approximately 6.2 percent of access lines in Montana. Qwest III Teitzel Decl. at 20.

[59] Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-MT-1 (citing confidential information).

[60] Qwest III Teitzel Decl. at paras. 19, 23 , 30; Qwest III Teitzel Decl., Ex. DLT-Track A-Supp.-NE-1 (citing confidential information); Qwest I Application, App C, Key Recommendations, Recommendations of the Nebraska Public Service Commission, Book 1,Vol 1, Tab 2, Nebraska PSC Factual Findings and Partial Verification, at 56; Qwest Aug. 1 *Ex Parte* Letter at 1-3; Qwest July 9 *Ex Parte* Letter, Attach. at 1-3. Qwest estimates that competing LECs now serve approximately 32.2 percent of access lines in Nebraska. Qwest III Teitzel Decl. at para. 30.

[61] Qwest III Teitzel Decl., Ex. DLT-Track A-Supp.-NE-1 (citing confidential information).

alternatives" to Qwest.[62] Specifically, AT&T provides telephone exchange service to business subscribers using its own facilities, while Consolidated Communications and IdeaOne Telecom Group provide telephone exchange service to both residential and business subscribers predominantly through UNE loops.[63]

28. In Utah, we find that AT&T of the Mountain States, Integra Telecom of Utah, and XO Utah each serve more than a *de minimis* number of end users predominantly over their own facilities and represent "actual commercial alternatives" to Qwest.[64] Specifically, AT&T, Integra, and XO provide telephone exchange services to both residential and business subscribers through their own facilities and UNE loops.[65]

29. In Washington, we find that AT&T Communications of the Pacific Northwest, Rainier Cable, Time Warner Telecom of Washington, and XO Washington each serve more than a *de minimis* number of end users predominantly over their own facilities and represent "actual commercial alternatives" to Qwest.[66] Specifically, we find that AT&T provides telephone exchange services to both residential and business subscribers using its own facilities, UNE loops and UNE-P, while XO provides telephone exchange services to residential and business subscribers predominantly using UNE loops and its own facilities.[67] Rainier Cable and Time Warner provide telephone exchange services to both residential and business subscribers using their own facilities.[68]

30. In Wyoming, we find that Silver Star Telephone Company serves more than a *de minimis* number of end users predominantly over its own facilities and represents an "actual

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[62] Qwest III Teitzel Decl. at paras. 19, 22, 30; Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-ND-1 (citing confidential information); Qwest Aug. 1 *Ex Parte* Letter at 1-3; Qwest July 9 *Ex Parte* Letter, Attach. at 1-3. Qwest estimates that competing LECs now serve approximately 21.8 percent of access lines in North Dakota. Qwest III Teitzel Decl. at para. 30.

[63] Qwest III Teitzel Decl. at paras. 19, 22, 30; Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-ND-1 (citing confidential information).

[64] Qwest III Teitzel Decl. at paras. 19, 22, 30; Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-UT-1 (citing confidential information); Qwest Aug. 1 *Ex Parte* Letter at 1-3; Qwest July 9 *Ex Parte* Letter, Attach. at 1-3. Qwest estimates that competing LECs now serve approximately 22.6 percent of access lines in Utah. Qwest III Teitzel Decl. at para. 30.

[65] Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-UT-1 (citing confidential information).

[66] *Qwest III Teitzel Decl. at paras. 19, 22, 30; Qwest III Teitzel Decl, Ex. DLT-Track A Supp.-WA-1 (citing* confidential information); Qwest Aug. 1 *Ex Parte* Letter at 1-3; Qwest July 9 *Ex Parte* Letter, Attach. at 1-3. Qwest estimates that competing LECs now serve approximately 19.1 percent of access lines in Washington. Qwest III Teitzel Decl. at para. 30.

[67] Qwest III Teitzel Decl, Ex. DLT-Track A Supp.-WA-1 (citing confidential information).

[68] *Id.*

commercial alternative" to Qwest.[69] Specifically, we find that Silver Star Telephone provides telephone exchange services to both residential and business subscribers using its own facilities.[70]

31. AT&T, Sprint, Integra, and OneEighty contend that the level of competition is insufficient or *de minimis* in the nine application states.[71] In addition, AT&T and Sprint criticize Qwest's methodology for estimating the facilities of competitive LECs that rely on their own facilities rather than UNE loops, UNE-P, or resold lines. Specifically, AT&T and Sprint argue that Qwest overestimates the number of competitive LEC lines by basing its estimate on local interconnection service trunk lines,[72] and AT&T also criticizes Qwest's use of E-911 listings as an alternative method of estimating full facilities-based access lines.[73] We address these criticisms in turn.

32. First, we reject the argument put forth by Integra, Sprint, and AT&T that Qwest should fail Track A in each of the nine states because only a limited number or a small percentage of access lines are currently served by competing LECs.[74] As we have noted in previous section 271 orders, Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance.[75] And, as stated above, we find that there is an actual commercial alternative in each of the nine states serving more than a *de minimis* number of customers. Second, we disagree that Qwest's methodology for estimating competitive LECs' facilities-based lines is unreliable. In its application, Qwest estimates the number of residential and business customers receiving facilities-based service from competing LECs in each state by using three different methodologies to derive the estimated range of facilities-based access

[69] Qwest III Teitzel Decl. at paras. 19, 22, 30; Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-WY-1 (citing confidential information); Qwest Aug. 1 *Ex Parte* Letter at 1-3; Qwest July 9 *Ex Parte* Letter, Attach. at 1-3. Qwest estimates that competing LECs now serve approximately 11.6 percent of access lines in Wyoming. Qwest III Teitzel Decl. at para. 30; Wyoming Commission Qwest III Comments at 5-6.

[70] Qwest III Teitzel Decl., Ex. DLT-Track A Supp.-WY-1 (citing confidential information).

[71] AT&T Qwest II Comments at 147, 149-50; AT&T Qwest I Comments at 133-37; Integra Qwest III Comments at 7-8 (specifically in North Dakota); OneEighty Qwest II Comments at 6-7 (specifically in Montana); and Sprint Qwest III Comments at 2-3 (specifically in Idaho, Iowa, Montana, Utah, Washington, Wyoming).

[72] This method estimates the number of competitive LEC owned lines and stand alone UNE loops by multiplying the number of local interconnection service trunks by 2.75. We do not rely on this methodology in this application. AT&T Qwest II Comments at 148-49; AT&T Qwest I Comments at 134-135; Sprint Qwest III Comments at 3; Sprint Qwest II Comments at 12-13; Sprint Qwest I Comments at 11-13.

[73] AT&T Qwest II Comments at 148-49; AT&T Qwest I Comments at 134-135.

[74] AT&T Qwest II Comments at 147, 149-50; AT&T Qwest I Comments at 133-37; Integra Qwest III Comments at 7-8 (specifically in North Dakota); Sprint Qwest II Comments at 10-11; Sprint Qwest I Comments at 10-11.

[75] *See, e.g., Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77; *Sprint v. FCC*, 274 F.3d at 553-54.

lines.[76] These methodologies have been used in previous section 271 applications that have been approved by the Commission.[77] While carriers may differ in their protocol for when to report a phone number into the E-911 database,[78] no commenter, including AT&T, has criticized Qwest's method of counting the number of white pages listings contained in its Listing Service System to estimate a competitive LEC's facilities-based access lines.[79] Qwest's Listing Service System is likely to yield a lower estimate of a competitive LEC's access lines than the E-911 methodology. We recognize that these methodologies necessarily produce estimates and may be inexact, but we find them to be reasonable and note that the carriers we rely upon have not argued that Qwest's estimate of their customers is significantly incorrect.[80]

IV. PRIMARY CHECKLIST ISSUE IN DISPUTE

A. Checklist Item 2 – Unbundled Network Elements

33. Checklist item 2 of section 271 states that a BOC must provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections

[76] The first method sums E-911 wireline listings and UNE-P lines. Qwest reports E-911 wireline listings within Qwest's territory. The E-911 figures contain UNE loops and competitive LEC owned facilities within Qwest's territory, but do not contain access lines provided by independent LECs that have overbuilt into Qwest's territory or wireless phone numbers. The second method estimates the number of competitive-LEC owned lines and stand alone UNE loops by multiplying the number of local interconnection service trunks by 2.75. We do not rely on this methodology in this application. The third method estimates the number of competitive-LEC access lines by counting the number of white page listings in Qwest's Listing Service System. This database is updated daily to reflect additions, deletions, and changes in residential and business white page listings. Qwest only reports white page listings for competitive LECs serving customers in Qwest's territory. This method likely underestimates the number of access lines as residential customers may not list their primary or secondary lines and businesses may only list a main number. Qwest II Application App. A, Tab 5, Declaration of David L. Teitzel (Qwest II Teitzel Decl.) at paras. 33-41; Qwest II Reply Comments at 6; Qwest I Application App A, Tab 6, Declaration of David L. Teitzel (Qwest I Teitzel Decl.) at paras. 33-43; Qwest Aug. 1 *Ex Parte* Letter at 1-3; Qwest July 9 *Ex Parte* Letter, Attach. at 1-3; Department of Justice Qwest II Evaluation at 8, n.32.

[77] *See, e.g..*, BellSouth GALA II Application, Supplemental Affidavit of Elizabeth A. Stockdale at para. 8 (estimating facilities-based lines by summing E-911 and UNE-P lines); SBC Texas II Application, Affidavit of John S. Habeeb, App A at para. 24 (estimating facilities-based lines by multiplying the number of local service interconnection trunks by 2.75); Verizon Maine Application, Declaration of John A. Torre at para. 16 (estimating facilities-based lines by summing E-911 and directory listings).

[78] Qwest II Reply Comments at 6; AT&T Qwest II Comments at 148.

[79] This database is updated daily to reflect additions, deletions, and changes in residential and business white page listings for competitive LECs providing service within Qwest's region. Qwest II Teitzel Decl. at para. 39.

[80] *See Sprint v. FCC*, 274 F.3d at 562 (finding it was reasonable for the Commission to rely on the applicant's estimates for a competitive LEC's lines if the competitive LEC itself did not object to the estimate). Although Sprint disputes the access lines that Qwest attributes to it for purposes of establishing Track A compliance, the Commission has not relied upon the estimates for Sprint in any of the nine application states. Sprint Qwest II Comments at 12; Sprint Qwest I Comments at 12.

251(c)(3) and 252(d)(1)" of the Act.[81] Based on the record, we find that Qwest has satisfied the requirements of checklist item 2. In this section, we address those aspects of this checklist item that raised significant issues concerning whether Qwest's performance demonstrates compliance with the Act: (1) Operations Support Systems (OSS), particularly pre-ordering, ordering, billing, maintenance and repair, and change management; (2) provisioning of UNE combinations; and (3) UNE pricing. Aside from OSS, other UNEs that Qwest must make available under section 251(c)(3) are also listed as separate items on the competitive checklist, and are addressed below in separate sections for various checklist items, as are any provisioning issues that may be in dispute.[82]

1. OSS

34. Under checklist item 2, a BOC must demonstrate that it provides non-discriminatory access to the five OSS functions: (1) pre-ordering; (2) ordering; (3) provisioning; (4) maintenance and repair; and (5) billing.[83] In addition, a BOC must show that it provides non-discriminatory access to UNEs and that it has an adequate change management process in place to accommodate changes made to its systems.[84] We find that Qwest provides non-discriminatory access to its OSS. Consistent with prior Commission orders, we do not address each OSS element in detail where our review of the record satisfies us there is little or no dispute that Qwest meets the nondiscrimination requirements.[85] Rather, we focus our discussion on those issues in controversy, which in this instance primarily involve certain elements of Qwest's pre-ordering, ordering, billing, and change management systems and processes. We also specifically address issues related to flow-through.

a. Relevance of Qwest's Regionwide OSS

[81] 47 U.S.C. § 271(c)(2)(B)(ii).

[82] *See* 47 U.S.C. § 271(c)(2)(B). For example, unbundled loops, transport, and switching are listed separately as checklist items iv, v, and vi.

[83] *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, 3989, para. 82 (1999) (*Bell Atlantic New York Order*), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000). The Commission has defined OSS as the various systems, databases, and personnel used by incumbent LECs to provide service to their customers. *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18396-97, para. 92 (2000) (*SWBT Texas Order*).

[84] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3999, para. 102 and n.277 (citations omitted).

[85] *See Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc. and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147, 14151, para. 9 (2001) (*Verizon Connecticut Order*).

35. Consistent with our precedent, Qwest relies in this application on evidence concerning its regionwide OSS.[86] Specifically, Qwest asserts that its OSS in the nine application states is the same as its OSS in the entire thirteen-state region that participated in the ROC test.[87] The thirteen participating states in Qwest's local service region initiated a collaborative process to design an overall plan for ensuring that Qwest's OSS and related databases and personnel are available to competing LECs in an open and nondiscriminatory manner.[88]

36. To support its claim that its OSS is the same across all states, Qwest relies on the comprehensive KPMG test. KPMG, in addition to administering the overall test, performed a regional differences assessment (RDA).[89] KPMG's RDA, released on October 5, 2000, found that Qwest's order management, provisioning, maintenance and repair, and competing LEC relationship management and infrastructure are materially consistent across the three regions.[90] Although KPMG found that Qwest's CRIS billing and service order processors (SOPs) differ by region, it noted that Qwest has standardized most of its processes across these regions.[91] Moreover, KPMG made certain adjustments to its test. Specifically, KPMG designed and scaled the third-party test to represent the environment of the thirteen states to ensure their ability to use the results in individual state proceedings.[92] Where differences within Qwest's local service regions existed (such as the CRIS billing and SOP differences), the test was modified, as appropriate, to address these regional and state differences to ensure that the ROC Third Party Test would provide a valid basis upon which each of the thirteen participating ROC states could base their respective recommendations to the Commission regarding Qwest's section 271 applications.[93] KPMG's test transaction volumes were set at levels and distributed in such a way as to produce statistically valid results given the identified differences among the regions.[94]

37. In reaching our conclusion that Qwest has demonstrated it provides nondiscriminatory access to its OSS, we rely on detailed evidence provided by Qwest in this proceeding. We base this determination on Qwest's actual performance in the nine application states. In cases of low volume, where state-specific data may thus be unreliable,[95] as discussed

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86 *See, e.g., SWBT Kansas/Oklahoma Order* 16 FCC Rcd at 6254, para. 36.

87 Qwest I Notarianni/Doherty Decl. at para. 63.

88 *Id.* at para. 19.

89 *Id.* at para. 35.

90 *Id.* at para. 36, and Exhibit LN-OSS-4 (KPMG's RDA).

91 *Id.*

92 *Id.* at para. 33.

93 *Id.* at paras. 33, 35.

94 *Id.*

95 As the Commission has found in previous section 271 applications, performance data based on low volumes of orders or other transactions is not as reliable an indicator of checklist compliance as performance based on larger (continued....)

above, we look to Qwest's performance in Colorado to supplement our analysis.[96] However, as the Commission has previously stated, evidence of satisfactory performance in another state cannot trump convincing evidence that an applicant fails to provide nondiscriminatory access to a network element in the application states.[97] Also consistent with our past practice, we note that in the course of our review, we look for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete.[98] Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.[99]

b. Pre-Ordering

38. As explained in previous orders, pre-ordering includes gathering and verifying the information necessary to place a new service order.[100] Given that pre-ordering represents the first exposure that a prospective customer has to a competing carrier, inferior access to the incumbent's OSS may render the competing carrier less efficient or responsive than the incumbent.[101] The applicable standard is whether the BOC provides access to its OSS that allows competitors to perform pre-ordering functions in substantially the same time and manner as the

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numbers of observations. It is thus not possible to place the same evidentiary weight upon – and draw the same types of conclusions from – performance data where volumes are low, as for data based on more robust activity. *See, e.g., SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6254, para. 36.

96 *See* Introduction above.

97 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6254, para. 36.

98 *See Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

99 *Id.*

100 *Bell Atlantic New York Order*, 15 FCC Rcd at 4014, para. 129; *Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, 13 FCC Rcd 539, 589, para. 91 (1997) (*BellSouth South Carolina Order*); *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20599-60, para. 94 (referring to "pre-ordering and ordering" collectively as "the exchange of information between telecommunications carriers about current or proposed customer products and services or unbundled network elements or some combination thereof"). In prior orders, the Commission has identified the following five pre-ordering functions: (1) customer service record (CSR) information; (2) address validation; (3) telephone number information; (4) due date information; and (5) services and feature information. *Id.*; *Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231, Memorandum Opinion and Order, 13 FCC Rcd 6245, 6274, para. 47 (1998) (*First BellSouth Louisiana Order*).

101 *Bell Atlantic New York Order*, 15 FCC Rcd at 4014, para. 129 (citing *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20669). *See also* App. K at paras. 33-34.

BOC's retail operations.[102] For those pre-order functions that lack a retail analogue, the BOC must provide access that affords an efficient competitor a meaningful opportunity to compete.[103]

39. Based upon the evidence in the record, we find that Qwest demonstrates that it provides nondiscriminatory access to its OSS preordering functions. Specifically, as discussed below, we conclude that Qwest has shown that it provides nondiscriminatory access to its pre-ordering functions because competing carriers can: successfully build and use application-to-application interfaces that perform pre-ordering functions; consistently gain access to the OSS; receive timely responses to submitted pre-order information requests; and integrate pre-ordering and ordering interfaces.[104] Additionally, Qwest has shown that competitors have access to

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[102] *Bell Atlantic New York Order* 15 FCC Rcd at 4014, para. 129 (citing *BellSouth South Carolina Order*, 13 FCC Rcd at 619; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20655; *Ameritech Michigan Order*, 12 FCC Rcd at 20618-19).

[103] *Id.*

[104] *Id.* at 4013-14, para, 128. We reject AT&T's argument that informational issues related to the multiple UNE rate zones in Montana and Wyoming cause competitive LECs to be at a competitive disadvantage in those states. *See* AT&T Qwest II Comments at 53. The record shows that Qwest provides competing LECs with the necessary information to determine a potential customer's rate zone. Qwest's OSS, through both the GUI and EDI, includes an address validation tool, which provides competing LECs with customer addresses and associated rate zones. Also, Qwest's retail marketing agents do not have access to the inquiries placed by competing LECs by means of the GUI or EDI. *See* Qwest II Reply, App. A, Tab 8, Declaration of Jerrold L. Thompson (Qwest II Thompson Reply Decl.) at para. 55. We also reject WorldCom's assertion that Qwest does not provide the information needed to program its system in Idaho. WorldCom asserts that different universal service order codes (USOCs) are required in the northern part of Idaho than in the southern part of the state and that Qwest has been unable to direct WorldCom to the common language location identifiers (CLLI) that define the geographic boundaries between the regions. *See* WorldCom Qwest III Comments at 13. The record shows that Qwest has provided this information to WorldCom in response to WorldCom's request. *See* Qwest III Reply, App. A, Tab 17, Reply Declaration of Lynn M. V. Notarianni and Christie L. Doherty (Qwest III Notarianni/Doherty Reply Decl.) at para. 86. We also reject WorldCom's assertion that Qwest's EDI documentation errors rise to the level of checklist non-compliance. *See* WorldCom Qwest III Comments at 12-13; WorldCom Nov. 6 *Ex Parte* Letter at 9; Letter from Lori Wright, WorldCom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed on Dec. 2, 2002) at 1 (WorldCom Dec. 2 *Ex Parte* Letter). For example, WorldCom argues that Qwest is unclear in how competing LECs should treat community names in ordering through EDI. WorldCom Nov. 6 Ex Parte Letter at 9. The record shows that using the pre-order address validation query will ensure that the order will pass all address validation edits. *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 22, 2002) at 3-4 (Qwest Nov. 22e *Ex Parte* Letter). We note that many of the EDI problems addressed by WorldCom in its Dec. 2 *Ex Parte* Letter have been closed. *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 3, 2002) at 2 (Qwest Dec. 3c *Ex Parte* Letter). Additionally, we note that that many of the EDI problems addressed by WorldCom in its Dec. 2 ex parte letter are in regard to Qwest's most recent EDI release, EDI version 11.0 (which was available to competing LECs starting Nov. 18, 2002). *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 6, 2002) (Qwest Dec. 6b *Ex Parte* Letter). We note that Qwest's change management process utilizes an extensive help-desk ticket and notification process to handle errors that may occur when implementing new software. Qwest Dec. 3c *Ex Parte* Letter at 1. We take further comfort, although we do not rely on it, in Qwest's commitment to resolve WorldCom's Trouble Ticket 6090995 through a new patch that will be available to competing LECs on December 20, 2002. *See* Letter from Hance Haney, Executive Director – (continued....)

information to determine whether loop facilities are qualified to support xDSL advanced technologies.[105]

(i) Pre-Ordering Functionality

40. The record shows that Qwest offers requesting carriers access to an application-to-application interface that enables them to perform the same pre-ordering functions that Qwest provides for its retail operations. Pre-ordering functionality is provided through Qwest's two electronic interfaces: Interconnect Mediated Access-Electronic Data Interexchange (IMA-EDI or EDI), and Interconnect Mediated Access-Graphical User Interface (IMA-GUI or GUI).[106] Competitive LECs may use either of these interfaces to submit orders for end users throughout Qwest's region.[107] Using these interfaces, competing carriers gain access to pre-ordering information, including address validation;[108] customer service records (CSR); service availability; facility availability; loop qualification (for qualifying Qwest DSL for resale and

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Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 17, 2002) at 1 (Qwest Dec. 17 *Ex Parte* Letter on Trouble Ticket 6090995).

[105] *See e.g., Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts,* 16 FCC Rcd 8988, 9013, para. 50 (2001) (*Verizon Massachusetts Order*).

[106] The Application shows that both interfaces are real-time, electronic interfaces, allowing competitive LECs to access pre-ordering, ordering, and provisioning OSS functions. The notable differences in the two interfaces are that EDI is a computer-to-computer interface, whereas GUI is human-to-computer. EDI also provides electronic access directly from a competitor's systems to Qwest's interfaces, and, thus, enables competitive LECs to integrate their own OSS with the Qwest electronic interface (in addition to integrating EDI's pre-ordering functions with its ordering functions), whereas GUI allows competitors to obtain electronic access to Qwest's OSS pre-ordering, ordering, and provisioning functionality without having to develop their own software. *See* Qwest I Notarianni/Doherty Decl. at paras. 59-65. We do not consider the Web GUI's functionality because it is a human-to-application interface. *Bell Atlantic New York Order*, 15 FCC Rcd at 4016-17, para. 133, n.385. However we observe that the GUI provides an economically efficient pre-ordering interface for low-volume carriers and new entrants. *See id.*

[107] As of the time of its application, Qwest reports that 22 competing LECs use IMA-EDI and 172 competing LECs use IMA-GUI in Qwest's 14 state region to complete pre-order transactions. *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 15, 2002) (Qwest Nov. 15d *Ex Parte* Letter) at 1; Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 9, 2002) at 1 (Qwest Dec. 9 *Ex Parte* Letter).

[108] Competitors use this function to determine if a customer's address matches the address in Qwest's OSS, and this tool is used to create a list of validated addresses that can be used to generate other pre-ordering and ordering transactions. In addition to the Address Validation query, Qwest maintains a website with files called the "Street Address Guide Area Data Files," which contain address information organized by state. Competitive LECs can access and search these files by using standard text search tools or by downloading the files to their own site and integrating the data into their own systems. *See* Qwest I Notarianni/Doherty Decl. at paras. 70-71.

unbundled loop); raw loop data; connecting facility assignment (CFA); meet point query; and access to directory listings.[109]

41. KPMG tested the functionality of Qwest's EDI interface, and concluded that it performed pre-order functions in a satisfactory manner.[110] KPMG states that the Qwest business rules detail the form, field, and value information required to submit valid pre-order inquiries.[111] For example, KPMG tested Qwest's ability to process various pre-order transactions.[112] In addition, KPMG's comparison of Qwest's retail and wholesale pre-order transactions showed functional equivalence.[113] Given that competitors have the ability to and actually are using application-to-application interfaces to complete pre-order transactions, and that Qwest's functions have been successfully tested, we conclude that Qwest provides adequate pre-order functionality.

42. Eschelon is the only commenter to raise issue with Qwest's pre-ordering functionality, alleging that a customer configuration information system (called Qhost) is sometimes disabled without notice when ordering resold DSL services.[114] We find, however, that these outages do not warrant a finding of checklist noncompliance, as Qhost is not part of the OSS system that we examine for purposes of this application. The record shows that Qhost is used by ISPs, including Qwest's own ISP, Qwest.net,[115] to obtain customer configuration

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[109] *Id.* In addition, KPMG found that Qwest satisfied its requirements for pre-ordering functionality by successfully processing 14 pre-order transaction types. KPMG Final Report at 73 (Table 12-7: Evaluation Criteria and Results) (Test 12-2-1) (Qwest Systems Provide Required Pre-ordering Functionality). KPMG tested the following transactions: validate customer address; obtain customer service record; reserve telephone numbers; determine product and feature availability; perform facility availability check; schedule appointment; obtain loop qualification information; validate customer CFA; obtain directory listings information for an existing UNE-L customer; obtain design layout record; validate meet point; cancel an appointment or reserved telephone number. *Id.* at 65 (Table 12-1) (Pre-order Test Scenarios).

[110] KPMG Final Report at 70-72.

[111] *Id.*

[112] *Id.* at 73 (Test 12-2-1) (Qwest Systems Provide Required Pre-ordering Functionality).

[113] KPMG compared the following pre-order transactions: validate customer address; obtain customer service record; reserve telephone numbers; determine product and feature availability; perform facility availability check; schedule appointment; obtain loop qualification information; and cancel an appointment or reserved TN.. KPMG Final Report at 97 (Test 12-11-3) (Pre-Order and Order Capabilities Are Functionally Equivalent for Both Retail and Wholesale Services).

[114] Eschelon Qwest I Comments at 12. Eschelon asserts that the Qhost system suffered from outages on June 28, July 1, and July 2, 2002.

[115] Qwest offers DSL Internet services to subscribers under the Qwest.net brand name, and Qwest.net utilizes QHost in the same manner and receives the same services that are provided to all ISP and Business DSL Hosts, including Eschelon. *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, Executive Director-Federal Regulatory, to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 02-148 and 02-189 (filed Sept. 6, 2002) (Qwest Sept. 6 *Ex Parte* Letter) at 1.

information.[116] Competitive carriers, on the other hand, use IMA to order Qwest resold DSL services, and there is no evidence to suggest that there are functionality issues with IMA.[117]

(ii) Response Times and Availability

43. We find that Qwest demonstrates that it provides requesting carriers access to pre-ordering functionality in substantially the same time that it provides access to its retail operations. As expressed in past decisions, in order to compete effectively in the local exchange market, competitors must be able to perform pre-ordering functions and interact with their customers as quickly and efficiently as the incumbent.[118] Our finding of compliance in this area is principally based upon Qwest's commercial performance. Metric PO-1 measures the time it takes Qwest to respond to various requests for pre-order information, and, depending on the interface and function, the benchmark varies from 10 to 25 seconds.[119] The commercial data show that Qwest has met every benchmark for GUI and EDI in this area for each of the past 4 months.[120]

44. Qwest also demonstrates that both of its interfaces are available in a manner that affords an efficient competitor a meaningful opportunity to compete. As discussed in previous orders, an available pre-ordering interface is required for competing carriers to market their services and serve their customers, and the unavailability of an interface could directly and

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[116] Qwest I Reply, App. A, Tab 5, Declaration of Lynn M. V. Notarianni and Christie L. Doherty (Qwest I Notarianni/Doherty Reply Decl.) at para. 303. The record also shows that when Qhost is unavailable, users can obtain the same information by calling Qwest representatives at the phone number cited on the Qhost website. *See id.*

[117] *Id.*

[118] *See Bell Atlantic New York Order*, 15 FCC Rcd 4025, para. 145 (citing *BellSouth South Carolina Order*, 13 FCC Rcd at 625, 634-36; *Ameritech Michigan Order*, 12 FCC Rcd at 20616).

[119] For both the IMA-GUI and IMA-EDI interfaces, the metric tracks the time it takes Qwest to schedule appointments, inquire about service availability time, conduct facility checks, validate addresses, retrieve customer service records, and make telephone number reservation. Qwest explains that it separately tracks certain functions for the GUI interface, such as submitting responses, responding to submissions, and when applicable, accepting transactions. Qwest I Williams Decl. at paras. 96-99.

[120] *See, e.g.*, GA-1 (Gateway Availability-IMA-GUI) with a standard of 99.25 % for scheduled availability; GA-2 (Gateway Availability-IMA-EDI) with a standard of 99.25% for scheduled availability; PO-1 (Pre-order/Order Response Times) with standard response times ranging from 10 to 25 seconds; PO-3 (LSR Rejection Notice Interval) with standard response times ranging from 18 seconds for electronically submitted orders to ≤ 24 work week clock hours for faxed orders; and PO-5 (FOCs provided on Time) with standards ranging from 85% of all LIS trunk orders returned within 8 business days to 95% of all orders for resold services returned within 20 minutes. Our conclusion is also supported by the findings of the third-party tester. KPMG's test showed that for both the GUI and EDI interfaces, Qwest response times were satisfactory for a full range of pre-order transactions. For the performance of the GUI interface, *see* KPMG Final Report at 74-76 (IMA GUI Pre-Order Timeliness).

negatively affect a carrier's customer interaction.[121] Qwest's commercial data show that Qwest's interfaces were generally available as scheduled.[122]

(iii) Pre-Ordering and Ordering Integration

45. Consistent with state commissions examining this issue,[123] we conclude that Qwest demonstrates that its EDI interface allows competing carriers to integrate pre-ordering information into Qwest's ordering interface, as well as into the carriers' back office systems. The Commission has previously stated that the inability to integrate may place competitors at a disadvantage and significantly impact a carrier's ability to serve its customers in a timely and efficient manner.[124] In order to demonstrate compliance with checklist item 2, the BOC must enable competing carriers to transfer pre-ordering information (such as customer billing address or existing features) electronically into the carrier's own back office systems, and then transfer this information back to the BOC's ordering interface. Without an integrated system, a competing carrier would be forced to re-enter pre-ordering information manually into an ordering interface, leading to additional costs, delays, and a greater risk of error.[125] Thus, a BOC has enabled successful integration if competing carriers may, or have been able to, automatically populate information supplied by the BOC's pre-ordering systems onto an order form that will not be rejected by the BOC's OSS systems.[126]

46. The Commission has held that the ability to "parse" pre-order information successfully (*i.e.*, to divide electronic data into designated fields) is a necessary component of successful integration.[127] Our prior orders dictate that a BOC can demonstrate the ability of competitive LECs to integrate pre-ordering and ordering functions if the BOC parses the

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[121] *Bell Atlantic New York Order*, 15 FCC Rcd at 4029-30, para. 154 (citing *BellSouth South Carolina Order*, 12 FCC Rcd at 637-38, para. 180).

[122] See GA-1 through GA-4, GA-6, and GA-7.

[123] *See, e.g.*, Colorado Commission Qwest I Reply at 40; Iowa Board Qwest I Reply at 5-6; Wyoming Commission Qwest II Comments at 6.

[124] *See 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, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9078, para. 119 (2002) (*BellSouth Georgia/Louisiana Order*); *SWBT Texas Order*, 15 FCC Rcd at 18428-29, para. 152; *Bell Atlantic New York Order*, 15 FCC Rcd at 4019-20, para. 137.

[125] *See Bell Atlantic New York Order* 15 FCC Rcd at 4019, para. 137 (citing *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20661, 20666, 20676-77; *First BellSouth Louisiana Order*, 13 FCC Rcd at 6276-77; *BellSouth South Carolina Order*, 13 FCC Rcd at 602, 623-24, 629).

[126] *Id.*

[127] *SWBT Texas Order*, 15 FCC Rcd at 18429, para. 153. "Parsed" pre-ordering information is electronic data that are divided into fields that can be electronically transferred into other fields used in the pre-ordering and ordering process.

customer record information into identifiable fields for the competing carriers.[128] Also, if the BOC does not provide parsed pre-order information, the BOC can demonstrate that competing carriers can or have been able to successfully integrate by parsing the information themselves.[129]

47. As the Commission has explained, absent sufficient and reliable data on commercial usage,[130] we will consider the results of carrier-to-carrier testing, independent third-party testing, and internal testing in assessing the commercial readiness of a BOC's OSS.[131] In this instance, we base our conclusion that integration is achievable on evidence that Qwest parses pre-order information, as well as HP's ability to successfully integrate.[132]

48. *Parsing.* The record demonstrates that Qwest provides competitors with the necessary documentation and support to successfully integrate pre-ordering and ordering functions.[133] This information includes developer worksheets, which specify field lengths, field characteristics, and any conditions related to the usage of specific fields for specified products.[134] In addition, Qwest provides training and documentation to assist competitors in developing and

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[128] *Bell Atlantic New York Order*, 15 FCC Rcd at 4019, para. 137.

[129] A BOC that does not provide parsed pre-order information must demonstrate that competing carriers "may, or have been able to, automatically populate information supplied by the BOC's pre-ordering systems onto an order form ... that will not be rejected by the BOC's OSS systems." *SWBT Texas Order*, 15 FCC Rcd at 18428-29, para. 152. Regardless of whether an applicant parses, the record must show that competitors are able to successfully integrate.

[130] The record contains several sources of commercial usage evidence. First, the record indicates that New Access, a competitive LEC operating in Colorado, Iowa, Nebraska and North Dakota, has affirmed that it has achieved pre-order/order integration through its IMA-EDI interface as of June 2002. *See* Qwest I Notarianni/Doherty Reply Decl., Ex. LN-17 (Qwest July 25 *Ex Parte* on Pre-Order/Order Integration). Moreover, the application contains letters from two software designers, Telcordia Technologies and NightFire Software, Inc., both of which explain that they have successfully developed pre-order/order integration programs for competitive LECs that are actively submitting LSRs to Qwest via its EDI interface. *See* Qwest I Notarianni/Doherty Decl., Exs. LN-OSS-12 (Jan. 28, 2002 Letter from Telcordia Technologies), and LN-OSS-13 (May 22, 2002 Letter from NightFire).

[131] *See SWBT Texas Order*, 15 FCC Rcd at 18399, para. 98 (citing *Bell Atlantic New York Order*, 15 FCC Rcd at 3992, para. 88.) *See also* App. K at para. 31.

[132] *See* Qwest I Notarianni/Doherty Decl., Exhibit LN-OSS-11 (*Hewlett-Packard's PreOrder to Order Integration Report, 271 Test Generator, Arizona Corporation Commission,* Final Version 5.0). *See generally* Letter from Sumeet Seam, Attorney for Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 02-148 and 02-189 (filed Aug. 8, 2002) (Qwest Aug. 8c *Ex Parte* Letter).

[133] Letter from Sumeet Seam, Attorney for Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, Docket 02-148 (filed July 25, 2002) (Qwest July 25b *Ex Parte* Letter) at 5-7. *See also* HP's August 6 *Ex Parte* Letter, Exhibit C (Colorado *En Banc* Hearing 6/10/02, Transcript Excerpt) at 11-12; Qwest August 8c *Ex Parte* Letter at 5.

[134] *See* Qwest July 25b *Ex Parte* Letter at 5-7. Qwest states that its own "IMA Development, Systems Test and Regression Test" teams used these same worksheets to develop, test and implement IMA in its first implementation on January 1, 1997, and have continued to use them for enhancements to IMA. *See id.* at 5.

implementing integration capability.[135] Qwest's IMA system is based on local service ordering guidelines[136] (LSOG) for pre-order and order transactions, including rules for parsing information on pre-order transactions.[137] Qwest provides, among other things, address validation and CSR information that is parsed into identifiable fields for competitors, which separates the parsed elements returned for each pre-order transaction, and identifies the LSR field to which the particular data element relates.[138] According to the record, Qwest implementation teams are available to competitive LECs for all aspects of the EDI certification process.[139] We find that by providing competing LECs the tools necessary to integrate, in particular a parsed CSR, that Qwest has satisfied the Commission's standard for integration as articulated in the *Bell Atlantic New York Order*.[140]

49. *Third-Party Test.* The test results from HP, acting as a pseudo-competitor LEC, bolster our conclusions with respect to integration. As explained in the *SWBT Texas Order*, a persuasive third-party test provides an objective means by which to evaluate a BOC's OSS readiness.[141] HP successfully developed an EDI interface that integrated pre-order/order data,[142] and HP was able to develop pre-order/order integration capabilities using such generally available tools and documents as the developer worksheets and access to staff from Qwest's EDI implementation teams.[143] In particular, the record indicates that HP successfully integrated with

[135] Qwest I Notarianni/Doherty Reply Decl. at para. 140.

[136] The Alliance for Telecommunications Industry Solutions (ATIS) publishes and maintains the LSOGs. The LSOG is the standard for ordering and provisioning. As explained by HP, "a provider (ILEC) may interpret these guidelines when creating specifications that define how a CLEC should order and provision service from the ILEC." *See* KPMG Final Report, App. HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 7.0*) at 2.

[137] Qwest I Notarianni/Doherty Reply Decl. at para. 140. Qwest explains that by adhering to the LSOG guidelines, its pre-order transactions are defined and parsed to the extent that the pre-order information is required to submit an order. *See id.* Qwest also explains that "OBF did not publish a document to describe how to map between pre-order and order information due to a belief that the care taken in defining and naming the fields is readily comprehensible for CLECs. For example, if the LSR required the population of an address field called Street Address Number (SANO), then the preorder address validation transaction requires the parsing and returning of the same field (SANO), so that it can be readily identified and populated on the LSR." *See id.*

[138] Qwest I Application at 116; Qwest I Notarianni/Doherty Decl. at para. 197, Exhibit LN-OSS-5 (Developer Worksheets-PreOrder); Qwest July 25b *Ex Parte* Letter at 5-7.

[139] *Id.*

[140] *See Bell Atlantic New York Order*, 15 FCC Rcd at 4019-4021, paras. 137-139. *See also* Qwest August 8c *Ex Parte* Letter at 1-3.

[141] *See SWBT Texas Order*, 15 FCC Rcd at 18399-400, para. 98 (citing *Bell Atlantic New York Order*, 15 FCC Rcd at 3992, para. 89).

[142] Qwest I Notarianni/Doherty Decl. at para. 198.

[143] *Id. See also* Letter from Geoff May, Hewlett-Packard, to Marlene Dortch, Secretary, Federal Communications Commission, Docket 02-148 (filed Aug. 6, 2002) (HP August 6 *Ex Parte* Letter). Hewlett-Packard states that each (continued....)

both Qwest's EDI release 7.0[144] and EDI release 8.0.[145] HP's test results affirm that Qwest's IMA EDI interface provides competitors with pre-order, order, and post-order information in a parsed or fielded format.[146] For both releases, HP tested thirty-four separate products and transactions.[147] In addition, for the EDI 7.0 test, HP tested data integration for three different types of transactions: pre-order to pre-order transactions involving address-related data;[148] pre-order to order transactions involving address-related data;[149] and pre-order to order transactions involving CSR information for the ordering of both resold POTS and UNE-platform POTS.[150] For both of its reports, HP concluded that it "does not feel that [there] are any issues that would prohibit a CLEC from integrating Qwest data with their internal application system(s)."[151] The

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individual data element is defined in the Qwest IMA EDI disclosure documentation with the associated business rules and format characteristics. *See id.* at 2.

[144] Qwest I Notarianni/Doherty Decl. at para. 198 and Exhibit LN-OSS-9 (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA-EDI Release 7.0, Version 1.0, April 19, 2002*). *See* Exhibit LN-OSS-9 at 40. HP achieved integration with EDI 7.0 adhering to LSOG Issue 3.

[145] Qwest I Notarianni/Doherty Decl. at para. 198 and Exhibit LN-OSS-10 (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA-EDI Release 8.0, Version 1.0, April 19, 2002*). HP achieved integration with EDI 8.0 adhering to LSOG Issue 5.

[146] HP August 6 *Ex Parte* Letter.

[147] *See* KPMG Final Report, Appendices HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA-EDI Release 7.0*) at 2, and HP-C (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA-EDI Release 8.0*) at 2. In both tests, HP tested the following 34 products and transactions: address validation; appointment availability; appointment selection; cancellation; connecting facility assignment; customer service; design layout record; facility availability; meet point; raw loop data; service availability; telephone number availability; telephone number selection; centrex 21; centrex plus; DID in only trunks; ISDN-PRI resale availability; ISDN-PRI resale trunk; listing only; local number portability; PBX; POTS; private line; shared loop; unbundled loop distribution loop; unbundled loop; unbundled loop with number portability; UNE-C Private Line; UNE-platform POTS; completion; firm order completion; jeopardy/non-fatal/fatal; LSR status; and status change inquiry-auto push. *See id.* HP explains that it successfully developed and implemented integration of the data from an Address Validation Response (AVR) into other transactions, and that its data entry application retained address information that it received from Qwest, and then used it to populate address-related fields in a number of pre-order queries, including: address validation query; customer service record query; facility availability query; service availability query; telephone number availability query; raw loop data query; and meet point query. *See also* HP August 6, 2002 *Ex Parte* Letter at 2. HP also reports that it was able to integrate address information into such order related forms as local service request, end user, resale private line, and directory listing. *See id.*

[148] KPMG Final Report, App. HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA-EDI Release 7.0*) at 38 (Table 5.1 -- PCG Pre-Order to Pre-Order Integration).

[149] *Id.* at 39 (Table 5.2 – PCG Pre-Order to Order Integration); HP August 6 *Ex Parte* Letter at 1.

[150] *Id.*

[151] KPMG Final Report, App. HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA-EDI Release 7.0*) at 40, and App. HP-C (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA-EDI Release 8.0*) at 39. In both reports, HP observes that "this
(continued….)

record also indicates that in a separate test, HP was able to confirm that Qwest provides competitors with the tools required to successfully develop an integrated EDI interface, and it also confirmed that competitors have the ability to integrate pre-order responses with order transactions.[152] Utilizing its integrated IMA-EDI interface, HP states that it submitted a total of 889 UNE-platform retest orders from January 2002 to April 2002.[153] Only 12.15 percent of these orders were rejected, and HP explained that these rejected orders were attributable to issues unrelated to any pre-order/order integration problems.[154]

50. We are not persuaded by the allegations made by AT&T and WorldCom that the evidence does not support a showing of carriers' ability to integrate pre-ordering/ordering functions. Generally, AT&T and WorldCom make three arguments. First, the commenters dispute the reliability of the commercial evidence.[155] Second, AT&T and WorldCom question the conclusions from HP's test results. Lastly, these commenters cite to their own experience with Qwest's OSS, which allegedly demonstrates the inability to integrate. As an initial matter, given that we do not base our finding of integration upon either the New Access or vendor letters that the commenters dispute, and instead rely on Qwest's provision of a parsed CSR and HP's successful integration results, we need not address carriers' arguments challenging the validity of these letters.

51. Turning to the HP test results, we do not agree with WorldCom's contention that during the HP test of Qwest's ability to integrate, HP found inconsistencies between pre-order and order requirements that undermine its conclusion that integration is achievable.[156] The

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does not mean that there are not issues that would have to be resolved between Qwest and the CLEC, but simply that these issues are not insurmountable." *See id.*

[152] *See* Qwest I Notarianni/Doherty Decl. at paras. 199-200 and Exhibit LN-OSS-11 (*Hewlett-Packard's Pre-Order to Order Integration Report, 271 Test Generator, Arizona Corporation Commission, Final Version 5.0*). In its summary of how well Qwest's fields conform to LSOG 3 and LSOG 5, HP concludes that "the data definitions . . . between PreOrder and Order elements . . . do not require translation, or reconfiguration of the data elements when integrating PreOrder transactions into Order transactions. Therefore, HPC's assessment is that CLECs can utilize Qwest's EDI PreOrder transactions to submit an Order without data manipulation." *See* Exhibit LN-OSS-11 at 33-34.

[153] Qwest I Notarianni/Doherty Reply Decl. at para. 138; Letter from Sumeet Seam, Attorney for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, Docket 02-148 (filed July 29, 2002) (Qwest July 29a *Ex Parte* Letter) at 3.

[154] *See* Qwest July 29a *Ex Parte* Letter at 3. In correspondence dated July 26, 2002, from Don Perry of Hewlett-Packard Services, Consulting & Integration Division, to the ROC TAG Members, HP explains that "as described in the HP Final Report, HP integrated the address information from the pre-order transaction into the End User form. Issues not related to pre-order/order integration generated these 108 FATAL (caps in original) rejects." *See id.* at 5.

[155] AT&T and WorldCom argue that there is little evidence to support New Access' successful integration. *See* AT&T Qwest I Reply at 26-27; WorldCom Qwest I Lichtenberg Reply Decl. at para. 21.

[156] WorldCom states that these shortcomings included inconsistent business rules, inconsistent valid values, inconsistent data types, and failure to return information at the pre-order stage for several industry standard fields. *See* WorldCom Qwest I Comments, Sherry Lichtenberg Decl. (WorldCom Qwest I Lichtenberg Decl.) at para. 21.

inconsistencies HP discussed in its two reports examining the field lengths of both EDI 7.0 and EDI 8.0 do not evidence an inability to integrate.[157] For both EDI 7.0 and 8.0, KPMG found that only a minimal number of Qwest's pre-ordering and ordering data fields differed from the LSOG standard to such a degree that the discrepancy could disrupt, or "impact," the exchange of data. Moreover, because KPMG's report provides detailed information about the impacting data fields' names, form with which the data field is used, and the field's LSOG analogue, competitors can readily identify the impacting data fields. For example, HP's report for EDI 7.0 found that of the 275 data fields that are used to perform pre-order functions, only 11 were identified as impacting,[158] and of the 413 fields used for order functions, only 34 were considered to be impacting.[159] In its report for EDI 8.0, HP found that of the 274 data fields that are used to perform pre-order functions, only 16 were considered to be impacting,[160] and of the 255 fields used for order functions, only 37 were considered to be impacting.[161] These results are compelling because they constitute objective evidence that quantifies the high degree to which

[157] *See* KPMG Final Report, Appendices HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 7.0*), and HP-C (*Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 8.0*). HP explains that in creating these reports, it "took the Qwest documentation, [and] the IMA EDI disclosure documentation, which is the official Qwest documentation for that interface [, and] compared the Qwest documentation against itself so that if [for example], you had a field that was part of an address and it was used in four or five different transactions, [HP] compared across Qwest transactions looking for consistency and format and ability to be integrated. [HP] also compared Qwest documentation against industry publications . . . ." *See also* HP August 6 *Ex Parte* Letter, Exhibit A (Colorado *En Banc* Hearing 6/10/02, Transcript Excerpt) at 6-7.

[158] *See* KPMG Final Report, App. HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 7.0*) at 16, (Table 4.10 - Pre-Order Data Integration Issues). For a detailed description of the integration issue associated with each data field, *see* KPMG Final Report, App. HP-B at 8-15, (Table 4.6 (Generic Integration Issues); Table 4.7 (Field Length Variations Across Qwest Pre-Order Forms); and Table 4.8 (Field Length Variations Between Qwest and LSOG)).

[159] *See* KPMG Final Report, App. HP-B ((*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 7.0*) at 31, (Table 4.24 – Order Data Integration Issues). For a detailed description of the integration issue associated with each data field, *see* KPMG Final Report, App. HP-B at 21-30, (Table 4.20 (Generic Integration Issues); Table 4.21 (Field Length Variations Across Qwest Order Forms); and Table 4.22 (Field Length Variations Between Qwest and LSOG)).

[160] *See* KPMG Final Report, App. HP-C (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 8.0*) at 16, (Table 4.10 -Pre-Order Data Integration Issues). For a detailed description of the integration issue associated with each data field, *see* KPMG Final Report, App. HP-C at 8-15, (Table 4.6 (Generic Integration Issues); Table 4.7 (Field Length Variations Across Qwest Pre-Order Forms); and Table 4.8 (Field Length Variations Between Qwest and LSOG)).

[161] *See* KPMG Final Report, App. HP-C (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 8.0*) at 32, (Table 4.24 – Order Data Integration Issues). For a detailed description of the integration issue associated with each data field, *see* KPMG Final Report, App. HP-C at 21-31, (Table 4.20 (Generic Integration Issues); Table 4.21 (Field Length Variations Across Qwest Order Forms); and Table 4.22 (Field Length Variations Between Qwest and LSOG)).

Qwest's data fields conform to the industry standard.[162] That is, were a competitor to use industry guidelines to model its pre-ordering and ordering data fields for use with EDI 7.0, only 4 percent of its pre-ordering fields and 8 percent of its ordering fields would have different configurations than Qwest's system. As explained by HP, "the degree to which ILECs and CLECs conform to the LSOG guidelines has a direct impact on the internal application systems of both parties. The closer each company conforms to the other, the easier it is for the CLEC and ILEC that are exchanging data to build and maintain their respective internal application systems."[163] Moreover, we have previously noted that for both reports, HP concluded that there are not any issues that would prohibit a competitive LEC from integrating Qwest data with their internal application system(s).[164]

52. We also reject WorldCom's allegations that Qwest's July 25 and July 26 *Ex Parte* letters understate the pseudo-competitive LEC's actual reject rates by reporting only the percentage of fatal rejections, and not the percentage of both fatal and non-fatal rejections,[165] and that HP's overall order reject rate as reported in the KPMG Final Report was over 30 percent.[166] WorldCom's comments would have merit if the commercial measurements that track rejection rates made this distinction. However, PO-4, which measures Qwest rejection rates and was established through a collaborative process with Qwest and its competitors, does not account for non-fatal errors. Thus, contrary to WorldCom's comments, HP's rejection rate is accurately reported. To the extent that WorldCom believes that the business rules should be changed so that PO-4 counts non-fatal rejections, it should make its request at the state level. Moreover, HP explains that these orders were not rejected due to integration problems. In regard to WorldCom's comments about HP's overall order rejection rate as reported in the KPMG report, it is true that this rate is higher than the commercial average.[167] However, KPMG's report includes rejected orders that were not necessarily linked to integration problems, but could have

[162] Qwest I Notarianni/Doherty Reply Decl. at para. 140. The record shows that Qwest's legacy system required deviations from the LSOGs for some fields, but these deviations were evaluated to ensure conformity with the integration criteria. For example, Qwest states that "if there is a Qwest-specific field constraint on the order form and that specific field is available in a pre-order transaction, that field is parsed in the pre-order transaction in such a way that it can be readily used by the CLEC on the order. For example, if the billing name field in the OBF guidelines is 50 characters long, but Qwest's legacy systems limit the billing name to 30 characters, Qwest limited the billing name to 30 characters in order to ensure that the information can be processed through its legacy systems and provides documentation accordingly." *See id.*

[163] *See* KMPG Final Report, App. HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 7.0*) at 2; KPMG Final Report, App. HP-C (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 8.0*) at 2.

[164] *See* KPMG Final Report, Appendices HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 7.0*) at 40, and HP-C (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 8.0*) at 39.

[165] WorldCom Qwest I Lichtenberg Reply Decl. at para. 19.

[166] *Id.* at para. 20.

[167] *See* KPMG Final Report at 81 (Test 12-5-6).

been the result of test bed issues,[168] test case design issues, and interface design issues.[169] HP also states that LSR reject rates can vary by competitive LEC for numerous reasons, such as use of documented ordering processes and training; experience of customer service representative or turnover of service center staff; use of incumbent LEC or competitive LEC data entry applications and the degree of integration of these applications; adherence to business processes and rules; and validation of account and order information.[170] Thus, given the number of non-integration related factors that account for the pseudo competitive LEC's rejection rate, we do not find that the results in this area signify that underlying integration problems exist.

53. Lastly, we reject AT&T and WorldCom's comments that HP's test confirms that although it is possible for a competitive LEC to integrate, it would be unreasonably difficult.[171] HP subsequently clarified that due to clerical oversight, one of its statements was misstated, and that its report should have stated that "integration would be challenging for an information technology team *not experienced* in EDI development."[172] HP also explains that a high degree of difficulty is endemic to EDI development, and it clarified that competitors need appropriate EDI development experience in order to successfully integrate.[173] We find nothing in HP's statements to suggest that integrating with Qwest's system is any more difficult than other BOC regions or that it otherwise presents a barrier to entry. Accordingly, consistent with the Department of Justice's finding, we accept HP's conclusions that integration is possible,[174] and we find that such evidence is reliable and probative of competitors' integration abilities.[175]

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168 For an explanation of "test bed," see KPMG Final Report at 10.

169 *See* HP August 15 *Ex Parte* Letter at 1-2.

170 *See id.*

171 WorldCom Qwest I Comments at 8. WorldCom asserts that the following quote is taken from the HP Report: "a CSR to LSR parsing would be a very challenging and complex undertaking for a CLEC with an Information Technology team experienced in EDI development." *See id.* AT&T states that HP's test confirms that competitors would find it unreasonably difficult, if not impossible, to integrate. *See* AT&T Qwest I Comments at 39; AT&T Qwest I Comments, Joint Declaration of John F. Finnegan, Timothy M. Connolly, and Mitchell H. Menezes (AT&T Qwest I Finnegan/Connolly/Menezes Decl.) at para. 123.

172 Letter from Geoff May, Hewlett-Packard, to Marlene Dortch, Secretary, Federal Communications Commission, Docket 02-148 (filed July 31, 2002) (HP July 31 *Ex Parte* Letter) at 1 (emphasis provided). Hewlett-Packard explains that "upon review of these paragraphs, HP has determined that an inadvertent typographical error occurred in the final paragraph of Section 5.3 CSR to LSR Parsing Analysis (page 37 of LN-OSS-11). This paragraph was intended to be identical to the statement in the Executive Summary Section 1.3 CSR to LSR Parsing Analysis (page 9 of LN-OSS-11), however, the word "*not*" was omitted in error in the first sentence of the last paragraph on page 37 of LN-OSS-11." *See id.*

173 HP August 6 *Ex Parte* Letter, Exhibit C (Colorado *En Banc* Hearing 6/10/02, Transcript Excerpt) at 19.

174 *See* Department of Justice Qwest I Evaluation at 15.

175 *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9083, para. 128.

54. *Other Alleged Deficiencies.* We find insufficient evidence in the record to support AT&T's assertions that the failure to provide a field that identifies telephone numbers for a customer's account in the service and equipment section of the CSR is a competitive barrier.[176] On the contrary, Qwest's application and the third-party test indicate that Qwest does, in fact, return working telephone numbers parsed on the CSR.[177] During its analysis of EDI 7.0, HP successfully mapped from a CSR such data as the TN, PIC, LPIC, and USOC fields, and automatically populated these fields into an LSR.[178] Thus, the evidence shows that the format and organization of Qwest's CSR allows competitors to automatically populate LSRs. The standard for integration is not that a competitor must be able to integrate the system that it uses in another BOC region with the applicant's system; rather, only that competitors have access to a BOC's OSS in substantially the same time and manner as the BOC provides to its retail operations.[179] HP's test results prove this ability, and, therefore, AT&T's issue is not the result of discriminatory action. Additionally, the record indicates that AT&T neither addressed this issue before any state commission, nor did it request a CSR format change via the change management process.

55. We also reject commenters' arguments that Qwest provides insufficient documentation or specifications about how to integrate.[180] This allegation is refuted by HP's

[176] AT&T Qwest I Finnegan/Connolly/Menezes Decl. at para. 123, n.83. In its reply comments, AT&T argues that Qwest's failure to use the telephone number as the reference point for the service and equipment (S&E) section of the CSR prohibits competitors from integrating. AT&T contends that using the telephone number as the reference point assists competitors in locating the necessary data and populating orders. Unlike the other BOCs, AT&T argues that Qwest groups the S&E information based upon its USOC code, which is followed by a string of data. AT&T asserts that this data does not necessarily contain the telephone number associated with the USOC. Consequently, AT&T concludes that competitors have to devote too much time and resources to searching for the correct telephone number and line-based features to make using the parsed CSR worthwhile, especially for competitive LECs that intend to offer mass-marketed local exchange service. *See* AT&T Qwest I Reply at 25-26.

[177] Qwest I Notarianni/Doherty Reply Decl. at para. 139, and Qwest I Notarianni/Doherty Decl., Exhibit LN-OSS-5 (Developer Worksheets -- PreOrder) at 28.

[178] KPMG Final Report, App. HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 7.0*) at 39, (Table 5.2 – PCG Pre-Order to Order Integration).

[179] *See* App. K at paras. 34-35.

[180] *See* AT&T Qwest I Finnegan/Connolly/Menezes Decl. at para. 124; *WorldCom Qwest III* Comments at 12-13 (arguing that Qwest makes development of interfaces far too difficult). WorldCom also argues that there are unresolved inconsistencies between the Local Service Ordering Guide (LSOG) and the Developer Worksheets which make it difficult for competing LECs to use EDI. *See* Letter from Lori Wright, WorldCom, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 6, 2002) at 9-10. For example, WorldCom states that the Developer Worksheets are unclear on whether community names in the customer's address should be spelled out or abbreviated. *Id.* at 9. The record shows that WorldCom submitted a change request (CR) on Sept. 30, 2002 pursuant to Qwest's change management process (CMP). *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 22, 2002) at 2-5 (Qwest Nov. 22e *Ex Parte* Letter). WorldCom's CR will be addressed at the next CMP meeting. *Id.* at 3. Additionally, we note that Qwest convenes a documentation review board to review each change made to either the LSOG or the Developer Worksheets to ensure that consistent changes are made to both documents. *Id.* at 2. Finally, we note Qwest has (continued….)

explicit finding to the contrary, and by the integration materials that Qwest makes available to competitors. As described above, HP's integration report expressly states that Qwest makes the following documents available to competitors: *EDI Implementation Guidelines for Interconnect Mediated Access,*[181] and *IMA EDI Disclosure Document,*[182] both of which are downloadable from the web.[183]

56. Similarly, we find that the address verification inconsistencies that AT&T complains exist in the PREMIS and Customer Record Information System (CRIS) databases do not rise to the level of checklist noncompliance.[184] First, the record indicates that both Qwest's retail and wholesale customers are affected by the database inconsistencies.[185] The record shows that Qwest's process for migrating customers for both wholesale and retail requires that the service request contain a valid PREMIS address or the service request will not be created. Any other method of address validation, whether obtained through conversation with the customer or through another source such as CRIS, may cause the LSR to be rejected.[186] The inconsistency between the PREMIS and CRIS databases appears to be a common phenomenon in other BOC

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responded to WorldCom's request for clarification on community names, and Qwest plans to make a change to the Developer Worksheets for IMA Release 12.0 that will more clearly specify when abbreviations should be used. *Id.* at 4.

[181] *EDI Implementation Guidelines for Interconnect Mediated Access* provides competitors with information necessary to implement EDI processing with Qwest, and defines both the implementation process and the technical guidelines required to achieve implementation. KPMG Final Report, App. HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 7.0*) at 4.

[182] The *IMA EDI Disclosure Document* defines EDI business model/processes; developer worksheets (business rules for pre-order, order and post-order; and EDI trading partner access information (data mapping examples, enveloping and general guidelines). KPMG Final Report, App. HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 7.0*) at 4.

[183] In addition, Qwest provides competitors with its technical publications, as well as its listing of USOCs and FIDS, all of which are also available online at its website. Moreover, as noted above, Qwest has a team of integration experts with whom competitors can speak as they develop integrated interfaces. KPMG Final Report, App. HP-B (*Hewlett-Packard's Pre-Order/Order Integration Field Comparison Report, Analysis of Qwest IMA EDI Release 7.0*) at 4.

[184] *See* AT&T Qwest I Comments at 40; AT&T Qwest I Finnegan/Connolly/Menezes Decl. at paras. 137-38; AT&T Qwest I Reply at 27-28. AT&T explains that it has found it necessary to obtain address information for migration orders by using the address validation tool found in Qwest's GUI interface. AT&T Qwest I Comments at 28. AT&T states that using this approach causes double data entry because entries must be made to both the LSR and its own back office systems. AT&T also asserts that the CRIS/PREMIS address "mismatch" problem is unique to the Qwest region. *See id.* at 28, n. 56. Similarly, WorldCom argues that Qwest is the only BOC to require a pre-order address query in order to keep an order from rejecting. WorldCom Qwest III Comments at 6.

[185] *See* Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 (filed Aug. 13, 2002), Attach. at 1 (Qwest August 13f *Ex Parte* Letter).

[186] *Id.*

regions,[187] and the Commission has never required BOCs to eliminate the inconsistencies. Although we recognize that "TN migration"[188] would address the problems resulting from the inconsistency, the Commission has never imposed this requirement.[189] We note that Qwest first received a request to implement TN migration from WorldCom on June 13, 2002.[190] The competitive LEC community must prioritize this change for inclusion in a future IMA release, and it is likely that this agreed-upon change will be available with the IMA 12.0 Release scheduled to be issued on April 7, 2003.[191] We further note that Qwest's reject rates are similar

[187] *See, e.g., SWBT Texas Order* 15 FCC Rcd at 18431-32, paras. 157, n.427; at 18442-43, para. 177; at 18580 (App. B) at para. 15. We have stated that the mismatch between the PREMIS and CRIS databases is not a problem related to parsing. Instead, it is an internal database problem. An internal database inconsistency is not fatal to an applicant, for the inconsistency may affect the BOC's retail operations as well as its wholesale customers. *See id.* at 18580 (App. B) at para. 15.

[188] TN migration means that a carrier can place an order using only the customer's telephone number.

[189] Nor, contrary to WorldCom's suggestion, does the Commission find it appropriate to mandate migration by telephone number. *See* WorldCom Qwest I Comments at 5-6; WorldCom Qwest I Lichtenberg Decl. at paras. 13-18; WorldCom Qwest I Lichtenberg Reply at paras. 5. WorldCom alleges that its high reject rate is being caused by Qwest's requirement that a customer's address be provided on CSR queries. It explains that, although it recently submitted a change request for Qwest to allow migration by name and telephone number, Qwest should have been aware of its importance to competitive LECs, as it was discussed in both the *SWBT Texas Order* and the *BellSouth Georgia/Louisiana Order*. *See* WorldCom Qwest I Lichtenberg Decl. at para. 18.

[190] Qwest I Notarianni/Doherty Reply Decl. at para. 145.

[191] *Id. See also* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, Executive Director-Federal Regulatory, to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 02-148 and 02-189 (filed Aug. 13, 2002) (Qwest August 13a *Ex Parte* Letter) at 2-3. Qwest explains that the change request, SCR061302 (Migrate UNE-platform Customers by TN), was prioritized as number nineteen on the priority list for IMA 12.0 implementation. The following steps are required before this change can be implemented. First, Qwest must define the business and functional specifications, and the specifications will be completed on a per CR basis, in priority order. During this phase, Qwest will discuss any CRs that have affinities (similarities in functions or software components) with the competitive LECs. Qwest will also present any complexities, changes in CR size, or other concerns that may arise during this phase. Also during this phase, competing LECs can modify or add new CRs with a request that they be added to the list of release candidates. On November 21, 2002, Qwest began the next phase in the process: presenting packaging options -- the different combinations of proposed CRs. Due to affinities in candidates, or resource constraints, some CRs may be not implemented by Qwest while new options will completed. If more than one option is available, a vote will be taken. The option with the largest number of votes will continue through the design phase of the development cycle. On December 19, 2002, participants agreed to a final list of the CRs, which include both SCR061302-01 (Migrate UNE-platform by TN) and SCR060702-01 (Migrating Customers Using the Conversion As Specified Activity Type). These change requests are scheduled for inclusion in IMA 12.0, scheduled to be made available to competing LECs on April 7, 2003. *See* Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed December 19, 2002) at 1 (Qwest Dec. 19 *Ex Parte* Letter on CRs). In August 2002, WorldCom escalated its request for both "migrate by TN" and "migrate as specified," but other competitive LECs voted against this request. *See* WorldCom Qwest III Comments at 10; Qwest III Appl., Addendum, Tab 2, at 2. As Qwest requires these change requests to be approved unanimously, they were not adopted after some competing LECs opposed the change. Qwest III Appl., Addendum, Tab 2, at 3. Although WorldCom argues that Qwest forced this result (*see* WorldCom Qwest III Comments at 10-11), we conclude that Qwest followed the documented change management procedures.

to those approved in previous section 271 applications,[192] and we expect Qwest will commit resources to prevent any problems until the permanent fix is implemented in April.

57. We also find that Qwest's return of multiple CSRs in response to CSR inquiries does not pose a barrier to competition.[193] IMA returns multiple CSRs when it encounters more than one customer account in "live" status. This situation happens when a customer requests a billing change, the final bill is still pending, and – consequently – the account remains in "live" status until the final bill is issued.[194] Since this situation is limited to only those accounts that are in between billing cycles, there are only limited chances of this problem occurring. For example, during the months of June through September 2002, multiple CSRs were returned for 3.4 to 5.2 percent of the CSR requests made via IMA EDI 8.0; 2.7 to 5.8 percent for IMA EDI 9.0; and 0 to 4.8 percent for IMA EDI 10.0.[195] The results for IMA GUI 10.0 show that 4.0 to 4.4 percent of CSR requests produced multiple CSRs.[196] The record also shows that when multiple CSRs are returned, competitors can deduce from the returned CSR fields which CSR is the correct CSR.[197] Given the low incidence of the problem and the fact that competitors can work around it, we find that competitive LECs that receive multiple CSRs in these limited circumstances are nonetheless able to submit a complete and accurate conversion LSR.

58. Notwithstanding WorldCom's assertions to the contrary, we do not find it competitively significant that Qwest requires carriers to include a customer's existing services and other pieces of information in order to process an order.[198] The record shows that in 1997

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192 *See* discussion of reject rates in the Ordering section below.

193 *See* WorldCom Qwest I Reply at 3; WorldCom Qwest I Lichtenberg Reply Decl. at paras. 8-10. WorldCom states that this problem occurs in approximately 10% of the cases, and that its partner in the Qwest region, Z-Tel, has had to develop the capacity to display multiple CSRs. *See id.*

194 *See* Qwest August 13a *Ex Parte* Letter at 3.

195 *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 02-314 (filed Nov. 15, 2002) (Qwest Nov. 15b *Ex Parte* Letter) Attach. A at 1.

196 *Id.*

197 *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 02-148 and 02-189 (filed Sept. 9, 2002) (Qwest Sept. 9c *Ex Parte* Letter) at 1. Qwest's IMA User's Guide provides that when a competitor receives multiple CSRs, a list of the accounts is returned. For each account, the following fields are provided: listed name; account status; billing telephone number; customer code; and several address fields (*e.g.*, house number, street name and city). *Id.* Using this information, competitive LECs determine the correct CSR. Even if information does not produce the correct CSR, the record shows that competitive LECs can also review the full CSR for each account. *Id.* A competing LEC can use a variety of fields returned on the full CSR to resolve the multiple match (*e.g.*, the reseller ID to determine account ownership or the billing tab to determine billing responsibility). *Id.*

198 *See* WorldCom Qwest I Comments at 6; WorldCom Qwest I Reply at 3-4; WorldCom Lichtenberg Reply Decl. at paras. 11-12. WorldCom asserts that these requirements do not exist in other BOC regions. WorldCom has listed eight differences in the ordering practices in the Qwest region versus the other BOC regions, including the need to submit both existing feature information as well as feature identifiers (FIDs), which include such details (continued….)

Qwest did not have these requirements, and allowed competitors to submit service requests to convert customers "as specified." However, due to missing feature problems that consistently developed after migration, Qwest, in response to requests from competing carriers, modified its process to require a positive identification of the action to be taken for each existing feature.[199] Given that competitors asked for the elimination of the process for which WorldCom now requests re-implementation, we cannot find that WorldCom's issue is problematic for all competitors in the Qwest region. Moreover, we are heartened by the evidence showing that Z-Tel recently submitted a change request allowing "as specified" conversions,[200] and that this change is being implemented in two phases. First, effective August 15, 2002, Qwest eliminated the requirement that competitors must list the existing account's unwanted features on its LSRs.[201] The second phase, which is yet to be implemented, will eliminate the requirement that a competing LEC differentiate between features that are being retained and features that will be added. As this phase requires system changes, the competitive LECs are in the process of prioritizing this change, and it is anticipated that this agreed-upon change will be available with the release of EDI 12.0, anticipated to be issued on April 7, 2003.[202]

59. We reject WorldCom's allegation that Qwest takes too long to update CSR information.[203] The record indicates that Qwest updates the vast majority of CSRs within 3 to 5 days, and that this interval is the same for both wholesale and retail accounts.[204] In addition, contrary to WorldCom's contention, the record also shows that a supplemental order can be submitted without the CSR being first updated.[205] Thus, given that parity exists, we conclude that there is no evidence of discrimination.

60. We also reject WorldCom's arguments that separate directory listing inquiries must be done only in the Qwest region and that only in the Qwest region does the competing LEC need to access the CSR when submitting supplemental orders.[206] Our requirement is that

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about features as the "forward to" number if the customer has call forwarding. WorldCom Qwest III Comments at 4.

199 *See* Qwest I Notarianni/Doherty Reply Decl. at para. 146. *See also* Qwest August 13d, 2002 *Ex Parte* Letter at 17.

200 *See id.*; Qwest I Notarianni/Doherty Reply Decl., Exhibit CLD-22 (Change Request SCR060702).

201 *See* Qwest Aug 13f *Ex Parte* Letter at 2.

202 *Id.* For an explanation of how the change management process operates, see n. 191, below.

203 WorldCom Qwest I Lichtenberg Reply Decl. at para. 11.

204 Qwest I Notarianni/Doherty Qwest I Reply Decl. at para. 147. *See also* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 22, 2002) at 1 (Qwest Nov. 22a *Ex Parte* Letter).

205 *Id.*

206 WorldCom Qwest III Comments at 6-8.

the BOC provide nondiscriminatory access to unbundled network elements at rates, terms, and conditions that are just, reasonable, and nondiscriminatory, which is not necessarily identical in every BOC region.[207]

(iv) Access to Loop Qualification Information

61. Based on the evidence in the record, we find that Qwest provides competitive LECs with access to loop qualification information in a manner consistent with the requirements of the *UNE Remand Order*.[208] Specifically, we find that Qwest provides competitors with access to all of the same detailed information about the loop that is available to itself and in substantially the same timeframe as any of its own personnel could obtain it.[209]

62. Currently, Qwest provides carriers with various methods to obtain loop make-up information.[210] Qwest offers two primary loop qualification tools[211] through its EDI and GUI interfaces -- Unbundled Loop Qualification Tool (LQT)[212] and the Raw Loop Data Tool (RLDT).[213] These tools provide loop qualification information based upon, but not limited to,

207 *See* App. K at para. 26.

208 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*). The Commission's rules require Qwest to provide competitors all available information in its databases or internal records, in the same time intervals that it is available to any Qwest personnel, regardless of whether Qwest retail personnel have access to such information. *UNE Remand Order*, 15 FCC Rcd at 3885-87, paras. 427-31.

209 *Verizon Massachusetts Order*, 16 FCC Rcd at 9016-17, para. 54. *See also* App. K at para. 35.

210 *See* Qwest I Application at 115; Qwest I Notarianni/Doherty Decl. at para. 109.

211 Qwest I Notarianni/Doherty Reply Decl. at para. 41 and Exhibit LN-1 (Data Elements in Loop Qualification Tools). Qwest also offers a third tool, the DSL for Resale tool. This tool "qualifies working loops by telephone number or address so that a CLEC can determine whether resale of Qwest DSL is available. This tool accesses the QCity/QServ database, which is the same loop qualification tool used by Qwest's Retail representatives." The tool "provides the capacity for a CLEC to request automatic re-qualification of the telephone number that received a 'No' response on a periodic basis to determine if there has been a change in qualification status. If a loop becomes available at a latter date, the CLEC is notified." *See* Qwest I Notarianni/Doherty Decl. at para. 110.

212 The LQT "is used to determine if loops that meet the technical requirements defined for the ADSL-compatible loop product are available. This tool returns two levels of data to the CLEC. First, the query returns a loop qualification tab, which provides loop status (whether facilities qualify or not, whether a construction job, a bona fide request, or conditioning is required, and if the loop is too long), a loop qualification message that contains some loop information (*i.e.*, the telephone number or circuit; loop length; bridge tap length; the type of facility; the load type, if any; and the insertion loss calculated at 196 kilohertz frequency with 135 ohm terminations), and finally the loop product availability code to indicate which products are available. The second set of data provided is behind the loop data tab. This information is based upon LSOG 5 guidelines, and it details 12 different data points and descriptive values to assist the CLEC in qualifying loops. Some of the data points included are loop length, pair gain presence, presence of bridged tap or load coils, loop composition and remote switching unit indicator." *See* Qwest I Notarianni/Doherty Decl. at para. 111.

213 The Raw Loop Data tool is able to provide "CLECs with the necessary loop make-up information to allow them to make a determination of whether a loop qualifies for the specific DSL service they wish to provide utilizing (continued….)

customer address or telephone numbers. The record shows that these tools provide the underlying information only,[214] and once a competitor obtains loop make-up information, it can apply its own DSL qualification algorithm to the underlying make-up information to make a determination of loop suitability.[215] These tools provide information on more than 90 percent of Qwest's loops.[216] In addition, Qwest states that it has implemented a manual process to permit competitive LECs to obtain loop make-up information within 48 hours in the event the automated tools provide incomplete information.[217] Thus, competitors can request loop make-up information either through Qwest's mechanized tools, or request that Qwest perform a manual search of its paper records to determine whether a loop is capable of supporting advanced technologies.[218]

63. Qwest has shown that both its RLDT as well as its Unbundled Loop Qualification Tool use the same underlying database as Qwest retail.[219] Competing LECs, as well as Qwest retail, access information on loop make-up from the Loop Qualification Database (LQDB) which is generated from the information that resides in the Loop Facilities Assignment & Control System (LFACS).[220] The RLDT, using information from LFACS, returns loop qualification information to competing LECs, including loop length, presence of bridged taps and load coils, and whether there is a digital loop carrier all the way to the customer drop.[221] Information on loop length can be obtained from the LQDB in one of two ways: the "Makeup Information" field or the "MLT Distance" field. The information in the "Makeup Information" field contains information on loop length from engineering records.[222] The information contained in the LQDB is refreshed each day for approximately 60 wire centers. Over a period of approximately one

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Qwest's two-wire or four-wire Non-Loaded Loop products. This tool provides information about loop make-up characteristics, including: address, telephone number or circuit ID, CLLI code, terminal ID, Load Coils, Bridged Tap, Wire Gauge, and Cable and Pair make up. A CLEC may request loop make-up information for up to 24 loops or telephone numbers per query." *See* Qwest I Notarianni/Doherty Decl. at para. 112. There are two types of RLDT: a web-based version and an IMA-based version. *See* Qwest III Notarianni/Doherty Reply Decl. at para. 17.

214 *See* Qwest I Application at 115.

215 *See* Qwest I Notarianni/Doherty Reply Decl. at para. 41.

216 *See id.* at para. 109, n. 133. *See also* Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 02-148 and 02-189 (filed Aug. 13, 2002) (Qwest August 13d *Ex Parte* Letter) at 8.

217 Qwest I Notarianni/Doherty Decl. at para. 117.

218 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6293-94, para. 122.

219 *See* Qwest Nov. 7d *Ex Parte* Letter at App. A.

220 *Id.* at Attach., 14.

221 *Id.* at Attach., 4-5.

222 During 2001, Qwest added feeder and distribution loop make-up information to the LFACS database. This information is returned by the RLDT under the "Makeup Description" field of the RLDT. *Id.* at 40-41

month, all of Qwest wire centers are refreshed. As part of the refresh process, the MLT Distance information in the RLDT is also refreshed.[223] Qwest considers the information contained in the "Makeup Information" field to be more accurate.[224]

64. Commercial performance data indicate that Qwest is meeting its requirements to provide loop qualification information in a timely and accurate fashion. Qwest has met or exceeded the pre-order response time benchmarks (≤ 20 seconds) in all nine states in the past four months for providing competitive LECs with access to Unbundled Loop Qualification information, as well as making Qwest DSL for Resale available.[225] KPMG also conducted a "Loop Qualification Process Evaluation."[226] This test covered 11 separate evaluation criteria,[227]

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[223] Qwest III Notarianni/Doherty Reply Decl. at paras. 40-42. Qwest uses the Mediacc's Automated Loop Testing (MALT) process to extract MLT distance. *Id.* 37-42. MALT is an application that performs a mechanized MLT on telephone numbers, but returns only limited information, including loop length in feet. When the MLT distance is returned for the telephone number that was identified as the specific serving terminal during the MALT application, it is applied to all loops in that serving terminal, adjusting the MLT distance based on a number of factors, such as the wire-center and the distance band, to account for inherent inaccuracies of MLT distance values. *Id.* at para. 42. LFACS refreshes the loop make-up information in LQDB by wire center on a rolling monthly basis. In other words, some of the wire centers are updated in each nightly refresh run, with the entire set of wire centers completing within a 30 day calendar period. Qwest Nov. 7d *Ex Parte* Letter Attach. at 6-7.

[224] Qwest III Notarianni/Doherty Reply Decl. at 41.

[225] Qwest I Notarianni/Doherty Decl. at paras. 118-129. *See also* PO-1A-7 (Pre-Order Resp. Times, Loop Qual Tools, Avg Sec), requiring ≤ 20 seconds between query and response for pre-order transactions relating to the loop qualifications tools submitted via GUI ; PO-1B-7(Pre-Order Resp. Times, Loop Qual Tools, Avg Sec), requiring ≤ 20 seconds between query and response for pre-order transactions relating to the loop qualifications tools submitted via EDI; PO-1A-8 (Pre-Order Resp. Times, Resale of Qwest DSL Qual, Avg Sec.), requiring ≤ 20 seconds between query and response for pre-order transactions relating to Resale of Qwest DSL submitted via GUI; and PO-1B-8 (Pre-Order Resp. Times, Resale of Qwest DSL Qual, Avg Sec.), requiring ≤ 20 seconds between query and response for pre-order transactions relating to Resale of Qwest DSL submitted via EDI.

[226] KPMG Final Report at 120. KPMG described the evaluation as "a review of the Digital Subscriber Line (DSL) loop qualification processes and procedures developed and employed by Qwest to support both retail and wholesale customers. Operational analysis techniques were used to determine if parity exists in the design, implementation, and use of Qwest's loop qualification process. Additionally, the Loop Qualification Evaluation assessed remedial options available for both the retail and wholesale processes." *Id.* (footnote omitted) During this evaluation, KPMG did not place substantial reliance upon information provided by competitive LECs. *See* Letter from Peter Rohrbach, Attorney for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148 (filed Aug. 27, 2002) (Qwest August 27e *Ex Parte* Letter).

[227] The 11 evaluation criteria were: 1) End-user information that is required prior to the submission of a loop qualification is the same for wholesale and retail orders (Test 12.7-1-1); 2) Loop qualification query process is consistent for retail and wholesale customers (Test 12.7-1-2); 3) Processes and procedures are defined for addressing errors regarding loop qualifications in the retail and wholesale environments (Test 12.7-1-3); 4) Qwest's internal process flow used for loop qualification is consistent for retail and wholesale customers (Test 12.7-1-4); 5) Qwest contact information is readily available for retail and wholesale customers (Test 12.7-1-5); 6) The customer receives confirmation of the completion of a loop qualification, or can access the status of loop qualifications (Test 12.7-1-6); 7) Systems and processes are in place to allow wholesale and retail loop qualification queries to be performed using the customer address (Test 12.7-1-7); 8) Loop qualification response types that are provided are consistent between retail and wholesale customers (Test 12.7-1-8); 9) The escalation process for loop qualifications (continued….)

and Qwest satisfied them all. Generally, the test found that Qwest's retail and wholesale processes were consistent for providing pre-order loop qualification information, assembling pre-order responses, escalating problems, and providing thorough and capable management.[228]

65. We reject the arguments made by Covad and AT&T that Qwest's processes for providing loop make-up information violate our *UNE Remand Order*.[229] First, both commenters generally state that the RLDT's information is unreliable and inaccurate, and that competitors do not have equal access to all of Qwest's loop qualification information. Second, these commenters raise issues surrounding MLT testing. Specifically, they ask for access to mechanized loop testing (MLT) at the pre-order stage to correct alleged deficiencies in the RLDT. Further, commenters argue that the fact that Qwest conducts mechanized loop testing (MLT) at the provisioning stage indicates that critical information about the characteristics of these loops is being withheld from competing LECs.[230] Third, commenters maintain that Qwest has not discharged its duty to act in absolute truth and candor before this Commission because it diminished the visibility of MLT at the provisioning stage during regulators' visits. We address these objections in turn.

66. *Reliability and Accuracy of the RLDT's Loop Qualification Information.* Covad states that it tested the accuracy of the RLDT in Colorado and found a number of failures.[231] Moreover, Covad argues that the RLDT produces "false positive" and "false negative" responses.[232] Covad also states that the RLDT returns varying degrees of information depending on the type of validation method used,[233] and that it receives inconsistent information about loops where pair gain is on the line. AT&T states that the RLDT does not contain information on loop conditioning and spare facilities that are not connected to the Qwest switch.[234] Similarly, Covad

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is consistent for retail and wholesale customers (Test 12.7-1-9); 10) The capacity management process for loop qualification is consistent for retail and wholesale customers (Test 12.7-1-10); and 11) Loop qualification performance measurement processes are consistent for retail and wholesale operations (Test 12.7-1-11). *See* KPMG Final Report at 126-132.

228 KPMG Final Report at 125-132 (Test 12.7) (Loop Qualification Process Evaluation).

229 *See generally* AT&T Qwest I Comments at 39-40; AT&T Qwest III Comments at 50-57; AT&T Qwest I Finnegan/Connolly/Menezes Decl. at paras. 125-129; Covad Qwest I Comments at 13-22; Covad Qwest III Comments at 5-21.

230 AT&T Qwest III Comments at 53-57; Covad Qwest III Comments at 15-21. WorldCom Nov. 6 *Ex Parte* Letter at 13.

231 *See* Covad Qwest I Comments at 19-20.

232 *Id.*

233 *Id.* at 21.

234 AT&T Qwest I Finnegan/Connolly/Menezes Decl. at para. 127; AT&T Qwest I Reply at 28.

states that Qwest regularly skipped updating loop qualification information for the databases that supply the RLDT and other wholesale loop qualification tools.[235]

67. In addition, AT&T argues that Qwest is using its LFACS database and all other information sources without allowing competitors to do the same.[236] It also contends that Qwest does not share information that its engineers possess concerning the availability of spare facilities not connected to the Qwest switch.[237] In a similar vein, Covad states that Qwest is not sharing information that it generated when it conducted a region-wide, bulk manual loop test.[238] It also maintains that Qwest's manual, "Employee Training of LFAC Updates," states that outside plant workers may provide new "outside plant" information to either Qwest retail or to the database, implying that Qwest is bending the rules by not mandating that all new information go to the database.[239] Covad also maintains that Qwest has another, entirely separate, process for updating loop make-up information that apparently is provided only for, and to provision, Qwest retail orders.[240] Covad argues that the technicians dispatched to either provision or repair Qwest retail DSL loops send their form to the Load Resource and Allocation Center (LRAC) which has no responsibility for updating LFACS.[241]

[235] *See* Covad Qwest I Comments at 18.

[236] *See* AT&T Qwest I Finnegan/Connolly/Menezes Decl. at para. 128 & n.89.

[237] *Id.* at paras. 127-128.

[238] *See* Covad Qwest I Comments at 19; Letter from Praveen Goyal, Senior Counsel for Government and Regulatory Affairs, Covad Communications Company, to Marlene H. Dortch, Secretary, Federal Communications Commission, WCB Docket No. 02-148 at 2-3 (filed July 23, 2002) (Covad July 23 *Ex Parte* Letter).

[239] *See* Covad Qwest I Comments at 18-19; Covad Qwest I Reply at 11.

[240] Covad Qwest III Reply at 9-11. Additionally, Covad argues that evidence in the Minnesota hearings showed that: (1) Qwest reminded its retail employees that loop qualification information might be inaccurate and that additional steps are required to confirm whether the loop can support xDSL; and (2) unlike competing LECs, Qwest employees can access information that will determine whether loops are incorrectly statused in LFACS. *See* Letter from Praveen Goyal, Covad, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 21, 2002) at 2-3 (Covad Nov. 21 *Ex Parte* Letter). The Minnesota hearings showed that Qwest employs an 11-step process in order to identify alternate facilities to provision loop requests for both retail and wholesale orders for any loop order that is not automatically assigned through LFACS. *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 6, 2002) at 3-5 (Qwest Dec. 6 *Ex Parte* Letter on loop qualification issues). Qwest does not conduct a MLT as part of this 11-step process. *Id.* at 4. For these loops that do not flow through the LFACS database, Qwest uses a manual process conducted by the Loop Provisioning Center (LPC). *Id.* Status updates that are generated by this process are incorporated into LFACS. *Id.* Additionally, the record shows that if the QCity tool used by Qwest retail DSL representatives shows that the customer does not qualify for Qwest retail DSL, the Qwest retail representative will request a manual investigation of the loop using exactly the same manual process available to competing LECs. *Id.* at 5-6.

[241] *Id.* at 9-10.

68. We reject these claims for the following reasons. As an initial matter, KPMG testing found that Qwest provided loop qualification information in a nondiscriminatory manner.[242] Specifically, the record expressly shows that both retail and wholesale personnel obtain information from the LFACS database,[243] and we find no evidence that Qwest has denied competitors' access to the information in LFACS.[244] KPMG investigated the databases to which competitors had access, and reported that they have access to LFACS and all other sources of loop make-up information in the same manner as Qwest retail representatives.[245] Although this access is not "direct," we have never required that BOCs allow direct interaction with LFACS.[246] Indeed, we do not find it reasonable to require each competitive LEC, placing orders in multiple jurisdictions, to learn the back office ordering system used by each BOC, which is what "direct access" would require.[247] We also note that evidence in the record indicates that AT&T unsuccessfully raised these same issues in the Colorado section 271 proceeding and the Multi-State proceeding.[248]

69. To the extent the RLDT does contain inaccurate or incomplete information, the Commission has previously held that any inaccuracies or omissions in a BOC's database are not discriminatory to the extent they are provided in the exact same form to both retail and wholesale

[242] According to its Final Report, KPMG examined the DSL loop qualification processes and procedures developed and employed by Qwest to support both retail and wholesale customers, and found no evidence of discrimination. Specifically, it examined the following methods that wholesale customers can use to obtain loop qualification information: IMA tools (Qwest DSL Qualification Tool; ADSL Unbundled Loop Qualification Tool; and the RLDT); Website tools; telephone inquiry; and email or fax. It found non-discriminatory access to all these tools. *See* KPMG Final Report at 122 (Test 12.7) (Loop Qualification Process Evaluation). Moreover, a comparison of Figure 12.7-1 (Qwest Retail Loop Qualification Query Process) to Figures 12.7-2 (Wholesale Loop Qualification System Process) and 12.7-3 (Unbundled ADSL Loop Qualification Process) illustrates that both retail and wholesale customers have access to the same information sources. *See id.* at 121, 123-24.

[243] *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 02-148 and 02-189 (filed Sept. 6, 2002) (Qwest September 6 *Ex Parte* Letter) at 1.

[244] Additionally, Covad argues that KPMG did not evaluate Qwest's procedures for providing all loop qualification information. *See* Covad Qwest I Comments at 14-15; Covad July 23 *Ex Parte* Letter at 2; Covad Qwest I Reply at 8. However, Covad's comments appear misplaced. For example, KPMG found that the loop qualification process is consistent for retail and wholesale customers. *See* KPMG Final Report at 127 (Test 12.7-1-2) (Loop Qualification Query Process is Consistent for Retail and Wholesale Customers). KPMG found that wholesale customers can determine whether a loop qualifies for DSL service by e-mailing or faxing an inquiry, and that during its evaluation, it observed that wholesale representatives used various loop qualification tools, including additional process documentation. *See* KPMG Final Report at 127. *See also* Qwest August 13a *Ex Parte* Letter at 8.

[245] *See* KPMG Final Report at 124 (Test 12.7) (Loop Qualification Process Evaluation).

[246] Competing LECs do not directly access LFACS; instead, they access RLDT which contains information from LFACS. Similarly, Qwest retail representatives use QCity/QServ to access the information in LFACS.

[247] *See* Qwest I Notarianni/Doherty Reply Decl. at para. 55.

[248] *Id.* at para. 56.

customers.[249] Moreover, the Commission has declined to require incumbent LECs to catalogue, inventory, and make available to competitors loop qualification information through automated OSS even when it has no such information available to itself.[250]

70. Moreover, RLDT is not the only source of loop qualification information available to competitors. To the extent that competitors believe that information is inaccurate or not complete, Qwest will perform a manual search of its back office records, systems and databases.[251] For these reasons, we cannot find that the RLDT's alleged unreliability denies competitors a meaningful opportunity to compete. Although Covad and AT&T state that it is premature to conclude that Qwest will adequately process manual requests for loop information,[252] they do not present any evidence to undermine Qwest's claims surrounding its manual loop qualification process. We do not find that speculation about Qwest's ability to perform in the future warrants a finding of checklist noncompliance today.

71. Covad additionally asserts that it should be allowed to audit Qwest's loop qualification information to ensure parity of access and information in the future.[253] Specifically, Covad states that it should be allowed to ascertain what loop information is accessible to any Qwest employee, not just Qwest retail representatives, and that the audit right should extend to Qwest's paper records, including engineering records, back office systems and databases.[254] We note that Qwest already permits audits of its loop qualification databases in its SGAT, should a competing LEC feel the need to validate that the information being returned by the tools is comparable to the information available to Qwest.[255] Notably, Qwest has not received any such audit requests to date.[256] Given that the record indicates that Qwest's current automated and manual processes are adequate for providing access to loop qualification information in its

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249 *See Verizon Massachusetts Order*, 16 FCC Rcd at 9024, para. 66.

250 *UNE Remand Order*, 15 FCC Rcd at 3886, para. 429.

251 Qwest I Notarianni/Doherty Reply Decl. at para.70. As stated above, in addition to the automated loop qualification tools available to competing LECs, Qwest also provides competing LECs a mechanism to request a manual look-up of loop make-up data should the competing LEC find that the response the tools return is incomplete or inconsistent, or if the competing LEC questions the accuracy of the information returned. *See* Letter from R. Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 7, 2002) (Qwest Nov. 7 *Ex Parte* Letter) Attach. at 12 (citing SGAT § 9.2.2.8.6). To date, Qwest has only received five manual look-up requests (from one competing LEC) since Qwest implemented this manual process in June 2002. Qwest Nov. 7d *Ex Parte* Letter Attach. at 13.

252 *See* AT&T Qwest I Finnegan/Connolly/Menezes Decl. at para. 129.

253 *See* Covad Qwest I Comments at 16-22; Covad July 23 *Ex Parte* Letter at 3; Covad Qwest III Reply at 22-26.

254 *See* Covad Qwest I Comments at 18.

255 See Qwest Nov. 7d *Ex Parte* Letter at Attach., 12. (citing SGAT §§ 9.2.2.8 and 18)

256 *Id.*

possession, we see no need to consider expanding competitors' audit rights in the manner Covad suggests.

72. We also are not persuaded that Qwest is failing to disclose engineering information about spare facilities, given that AT&T provides no supporting evidence for its conclusory statements. Similarly, we are not persuaded that language in an employee manual giving outside plant workers the option of providing new loop information to either retail representatives or to the database demonstrates that Qwest is providing more information about its loops to its retail representatives. We also disagree with Covad's assertion that Qwest has failed to share information from the region-wide MLT. Notably, the North Dakota Commission conducted an investigation into this issue, and concluded that Qwest made the results of the test available to competitors.[257] Therefore, we conclude that there is no credible evidence to support a finding that Qwest is denying competitors' parity of access to its loop qualification information.

73. Lastly, we reject Covad's claims that competitors have to wait until the LFACS database is updated, up to 30 days after the voice is turned on, to pre-qualify a new Qwest voice customer that wants Covad data services.[258] The record shows that Qwest provides competitors the ability to pre-qualify a data customer as soon as the voice service is turned up for the customer.[259] Although in the past it may have taken longer, Qwest implemented a capability in August 2001 to permit competitors to access loop qualification information as soon as a customer's voice service was activated.[260] Specifically, this capability provides that each time LQDB receives a query for loop make-up information or qualification, it sends a query to LFACS to determine if there has been a change to LFACS for the queried telephone number or address.[261] During the third-party test, KPMG observed Qwest's use of this capability.[262]

74. *Issues Surrounding MLT.* The record shows that Qwest uses MLT in two ways: First, using the MALT process described above, Qwest populates the MLT loop length field in

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[257] *See* North Dakota Commission Qwest I Comments, Section 271 Consultative Report at 131.

[258] *See* Covad Qwest I Comments at 19-20.

[259] *See* Letter from Yaron Dori, Attorney for Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, Docket Nos. 02-148 and 02-189 (filed Aug. 16, 2002) (Qwest August 16c *Ex Parte* Letter) at 6-8.

[260] Qwest added this functionality with the 8.0 IMA Release in August 2001. *Id.* at 6-7.

[261] *Id.* A change to LFACS can occur when new service has been installed or existing service has been moved or changed. If a change has occurred and there is new or changed data in LFACS, the new or changed data in LFACS is populated in LQDB and provided in the response. The "recent changes" check assures that newly installed service will be immediately added to LQDB. *Id.* at 6-7.

[262] In sections 2.1.2 and 2.1.3 of the Test 12.7 Final Report, KPMG reported that "the LQDB . . . is updated with revised LFACS data on a nightly basis. [The LFACS and LQDB] databases are synchronized each month. As part of the loop qualification query process, the LQDB also queries a 'recent changes' field in the LFACS database. If this query indicates that the LFACS information has been updated, the new LFACS information is populated into the LQDB, and is used as the basis for the loop qualification query." *See* KPMG Final Report at 121-22.

the RLDT.[263] This information is refreshed periodically.[264] Loop length information is necessary for competitors to determine whether the loop is capable of supporting the advanced services they wish to offer and is available from the RLDT. Second, Qwest uses MLT during the provisioning process (as well as maintenance and repair) to ensure that the intended loop is in working order.[265] During the provisioning process, the information received from MLT is used to guarantee the quality of the loop, not to determine whether the high-frequency portion of the loop is capable of supporting the advanced services that competitors want to provide.[266] The information provided by MLT that is required to qualify a loop for DSL service (*e.g.*, whether the line is capable of supporting ADSL or whether there is a digital loop carrier (DLC) all the way to the customer drop) is already provided in the RLDT.[267]

75. Commenters raise a host of issues related to Qwest's use of MLT. First, they allege that Qwest should be required to provide pre-order access to MLT so that competing LECs can verify that the loop can support the service that they intend to provide. Second, commenters contend that Qwest is violating the *UNE Remand Order* because Qwest is not providing competing LECs with nondiscriminatory access to the same detailed information about the loop that is available to the BOC through the MLT. Third, according to certain parties, the fact that Qwest does not share information about the MLT results with competing LECs is a violation of the *UNE Remand Order* because the information provided by MLT is more accurate than the information provided by Qwest in its databases. Finally, these commenters maintain that Qwest should be required to provide "post-order/pre-delivery" MLTs to competing LECs so that competitors can verify that the loop provided by Qwest is capable of supporting the advanced services they wish to offer over it. We address these arguments below.

[263] See n.223 above.

[264] Qwest III Notarianni/Doherty Reply Decl. at para. 42

[265] Qwest Nov. 7d Ex Parte Letter, Attach. at 1-8. A MLT returns information regarding whether certain faults exist on a line, which should be resolved by submission of a repair ticket. Faults such as tip and ring imbalance, ground conditions, foreign voltages, and open conditions may also be resolved through the repair process. *See* Qwest Dec. 6 *Ex Parte* Letter at 9-10.

[266] *Id.* at 3-4. This information is cut and pasted in the circuit notes section of the Work Force Administrator (WFA). Qwest III Reply, Reply Declarations Book 1, Tab 5, Declaration of Mary Pat Chesier at paras. 6-8 (Qwest III Chesier Reply Decl.). Qwest has, and will continue to, put into place measures to ensure that access to WFA is limited to those Qwest personnel who perform or support provisioning and repair functions. Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 22, 2002) at 1-2 (Qwest Nov. 22f *Ex Parte* Letter). The limited amount of information pasted into WFA is not loop qualification information and Qwest has never used it for loop qualification purposes. *Id.* Qwest retains this information only to keep a record of the loop conversion transaction. *Id.*

[267] Qwest Nov. 7d *Ex Parte* Letter at 4.

76. We disagree with AT&T and Covad that they should be allowed to perform a pre-order MLT to verify that the loop can support the services that they intend to provide.[268] The Commission has never required pre-order access to MLT, and we decline to do so here, as several of Qwest's state commissions have also declined to do.[269] Specifically, the Commission has recognized that "MLT information is merely a small subset of . . . information . . . . [and that] the inability of competitors to access this subset of information on a pre-order basis is not fatal to [a BOC's section 271] application."[270] Further, Qwest itself does not perform MLT at the pre-order stage.[271] The fact that Qwest performs MLT testing on wholesale orders at the provisioning stage, in order to ensure that a loop is in working order before turning it over, does not mean that Qwest should be required to perform a MLT on every loop at the pre-ordering stage and provide such information to competing LECs. Accordingly, we do not find that Qwest's failure to provide a pre-order MLT warrants a finding of checklist non-compliance.

77. Second, we reject AT&T and Covad's argument that the fact that competing LECs do not have access to the information from MLTs run during the provisioning process means that Qwest is in violation of the *UNE Remand Order*.[272] Qwest performs the MLT when

[268] *See* AT&T Qwest I Comments at 40, AT&T Qwest I Finnegan/Connolly/Menezes Decl. at paras. 130-132; Covad Qwest I Comments at 22-25; Covad July 23 *Ex Parte* Letter at 3; Covad Qwest I Reply at 12-14. Both commenters state that a MLT would allow competitors to verify the presence of digital loop carriers. Covad also argues that MLT will provide information regarding loop characteristics in the outside plant, such as "loop length, grounds, opens, foreign voltage" which would be helpful to Covad in determining whether a particular loop is capable of supporting xDSL service at the time it is ordered. *See* Covad Qwest III Reply at 18-19.

[269] We note competing LECs efforts to expand pre-order MLT access in many other venues. *See* North Dakota *Qwest I Comments, Section 271 Consultative Report, at 131. AT&T requested that the North Dakota Commission* require Qwest to perform a pre-order MLT. That agency declined, agreeing with the facilitator who examined the issue, concluding that "Qwest has not performed MLT for itself, except in one, broad scale program, the results of which are made available to C[ompeting] LECs," and observing that "Qwest has reason to discourage such testing because it disrupts service when it takes place." *Id.* North Dakota agreed with the conclusion that "Qwest's approach to making loop qualification information available to competing LECs does not require allowing MLT in order to provide C[ompeting] LECs nondiscriminatory treatment and a meaningful opportunity to compete," and that Qwest should not be required to make the test available unless it begins to use it for itself or affiliates. *Id. See also* Colorado Commission Qwest I Reply at 22. The Colorado Commission explains that Qwest ran a MLT on its copper loops, provided the resulting data into its RLDT, and a Colorado hearing examiner determined that Qwest was not required to do more. Colorado states that Covad raised the issue of providing a MLT again, and the Commission determined that a pre-order MLT is not required, and that Qwest does not provide one for its own retail services. *Id.*

[270] *Verizon Massachusetts Order*, 16 FCC Rcd at 9023-24, para. 65.

[271] *See, e.g.,* Letter from David Lawson, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 6, 2002) at 2 (AT&T Dec. 6 *Ex Parte* Letter); Letter from Praveen Goyal, Covad, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 21, 2002) at 1-4 (Covad Nov. 21 *Ex Parte* Letter).

[272] AT&T Dec. 6 Ex Parte Letter at 2; Covad Nov. 4 Ex Parte Letter at 2-3; Covad Nov. 21 Ex Parte Letter at 1-4. As stated above, Qwest uses MLT before provisioning any analog loop converting from Qwest dial tone to a competing LEC unbundled loop for both basic and coordinated installations. Qwest Nov. 7 *Ex Parte* Letter at 15.

provisioning loops as a diagnostic test to determine the functionality of the loop to ensure Qwest is turning over a quality circuit to competing LECs.[273] Although the MLT reveals information concerning the loop, we disagree with commenters that this information is "loop qualification information" as the Commission has defined it. Specifically, pursuant to the *UNE Remand Order*, incumbent LECs are obligated to provide competitors with information concerning whether "the loop is capable of *supporting the advanced services equipment* the requesting carrier intends to install."[274] Accordingly, loop qualification information is information concerning whether the loop can be used to provide advanced services. This is separate and distinct from information that may indicate whether a particular loop is in working order or needs to be repaired. The record indicates that the loop information produced by the MLT identified by Covad and AT&T[275] is not "loop qualification" information as the Commission has defined it nor is it necessary for loop qualification. To the extent Qwest obtains loop characteristics from its MLT at the provisioning stage that is, in fact, loop qualification information, we find that such information, such as loop length or DLC, is already available to competitors through RLDT.[276]

78. Third, we disagree with AT&T and Covad that Qwest has access to superior loop qualification information because it has access to the results of the MLT done at the provisioning

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[273] *Id.* at 2.

[274] *UNE Remand Order*, 15 FCC Rcd 3885 at para. 427 (emphasis added).

> For example, the incumbent LEC must provide to requesting carriers the following: (1) the composition of the loop material, including, but not limited to, fiber optics, copper; (2) the existence, location and type of any electronic or other equipment on the loop, including but not limited to, digital loop carrier or other remote concentration devices, feeder/distribution interfaces, bridge taps, load coils, pair-gain devices, disturbers in the same or adjacent binder groups; (3) the loop length, including the length and location of each type of transmission media; (4) the wire gauge(s) of the loop; and (5) the electrical parameters of the loop, *which may determine the suitability of the loop for various technologies*.

Id. (emphasis added). *See also* 47 C.F.R. §51.5 (Pre-ordering and Ordering).

[275] *See, e.g.*, Letter from Michael Hunseder, Counsel for AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 7, 2002), Attached Suppl. Decl. of Kenneth Wilson at para. 17 (AT&T Nov. 7 Ex Parte Letter); Covad Nov. 4 *Ex Parte* Letter at 3-4; *see also* Qwest Nov. 7 *Ex Parte* Letter at 3-4.

[276] Qwest Nov. 7d *Ex Parte* Letter, Attach. at 3-4. We note that Qwest's MLT capabilities are not as advanced as those of other BOCs. All other BOCs are using LC 2.0 which allows for possible DSL-specific testing (load coils, bridged taps, wideband noise) if new generation test equipment is also installed. In contrast, Qwest is using MLT LoopCare LC 1.0. *See id.* at 3. Accordingly, Qwest is not able to derive as accurate and detailed loop information as other BOCs. For example, although Qwest's MLT indicates that a digital loop carrier's equipment is present, it does not provide equipment details. In contrast, the RLDT provides information about the presence, location, type of digital loop carrier on the loop, as well as information about the presence of pair gain. *See* Qwest Nov. 7d Ex Parte Letter, Attach. at 1-7.

or repair stage.[277] To the contrary, the record reveals that, through the RLDT, competitors have access to more accurate loop qualification information than what is derived through the MLT. According to Qwest, 93.7 percent of loops in the RLDT have actual loop lengths from engineering records, whereas the MLT derives only estimated loop lengths.[278] Moreover, retail employees "use the QServ tool that informs them if Qwest DSL is available at a specific address or telephone number, [and this tool provides] far less information than is provided to competing LECs through the loop qualification tools as competing LECs receive specific detailed information on loop makeup and length of the loop."[279] We also disagree that Qwest does not provide all loop qualification information in its possession to competitors. As discussed above, we find that the information necessary for competing LECs to determine whether a loop is capable of supporting the advanced services the competing LEC wishes to offer over the loop are already contained in the RLDT.[280] For example, although Qwest also uses MLT on a regular basis as part of the MALT process, all loop length information derived from this process is inserted into LFACS and is made available to competitors in a nondiscriminatory manner.[281] In

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[277] *See, e.g.*, AT&T Nov. 7 *Ex Parte* Letter, Wilson Suppl. Decl. at paras. 18-19. AT&T and Covad allege that a MLT will show actual and current characteristics for the loop as of the date of the test, and that this information is more accurate than the information provided by Qwest through its RLDT. AT&T Nov. 7 Ex Parte Letter, Wilson Supp. Decl. at para. 17; Covad Nov. 4 *Ex Parte* Letter at 3; Covad Nov. 21 *Ex Parte* Letter at 3.. Specifically, commenters allege that MLT can provide data regarding loop qualification information like bridge taps, presence of DLC, or pair gain. AT&T Nov. 7 *Ex Parte* Letter, Wilson Decl. at para.17; Covad Nov. 4 *Ex Parte* Letter at 3; Covad Nov. 21 *Ex Parte* Letter at 3. Based on the record before us, we disagree. As noted, the record shows that Qwest's MLT capabilities are not as advanced as those of other BOCs and does not provide information on load coils, bridged taps or wideband noise. Qwest Nov. 7d *Ex Parte* Letter at 3. *See* also n.276 above. As far as the presence of DLC is concerned, we note that Qwest's "Pair Gain Type" field of the RLDT will indicate if DLC is present on the line, and if so, will identify the type of DLC for each segment of the loop. Qwest Nov. 7d *Ex Parte* Letter at 5. This information is more accurate and easier to use than the MLT results of whether there is a DLC all the way to the customer drop, which requires technical interpretation of the MLT result. *Id.* Given that Qwest's MLT does not provide additional information that would be useful for loop qualification, we conclude that Qwest has adequately demonstrated that it meets the requirements of the *UNE Remand Order*. The record shows that the "Makeup Field" in the RLDT contains current information, as the information is updated in a variety of different ways. *See* Qwest Dec. 6 *Ex Parte* Letter at 11-12. Additionally, AT&T contends that since the information obtained from provisioning MLTs is retained by Qwest, the *UNE Remand Order* requires that the information be shared with competing LECs. AT&T Dec. 6 *Ex Parte* Letter at 4. Given our conclusion that this information is not necessary for loop qualification purposes, it is inconsequential that this information is retained by Qwest in its back office systems.

[278] Qwest Nov. 15f *Ex Parte* Letter at 2. We note that the information in the RLDT comes from information in the LQDB.

[279] *Id.*

[280] *See* paras. 63-72 above. *See also* n.277 above. Using its own parameters for the type of DSL service it wishes to offer, a competing LEC can use the data returned through the RLDT to determine if the requested loop meets the technical parameters of the DSL service the competing LEC wishes to offer. *See* Qwest Nov. 7d *Ex Parte* Letter at 8.

[281] *See* Qwest I Notarianni/Doherty Reply Decl. at para. 46.

addition, Qwest shows that of the loops in the RLDT, less than 5 percent of those that are capable of having MLT-generated loop length information are missing this information.[282]

79. Finally, we reject Covad's argument that the Commission should order Qwest to provide competing LECs with access to "pre-delivery" MLTs after Covad has ordered the loop, but before it has accepted the loop, to assure quality of the loop.[283] The Commission has no such requirement, and we do not impose one here. Covad argues that Qwest should perform MLTs on line-shared loops prior to loop delivery to ensure that a loop that is capable of line-shared ADSL service is being turned over to competing LECs.[284] Although Qwest does not perform MLTs as part of the provisioning process for line-shared loops, it has several processes in place to ensure that the high-frequency portion of the loop is operational before turning it over.[285] In any event, Covad is raising issues related to loop quality rather than loop qualification.[286] Qwest is required to provide line-shared loops that do not contain ground faults or other problems that would

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282 Qwest Nov. 15f *Ex Parte* Letter at 2. The record shows that 68.3% of loops in the RLDT currently contain MLT-generated loop length information. *Id.* Roughly 30 percent of loops are incapable of having MLT-generated loop lengths because they are connected to pair gain, are unbundled loops, are spare loops, or are in wire centers that do not have MLT capabilities. *Id.* Although Qwest does not update the RLDT (through updates to the LQDB) with the provisioning MLT-generated loop length information, Qwest states that the individually MLT-generated loop length information is not significantly different from the loop length information generated using the MALT process. *Id.* at 6.

283 Covad argues that the information returned from an MLT would be useful to Covad at the post-order/pre-delivery stage. *See* Covad Qwest III Reply at 21-22. Similarly, AT&T argues that once Qwest runs the MLT test, that information must be made available to competing LECs. AT&T Dec. 6 *Ex Parte* Letter at 3. AT&T argues that such information about the capabilities of the loop gives Qwest an advantage, for example, in winback situations where Qwest is competing with the competing LEC currently serving a customer to obtain the customer's business. *Id.* As discussed above, however, we find that the information obtained by the provisioning MLT is not loop qualification information. Even if the information was loop qualification information, the record shows that Qwest retail personnel do not have access to this information. *See* Qwest Nov. 22f *Ex Parte* at 1-2. Qwest has presented sworn testimony that Qwest retail personnel use QCity/QServ to determine whether a loop is capable of supporting Qwest's DSL offering, and use the same manual look-up process available to competing LECs when information on a particular loop is not returned by QCity/QServ. *See* Qwest Dec. 6 *Ex Parte* Letter at 5-7. Therefore, it is not credible that this information gives Qwest a competitive advantage over competing LECs.

284 Covad Qwest III Reply at 21.

285 *See* Qwest Nov. 15f *Ex Parte* Letter at 3-4. Additionally, Qwest notes that MLT results during line shared loop provisioning will provide negligible information. *Id.* at 4. Faults identified through a MLT performed during the provisioning process would most likely have caused degradation to the voice frequency and have generated a trouble report from the end user customer prior to the line shared loop being provisioned. *Id.* Furthermore, Qwest performs quality assurance testing on two aspects of line shared loops during testing. First, central office wiring is tested to assure a viable data path exists between the physical demarcation with the competing LEC and the loop. *Id.* This test today is performed using an LSVT test set. *Id.* Qwest also checks that there are no load coils on the line prior to provisioning line-shared loops. *Id.* As an additional step to assure line shared loops are properly provisioned, beginning in the first Quarter of 2003, Qwest will provide router testing for requesting competing LECs. *Id.*

286 *See* para. 74 above.

prevent line a from being used for advanced services, and we decline to dictate their business practices or to how they accomplish this. Significantly, we note Qwest's satisfactory commercial performance on provisioning quality of line-shared loops.[287] We also note that Qwest's line-sharing provisioning quality is an element of the PAP for the nine application states. Qwest will be subject to penalties if the quality of loops they provide for line-sharing deteriorates.[288]

80. *Allegations of Lack of Candor.* Finally, we are not persuaded by allegations that Qwest's actions during visits to its wholesale provisioning facility by Commission staff warrant denial of these section 271 applications. AT&T has provided a declaration from a former Qwest service representative that alleges Qwest misled the Commission, particularly during a visit by Commission staff to Qwest's Omaha wholesale provisioning facility, about Qwest's use of the MLT in the hot cut process. The declarant, Edward Stemple, alleges that "Qwest supervisors instructed the service representatives who were to be observed by the FCC to perform the cutover process without performing MLTs," even though "my co-workers and I were instructed to run an MLT for each line" in the normal course.[289] The Stemple declaration also includes as an attachment an e-mail message from "the head of [the Omaha facility]" to Qwest employees working there that states that "we made an effort to diminish the visibility to MLT during these visits for the sole purpose of protecting access to our legacy systems."[290]

81. Commenters argue that Qwest's attempts to hide MLT testing from regulators, as well as Qwest's use of MLT in the provisioning process, indicates the Commission cannot be confident that Qwest provides competitors with access to all of the loop makeup information accessible by any Qwest personnel in Qwest's back office systems.[291] We disagree. As discussed above, we find that Qwest satisfies the *UNE Remand* requirement for access to loop qualification.

82. In addition, commenters raise the issue of Qwest's candor on the issue of MLT in this proceeding.[292] Commenters allege that Qwest appears to have – at the very least – "diminish[ed] the visibility" of a particular step in its Omaha routine to protect the position

287 *See* Provisioning section below, addressing OP-3 and OP-4. *See also* OP-5 (New Service Installation Quality) for line sharing.

288 See Public Interest Section, below.

289 AT&T Qwest III Comments Tab A, Declaration of Edward F. Stemple at para. 1 (AT&T Qwest III Stemple Decl.).

290 *Id.*

291 AT&T Qwest III Comments at 51-58; Covad Qwest III Reply at 5-14; *see also* Letter from Praveen Goyal, Covad, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 at 2-4 (filed Nov. 4, 2002) (Covad Nov. 4 *Ex Parte* Letter).

292 *See, e.g.*, Department of Justice Qwest III Evaluation at 4-5; AT&T Qwest III Comments at 3-5; Covad Qwest III Reply at 3-4; TouchAmerica Qwest III Reply at 4-7; AT&T Nov. 7 Ex Parte Letter at 2-3.

Qwest has taken before state and federal regulators.[293] Moreover, the Department of Justice expresses concern that Qwest sought to limit the information available to regulatory decision-makers and recommends that the Commission assure itself that it has full and accurate information with regard to this allegation.[294]

83. We find that the evidence presented by AT&T's declarant, even if true, does not directly contradict any statements made by Qwest in this proceeding's record. Qwest readily acknowledges that it performs the MLT as a part of its loop provisioning process.[295] Mr. Stemple's allegations about Qwest's use of the MLT concern neither the appropriateness of using the MLT at the pre-ordering stage, which is an issue raised by Covad, nor whether the information gathered and used in the provisioning-stage MLT is in fact loop qualification information, as alleged by AT&T. Mr. Stemple's allegations, while of potential concern, do not implicate issues that are significant in the record, nor do they have a bearing on our finding of Qwest's compliance with this checklist item. Based on the record before us, we have sufficient information pertaining to Qwest's use of the MLT that enables us to find that Qwest's loop qualification processes are nondiscriminatory. We take very seriously allegations that a carrier has willfully and intentionally taken steps to limit regulators' access to relevant information. Accordingly, we have examined particularly closely Qwest's use of the MLT process. Although we find that Qwest meets the statutory standard, we caution carriers against withholding information and will not hesitate to take action against carriers that do so.

c. Ordering

84. In this section, we address Qwest's ability to provide competing carriers with access to the OSS functions necessary for placing wholesale and resale orders. We find that Qwest demonstrates, based on the evidence in the record, that it provides nondiscriminatory access to its ordering systems.[296] Specifically, we conclude that Qwest shows that its system is able to process manually handled orders accurately.

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[293] AT&T Qwest III Stemple Decl., Attach. 1. The Qwest e-mail message from Mary Pat Chesier attached to AT&T's Stemple declaration also includes the following statement:

> CLECs have specifically asked for access to MLT. We believe this is a part of our legacy system we want to keep proprietary. As a result we don't want to bring attention to it in front of the FCC as they may have a tendency to respond to CLEC requests in a manner which may be unfavorable to us.

Id.

[294] Department of Justice Qwest III Evaluation at 4-5.

[295] Letter from R. Steven Davis, Qwest, to Marlene Dortch, Federal Communications Commission, WC Docket No. 02-314 at 5 (filed Oct. 21, 2002) (Qwest Oct. 21 Ex Parte Letter).

[296] *See* Colorado Commission Qwest I Comments at 2-3 (maintaining that the ROC OSS test demonstrates that Qwest's OSS meets the competitive checklist criteria after reviewing areas in which Qwest fell short of a passing grade); Idaho Qwest I Commission Comments at 6 (recognizing that while some areas still need improvement, the (continued….)

85. We disagree with commenters' allegations that Qwest relies too heavily on manual processing.[297] The Commission has looked to order flow-through as a potential indicator of a wide range of problems that underlie a determination of whether a BOC provides nondiscriminatory access to its OSS. Although flow-through levels may be a useful diagnostic tool, even when these levels are not high, this is not necessarily fatal to a BOC's application. A BOC may still demonstrate compliance with checklist item 2 if other evidence shows that there is nondiscriminatory access to OSS.[298] In the following discussion, we address the OSS ordering issues that the Commission previously has found relevant and probative for analyzing a BOC's ability to provide access to its ordering functions in a nondiscriminatory manner: a BOC's ability to return timely status notices such as firm order confirmation, reject, jeopardy, and service order completion notices, to process manually handled orders accurately, and to scale its system.[299]

86. As an initial matter, we disagree with Eschelon's contention that Qwest improperly included the performance of UNE-Star orders with UNE-platform orders in its performance metrics.[300] Eschelon contends that UNE-Star orders should be categorized as resale products in the performance metrics because, according to Eschelon, they are ordered, provisioned, and billed through the existing resale processes.[301] Contrary to Eschelon's

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overall record demonstrates that competing LECs have nondiscriminatory access to Qwest's OSS); Iowa Board Comments at 32; Montana Commission Qwest II Comments at 19-22; Nebraska Qwest I Commission Comments at 8; North Dakota Qwest I Commission Comments at 203; Utah Commission Qwest II Comments at 5; Wyoming Commission Qwest II Comments at 6; Washington Commission Qwest II Comments at 12-14.

297 *See* AT&T Qwest I Comments at 40-42; Covad Qwest I Comments at 39-41; Eschelon Qwest I Comments at 6; Eschelon Qwest III Comments at 20-27; WorldCom Qwest I Comments at 10-12; WorldCom Qwest I Reply at 3-4; WorldCom Qwest I Reply, Lichtenberg Decl. at paras. 11-12, 18. WorldCom Qwest III Comments at 4-6; WorldCom Qwest III Comments, Lichtenberg Decl. at para. 10. *See also* Department of Justice Qwest III Evaluation at 5-6. Eschelon also contends that errors are created in the flow-through service order process. *See* Eschelon Qwest III Comments at 31-34.

298 *See Bell Atlantic New York Order*, 15 FCC Rcd at 4035, para. 162.

299 *See Bell Atlantic New York Order*, 15 FCC Rcd at 4035, para. 163; *SWBT Texas Order*, 15 FCC Rcd at 18443-44, para. 179; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9092, para. 143.

300 Letter from Karen Clauson, Senior Director of Interconnection, Eschelon Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189, at 12 (filed Sept. 4, 2002) (Eschelon Sept. 4 *Ex Parte* Letter). UNE-Star is a product, unique to Qwest, that combines elements of resale orders and UNE-platform orders. Parties have also referred to UNE-Star as UNE-E or UNE-Eschelon or UNE-McLeod or UNE-M. These products have been purchased by Eschelon and McLeod, although they are available to other carriers as well. *See also* Eschelon Qwest III Comments at 44-47.

301 Eschelon Qwest III Comments at 44-47. Additionally, we are troubled by the allegations of this offering as an unfiled agreement, and we note that, to the extent any past discrimination existed, affected entities may initiate enforcement action through state commission enforcement processes or this Commission in the context of a section 208 complaint proceeding. *See* Public Interest Section, Unfiled Agreements below.

contention, we note that UNE-Star has characteristics of both resale and UNE-platform orders.[302] The process of migrating customers from Qwest retail to resale is not substantially different from the process of migrating customers from Qwest retail to UNE-platform, as well.[303] Indeed, the categorization of UNE-Star orders was apparently confusing to Qwest itself.[304] Qwest originally classified UNE-Star as resale orders, but notified competing LECs in the Summary of Notes published with Qwest's October 2001 commercial performance results that it would re-categorize UNE-Star orders as UNE-platform orders in November 2001 (and retroactively to January 2001).[305] Competing LECs, including Eschelon, have thus been on notice for almost a year that Qwest reports its UNE-Star performance in the UNE-platform category. Moreover, Eschelon provides no evidence that Qwest's performance varies between resale and UNE-platform orders. In fact, an examination of Qwest's performance data shows that there are no significant performance disparities between UNE-platform performance as filed and after excluding UNE-Star orders.[306] In the absence of evidence that significant performance disparities exist between resale and UNE-platform orders, or that Qwest has violated the agreed-upon performance reporting process, we find that the categorization of UNE-Star orders as UNE-platform orders does not warrant a finding of checklist noncompliance.

(i) Order Confirmation and Reject Notices

87. We conclude that Qwest provides competing carriers with order confirmation and reject notices in a timely and nondiscriminatory manner.[307] Specifically, we find that Qwest has demonstrated that it provides mechanically processed firm order confirmations (FOCs) and reject

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302 *See* Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 (filed Sept. 9, 2002) at 1 (Qwest Sept. 9d *Ex Parte* Letter).

303 *Id.* Qwest explains that the processes use the same LSR forms, with all the same fields being populated. *Id.*

304 Qwest III Reply, App. A, Tab 15, Reply Declaration of Michael G. Williams at para. 48(Qwest III Williams Reply Decl.).

305 Qwest III Reply at 52-53; Qwest III Williams Reply Decl. at paras. 47-48.

306 *See* Qwest III Appl. at Tab 1 (Breakout of UNE-P Star Performance Data: Tab 15) (citing confidential version) (showing the difference between performance results for UNE-platform orders including and excluding UNE-Star orders for OP-3 (Installation Commitments Met), OP-4 (Install Intervals, Avg Days), OP-5 (New Installation Quality), and MR-8 (Trouble Rate) for resale and UNE-platform orders).

307 *See* Iowa Board Qwest I Reply at 9 (stating that issues raised by AT&T on order status notices will be reviewed at the six-month review). The KPMG Final Test shows that overall 99% of orders either received a FOC or error response notice (in the form of a reject notice or non-fatal error notice). The breakdown by type of order shows a similar pattern, with at least 98% of each order type receiving either a FOC or error notice. *See* KPMG Final Test Table 12-15 at 118. We reject arguments from AT&T that the reject timeliness metric (PO-3) is flawed because it does not include orders that are held for lack of facilities for 30 days and then rejected. *See* AT&T Qwest I Reply at 43. We find that concerns raised by AT&T about the specifics of a performance measure are more appropriately addressed by the state commissions. We expect that the state commissions will scrutinize the increasing levels of held orders, such as line-sharing orders in Colorado and Washington.

notices in a timely manner.[308] Qwest has also demonstrated that it provides timely FOC and reject notices for those orders that are electronically submitted but require manual processing.[309] Moreover, Qwest processes manually-submitted orders in a timely manner.[310]

88. Given Qwest's strong commercial performance on FOC timeliness, we reject Covad's arguments that Qwest does not send reliable and accurate FOCs.[311] Covad questions Qwest's ability to return accurate and timely FOC notices based on the Liberty audit, which showed that two-thirds of Covad's orders were omitted from the denominator of the FOC timeliness metric.[312] Liberty concluded, however, that the exclusions for Qwest's FOC timeliness metric, including the exclusion of Covad's orders, were consistent with the description of this performance metric (*i.e.*, business rules).[313] Without more specific evidence that Qwest is inappropriately excluding Covad orders from this measure, we find that Qwest's performance on FOC timeliness satisfies the requirement of the checklist.

89. We also reject allegations that Qwest's overall reject rates indicate systemic OSS problems.[314] The Commission has previously found that high reject rates are not necessarily such

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[308] *See* PO-5A (Firm Order Confirmations On Time – Fully Electronic LSRs) with a standard of 95% of FOCs returned within 20 minutes; PO-3A-2 (LSR Rejection Notice Interval – LSRs Submitted Via IMA-GUI and Auto-Rejected); and PO-3B-2 (LSR Rejection Notice Interval – LSRs Received Via EDI and Auto-Rejected) with standards of ≤ 18 seconds. *See also* Qwest I Williams Decl. at paras. 117-123; Qwest I Notarianni/Doherty Decl. at paras. 206-250; Department of Justice Qwest I Evaluation at 18; and KPMG Final Report at 83–90.

[309] *See* PO-5B (Firm Order Confirmations On Time – Electronic/Manual LSRs) with a standard of 90% of FOCs returned within 24 hours, 48 hours or 72 hours, depending on product type; PO-3A-1 (LSR Rejection Notice Interval – LSRs Submitted Via IMA-GUI and Rejected Manually); and PO-3B-1 (LSR Rejection Notice Interval – LSRs Submitted Via EDI and Rejected Manually) with a standard of ≤ 12 business hours. Qwest has consistently met the standards set for these metrics for all nine application states.

[310] *See* PO-5C (Firm Order Confirmations On Time – Manual) with a standard of 90% of FOCs returned within 48, 72, or 96 hours, depending on product type; and PO-3C (LSR Rejection Notice Interval – LSRs Received Via Facsimile) with a standard of ≤ 24 work week clock hours (work week clock hours are 24 hours per day Monday through Friday). *See* Letter from R. Hance Haney, Executive Director-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189, (filed Aug. 13, 2002) at 1 (Qwest Aug. 13d *Ex Parte* Letter).

[311] Covad Qwest I Comments at 43-44 (stating that the Liberty audit showed that two-thirds of Covad's orders were omitted from the denominator of PO-5); *see also* Covad Qwest I Reply at 19.

[312] Covad Qwest I Comments at 43; Covad Qwest I Reply at 19.

[313] Liberty Audit at 38 (stating conclusions regarding PO-5 data reconciliation).

[314] *See* AT&T Qwest I Comments at 9, AT&T Qwest I Finnegan/Connolly/Menezes Decl. at 149 (stating that Qwest's system rejects nearly one-half of all competing LEC orders and that the high rejection rates inflict a substantial burden because service is delayed and resubmission of orders is costly); WorldCom Qwest I Comments at 10; WorldCom Qwest I Reply at 5; WorldCom Qwest I Lichtenberg Reply at para. 2 (indicating that WorldCom's reject rates for its "Neighborhood products" offered through its partner Z-Tel are 11.4% in the SWBT region and 14.1% in the BellSouth region for the same time period, while its reject rate in the Qwest system is over 30%); Eschelon Qwest I Comments at 4 (arguing that it now receives automatic reject messages when migrating customers (continued....)

an indication.[315] We note that Qwest's reject rates are within the range the Commission has previously found to be acceptable.[316] Notably, the Department of Justice points out that reject rates in the *BellSouth Georgia/Louisiana Order* were similar to those in the Qwest region.[317] Furthermore, Qwest has shown that reject rates vary by competing LEC.[318] Because the record demonstrates that a number of competing LECs experience low reject rates, we conclude that it is inappropriate to attribute the wide range of reject rates entirely to Qwest.[319] Although we do

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under IMA release 10.0 that it did not have receive with an earlier IMA release). Qwest tracks information on reject rates, although there is no performance benchmark for these metrics. Qwest's commercial performance for June to September shows that an average of 31% of LSRs submitted over the GUI and an average of 22% of LSRs submitted over EDI were automatically rejected. *See* PO-4A-2 (LSRs received via GUI and auto-rejected) and PO-4B-2 (LSRs received via EDI and auto-rejected). For manual rejects, Qwest's commercial data show that from June to September, an average of 3% of LSRs submitted over the GUI and 5% of LSRs submitted over EDI were manually rejected. *See* PO-4A-1 (LSRs received via GUI and manually rejected) and PO-4B-1 (LSRs received via EDI and manually rejected). The third-party test also showed similar reject rates, with 20 to 25 percent of LSRs submitted through the GUI rejected, and 32 to 40 percent of LSRs submitted through EDI rejected, depending upon the service order processor (SOP) into which the LSR flowed. *See* KPMG Final Report Table 12-16 at 119. There are three SOPs corresponding to the three predecessor BOC companies that now make up Qwest: Qwest's Western Region covering Washington and Oregon, corresponding to Pacific Northwest Bell; the Central Region covering Arizona, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming, corresponding to Mountain Bell; and the Eastern Region covering Iowa, Minnesota, Nebraska, North Dakota, and South Dakota, corresponding to Northwestern Bell. Although KPMG found that the SOPs differ, it noted that Qwest has standardized most of its processes across these three regions. *See* Qwest I Appl. Notarianni/Doherty Decl. at paras. 34-36. Of those reject notices received by KPMG, 16% of the EDI reject notices were manual rejects and 84% were auto-rejects; 34% of the GUI reject notices were manual rejects and 66% were auto-rejects. *See* KPMG Final Report Table 12-12 at 112. Because these reject rates are designed to monitor the error rate of competing LEC submissions, the rate includes rejects due to competing LEC error. Additionally, we find that Qwest has shown that the reject notice problem raised by Eschelon regarding new reject notices associated with IMA release 10.0 was corrected on July 10, 2002. *See* Eschelon Qwest I Comments at 4-6. Qwest states that it distributed a notification to all wholesale customers on July 10, 2002, informing competing LECs that the problem had been corrected. *See* Qwest I Notarianni/Doherty Reply Decl. at para. 149.

315 *See, e.g., Bell Atlantic New York Order,* 15 FCC Rcd at 4044-45, para. 175; *BellSouth Georgia/Louisiana Order,* 17 FCC Rcd at 9091, para. 142.

316 Bell Atlantic reported UNE average reject rates between 27 and 34% during the relevant months of its New York section 271 application. *See Bell Atlantic New York Order,* 15 FCC Rcd at 4044, para. 175, n.552.

317 *See* Department of Justice Qwest I Evaluation at 15, n.61. We reject WorldCom's allegations that the Department of Justice was erroneously stating that reject rates in the *BellSouth Georgia/Louisiana Order* were similar to reject rates in the Qwest region for the instant application.. WorldCom argues that reject rates for UNE-platform orders that are electronically submitted but fall out for manual handling are much higher in the Qwest region than in Georgia/Louisiana. *See* WorldCom Qwest I Lichtenberg Reply at para. 17. We have not required the reject rates for a particular product type to be identical across BOC regions. *See Bell Atlantic New York Order,* 15 FCC Rcd 4044, para. 175, n.552.

318 Qwest I Notarianni/Doherty Reply Decl. at paras. 100-109.

319 Qwest has submitted manual and automatic reject rates for competing LECs with the highest volume of orders in the nine application states submitting orders through both GUI and EDI. Those rates show a wide range, demonstrating that competing LECs with the highest volumes are able to submit orders with automatic reject rates (continued….)

not rely on it, we note that Qwest has said that it is likely that TN migration, as well as a simplified version of "migration as specified" that does not require competing LECs to list the customer's current features, will be available with the IMA 12.0 release in April 2003.[320] We believe, as we have observed in other orders, that these changes should reduce the reject rates experienced by competing LECs.[321]

90. Finally, we disagree with WorldCom's assertion that there was no third-party evaluation of Qwest's ability to identify multiple errors on an LSR.[322] The record shows that the issue of identifying and testing multiple errors was addressed as part of the Vendor Technical Conference held on May 15, 2002.[323] At that conference, HP confirmed that its test showed that returned error messages reflected all errors included on the LSR.[324] In the absence of any commercial evidence that Qwest does not return all error messages, we find that Qwest has shown that it is providing reject messages with all errors.

(ii) Jeopardy notices

91. We find that Qwest has shown that it sends timely and accurate jeopardy notices. Qwest measures the timeliness and accuracy of its jeopardy notices through two metrics: (1) the percent of late orders for which a jeopardy notice was actually sent, and (2) how far in advance of the due date a jeopardy notice was sent, regardless of whether the due date was actually missed.[325]

92. With regard to the first measure, the record shows that Qwest provides timely jeopardy notices for non-designed services, Link Interface Shelf (LIS) trunks, and UNE-platform POTS orders.[326] The record shows, however, that Qwest has failed to provide timely jeopardy

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as low as 0% and 1% and manual reject rates as low as 9% and 13%, for orders submitted via GUI and EDI respectively. *See* Letter from Hance Haney, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 5, 2002) at Attach (Qwest Dec. 5a *Ex Parte* Letter) (citing confidential version). Qwest does not track reject rates by the type of service ordered; however, we note that many of Qwest's markets have few competitors, making it difficult to make meaningful comparisons within the different services being ordered.

320 *See* discussion above on TN migration and migration as specified. WorldCom contends that its high reject rate is being caused by the current lack of TN migration and "migration as specified. *See, e.g.*, WorldCom Qwest I Lichtenberg Decl. at para. 18.

321 *See SWBT Texas Order*, 15 FCC Rcd at 18443, para. 178. *See also* Qwest III Reply at 35.

322 WorldCom Qwest I Comments at 15; WorldCom Qwest I Lichtenberg Decl. at para. 56.

323 Qwest I Reply at 38.

324 *Id.* (citing to a transcript of ROC OSS 271 Vendor Technical Conference #3 at 153-154).

325 *See* descriptions of PO-9 (Timely Jeopardy Notices) and PO-8 (Jeopardy Notice Interval) in ROC 271 Working PID Version 5.0 at 19-20.

326 *See* PO-9A (Timely Jeopardy Notices – Non-Designed Services); PO-9C (Timely Jeopardy Notices – LIS Trunks); and PO-9D (Timely Jeopardy Notices – UNE-platform POTS).

notices for unbundled loops.[327] We find that Qwest's performance on unbundled loop jeopardy notices is not competitively significant because the volume of orders for unbundled loops for which Qwest actually missed the due date is very low, compared to the total volume of unbundled loop orders.[328] Given that Qwest's jeopardy performance problem affects so small a percentage of orders, we do not find that the performance disparity with respect to timely jeopardy notices for loops is an indication of a systemic problem with Qwest's OSS.[329] We also take into consideration that jeopardy notice metrics are included in Qwest's Performance Assurance Plan (PAP), which we discuss below.[330] If this situation deteriorates, we will not hesitate to take appropriate enforcement action pursuant to section 271(d)(6).[331]

93. Although Qwest's performance under the second measure, jeopardy notice interval, shows performance disparities in Colorado and Iowa, we find that these performance disparities do not indicate discriminatory access to jeopardy notices for competing LECs.[332] Specifically, Qwest has provided jeopardy notices closer to the due date for non-designed services in Colorado, and unbundled loops in Iowa than for analogous retail services.[333] We

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[327] *See* PO-9B (Timely Jeopardy Notices – Unbundled Loops) which shows the four-month average from June to September for competing LECs as 15%, 3%, 16%, 40%, 41%, 45%, 33%, 23%, and 50% versus Qwest performance of 22%, 28%, 30%, 36%, 24%, 36%, 35%, 16%, and 20% in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming, respectively. *See also* Colorado Commission Qwest I Comments, App. A at 65, Idaho Qwest I Commission at 8 (acknowledging that Qwest's performance is not at parity for this issue); Iowa Qwest I Board Reply at 9 (stating that issues raised by AT&T on order status notices will be reviewed in the six-month review). Both the Colorado and the Idaho Commissions noted that Qwest was not meeting parity for jeopardy notices and that they expect Qwest to continue to work to improve its performance in this area. Both commissions note jeopardy notice performance metrics are in the PAP. *See* Colorado Commission Qwest I Comments at 37; Idaho Qwest I Commission Comments at 8.

[328] Qwest I Williams Decl. at para. 135; Letter from Hance Haney, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 3, 2002) at Attach. (Qwest Dec. 3d *Ex Parte* Letter).

[329] We also note that in June 2002 Qwest installed an enhanced notification process in order to provide automated jeopardy notices for non-design, unbundled loops, and UNE-platform orders. *See* Qwest I Notarianni/Doherty Reply Decl. at para. 131. We note that performance in August and September shows an improvement from the previous months. See PO-9B (Timely Jeopardy Notices, UBLs and LNP) for the nine application states.

[330] *See* below Section VI.B. (Public Interest – Assurance of Future Compliance).

[331] 47 U.S.C. § 271(d)(6).

[332] *See* PO-8 (Jeopardy Notice Interval). This metric measures the average number of days lapsed between the date the customer is first notified of an order jeopardy event and the original due date of the order. It includes all orders that received jeopardy notices (with some exclusions), unlike PO-9 discussed above, which only tracks jeopardy notices in which the original due date was missed. *See* ROC 271 Working PID Version 5.0 at 19-20.

[333] *See* PO-8A (Jeopardy Notice Interval - Non-Designed Services) for Colorado reporting 3.14, 3.85, 2.43, and 1.73 days for competing LECs versus 6.08, 5.7, 5.99, and 5.68 for Qwest retail service for June through September and PO-8B (Jeopardy Notice Interval – UBL and LNPs) in Iowa, showing 3.91, 2.78, 3.67, and 5.11days for competing LECs versus 5.54, 5.26, 5.44, and 5.91 days for Qwest retail service for June through September.

note, however, that the number of jeopardy notices sent in both Colorado and Iowa is low relative to average volume of competing LEC orders for non-designed services or unbundled loop orders processed by Qwest in those states.[334] *Given the small number of orders affected by* these performance disparities, we conclude that these performance disparities do not warrant a finding of checklist noncompliance.

94. We disagree with WorldCom that our conclusion is undermined by commenters' references to third-party test results concerning Qwest's ability to provide jeopardy notices for resale and UNE-platform.[335] The KPMG test yielded inconclusive or negative results since only a small number of jeopardy notices was sent to KPMG.[336] The number of jeopardy notices sent to KPMG was small due to the fact that Qwest met 99 percent of its resale and UNE-platform due date commitments during the test.[337] Therefore, we reject commenters' arguments that the jeopardy notice interval and jeopardy timeliness metrics discussed above do not capture Qwest's true performance because KPMG issued "fail" or "unable to determine" decisions for these metrics.[338]

95. *Jeopardy and reject notices after FOC.* We reject contentions that the fact that Qwest sometimes sends jeopardy notices (or reject notices) after a FOC for incomplete or missing LSR information is an indication of underlying OSS problems.[339] Commenters claim that jeopardy notices are supposed to inform a competing LEC that the date for completing the order has changed from what the BOC originally promised on the FOC.[340] Qwest explains that it

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[334] *See* Letter from Hance Haney, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 4, 2002) at Attach. (Qwest Dec. 4c *Ex Parte* Letter). We note that PO-9 tracks only timely jeopardy notices for missed due dates caused by Qwest. *See* exclusions under PO-9 Timely Jeopardy Notices, ROC 271 Working PID Version 5.0 at 20.

[335] WorldCom Qwest I Comments at 14.

[336] KPMG Final Report Table V-2 at 690-692.

[337] Qwest I Notarianni/Doherty Reply Decl. at para. 132.

[338] *Id.*; *see also* KPMG Final Report Table V-2 at 690-692.

[339] AT&T Qwest I Finnegan/Connolly/Menezes Decl. at paras. 183-187; WorldCom Qwest I Comments at 13; WorldCom Qwest I Reply at 9; WorldCom Qwest I Lichtenberg Reply Decl. at para. 51; WorldCom Nov. 6 Ex Parte Letter at 11. In addition, AT&T argues that Qwest frequently assigns due dates requested by competing LECs without checking its systems to determine whether facilities are available on those dates. AT&T Comments at 43. The due date issue raised by AT&T is addressed below at para.113. The record shows that some of these jeopardy notices are due to competing LEC errors, such as duplicate LSRs being sent very close together. Some of the jeopardy notices were sent in error to competing LECs who were legitimately using an older version of IMA which had different ordering rules than the updated version. The record shows that Qwest has since clarified with its customer care personnel that competing LECs can use ordering guidelines with older versions of IMA. *See* Qwest I Notarianni/Doherty Reply Decl. at paras. 127-129 and Letter from R. Hance Haney, Executive Director-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189, (filed Aug. 15, 2002) at 1 (Qwest Aug. 15b *Ex Parte* Letter).

[340] WorldCom Qwest I Comments at 13.

adopted the current process in response to competing LEC requests.[341] Under the current process, Qwest sends a jeopardy notice instead of a reject notice after a FOC.[342] The competing LEC then has the opportunity to supplement the order, thus avoiding the significant delay which would occur if the competing LEC had to resubmit the order. Given that Qwest modified its processes to accommodate competing carriers and Qwest's modification appears to benefit competing carriers, we are not persuaded by these two commenters' claims.

96. *Other FOC Issues.* We are also not persuaded by Covad's allegations that Qwest sends erroneous and unreliable FOCs.[343] Specifically, Covad states that on numerous orders, after receiving an initial FOC with a committed due date, Qwest sends Covad a second FOC with a new committed due date.[344] The record shows that for some of the unbundled loop products that Covad orders, Qwest sends – at Covad's request – a second FOC with a new due date to Covad when Qwest finds that facilities are unavailable.[345] The record further shows that for line-sharing products, multiple FOCs are often returned if, during the conditioning evaluation, Qwest determines that bridge taps and load coils need to be removed, since there is a fifteen-day standard interval for removing bridge taps and load coils.[346] If Qwest can complete the work early, the competing LEC receives an additional FOC with an improved due date.[347] In light of these explanations, we do not conclude that multiple FOCs sent by Qwest is an indication of discriminatory access to OSS.[348]

(iii) Service Order Completion Notices

97. Based on the evidence in the record, we find that Qwest is providing timely and accurate service order completion notices (SOCs).[349] We reject commenters' arguments that we

[341] Qwest I Notarianni/Doherty Reply Decl. at para. 127.

[342] *Id.*

[343] Covad Qwest I Comments at 28.

[344] *Id.* Covad states that Qwest does not have the incentive to provide accurate due dates since the metric that tracks due date changes is not included in the PAP.

[345] Qwest I Notarianni/Doherty Reply Decl. at para. 121.

[346] *Id.* at paras. 120-125.

[347] *Id.*

[348] We note that Covad also argued in the Qwest I docket that it experienced more due date changes than Qwest experienced on its own. *See* Covad Qwest I Comments at 28. However, in this docket, Covad does not argue that it is currently experiencing more due date changes than Qwest.

[349] *See* PO-6A (Work Completion Notification Timeliness – All Products ordered through IMA-GUI) and PO-6B (Work Completion Notification Timeliness – All Products ordered through IMA-EDI) with a benchmark of 6 hours. This metric measures the difference between the time that the last of the service orders that comprise the competing LEC's LSR is completed in the SOP and the date and time the completion notification was transmitted (or was made available for orders submitted through the GUI) to competing LECs.

should find checklist non-compliance because Qwest has issued SOCs prior to the actual completion of line-sharing and UNE-platform orders.[350] For line-sharing orders, the record shows that Qwest has identified the problem, and has taken the necessary steps to control and correct it.[351] For SOC notices sent for UNE-platform orders, the record shows that in limited situations, Qwest may complete a service order though the order is in jeopardy status.[352] Given that this problem affects only a *de minimis* number of orders,[353] we decline to find that this issue warrants a finding of non-checklist compliance. If this problem should increase in scope, however, we will not hesitate to take enforcement action under our section 271(d)(6) authority.[354]

[350] Covad Qwest I Comments at 26; WorldCom Qwest I Comments at 25; WorldCom Qwest III Comments at 15; WorldCom Qwest III Lichtenberg Decl. at para. 37-40; Eschelon Qwest III Comments at 17-20. The Department of Justice also noted concerns regarding SOC notifiers provided by Qwest. *See* Department of Justice Qwest III Evaluation at 5, n.22.

[351] The record shows that in January 2002, Qwest introduced additional controls, provided retraining for its technicians, and instituted a compliance checklist for these orders in the provisioning stage in an effort to ensure process adherence. Subsequently, in response to another request by Covad, Qwest began providing each central office manager with a daily report of line-sharing orders that were not completed by the assigned due date and did not receive a jeopardy code. Qwest also initiated a cross check, effective July 11, 2002, to the existing process to prevent line-sharing orders from completing prior to the installation work being properly preformed by the technician. This measure calls for identification of all line-sharing orders that are not complete by 4:00 pm local time. Inquiries into the provisioning status of the order result in either completion of the order or positive jeopardy notice to the competitor that the order may not complete on the desired completion date. Qwest I Stewart Reply Decl. at paras. 34-36; Qwest III Reply, App. A, Tab 2, Reply Declaration of Karen A. Stewart (Qwest III Stewart Reply) at 4. Qwest explains that the fix that was put in place in July 2002 will prevent the final service order from completing in the SOP. Since a SOC is generated by the last service order completing in the SOP, no SOC should be generated until the work is complete. *See* Letter from R. Hance Haney, Executive Director-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 at 1 (filed Aug. 30, 2002) (Qwest Aug. 30c *Ex Parte* Letter). *See also* Qwest III Stewart Reply Decl. at paras. 3-4.

[352] Qwest III Reply, App. A, Tab 17, Reply Declaration of Lynn MV Notarianni and Christy Doherty (Qwest III Notarianni/Doherty Reply Decl.) at para. 107. Qwest notes that this issue impacts less than 0.73% of service orders processed for both retail and wholesale. Qwest plans to fix the problem by the first quarter of 2003. *Id.* WorldCom also expressed concerns regarding double billing and repair issues that may stem from these "fake SOCs." *See* WorldCom Qwest III Comments at 15; WorldCom Qwest III Lichtenberg Decl. at para. 40. The record shows that double billing and repair issues do not arise because Qwest updates its billing and repair systems to reflect any change in account ownership at the time that it completes the service order. Qwest III Notarianni/Doherty Reply Decl. at para. 108.

[353] See Letter from Hance Haney, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 18, 2002) at 1 (Qwest Nov. 18b *Ex Parte* Letter).

[354] 47 U.S.C. § 271(d)(6). We note WorldCom's concern that if the volume of new UNE-platform orders increase, Qwest may increases the number of SOCs it sends for work that is not completed. See WorldCom Nov. 6 *Ex Parte* Letter at 11. We rely on competing LECs to inform the Commission in the future if this problem increases.

(iv) Processing of Manually Handled Orders

98. Based on the evidence in the record, we find that Qwest's orders are manually processed in an accurate fashion. Accuracy of manual processing is relevant to our analysis because the Commission has previously found that the timeliness and accuracy of manual processing is a more important indicator of nondiscriminatory access to OSS than the quantity of orders that are manually handled.[355] We look primarily to two metrics to determine Qwest's ability to accurately process orders – PO-20 and OP-5++.[356] PO-20 currently compares the LSR and service order fields for the customer's address, PON number, and due date of the order.[357] OP-5++ measures the troubles reported by competing LEC calls to service delivery centers due to LSR/service order mismatches for both manually and electronically processed service orders.[358] The record shows that the PO-20 accuracy rate for both unbundled loop orders and POTS orders (UNE-platform and resale) orders that are manually handled ranged from 90 percent to 97 percent from June to September 2002, which is in the range that the Commission has accepted in previous successful section 271 applications.[359] Qwest's order accuracy measured under OP-5++ shows that Qwest's accuracy rate under OP-5++ was over 99 percent in most states in July, August, and September.[360] In addition to the commercial data, we also rely on third-party tests that indicate Qwest provisioned switch features accurately.[361] These tests

[355] *See Bell Atlantic New York Order,* 15 FCC Rcd at 4034-35, para. 162, *SWBT Texas Order,* 15 FCC Rcd at 18443-44, para. 179, and *BellSouth Georgia/Louisiana Order,* 17 FCC Rcd 9092, para. 143.

[356] This metric "Service Order Accuracy – via Call Center Data" was formerly known as OP-5++. *See* Qwest III Brief App., Tab 1 at 8. For purposes of the instant application, we will refer to it as OP-5++.

[357] *See* Qwest III Reply App. Tab 1, Exhibit 1-1 at 2.

[358] *Id.*, Exhibit 1-4 at 1.

[359] *See* PO-20 (Manual Service Order Accuracy, UNE-platform and Resale POTS) with (90.25%, 90.58, 92.78%, 96.88%), PO-20 (Manual Service Order Accuracy, UBL) with (96.46%, 95.20%, 95.16%, 94.42%) for June to September, 2002. *See also Bell Atlantic New York Order,* 15 FCC Rcd at 4043-44, paras. 173-174, nn.545, 548; *Verizon Massachusetts Order,* 16 FCC Rcd at 9032, para. 81, n.251; and *Georgia/Louisiana Order,* 17 FCC Rcd at 9103, para. 159, n.577.

[360] See OP-5++ (Service Order Accuracy – Call Center Data) reporting 99 percent or higher in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, and Washington for July, August and September, and 97 percent, 99 percent, and 95 percent in Wyoming in July, August, and September. In order to use the results of OP-5++ as a check on the accuracy of Qwest's manually handled orders, Qwest submitted the results of OP-5++ disaggregated into manually processed and electronically processed orders. *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 21, 2002) at 1-2 (Qwest Nov. 21b *Ex Parte* Letter). This disaggregation shows the accuracy of manually processed orders ranges between 98 percent and 100 percent in each of the nine states in the instant application between July and September, 2002, except for Wyoming. *Id.* We note that the accuracy of Wyoming's manually processed orders ranges from 92.5 percent to 97.9 percent in this time period. *Id.* However, the volume of orders processed in Wyoming is very small relative to the volumes processed in Colorado or Iowa. *Id.*

[361] *See* KPMG Final Test at 182-183, 186-87 (Tests 14-1-3 and 14-1-12). Eschelon argues that Qwest commits errors when performing switch translations. Eschelon Qwest III Comments at 27-33; *see also* Letter from Karen Clauson, Eschelon, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (continued....)

found that Qwest correctly provisioned switch features 99.1 percent of the time and that post-order CSR records contained the correct field inputs 97.2 percent of the time.[362]

99. We are further assured of Qwest's accuracy in manually processing orders by the results of AT&T's UNE-platform trial in Minnesota.[363] Specifically, during this trial AT&T submitted thousands of LSRs for UNE-platform orders and verified that Qwest provisioned exactly what it had ordered on the LSR, including the features on the LSR.[364] AT&T's UNE-platform trial was conducted in two phases: Phase 1 captured data from June to October 2001, and Phase 2 captured data in mid-November and December 2001.[365] We note that, although AT&T conducted this trial only in Minnesota, the results reflect Qwest's ability to accurately process orders across its region because LSRs are centrally processed by the same personnel, in the same ISC, using the same systems and processes, regardless of the state.[366] During this UNE-platform trial, AT&T found that Qwest's accuracy rate ranged from 97.81 to 99.49 percent.[367] Significantly, Qwest's accuracy rate for manually-processed orders alone ranges from 96.93 to 98.46 percent.[368]

100. In addition, Qwest's recent actions give us further assurance that it will continue to improve in this area. For example, Qwest released a system enhancement as part of IMA 10.1

(Continued from previous page)
(filed Dec. 4, 2002) at 1-2 (Eschelon Dec. 4 *Ex Parte* Letter) (arguing that 13% of their recent UNE-platform orders had errors). The errors described by Eschelon are captured by OP-5++. Qwest III Notarianni/Doherty Reply Decl. at 59-61. The disaggregation of OP-5++ described in the preceding footnote shows electronic order accuracy ranging from 99.5% to 100% in the nine-state region from July to September, 2002. Qwest Nov. 21b Ex Parte Letter at 3. Given the high accuracy rates demonstrated by this disaggregation of OP-5++, we do not find that the flow-through errors described by Eschelon rise to the level of checklist noncompliance.

362 *Id.*

363 *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 18, 2002) at 1 (Qwest Nov. 18e *Ex Parte* Letter); Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 22, 2002) at (Qwest Nov. 22b *Ex Parte* Letter).

364 Qwest Nov. 18e *Ex Parte* Letter at 2. AT&T even made test calls to determine if the order was provisioned correctly, including whether all of the features ordered were provisioned accurately. *Id.*

365 Qwest Nov. 22b *Ex Parte* Letter at 2.

366 Qwest Nov. 18e *Ex Parte* Letter at 2. Qwest's Interconnect Service Centers (ISCs), which Qwest used to process the UNE-platform orders in the Minnesota trial, operate on a regional basis. *Id.*

367 *Id.* at 1-2.

368 *Id.* This trial included two phases of testing: Phase One tested 1,215 UNE-platform orders that flowed through electronically and 4335 UNE-platform orders that were manually processed; Phase Two tested 1,079 electronically processed UNE-platform orders and 518 manually processed UNE-platform orders. Qwest Nov. 22b *Ex Parte* Letter at 2.

on August 17, 2002.[369] Qwest states that this enhancement addresses two of the most common errors that Qwest has found to affect its service order accuracy.[370] The system change implements edits at the point the FOC is being created by the service delivery coordinator (SDC).[371] First, the fix will require the purchase order number on the service order to match the LSR.[372] Second, the system flags for the SDC any differences between the due date on the LSR and the due date on the service order.

101. In reaching our conclusions, we note that the Department of Justice observed that the record demonstrates improvement with respect to manual order processing.[373] The Department of Justice also stated that "Qwest's fulfillment of its commitments to maintain as well as improve the accuracy of its service order processing deserves close monitoring, and its continued collection and reporting on this process will be critical to ensure the adequacy of its post-entry performance."[374] With respect to this observation, we note that Qwest filed a commitment to incorporate PO-20, one of its service order accuracy metrics, into its PAP on a regionwide basis.[375] Although we do not rely on this commitment, we find that Qwest's obligation to make payments on PO-20, based on a benchmark of 95 percent accuracy, which will become effective at the same time as the PAP, responds to the concerns expressed in the

369 Qwest Aug. 8 *Ex Parte* Letter at 5.

370 *Id.*

371 *Id.* Qwest explains that the system retrieves all service orders that contain the purchase order number (PON) for which the SDC is creating the FOC. The system will display the service order numbers and their associated due dates. The SDC can then select the correct order to associate with each line on the FOC. If the SDC does not see all the orders he/she has created for this LSR, the SDC will go back into the SOP and review and correct the order(s) that does not have the appropriate PON. This will allow the SDC to continue with the creation of the FOC.

372 *Id.*

373 Department of Justice Qwest III Evaluation at 4.

374 *Id.* at 6.

375 *See* Letter from Yaron Dori, Counsel for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189, at 1-2 (filed Aug. 9, 2002) (Qwest Aug. 9b *Ex Parte* Letter) (advising the Commission that it will file requests with the regulatory authorities in each of the nine states for which Qwest has pending section 271 applications asking that each authority include PO-20 in its PAP). Qwest has proposed to include these payments as a Tier 2 measure, which means that the payments will be made to the states rather than to competing LECs. *See id.* at 2. *See also* Letter from Mace J. Rosenstein, Counsel, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148 and 02-189 at 1-2 (dated August 20m, 2002) (Qwest Aug. 20m *Ex Parte* Letter). We expect that if the existing metric on service order accuracy, PO-20, proves not to be adequate for Qwest to maintain a high degree of service order accuracy, then a collaboration between Qwest, the state commissions, and the competing LECs will lead to appropriate changes in the metric.

record that competing LECs and regulators will have an ongoing process to monitor and maintain adequate performance on manually handled orders.[376]

102. We find, consistent with past orders, that the commercial data are more probative than third-party test results.[377] Therefore, we disagree with commenters that argue, based on KPMG's findings, that Qwest commits excessive errors while manually processing competing LEC orders.[378] Specifically, commenters argue that Qwest cited human errors and/or inadequate training as a source of various problems noted in 75 exceptions and observations that KPMG issued during the ROC test.[379] We are not persuaded because KPMG's findings were based on Qwest's handling of a small number of LSRs.[380]

103. We reject Covad's arguments that PO-20 is inadequate because it does not include all product types.[381] As stated above, we find that, for purposes of the instant analysis, PO-20 and the metric formerly known as OP-5++ provide us with sufficient information to assess Qwest's accuracy. We find Covad's arguments regarding the product types included by Qwest in this metric are more appropriately addressed by the state commissions, as they are in a better position to make an assessment about the specifics of this metric, including the possible addition of other products. We also reject arguments that PO-20 is a "paper tiger."[382] We note Qwest's expressed willingness to include PO-20 in the PAP and begin payments, based on a 95 percent benchmark, with the other metrics included in the PAP.[383]

104. We also disagree with commenters that claim that PO-20 is inadequate to determine service order accuracy because it does not capture manual processing errors where certain features requested on the LSRs are not provisioned.[384] Although PO-20 as currently

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[376] Qwest will face penalties for its failure to meet specified performance benchmarks, which increase depending on the severity of its error rate. *Id.* We find that this potential for performance penalties will give Qwest the incentive to continue to provision orders accurately as volumes increase.

[377] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3993, para. 89.

[378] AT&T Qwest I Comments at 41-42; Covad Qwest I Comments at 39-42; WorldCom Qwest I Comments at 11-12. As we do not rely on the Liberty audit for accuracy of manual handled orders, we do not address AT&T's argument that relying on the results of the Liberty data reconciliation for accuracy of manually handled orders is flawed because Liberty failed to confirm that Qwest's reported measures actually eliminated or reduced the rate of human error to acceptable levels. *See* AT&T Qwest I Finnegan Decl. at paras. 38-77.

[379] See AT&T Qwest I Comments at 41-42; AT&T Qwest I Finnegan/Connolly/Menezes Decl. at para. 163.

[380] Qwest I Reply at 34-35.

[381] Covad Qwest I Comments at 41-42.

[382] *Id.* at 41.

[383] *See* Qwest Aug. 9b *Ex Parte* Letter at 1-2.

[384] AT&T Qwest I Finnegan/Connolly/Menezes Decl. at para. 173; Covad Qwest I Comments at 41-42. Eschelon Qwest III Comments at 35.

measured does not include discrepancies between service and equipment fields between LSRs and service orders, as discussed above, Qwest now captures those discrepancies through OP-5++.[385] As discussed above, PO-20 coupled with OP-5++ provide us with a sufficient picture of Qwest's performance to determine Qwest is processing LSRs accurately.[386] Moreover, we note Qwest's expressed willingness to add additional fields to PO-20.[387] Specifically, Qwest has acknowledged that PO-20, as currently reported, is a starting point, and it plans to include additional fields, eliminate sampling, and mechanize data collection.[388] We find that the Long-term PID Administration (LTPA) process is the appropriate forum to address whether these fields are best included in PO-20, or continue to be measured through OP-5++.[389]

105. Finally, we reject commenters' claims that problems with OP-5 discovered through CapGemini's data reconciliation with Eschelon in Arizona rise to the level of checklist non-compliance.[390] Although Cap Gemini found that Qwest did not calculate OP-5 correctly,

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385 *See* Qwest III Reply App., Tab 1, at 8. *See also* Qwest Nov. 13 *Ex Parte* Letter at 1-2.

386 *See* above, para. 98.

387 *See* Qwest I Notarianni/Doherty Reply Decl. at para. 91.

388 *Id.*

389 We note that the Department of Justice took no position on whether the relevant data should be included in a revised PO-20, a revised OP-5++, or some other metric. *See* Department of Justice Qwest III Evaluation at 6, n.28. We also reject arguments that OP-5++ is inadequate to determine service order accuracy since potential service order errors, corrected before provisioning, are not counted in OP-5++. *See* Eschelon Qwest III Comments at 25-27. These errors include errors found by competing LECs through their use of Qwest's pending service order notifiers (PSONs). *Id.* Eschelon argues that as competing LECs use the PSON data to identify errors before their due date, even fewer of these service order error will be reflected in Qwest's metrics, indicating that Qwest's performance has improved when competing LECs are performing quality control for Qwest. *Id.* Qwest has submitted evidence that shows that the error rate for manually handled orders was 4.49% from Sept. 15, 2002 to Oct. 15, 2002. *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 5, 2002) at 1 (Qwest Dec. 5c *Ex Parte* Letter). We agree that not including these errors discovered by competing LECs prior to the provisioning process will reduce Qwest's incentive to improve its performance. However, as we have stated previously, we find that issues related to the exact definition of the performance metrics is best left to the state commissions.

390 *See* Eschelon Qwest III Reply Comments at 1-2; WorldCom Nov. 6 Ex Parte Letter at 10-11. The CapGemini data reconciliation showed that 1.6% of Eschelon UNE-platform customers experienced a loss of dial tone for an extended period of time. *See* WorldCom Nov. 6 *Ex Parte* Letter at 10 (citing the CapGemini Report at 30, 39-40). During August and September, Qwest tracked the incidence of this problem and found that of almost 32,000 orders processed by Qwest, only 26 experienced a loss of dial tone severe enough to warrant a call to the ISC. *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 22, 2002) at 2 (Qwest Nov. 22d *Ex Parte* Letter). We also note, although we do not rely on it, that Qwest has identified the problem and plans to implement a fix on December 29, 2002. *Id.* at 2. Additionally, commenters argued that some manual processing errors are not captured by any metric. Covad Qwest I Comments at 42 (stating that Qwest's reporting of OP-5 cannot be deemed accurate and reliable); Eschelon Qwest III Reply Comments at 1-2. We also note that Covad has claimed that OP-5 does not capture all of the troubles they report. *See* Covad Sept. 6 *Ex Parte* Letter at 1-2. However, Covad's issues regarding trouble tickets not included in OP-5 appear to be resolved. *See* Letter from Yaron Dori, Qwest, to (continued....)

CapGemini's analysis of OP-5 indicated that Qwest's performance on OP-5 for competing LECs is in parity with Qwest's retail performance.[391] Although we do not rely on it, we take additional comfort in the fact that many of the issues raised by CapGemini can be explained by historical limitations in the legacy Loop Maintenance Operation System (LMOS) that will be eliminated by a December systems release.[392] Given the totality of the circumstances, we do not find that the Qwest errors in OP-5 that CapGemini identified rise to the level of checklist non-compliance.

(v) Order Flow-Through Rate

106. We conclude, as did the commissions of the nine application states,[393] that Qwest's OSS are capable of flowing through UNE orders in a manner that affords competing carriers a meaningful opportunity to compete.[394] We also conclude that Qwest is capable of flowing through resale orders in substantially the same time and manner as it does for its own retail customer orders.[395] We note at the outset that the Commission has used flow-through rates

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Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Oct. 2, 2002) at 1-4 (Qwest Oct. 2 *Ex Parte* Letter).

391 Cap Gemini claims that OP-5 (at least as far as Eschelon is concerned) shows new installation quality between 87.37% and 88.26% for competing LECs, versus 86.84% for Qwest retail customers. *See* Eschelon Qwest III Reply, attaching CGE&Y's Data Reconciliation Report, Draft Version 2.0, dated Oct. 24, 2002 (CapGemini Report) at 4. We also note that Eschelon disputes CapGemini's final calculation, claiming that CapGemini miscalculated the trouble rate for competing LECs, as CapGemini included conversions of existing Eschelon UNE-Star customers to UNE-platform, which were handled as a special project. *See* Eschelon Nov. 12 *Ex Parte* Letter at 2. The record shows that the business rules do not exclude conversion involving the same competing LEC. *See* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 19, 2002) at 5-6 (Qwest Nov. 19b *Ex Parte* Letter).

392 Additional issues raised by CapGemini relate to interpretations of the business rules for OP-5, such as whether service order errors should be included in OP-5. Qwest Nov. 13 *Ex Parte* Letter at 1-2. We find that disputes about the exact definitions of performance metrics are best addressed through the states and the LTPA process. In any event, as discussed above, Qwest now has a metric which captures those ordering-related troubles reported via calls to service delivery centers, OP-5++.

393 *See* Colorado Commission Qwest I Comments at 2; Iowa Board Qwest I Comments at 32; Idaho Commission Qwest I Comments at 6; Montana Commission Qwest II Comments at 19-22; Nebraska Qwest I Commission Comments at 8; Utah Commission Qwest II Comments at 1; Washington Commission Qwest II Comments at 14; Wyoming Commission Qwest II Comments at 6.

394 Qwest's commercial data show, on the average, modest flow-through rates both for orders eligible for electronic flow-through as well as overall flow-through. *See* Qwest PO-2B-1 (Electronic Flow-Through for Eligible Resale LSRs Received Via GUI), and PO-2B-2 (Electronic Flow-Through for All Eligible LSRs Received Via EDI). These metrics have different standards, depending on the product type. The standards are escalating upward. By January 2003, the standards will be 95% for resale, LNP, and UNE-platform, and 85% for unbundled loops. *See also* PO-2A-1 (Electronic Flow-through for all LSRs Received via GUI) and PO-2A-2 (Electronic Flow-through for All LSRs Received Via EDI). These metrics are diagnostic only.

395 *See* Qwest PO-2B-1 (Electronic Flow-Through for Eligible Resale LSRs Received Via GUI) showing four-month average flow-through rates ranging from 60 to 83% with a regional average of 74%, and PO-2B-2 (Electronic Flow-Through for Eligible Resale LSRs Received Via EDI), showing four-month average flow-through rates ranging from 35% to 92%, with a regional average of 80%.

as a potential indicator of a wide range of problems that underlie a determination of whether a BOC has provided nondiscriminatory access to OSS.[396] The Commission has not relied upon flow-through rates as the sole indicator of nondiscrimination, however, and thus has not limited its analysis of a BOC's ordering process to a review of its flow-through performance data. Instead, the Commission has held that factors such as a BOC's overall ability to return timely order confirmation and reject notices, accurately process manually handled orders, and scale its system are relevant and probative for analyzing a BOC's ability to provide access to its ordering functions in a nondiscriminatory manner.[397]

107. As discussed above, Qwest demonstrates that it provides timely and accurate status notifications. In addition, the evidence demonstrates that Qwest accurately processes both manual and mechanized orders.[398] Moreover, as discussed more fully below, we find that Qwest scales its system as volumes increase, and demonstrates its ability to continue to do so at reasonably foreseeable volumes. As a result, in this application, flow-through has significantly less value as an indication of the capability of Qwest's OSS.

108. Our determination that Qwest is able to scale its systems is based on third-party tests that show that Qwest is able to process orders at projected future transaction volumes.[399] KPMG examined Qwest's system responses and the timeliness of Qwest's EDI and GUI pre-order and order responses.[400] The test used projected transaction volumes simulating peak (150 percent of normal) and stress (250 percent of normal) transaction volume conditions.[401] We reject commenters' contentions that Qwest has not proven that it can scale its system.[402] Although we recognize that there has not been significant commercial usage of Qwest's system,

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[396] *See Bell Atlantic New York Order*, 15 FCC Rcd at 4035, para. 162.

[397] *See id.* at 4035, para. 163, *SWBT Texas Order* 15 FCC Rcd at 18444, para. 179; and *BellSouth Georgia/Louisiana Order* 17 FCC Rcd at 9092, para. 143.

[398] *See supra* paras. 98-99 & n.361.

[399] *See* KPMG Final Report at 252-299 (Test 15: POP Volume Performance Test).

[400] *Id.*

[401] *Id.*

[402] Eschelon Qwest III Comments at 46-47 (arguing that the standard process for UNE-platform orders has not been "stress tested" because Eschelon's orders were UNE-Star, not UNE-platform orders); WorldCom Qwest I Comments at 1; WorldCom Qwest I Lichtenberg Decl. at paras. 4, 6 (stating that while successful section 271 applicants in the past have relied upon both a third-party test of OSS and commercial activity in at least one state in their region, Qwest has almost no commercial experience in processing UNE-platform migration orders).

in the absence of such evidence, we look to third-party tests.[403] In the instant case, these tests have demonstrated that Qwest is able to timely and accurately return FOC and reject notices.[404]

109. Commenters express three specific concerns regarding OSS flow-through rates. First, competing LECs contend that low total flow-through rates are evidence that Qwest has failed to provide nondiscriminatory access to OSS.[405] Second, commenters complain that commercial experience indicates Qwest's "achieved" flow-through rate, for orders designed to flow through, is too low.[406] Finally, commenters contend that, on conversions from Centrex to UNE-platform or resale POTS, the LSR generates multiple service orders, some of which flow through, but with other portions falling out for manual handling.[407]

110. With respect to the first argument, we disagree with commenters that we should reject Qwest's application based on its average flow-through rates or because some kinds of orders are not designed to flow-through.[408] Although Qwest's commercial data show low

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[403] *See Bell Atlantic New York Order,* 15 FCC Rcd at 3992, para. 89; *SWBT Texas Order,* 15 FCC Rcd at 18399, para. 98.

[404] KPMG Final Test at 252-299.

[405] *See* AT&T Qwest I Comments at 41; AT&T Qwest I Comments, Finnegan Decl. at paras. 135–139, 158; Covad Qwest I Comments at 40-41; WorldCom Comments at 10-11. Total flow-through (PO-2A) measures the percentage of orders that pass through an incumbent's ordering systems without the need for manual intervention. Achieved flow-through (PO-2B) measures the percentage of orders that are designed to pass through an incumbent's ordering system electronically that actually flow-through without the need for manual handling. For example, Qwest's commercial data shows, total flow-through rates of 46-64% for UNE-platform POTS, 44-69% for unbundled loops, and 65-78% for resale orders in Colorado. States with smaller volumes of transactions show flow-through rates as low as 0% for certain order types. *See* Letter from Christopher L. Killion, Counsel for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148 (filed Aug. 19, 2002) at Attach. 1-5 (Qwest Aug. 19e *Ex Parte* Letter) (citing confidential version).

[406] WorldCom Qwest I Comments at 10-11.

[407] Eschelon Qwest I Comments at 6. This problem has caused some end-user customers to be out of service for several hours, as the disconnect portion of the order is the part of the LSR that flows through, while the new switch translation will fall to manual handling.

[408] *See* WorldCom Qwest I Comments at 11; *see also* Eschelon Qwest I Comments at 4-5 (stating that since the 10.0 release on June 17, 2002, Eschelon cannot electronically submit CLEC-to-CLEC migration orders). Specifically, WorldCom argues that KPMG's test revealed problems with Qwest's flow-through. It points out that KPMG's commercial test resulted in less than 52% of orders submitted through EDI flowing through to the SOP. WorldCom also argues that Qwest has not designed to flow through some order types – such as supplemental orders to change due dates or features – that are important and should flow through. WorldCom Qwest I Comments at 10. AT&T states that Qwest unilaterally decides which products are eligible for flow through. AT&T Qwest I Comments, Finnegan Decl at para. 138. Eschelon expresses similar concerns, particularly with regard to its conversion of certain Centrex numbers to either UNE-platform or resale that it says fail to flow through. *See* Eschelon Qwest I Comments at 6. Touch America argues that the low total flow-through numbers increase the amount of manual handling, which "permits Qwest the opportunity to make mischief by revising information at will, creating new rules of the game, and obfuscating explanations upon inquiry." *See* Touch America Qwest I Reply at 15-16. We note that Qwest has a change management process (CMP) that controls the process and speed with which changes to the ordering system are introduced. Qwest has articulated a commitment to continue to (continued....)

monthly total flow-through rates, Qwest's total flow-through rates are comparable to those of BOCs that the Commission has previously approved.[409] We also note several measures taken by Qwest to ensure continued improvement of flow-through rates. These include change requests that are scheduled to be adopted with the IMA 12.0 release (scheduled for April 2003) to install additional business process layer (BPL) edits to improve automatic rejects so that errors that currently cause LSRs to fall out for manual handling will be rejected upfront instead.[410] This will enable the competing LEC to make the correction and resubmit the LSR so it will flow through.[411] Additionally, Qwest clarified business ordering rules and competing LEC disclosure documentation with the IMA 11.0 release.[412]

111. With respect to commenters' second argument, we disagree that Qwest's low commercial flow-through rates for orders that are eligible to flow through require that we find that Qwest is not compliant with checklist item 2.[413] Commenters state that even the third-party test showed a higher failure rate for Qwest's UNE-platform transactions designed to flow-through than third-party tests for other BOCs.[414] We find that Qwest has met the flow-through benchmarks under PO-2B for most states over the past nine months.[415] At the same time,

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analyze LSRs that fail to flow through and submit proposed improvements to the CMP. *See* Qwest III Notarianni/Doherty Reply Decl. at 94.

[409] Qwest I Reply at 40 citing *Bell Atlantic New York Order* at n.512 and 569; *Verizon Massachusetts Order* at para. 49; *Verizon Rhode Island Order* at Appendix B; *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Maine*, CC Docket No. 02-61, Memorandum Opinion and Order, 17 FCC Rcd 11659, Appendix B (2002) (*Verizon Maine Order*); and *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, 17 FCC Rcd 12275, Appendix B (2002) (*Verizon New Jersey Order*).

[410] Qwest I Williams Decl. at para. 116.

[411] *Id.*

[412] *Id.*

[413] AT&T Qwest I Comments, Finnegan Decl. at para. 138; Covad Qwest I Comments at 40 (stating that 67% of its flow-through eligible orders submitted via GUI and 44% via EDI fell out and were manually processed); Touch America Qwest I Reply at 15; WorldCom Qwest I Lichtenberg Decl. at para. 37.

[414] WorldCom Qwest I Comments at 9-10; WorldCom Qwest I Comments, Lichtenberg Decl. at para. 35. We note that the third-party test showed 94-96% achieved flow-through rate for resale, 95-97% for UNE-platform, 84-88% for unbundled loops, and 100% for ported numbers. KPMG Final Test at 158-168 (Tests 13-1-3, 13-1-4, 13-1-5, 13-1-6, 13-1-7, 13-1-8, 13-1-9, 13-1-10, 13-1-11).

[415] Qwest III Notarianni/Doherty Reply Decl. at para. 93. *See also* PO-2B-1 (Elec Flow-through for All Elig. UNE-platform POTS LSRs Rec'd via GUI) and PO-2B-2 (Elec Flow-through for All Elig. UNE-platform POTS LSRs Rec'd via EDI). We note that Qwest has missed the benchmark in Idaho for PO-2B-1 for LNP orders for all four months (four month average of 78%), and in Utah for LNP orders (four-month average of 72%). Qwest also (continued….)

benchmarks were raised in July 2002. Qwest missed the upwardly adjusted benchmarks, but flow-through rates have continued to improve since July.[416] We expect that Qwest's flow-through rates will improve over time as individual carriers gain experience with the OSS and Qwest conducts training for competing carriers to help improve their order submissions.[417]

112. With respect to the third argument, we find that the disconnect problems associated with conversions from Centrex 21 do not have a competitively significant effect. Qwest states that, unlike conversions where the product remains unchanged, during a conversion of Centrex 21 to a POTS service, there is a 30-second period when a customer is out of service.[418] This occurs for retail customers converting from Centrex 21 to POTS service, as well as conversions from Centrex 21 to UNE-platform or resale POTS.[419] Qwest states that a longer out-of-service period occurs in rare circumstances when lines involving hunt groups with the call forwarding feature are served by a Nortel DMS100 switch.[420] Qwest has been able to identify only two Eschelon orders that fell into this category between January and June 2002.[421] Because this outage affects so few of Eschelon's orders and is typically less than a minute in duration, we find that this issue does not rise to the level of checklist non-compliance.

(vi) Other Ordering Issues

113. *Equivalent Access to Due Dates.* We find that Qwest offers nondiscriminatory access to due dates. Although PO-15, which measures the number of due date changes per order, shows that Qwest has changed due dates for wholesale more than it has for its retail customers,[422] we do not find this discrepancy to be competitively significant. As explained above, some of the due date changes are the result of service being provisioned to its competitors ahead of schedule.

(Continued from previous page)
missed the benchmark for all four months in Utah for PO-2B-1 and PO-2B-2 for POTS resale orders (four-month average of 81% for orders submitted via GUI, 47% for orders submitted via EDI). Qwest also missed the benchmark for PO-2B-2 in Wyoming for July through September (four-month average of 86%).

416 *Id.*

417 *See* Qwest I Reply at 39.

418 *See* Qwest Aug. 8a *Ex Parte* Letter at 7.

419 *See id.* Additionally, Qwest states that in order to minimize the impact to end users, these types of orders are worked between 11 PM and 6 AM.

420 *See id.*

421 *See id. See also* Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 5, 2002) at 1 (Qwest Dec. 5a *Ex Parte* Letter).

422 *See* PO-15 (Number of Due Date Changes per Order).

We therefore reject AT&T's assertion that competing LECs suffer from a higher rate of postponed installation, and that this delay causes customer dissatisfaction.[423]

d. Billing

114. Consistent with the determinations of the commissions of the nine application states, we find that Qwest provides nondiscriminatory access to its billing functions.[424] As discussed below, Qwest offers competing carriers access to a set of billing systems that are the same systems Qwest uses for its own retail operations. In combination, these billing systems provide all the information, in an appropriate format, that is necessary for competing carriers to have a meaningful opportunity to compete. Qwest's commercial performance data demonstrate its ability to provide competing carriers with service usage information in substantially the same time and manner that Qwest provides such information to itself, and with wholesale carrier bills in a manner that gives competing carriers a meaningful opportunity to compete. In sum, Qwest has met, with few exceptions, the benchmarks for timeliness, accuracy, and completeness in providing usage information and for wholesale bills.[425] Moreover, in finding that competing carriers have a meaningful opportunity to compete, we rely on third-party testing, conducted by KPMG, which found Qwest's billing system to be accurate and reliable.[426]

115. Pursuant to the Commission's prior section 271 decisions, BOCs must provide competitive LECs with two essential billing functions: (i) complete, accurate and timely reports on the service usage of competing carriers' customers and (ii) complete, accurate and timely wholesale bills in a manner that gives competing carriers a meaningful opportunity to compete.[427] Service-usage reports and wholesale bills are issued by incumbent LECs to competitive LECs for two different purposes. Service-usage reports are issued to competitive LECs that purchase UNEs, such as unbundled switching, and measure the types and amounts of incumbent LEC services used by a competitive LEC's end users.[428] In contrast, wholesale bills are issued by incumbent LECs to competitive LECs to collect compensation for the wholesale inputs, such as

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[423] AT&T Qwest I Comments at 40; AT&T Qwest I Comments, Finnegan/Connolly/Menezes Decl. at paras. 139-141.

[424] Colorado Commission Qwest I Comments at 44-45; Qwest I Application App. C, Recommendation of the Iowa Board Key Recommendations, Vol. 1, Tab 5 at 3; Idaho Commission Qwest I Comments at 13-14; Montana Commission Qwest II Comments at 19-22; Nebraska Commission Qwest I Comments at 2, 8-9; North Dakota Commission Qwest I Comments, Consultative Report at 281; Utah Commission Qwest II Comments at 1; Washington Commission Qwest II Comments at 14; Wyoming Commission Qwest II Comments at 6.

[425] *See* BI-1 (Time to Provide Recorded Usage Records), BI-2 (Invoices Delivered within 10 Days), BI-3 (Billing Accuracy – Adjustments for Errors), and BI-4 (Billing Completeness).

[426] KPMG Final Report at 15-16.

[427] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17427, para. 15; *Verizon Massachusetts Order*, 16 FCC Rcd at 9043-44, para. 97; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6316-17, para. 163; *Bell Atlantic New York Order*, 15 FCC Rcd at 4075, para. 226.

[428] *See, e.g., Bell Atlantic New York Order*, 15 FCC Rcd at 4075, para. 226.

unbundled elements, used by competitive LECs to provide service to their end users.[429] Wholesale bills are essential because competitive LECs must monitor the costs they incur in providing services to their retail customers.[430] We discuss both elements of billing below.

(i) Service Usage

116. We find that Qwest demonstrates that it provides competing carriers with complete, accurate and timely reports on the service usage of its customers in substantially the same time and manner that it provides such information to itself.[431] Specifically, Qwest, using the same process that it uses for its own end users, collects competitive LEC end-user usage data and provides competitive LECs with a cumulative record of their customers' usage via the Daily Usage File (DUF).[432] Competitive LECs then are able to reconcile Qwest's DUF with their own usage records to ensure Qwest accurately charges them for their customers' usage.[433]

117. We reject concerns raised by commenters because they do not raise issues relevant to our section 271 analysis or do not provide enough evidence to support a finding of checklist non-compliance.[434] For example, Eschelon asserts that Qwest does not provide complete and accurate records of switched access minutes of use (MOU).[435] Eschelon asserts, and we agree, that Qwest would benefit inappropriately in two ways if this allegation were true: (1) it would deprive competitive LECs of revenue by decreasing the amount of access charges

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429 *See, e.g., Verizon Pennsylvania Order*, 16 FCC Rcd at 17425, para. 13. Qwest's wholesale bills are generally issued on a monthly basis. Qwest I Notarianni and Doherty Decl. at paras. 490-95.

430 *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6316-17, para. 163.

431 *Id.*; *SWBT Texas Order*, 15 FCC Rcd at 18461, para. 210; *Bell Atlantic New York Order*, 15 FCC Rcd at 4075, para. 226.

432 Qwest I Notarianni and Doherty Decl. at para. 516.

433 Competitive LECs may return the DUF to Qwest within 90 days of receipt for investigation of errors. *Id.* at para. 524.

434 We reject AT&T's claims that Qwest failed to provide timely DUF files for the nine application states. AT&T does not directly state that it did not receive DUFs for the application states, but instead claims that it offers local service in Colorado, Arizona and Washington and that Qwest failed initially to provide DUFs for "two of those States until 2002." AT&T Qwest I Finnegan, Connolly and Menezes Decl. at para. 116. AT&T's conclusory claims lack the specifics necessary to rebut Qwest's showing on this issue. Similarly, AT&T points to performance data from 2001 as evidence that Qwest's DUFs are incomplete or inaccurate. *Id.* at para. 224. In the instant proceeding, however, we consider only recent commercial data, beginning with June 2002, in making our decision. In addition, OneEighty claims that starting in August, 2002, it experienced a drop in the call termination records it received from Qwest. OneEighty Qwest III Comments at 14. We address issues raised by OneEighty under our discussion of checklist item number 11.

435 Eschelon Qwest I Comments at 25-26; Eschelon Qwest III Comments at 47-53. The Department of Justice indicated that it considered this allegation one that should command the Commission's attention. Department of Justice Qwest III Evaluation at 5, n.22.

they collect from IXCs; and (2) as an IXC, Qwest would pay less than it should for access.[436] Eschelon provides evidence that it undertook an independent audit in which the auditor placed test calls and later examined records received from Qwest to determine if the calls placed appear in the records.[437] The audit determined that approximately 22 percent of the call records expected were not found, and that the missing records did not appear to be caused by Eschelon's processes.[438] In addition, Eschelon provides evidence that its MOU have dropped, without change in Eschelon's usage patterns.[439] After careful consideration, we reject Eschelon's argument and find that the evidence on the record demonstrates that Qwest provides competing carriers with complete, accurate and timely reports on their customers' service usage. In particular, the record shows that Qwest reviewed the audit report and performed an internal investigation.[440] Qwest explains, first, that its review of the call records was hindered by the age of the records and lack of relevant information from Eschelon.[441] Nonetheless, Qwest demonstrates that it accounts for 97.3 percent of the records it was able to research.[442] Of note, Qwest demonstrates that some of the calls that generated the greatest percentage of "missing" call records in the audit were, in fact, calls that do not generate access records.[443] Further, Qwest provides a reasonable explanation for the drop in Eschelon's MOU over a period of months that Eschelon does not dispute on the record. Qwest demonstrates that other carriers, including Qwest, had similar drops in access records during the same time period.[444] In addition to

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436 Eschelon Qwest III Comments at 48.

437 Eschelon Qwest III Comments at 50-51, exhibit 39.

438 *Id.*

439 Eschelon Qwest III Comments at 52-53.

440 Letter from R. Hance Haney, Executive Director – Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 8, 2002) at 3 -8 (Qwest Nov. 8b *Ex Parte* Letter) (citing confidential version).

441 *Id.* at 3-4.

442 *Id.* at 4. Qwest claims that the methods used by the auditor made Qwest's investigation difficult by, for example, placing numerous calls on the same line to the same number with different calling patterns all within minutes of each other. Without Eschelon providing "connect time" in all instances, Qwest claims it was handicapped in investigating the calls. *Id.*

443 *Id.* at 5. For example, local calls and directory assistance records do not generate switched access usage. *Id.* Qwest's investigation showed that 80.9% of the records Qwest was able to research were *successfully found* by the auditor; 9.2% of the records were found by Qwest in the ADUF or ODUF records provided to Eschelon; 4.3% of the records were for uncompleted calls; 1.9% of the calls did not generate automatic message accounting (AMA) records (meaning that the test calls had not been answered and accordingly, did not generate usage records); 1.0% of the calls are not call types that generate access records. Finally, Qwest found a CRIS toll guide error accounted for the missing 2.7% of the records that should have generated access records. *Id.* at 4 - 5.

444 Qwest Nov. 8b *Ex Parte* Letter (citing confidential version). In addition, Qwest performed additional analysis and determined that a number of factors accounted for Eschelon's decreasing MOU, including: loss of the end-user to Qwest or another competitive LEC, line conversion to a loop account by Eschelon (which would no longer generate switched access), line disconnected, and lack of use on the line during the month by the end-user. *Id.* at 7.

Qwest's nondiscriminatory performance, the independent third-party test that KPMG performed provides additional assurance that Qwest's DUF is delivered in a timely and accurate manner.[445]

118. We reject AT&T's contentions that Qwest fails to provide nondiscriminatory access to its billing functions. First, although AT&T is correct that it took Qwest six times to pass KPMG's military-style test for production processes related to DUF reports, Qwest ultimately demonstrated an ability to sufficiently provide service usage files due to process improvements such as additional training.[446] During the course of the test, KPMG was also able to determine that Qwest's processes for creating and distributing the DUF files are functional, except for the aspects of the process that involve return of DUF records.[447] KPMG used the Observations and Exceptions process to communicate DUF problems to Qwest, rather than the returns process. Accordingly, KPMG was unable to determine if the DUF returns process would function appropriately in the event that a competitive LEC would choose to make such a return.[448] Thus, we rely here on the conclusions of the commissions of the nine application states, as well as that of KPMG, that Qwest demonstrates that it provides the requisite DUF functionality.[449]

(ii) Wholesale Bills

119. We find that Qwest's Customer Record and Information System ("CRIS") wholesale bills provide competitive LECs a meaningful opportunity to compete. Although Qwest provides competitive LECs with a billing format that is not an industry standard, we find

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445 KPMG Final Report at 413 (providing the results of Test 19-1-2, stating "DUF records produced by Qwest contain field values in accordance with both EMI guidelines and expected results").

446 *Id.* at 44-45. AT&T argues that Qwest failed KPMG's DUF tests five straight times before barely passing the sixth time and that these failures call into question the reliability of Qwest's DUF mechanisms. *Id.* at 45. We note that the purpose of KPMG's military style testing ("test until you pass") was to incent Qwest to implement systemic changes, such as additional training and software fixes, that would allow Qwest to pass. Idaho Commission Qwest I Comments at 11 ("Many of the improvements Qwest implemented to improve its performance consisted of additional training or coaching of existing personnel.").

447 KPMG Final Report at 15-16.

448 *Id.* at 432 (referencing Test 19.6-1-17). Specifically, because none of the events occurred that would enable, or trigger, a review of these functionalities, KPMG was unable to observe various test criteria concerning DUF. Although KPMG issued an "unable to determine" rating, KPMG was able to conclude that processes are in place for these criteria. We agree with the Colorado Commission's conclusion that, because these triggering events have a low occurrence rate, and because no objections were filed regarding KPMG's finding that Qwest's processes are in place, Qwest has adequately demonstrated that it has sufficient processes in place for each of these components. Colorado Commission Qwest I Comments at 43-44.

449 *See, e.g., id.* at 44. We also encourage the state commissions to continue monitoring Qwest's billing performance and note, for example, that the Idaho Commission states that it will continue to monitor Qwest's performance in this area. If evidence reveals problems due to lack of inadequately trained staff, the Idaho Commission will address these issues within the periodic reviews contained in the performance plans. Idaho Commission Qwest I Comments at 10-11.

that Qwest ultimately satisfies its evidentiary burden for demonstrating that its bills are electronically auditable and, in combination with the commercial data and its DUF performance, comply with the OSS billing requirements under checklist item 2.

120. We begin our analysis with an overview of Qwest's wholesale billing systems and summarize the various steps Qwest has taken to provide competitive carriers with an auditable wholesale bill. Next, we describe the commercial performance of Qwest's wholesale billing systems. We then analyze the results of the third-party review of Qwest's billing systems. We also discuss the sufficiency of the evidence presented to demonstrate that Qwest provides complete, accurate, and timely wholesale bills.

121. *Background.* In the nine application states, Qwest utilizes the same system, CRIS, for billing resale and UNE- platform that it uses in the retail context.[450] Qwest bills resale products, such as basic business and residential services, Centrex, and PBX, through CRIS.[451] In addition, Qwest uses CRIS to bill UNE products such as unbundled loops, line sharing, sub-loops, EELs and UNE-platform.[452] Once Qwest generates a competitive LEC's wholesale bill using CRIS, Qwest is able to provide the bill electronically in either EDI or ASCII format.[453]

122. Commenters have raised a number of issues related to the ability of competitive carriers to audit wholesale bills, specifically UNE-platform bills generated by Qwest's CRIS.[454] We agree with AT&T and WorldCom that Qwest must demonstrate that it can produce a readable, auditable, and accurate wholesale bill to satisfy its nondiscrimination requirements under checklist item 2.[455] Consistent with the Commission's *Pennsylvania 271 Order*, we find that for the BOC to meet the requirement that wholesale bills are auditable, a competitive LEC must be able to receive customer bills in an electronic format that reasonably permits the

[450] Qwest I Notarianni and Doherty Decl. at para. 491. Qwest utilizes at least two other billing systems, Integrated Access Billing System ("IABS") for a limited set of products, including Resale Frame Relay, LIS, UDIT, CCSAC, E911, as well as for recurring charges for collocation and dark fiber, and the Billing and Receivable Tracking System ("BARTS'), which is used for products and services not otherwise billed through CRIS or IABS. *Id.* at paras. 502, 513; *see also* KPMG Final Report at 8.

[451] Qwest I Notarianni and Doherty Decl. at para. 491.

[452] *Id.*

[453] *Id.* at para. 498. In addition to several traditional transmission methods for the ASCII format, such as diskette and CD ROM, for example, all three of Qwest's billing formats can be provided via Web access. *Id.*

[454] The inability to audit bills electronically impedes a competitive LEC's ability to compete in many ways. First, a competitive LEC must spend additional monetary and personnel resources reviewing complex paper bills or attempt to design software that can organize the information on the BOC's wholesale bills. Second, inaccurate bills cause a competitive LEC to expend unnecessary resources reconciling and pursuing bill corrections, to show improper overcharges as debts on its balance sheet until resolution, and to lose revenue where back-billing customers in response to an untimely wholesale bill becomes impossible as a practical matter. *Verizon Pennsylvania Order*, 16 FCC Rcd at 17431-32, para. 23.

[455] AT&T Qwest I Comments at 46; WorldCom Qwest I Lichtenberg Decl. at para. 73.

competitive LEC to manipulate the data to perform audits on a customer-by-customer basis.[456] We decline in this proceeding, however, to specify particular billing systems, such as CRIS or CABS, or electronic billing formats, such as ASCII or BOS, that a BOC must provide.[457] Instead, we describe various functionalities that, in accordance with our past section 271 decisions, BOC wholesale bills must incorporate. We then consider whether Qwest's CRIS ASCII bills possess these attributes.

123. The ability to audit Qwest's CRIS ASCII wholesale bills to ensure they are both accurate and timely represents a crucial component of OSS.[458] To make this possible, the BOC must provide the billing data in a form that enables a competitive LEC, without unreasonable expense and delay, to manipulate the data into fields that reasonably correspond with its internal records, *e.g.*, the identity of the customer accounts, services ordered, and relevant rate information. For practical purposes, the ability of competitive LECs to audit bills electronically depends on the availability of software, either directly from the BOC, commercially from a third-party vendor, or designed by an efficient competitor itself.[459] The billing format should support commonly available software that permits the competitive LEC to receive the bill via electronic interface, to compare the BOC's bill with the competitive LEC's internal records, and to prepare any inquiries for resolution by the BOC.

124. We find that Qwest's current electronic bills meet these criteria and note that the billing agent for at least one competitive LEC states that it is able to perform "detailed" electronic audits of Qwest's UNE-platform and resale bills.[460] We reject AT&T's assertion that

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[456] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17428, n.51 (addressing transferability of a retail-formatted bill into a computer spreadsheet for computer auditing).

[457] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17522, App. C, para. 30 (stating that national standards are not a prerequisite to the provision of access to any particular OSS function).

[458] We note that Qwest asserts that no competitive LEC raised the issue of auditability of Qwest's bills as an issue during the ROC workshops or OSS test. Letter from Yaron Dori, Counsel for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148, at 3 (filed July 19, 2002) (Qwest July 19 *Ex Parte* Letter) (citing confidential version).

[459] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17440-41, para. 36 (discussing a third-party confirmation that commercial software was available to audit Verizon's wholesale bills).

[460] Qwest I Notarianni and Doherty Reply Decl. at para. 179, Reply Exhibit CLD-32, March 12, 2002 E-Mail from Ted Bailey-BroadMargin.com to Pam Delaittre-Qwest. BroadMargin, a third-party vendor that audits Global Crossing's bill, states that it electronically receives Qwest wholesale UNE-platform and resale bills and performs detailed audits on these bills. *Id.* (stating also that Qwest's customer support staff has "been extremely helpful in resolving and answering any questions"). We reject AT&T's contention that its investigation of vendors who provide software to audit Qwest's CRIS bills demonstrates that those bills cannot be electronically audited. Letter from Amy L. Alvarez, District Manager – Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-418 and 02-189 (filed Aug. 29, 2002) at 4-6 (AT&T Aug. 29 *Ex Parte* Letter). We find AT&T's investigation results to be speculative and unconvincing. For example, AT&T's determination that the work required to audit Qwest's bills might "result in a substantial increase in the price of the software" provided by TEOCO, is not a compelling demonstration that Qwest's bills cannot be electronically audited. *See* Qwest III Application, App. Tab 5 at 8-12.

Qwest's CRIS ASCII bills only provide summarized volumes of services and their respective universal service ordering codes ("USOCs").[461] While Qwest does provide a monthly bill that summarizes the total numbers of services ordered with the respective USOCs, Qwest also provides competitive LECs with a separate bill that itemizes certain information, such as USOCs and relevant tax information, for each of the competitive LEC's relevant customer accounts.[462] We also disagree with AT&T's assertion that Qwest's bills are not auditable because they are not provided via a Carrier Access Billing System in Billing Output Specification format ("CABS BOS"). Qwest has demonstrated, as one example, that an ASCII format version of the CRIS wholesale bill can be transferred to a variety of spreadsheet applications whereby the data can be manipulated.[463] In reaching our conclusion, we note that the Department of Justice has

[461] AT&T Qwest I Finnegan, Connolly and Menezes Decl. at para. 234. *See also* Eschelon Qwest III Reply Comments at 2-5. We reject Eschelon's assertions regarding the auditability of Qwest's CRIS bills. As discussed herein, the record demonstrates that Qwest's bills are electronically auditable. *See also* Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 13, 2002) (Qwest Dec. 13 *Ex Parte* Letter). Additionally, Eschelon fails to provide sufficient evidence to demonstrate that the complained of billing concerns are competitively significant. We also find WorldCom's claim that "it has hundreds of thousands of outstanding billing disputes open with Qwest" unpersuasive because WorldCom provides neither supporting details regarding the validity of these disputes, nor an explanation why CABS billing would resolve these billing issues. WorldCom Qwest I Lichtenberg Decl. at para. 73.

[462] Letter from Peter D. Shields, Counsel for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148, at 2-4 (filed July 10, 2002) (Qwest July 10 *Ex Parte* Letter); Qwest July 19 *Ex Parte* Letter at 1 (citing confidential version); *see also* Qwest III Application, Att. Tab 5 at 4-5. We reject AT&T's claim that Qwest's ASCII files, specifically UNE-platform wholesale bills, are too large to import into commercially available spreadsheets. AT&T Qwest I Reply at 38. In the event competitive LEC bills contain too many lines, Qwest will provide additional segmentation of sub-accounts. Qwest I Notarianni and Doherty Reply Decl. at para. 209. We note that, although Qwest processes bills in multiple billing centers throughout its 14-state region, the record in the instant application does not reflect any meaningful differences between the bills of the nine application states. AT&T Qwest I Reply at 37 (referencing a billing dispute in Washington). Similarly, we reject AT&T's assertion that the absence of summarized charges in bills issued by Qwest's central region billing center "effectively prevents" AT&T from auditing those bills. *See* AT&T Aug. 29 *Ex Parte* Letter at 1-3. The record demonstrates that all three of Qwest's billing regions contain equivalent audit-affecting billing information and a comparable level of detail. Qwest III Application, Att. Tab 5 at 6. Additionally, AT&T's complaint regarding summary information is relevant only to paper bills; Qwest provides electronically auditable bills that contain the requested summary information. *Id.*

[463] Qwest July 19 *Ex Parte* Letter at 1 (citing confidential version); *see also* Qwest I Notarianni and Doherty Reply Decl. at para. 210. Qwest's website provides competitive LECs with documentation containing instructions on importing CRIS ASCII files into competitive LEC software. Qwest I Notarianni and Doherty Reply Decl. at para. 179, Reply Exhibit CLD-26 at 6 (providing instructions on importing the ASCII bill into spreadsheets, relational databases, and word processing software packages). Qwest's documentation states that each data element in the ASCII format is divided, or delimited, by commas and/or quote marks ("comma delimited") which then allows the competitive LEC to import the data elements into commercial software. Qwest I Notarianni and Doherty Reply Decl. at para. 179, Reply Exhibit CLD-26 at 6, 15. Seven out of eleven competitive LECs in Colorado receive their wholesale bills in ASCII format. Qwest I Notarianni and Doherty Reply Decl. at para. 181, n.223. Also, four out of four competitive LECs in Idaho, two out of four competitive LECs in Iowa, and four out of five competitive LECs in Nebraska and North Dakota receive their wholesale bills in ASCII format. *Id.*

determined that the record "support[s] a positive assessment of Qwest's wholesale billing capabilities."[464]

125. In addition, we are encouraged by the fact that Qwest has responded in good faith to competitive LEC requests to support an additional industry standard format. On April 19, 2002, Qwest announced that it would provide competitive LECs with the option of having UNE-platform bills provided in CRIS BOS format.[465] From April 19, 2002 to July 1, 2002, Qwest sought comment from competitive LECs, made subject matter experts available for question and answer sessions, provided a month-long testing window, and, on July 1, 2002, made this new format available.[466] Although we commend Qwest for making available a BOS-formatted bill, we do not rely on these bills as there is no commercial or third party evidence that Qwest's BOS bills can be successfully audited.[467] To the contrary, Qwest's introduction of BOS bills has not been problem free.[468] However, we are encouraged by Qwest's demonstrated willingness to work collaboratively with competing LECs to produce accurate and timely BOS bills.

126. Finally, although not of decisional weight, we note that Qwest has responded to the concerns raised in the record by voluntarily committing to a series of undertakings aimed at ensuring continued acceptable performance. Although we do not rely on these recent undertakings in finding that Qwest provides nondiscriminatory access to its OSS billing functions, these commitments give us additional confidence that Qwest will continue to deliver timely and accurate wholesale bills and endeavor to remedy wholesale billing disputes expeditiously. Qwest has voluntarily committed to proposing additional performance metrics for measuring billing dispute timeliness.[469] These new performance measurements, for dispute-

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[464] Department of Justice Qwest III Evaluation at 8.

[465] Qwest July 10 *Ex Parte* Letter at 2 (discussing Qwest BOS billing).

[466] *Id.* Notably, AT&T acknowledges that it transmitted BOS test files for UNE-platform during June 2002. AT&T Qwest I Finnegan, Connolly and Menezes Decl. at para. 234.

[467] WorldCom Qwest I Lichtenberg Decl. at para. 70.

[468] *See, i.e.*, AT&T Qwest III Comments at 63, App. Tab E, Finnegan/Connolly/Wilson Decl. at paras. 75-115; Qwest III Notarianni/Doherty Reply Decl at paras. 134-139; Letter from Yaron Dori, Counsel for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148 and 02-189 (filed September 4, 2002) (Qwest Sept. 4b *Ex Parte* Letter); Letter from R. Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Oct. 11, 2002) (Qwest Oct.11a *Ex Parte* Letter).

[469] Letter from Anthony Luis Miranda, Counsel for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148, at 1-4 (filed August 2, 2002) (Qwest August 2d *Ex Parte* Letter). Qwest has committed to submitting the proposed billing PID BI-5 to competitive LECs and state commission staff as part of the ROC's long term section 271 PID administration process. *Id.* at 3-4; *see also* Qwest I Notarianni and Doherty Reply Decl. at para. 226 (stating that "Qwest will submit the proposed PID to Long Term PID Administration").

acknowledgement timeliness[470] and dispute-resolution timeliness,[471] represent important steps in ensuring that any billing errors are resolved in a timely fashion.

(iii) Billing Performance

127. *Commercial Usage.* Qwest's performance data demonstrate its ability to provide competitive LECs with service usage information in substantially the same time and manner that Qwest provides such information to itself, as well as wholesale bills in a manner that gives competitive LECs a meaningful opportunity to compete. Qwest consistently has met, with a few minor disparities which are addressed below, the benchmarks for timeliness, accuracy, and completeness in delivering service usage information and wholesale bills.[472] In addition, in finding that competitive LECs in the nine application states have a meaningful opportunity to compete, we rely on successful third party testing of Qwest's billing systems.[473]

128. AT&T challenges the commercial reliability of Qwest's wholesale bill.[474] AT&T contends that Qwest's own reported data on billing accuracy and bill completeness confirm that Qwest falls short of its obligation to provide nondiscriminatory access.[475] Although Qwest missed the parity standard for UNE and Resale billing completeness in Colorado, Idaho, Utah,

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[470] Draft PID BI-5A measures the number of billing adjustment claims acknowledged during the month that are acknowledged within two business days after receipt. Qwest August 2d *Ex Parte* Letter at Att. 1. In June 2002, Qwest tracked this PID internally and reports a result of 90%. That figure rises to approximately 97% when one competitive LEC's results are removed from the calculation. The service representative for this competitive LEC was unaware of the 2-day acknowledgement requirement and "assumed that acknowledgement could accompany resolution within 28 calendar days." *Id.* at 2. Nonetheless, while we do not rely on Qwest's internal unaudited measurements, we are encouraged that Qwest has already begun to track its performance of BI-5. For the four-month period covering June through September 2002, Qwest missed the 95% benchmark in June and in July. Qwest's performance improved markedly in the two most recent months, where it exceeded the benchmark.

[471] Draft PID BI-5B measures the number of billing adjustment claims acknowledged during the month that are resolved within 28 days after acknowledgement. Qwest August 2d *Ex Parte* Letter at Att. 1. In June 2002, Qwest tracked draft BI-5B internally and reports that it successfully resolved 97 of 102 disputes (95%) within 28 calendar days of the acknowledgement, with an average resolution timeframe of 20.7 days. *Id.* at 3. Although we do not rely on Qwest's internal unaudited measurements, we are encouraged that Qwest has already begun to track billing dispute resolution performance and note that the record does not reflect any significant competitive LEC concerns regarding billing dispute resolution. For the four-month period covering June through September 2002, Qwest missed the 95% benchmark in June and in July. Qwest's performance improved markedly in the two most recent months, where it exceeded the benchmark.

[472] The following PIDs were used to evaluate Qwest's billing performance: BI-1 Time to Provide Recorded Usage Records; BI-2 Invoices Delivered Within 10 Days; BI-3 Billing Accuracy-Adjustment for Errors; and BI-4 Billing Completeness.

[473] KPMG Final Report at 407-80 (providing results of KPMG billing system tests).

[474] AT&T Qwest I Comments at 44.

[475] *Id.* at 46.

and Wyoming for the previous four months, the performance disparity was minimal.[476] Accordingly, we find that despite the *de minimis* difference in errors between Qwest's retail and wholesale bills, competitors have a meaningful opportunity to compete.

129. Qwest's billing accuracy performance, with few exceptions, is also sufficient.[477] Although Qwest missed the benchmark for UNE and resale billing accuracy in Washington[478] for three out of the last four months, the record demonstrates that Qwest's misses in July, August, and September in Washington were related to one time rate errors that are not likely to reoccur.[479] Qwest's other miss in Washington was *de minimis*, with Qwest performing at above 95% in June 2002. We are persuaded that these misses have been satisfactorily corrected and do not affect a competitive LEC's ability to compete.

130. We reject Eschelon's numerous assertions that Qwest's bills are not accurate.[480] As discussed above, Qwest's commercial performance demonstrates that Qwest's commercial performance is adequate. To the extent Eschelon asserts that Qwest's bills have contained "invalid rates" that are inconsistent with its interconnection agreements, Eschelon should pursue its contractual dispute resolution process or raise the issue before the appropriate state commission.[481] Finally, Eschelon's allegations regarding Qwest's "Billmate" system do not

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[476] Specifically, Qwest provides its retail customers approximately 2.05%, 1.27%, 1.98%, and 1.07% better service in this category than it provided Colorado, Idaho, Utah, and Wyoming competitive LECs, respectively. Similarly, in Iowa, and Montana, Qwest missed the same metric for two of the last four months, with the difference in performance amounting to approximately 0.79% and 0.07% in each state, respectively. BI-4A evaluates the completeness with which Qwest reflects non-recurring and recurring charges associated with completed service orders on bills.

[477] The Department of Justice states that "[o]n the whole, Qwest's commercial performance and the third-party testing has satisfied the Department that, despite limited problems, Qwest's wholesale billing meets the requirements for accuracy." Department of Justice Qwest I Evaluation at 25, n.116.

[478] In addition, Qwest missed parity for BI-3A (Billing Accuracy – Adjustments for Errors, UNEs/Resale) in Iowa, North Dakota, Nebraska, and Utah in three of the last four months. The record demonstrates that Qwest's misses in Iowa, North Dakota, and Utah were *de minimis*, with Qwest's averaging 1.59%, 1.09%, and 0.68% better performance for retail in Iowa, North Dakota, and Utah respectively, in the previous four months. In addition, Qwest's performance in Nebraska was within one percentage point of parity in two of the three months it missed. In August, 2002, Qwest demonstrates that it missed parity because it included a timely cost docket implementation in its reporting that should have been excluded. Qwest Nov. 8b *Ex Parte* Letter at 1-2.

[479] *Id.* at 2; Letter from R. Hance Haney, Executive Director – Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 20, 2002) (Qwest Nov. 20a *Ex Parte* Letter).

[480] Eschelon Qwest I Comments at 22-24.

[481] *See id.* at 22; see also Letter from Karen L. Clauson, Senior Director of Interconnection, Eschelon Telecom Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 4, 2002) (Eschelon Dec. 4 *Ex Parte* Letter) at exh. 46 (raising similar billing issues before the Arizona Corporation Commission). Further, Eschelon's allegations regarding the bills for UNE-Eschelon/UNE-Star appear to be disputes between parties, and more appropriate for the interconnection dispute resolution process. *Id.* at 22-23. Similarly, while Eschelon argues broadly that Qwest's practice of informing competing LECs of rate changes is (continued....)

contain enough detail for this Commission to make a determination. Eschelon, for example, does not provide sufficient information regarding the data it considers necessary, but missing, from Billmate, or how the lack of such data harms Eschelon.[482]

131. *Third-Party Testing.* Our conclusions are bolstered by KPMG's third-party studies of Qwest's billing systems, processes and performance: Notably, KPMG concluded that Qwest can create and distribute bills to competitive LECs in an accurate and timely fashion.[483] Contrary to AT&T's claims that KPMG reviewed inaccurate and unreliable data,[484] we find that KPMG's data reconciliation sufficiently established the integrity of billing data.[485] KPMG's review provides relevant evidence of Qwest's billing performance to supplement the commercial performance data that Qwest has presented.

e. Change Management

(i) Change Management Process

132. In previous section 271 orders, the Commission has explained that it must review the BOC's change management procedures to determine whether these procedures afford an efficient competitor a meaningful opportunity to compete by providing sufficient access to the BOC's OSS.[486] In evaluating whether a BOC's change management plan affords an efficient competitor a meaningful opportunity to compete, we first assess whether the plan is adequate by determining whether the evidence demonstrates: (1) that information relating to the change management process is clearly organized and readily accessible to competing carriers; (2) that competing carriers had substantial input in the design and continued operation of the change management process; (3) that the change management plan defines a procedure for the timely resolution of change management disputes; (4) the availability of a stable testing environment that mirrors production; and (5) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway.[487] After determining whether the BOC's change

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imperfect, *see id.* at 18-19, it does not suggest that Qwest's actions violate any of its stated procedures or demonstrate that Qwest's policies deny it a meaningful opportunity to compete.

482 *See id.* at 22.

483 KPMG Final Report at 16.

484 AT&T Qwest I Comments at 47-48 (arguing that Qwest's manual processing of orders negatively affected data). WorldCom claims that the data are flawed because "presumably" Qwest lacks sufficient internal checks to verify the validity of its bills. WorldCom Qwest I Comments at 18. We disagree and find that KPMG's test provides adequate assurance that Qwest's internal processes are sufficient. *See, e.g.*, KPMG Final Report at 424 (referencing 19.6-1-4).

485 *Id.* at 19.

486 *Bell Atlantic New York Order*, 15 FCC Rcd at 3999-4000, paras. 102-03; *SWBT Texas Order*, 15 FCC Rcd at 18403-04, paras. 106-08.

487 *SWBT Texas Order*, 15 FCC Rcd at 18404, para. 108. We have noted previously that we are open to consideration of change management plans that differ from those already found to be compliant with the
(continued....)

management plan is adequate, we evaluate whether the BOC has demonstrated a pattern of compliance with this plan.[488]

(ii) Adequacy of the Change Management Process

133. *Organization and Accessibility.* We find that Qwest's current Change Management Process ("CMP") is clearly drafted, well organized, and accessible.[489] Qwest's CMP was created as a result of an extensive collaborative effort beginning in 1999 between Qwest and competitive LECs.[490] Beginning in July 2001, Qwest began replacing its former Co-provider Industry Change Management Process ("CICMP") with the collaboratively designed CMP.[491] Qwest's CMP is memorialized in a single document entitled "Qwest Wholesale Change Management Process Document" and is available on Qwest's website.[492] We find that Qwest, through the CMP, effectively processes and communicates to competitive LECs "any changes in Qwest's OSS interfaces and to products and processes that are within the scope of the CMP."[493]

134. *Competing Carrier Input.* We find in particular that Qwest's CMP provides competitive carriers with substantial opportunities to address Qwest-proposed changes and to

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requirements of section 271. *Bell Atlantic New York* Order, 15 FCC Rcd at 4004, para. 111; *SWBT Texas Order*, 15 FCC Rcd at 18404, para. 109.

488 *Bell Atlantic New York* Order, 15 FCC Rcd at 3999, 4004-05, paras. 101, 112.

489 Qwest I Application App. A, Tab 11, Declaration of Dana L. Filip (Qwest I Filip Decl). at paras. 24-25; Colorado Commission Qwest I Comments at 49 (concluding that "Qwest clearly meets this element of the FCC's test").

490 Qwest I Filip Decl. at para. 4. We note that the Colorado Commission states that Qwest has in place the most comprehensive, inclusive, and forward-looking change management plan in the nation. Colorado Commission Qwest I Comments at 45.

491 KPMG Final Report at 17. Qwest's CMP distinguishes between the Systems CMP that governs changes to electronic interfaces, and the Product/Process CMP that governs changes to wholesale products and processes. *Id.*

492 Qwest I Filip Decl. at paras. 3, 24-25. The most recent draft CMP document has been available for several months on Qwest's website and is described by the Colorado Commission as being clearly written. Colorado Commission Qwest I Comments at 49. Moreover, Qwest and competing carriers jointly determined the contents of the CMP document during the redesign process. Colorado Commission Qwest I Comments at 49. The North Dakota Commission describes Qwest's CMP as clearly organized, readily accessible via Qwest's website, and containing a wealth of information including schedule of meetings and the status of requests. North Dakota Commission Qwest I Comments, Consultative Report at 172-73.

493 Qwest I Filip Decl. at para. 4. We also note that the Commission has recognized that changes that do not impact OSS interfaces are not necessarily required to be a part of a change management process. *Verizon Pennsylvania Order*, 16 FCC Rcd at 17451, para. 51 (accepting Verizon's argument that "the changes to the BOS BDT billing systems are 'back-office' OSS changes that do not impact OSS interfaces"). Nonetheless, Qwest has expanded its CMP process to include products and processes as well as changes to OSS interfaces.

initiate their own changes.[494] That is, the CMP was created with, and provides for substantial input from, competitive LECs.[495] As noted in previous section 271 applications, "a key component of an effective change management process is the existence of a forum in which both competing carriers and the BOC can work collaboratively to improve the method by which changes to the BOC's OSS are implemented."[496] Here, Qwest's CMP provides a collaborative process in which competitive LECs are closely involved.[497] We encourage Qwest to continue to collaborate with competitive LECs through this important process.[498]

135. As part of the change management process, competitive LECs and Qwest meet at least two days a month to consider changes to the CMP.[499] In addition to providing a forum for upcoming releases, competitive carriers may both discuss change requests and prioritize requests at these meetings.[500] Competitive LECs are able to initiate a change request by e-mailing a completed change request form (which is available on the CMP website with detailed instructions) to Qwest's Systems CMP Manager.[501] Qwest's CMP Manager acknowledges receipt within two business days and within two more business days is responsible for posting the request to the CMP website and returning to the request originator a detailed report

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[494] Qwest I Filip Decl. at para. 4. The Nebraska Commission found that competing carriers have had, and shall continue to have, substantial opportunities for meaningful input into the design and operation of Qwest's change management process. Nebraska Commission Qwest I Comments at 7.

[495] KPMG Final Report at 508 (describing the CMP collaborative process).

[496] *SWBT Texas Order*, 15 FCC Rcd at 18410, para. 117.

[497] In addition to the numerous opportunities, described herein, that competitive carriers have to communicate with Qwest regarding the CMP, the Colorado Commission informs us that the participants in the CMP redesign process have met in-person a total of 45 days in the last year with several carriers actively participating. Colorado Commission Qwest I Comments at 49. The Iowa Board found, in particular, that Qwest's CMP provides an effective forum for competitive LECs and Qwest to discuss and implement changes to Qwest's products, technical documentation, OSS interfaces, and processes that would result in changes to competing carrier operating procedures. Qwest I Application App. C, Vol. 1, Tab 15, IUB Conditional Statement Regarding Change Management Process Compliance at 8-9. Based on the evidence in the record, we are not persuaded by Eschelon's assertion that the change management process was "completed in a manner that precluded full review and participation, especially for small carriers." Eschelon Qwest I Comments at 27.

[498] We reject AT&T's claims that Qwest has not completed the collaborative redesign process. AT&T Qwest I Finnegan/Connolly/Menezes Decl. at paras. 16-17. The issues AT&T raises -- manual work-around processes and CMP voting procedures -- have been resolved and resolution of these issues demonstrates that competitive LECs are able to successfully request changes through Qwest's CMP. Qwest I Reply at 55–56.

[499] Qwest I Filip Decl. at para. 4. The minutes from these meetings are posted on Qwest's CMP website and are regularly distributed to competitive LECs. *Id.; see also* North Dakota Commission Qwest I Comments, Consultative Report at 172-73 (describing the collaborative meetings).

[500] Qwest I Filip Decl. at paras. 4-5. We note that no commenter has questioned the effectiveness of the collaborative nature of this process. Nor has any commenter argued that Qwest does not adhere to the collaborative meeting schedule.

[501] *Id.*

designating various Qwest subject matter experts, responsible directors, and the assigned request project manager.[502] Within eight business days of receipt of the completed change requests, Qwest holds a clarification meeting with the request originator. If the request is received within three weeks of a scheduled CMP meeting, the request is presented at the meeting.[503] Subsequently, depending on the OSS function affected by the change request, parties are invited to submit written comments and Qwest renders a decision pursuant to various defined schedules.[504] We find that by providing this defined schedule of intervals and responsible personnel, Qwest demonstrates that it provides competitive LECs with an adequate opportunity to provide substantial input in the change management process.

136. *Dispute Resolution.* Additionally, we find that the Qwest CMP provides a sufficient mechanism for resolving impasses between Qwest and competitive LECs.[505] The CMP provides a detailed process for escalations whereby a Qwest employee (Director or above) is assigned to the escalation.[506] In the event the competitive LEC wishes to further dispute an issue, there is a defined dispute resolution process which provides for arbitration, mediation, or submission to the appropriate regulatory agency.[507]

137. *Testing Environment.* We find that Qwest's Stand Alone Test Environment ("SATE") provides competing carriers with a sufficient testing environment to successfully adapt to changes in Qwest's OSS.[508] Although we recognize that SATE was not fully tested by

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502 *Id.*

503 *Id.* at paras. 28-29.

504 *Id.* at paras. 51-70.

505 *SWBT Texas Order*, 15 FCC Rcd at 18404, para. 108.

506 Qwest I Filip Decl. at para. 91.

507 *Id.* at paras. 91-93. The CMP also has an "exception process" whereby Qwest or a competitive LEC can request a deviation from the CMP. *Id.* at para. 48.

508 *Bell Atlantic New York Order*, 15 FCC Rcd at 4002-03, para. 109. Prior to August 2001, Qwest supported only its Interoperability test environment for competing carriers testing an EDI interface. In response to KPMG identifying several deficiencies with Interoperability, Qwest implemented the SATE on August 1, 2001. Qwest I Notarianni and Doherty Decl. at para. 717. Due to the then relatively recent release of Version 9.0 of SATE on January 28, 2002, however, KPMG was unable to conduct a transaction-based test of SATE. Thus, KPMG was unable to conclude whether SATE supports flow-through transactions. KPMG Report at 580-81 (referencing Test 24.6-1-8 and describing Exception 3077 which was closed unresolved). Qwest asserts, however, and we agree that the addition of Virtual Interconnect Center Knowledge Initiator ("VICKI"), which provides post-order response capability, in January 2002 and flow-through capabilities in May 2002 address many of KPMG's concerns in Exception 3077. Qwest July 19 *Ex Parte* Letter at 10 (citing confidential version); *see also* Qwest I Notarianni and Doherty Decl. at para. 723. Further, we note that the Colorado Commission states that it has adequately addressed this issue in requiring a new PID, PO-19, to be added to the performance plan that will measure production mirroring. Colorado Commission Qwest I Comments at 50-52. Therefore, we examine the record to consider whether SATE incorporates the requisite functionalities and to determine whether competitive LECs are actually entering production by using SATE.

KPMG, we find that commercial activity shows that Qwest provides an adequate testing environment that mirrors production.[509]

138. Competing carrier commercial activity demonstrates that SATE currently allows carriers to successfully test their EDI interfaces in SATE and enter production.[510] Qwest states that, as of July 9, 2002, eleven competitive LECs, with an additional five through third-party vendors, have successfully tested in SATE and entered production.[511] We also note that Qwest provides competitive LECs with several tools to implement SATE, including a technical support staff, an interface testing users' group that meets regularly as part of the change management process, and extensive documentation on SATE implementation.[512]

139. We find that the record demonstrates that SATE allows competitive LECs to electronically test their OSS interfaces by submitting pre-defined test scenarios that are intended to mirror production responses.[513] We reject claims that SATE does not mirror the production environment's responses because it does not provide identical responses to all submissions.[514]

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509 In reaching our conclusion, we note the findings of HP's review of SATE as part of the Arizona Commission's evaluation. In its evaluation, HP concluded that "the Qwest SATE is adequate to support New Release Testing by a [competitive LEC]." Qwest I Application App. A, Tab 10, Exhibit LN-OSS-77, SATE New Release Test Summary Report, at 11; *see also* Qwest I Notarianni and Doherty Decl. at para. 751 (addressing the Arizona HP test results). HP also noted that competitive LECs "appear to be successful in using SATE and many [competitive LECs] appear to be migrating to using the SATE rather than Qwest's Interoperability." *Id.* We note that HP did not, however, conduct an evaluation of production mirroring for Version 9.0. Instead, HP developed a series of recommendations aimed at ensuring that SATE remains adequate for supporting new releases. HP recommended that Qwest create additional documentation identifying business rule changes and documentation defining the resolution process for production mirror issues. *Id.* As addressed in our discussion of CMP documentation, the record reflects that Qwest has provided these documents to competitive LECs on its website.

510 Qwest I Notarianni and Doherty Decl. at para. 740.

511 Qwest July 19 *Ex Parte* Letter at 13; *see also* Qwest I Notarianni and Doherty Reply Decl. at para. 245. Notably, Qwest submitted a letter from a third party software vendor, Nightfire, that develops interfaces for competitive LECs. *Id.*, Attachment B. Nightfire states that it has successfully tested, for five competitive LECs, the following Qwest products in SATE: Resale POTS, Unbundled Loops, Number Portability, Loop with Number Portability, Sub Loops, Line Sharing, and UNE-P POTS. *Id.* Similarly, SWBT demonstrated that several carriers utilized its testing environment. *SWBT Texas Order*, 15 FCC Rcd at 18411-12, para. 120.

512 Qwest I Notarianni and Doherty Decl. at para. 720; Qwest July 19 *Ex Parte* Letter at 11 (describing SATE documentation provided to competitive LECs) (citing confidential version).

513 Qwest I Notarianni and Doherty Decl. at para. 718; Qwest July 19 *Ex Parte* Letter at 8-9 (describing the differences between SATE responses and production responses) (citing confidential version).

514 WorldCom Qwest I Comments at 21. We also find that Qwest provides a stable testing environment because it makes no changes to the test environment (other than "bug" fixes – production support changes necessary to correct software problems that are identified during the pre-implementation testing period prior to implementing a major release) during the 30-day period prior to implementation of a new release. Qwest I Notarianni and Doherty Decl. at para. 731 (referencing KPMG's findings that Qwest makes SATE available to competitive LECs approximately 30 calendar days prior to production); Qwest Nov. 6 *Ex Parte* Letter at 3 (defining "bug"). This requirement is documented in the CMP under "Change to Existing OSS Interfaces." *Id.*

To the contrary, in the *SWBT Texas 271 Order*, the Commission held its mirroring requirement does not mandate that the testing environment provide a set of responses identical to the production environment.[515] Instead, a BOC's testing environment must perform the same key functions.[516] Here, SATE returns all IMA-EDI generated production error messages, as well as "commonly triggered" legacy system errors.[517] Qwest acknowledges that SATE does not provide identical responses to every possible scenario.[518] That is, SATE does not provide every possible error response in Qwest's legacy system, but rather provides a response that indicates the type of error submitted. Competitive LECs are then able to use Qwest's documentation to determine the cause of the error response.[519] In order for competitive LECs to determine what a particular response represents, Qwest documents and makes available all known differences between SATE and the production environment.[520] In addition, Qwest has offered to add to SATE any error message or test scenario that a competitive LEC requests.[521] Accordingly, we conclude that SATE is designed to ensure that competitive LECs' EDI interfaces can communicate with Qwest's systems regarding key functionalities and to allow real-world orders to be tested.[522]

140. Lastly, we find that Qwest provides competitive LECs with the ability to migrate to an updated version of its testing environment, *i.e.*, "versioning." In reviewing a section 271 application, the Commission looks for mechanisms to ensure the timely and effective transition from one testing environment software release to another, thus showing that competitors have a meaningful opportunity to compete.[523] Qwest's versioning process, which allows use of a prior SATE release even after implementation of a new release in order to provide flexibility on the timing of migrating to the new release, provides a sufficient mechanism to protect competing carriers from premature cut-overs and disruptive changes to their OSS interfaces.[524] Qwest

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515 *SWBT Texas Order*, 15 FCC Rcd at 18421, para. 138.

516 *Id.*

517 Qwest I Notarianni and Doherty Decl. at para. 736.

518 *Id.* at paras. 736-37.

519 Qwest July 19 *Ex Parte* Letter at 7-8 (describing SATE legacy error messages) (citing confidential version).

520 Qwest July 19 *Ex Parte* Letter at 11 (citing confidential version).

521 *Id.* Qwest states that no competitive LEC has requested that any additional error messages be added to SATE. *Id.*

522 *See* Qwest July 19 *Ex Parte* Letter at 7 (citing confidential version).

523 *SWBT Texas Order*, 15 FCC Rcd at 18408, para. 115. While a change management process must include assurances that changes to existing OSS interfaces will not disrupt competing carriers' use of the BOC's OSS, the Commission has not required any particular safeguard. *See Bell Atlantic New York Order*, 15 FCC Rcd at 4004-05, para. 110; *SWBT Texas Order* 15 FCC Rcd at 18406, para. 112.

524 Qwest I Notarianni and Doherty Decl. at para. 732.

makes SATE available for an extended testing period, allowing competitive LECs to test a new EDI release for thirty days prior to and, on average, six months after the introduction of the next release.[525] We encourage Qwest to continue this practice, and to accept and consider any input from competitive LECs regarding software problems they discover during testing before Qwest decides to implement a new software release.

141. We also reject claims that SATE is inadequate because it does not enable competitive LECs to test all of Qwest's products.[526] The record reflects that SATE generally allows competitive LECs to test all products that are presently being ordered and to add new products as needed.[527] Although Qwest admits that certain products are not yet available for testing in SATE,[528] SATE was collaboratively designed with competitive carriers prioritizing the products that would be initially offered.[529] The few remaining products not yet available in SATE presently are not being ordered in significant quantities by competitive LECs.[530] Moreover, competitive LECs are able to request that new products be added to SATE through the change management process.[531]

142. Similarly, we reject claims that SATE is inadequate because the directory listing function does not exist in SATE and that the test deck only includes the simplest of order types.[532] With respect to the directory listing function, Qwest explains that, contrary to WorldCom's assertion, the pre-order directory listing information is included on the SATE test

525 *Id.*

526 *See, e.g.*, AT&T Qwest III Comments at 64-65; WorldCom Qwest I Comments at 21-22.

527 Qwest I Notarianni and Doherty Decl. at paras. 747, 765-69.

528 *Id.* at para. 766. Qwest notes that it proposed in May 2002 to add an extensive list of products to SATE, with competitive LECs showing little or no interest in adding 14 of Qwest's proposed products. *Id.* at paras. 767-68.

529 *Id.* at paras. 718, 721.

530 Qwest Nov. 6 *Ex Parte* Letter at 3.

531 We reject AT&T's argument that use of the change management process to request that new products be added to SATE denies competing LECs an opportunity to compete. AT&T Qwest III Comments at 65, App. Tab E, Declaration of John Finnegan, Timothy Connolly and Kenneth Wilson at paras. 118-119 (AT&T Qwest III Finnegan/Connolly/Wilson Decl.). As discussed herein, we find that Qwest's change management process provides competitive LECs an opportunity to request changes to Qwest's OSS. Qwest explains that it reached a compromise with AT&T on September 30, 2002 which mandates that Qwest use a threshold of 100 EDI transactions in the production environment during the previous 12 months to calculate which products to add to SATE. This issue and compromise is an impasse issue that is pending before the Arizona Corporation Commission. Qwest III Notarianni & Doherty Reply Decl. at para. 166. *See also* Qwest Nov. 6 *Ex Parte* Letter. Accordingly, AT&T's concerns should be minimized as Qwest will automatically be adding frequently ordered products, without need to resort to the change management process.

532 WorldCom Qwest III Comments at 16; Letter from Lori Wright, Associate Counsel, WorldCom, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 6, 2002) at 5,12 (WorldCom Nov. 6 *Ex Parte* Letter).

scenario CSR, thus allowing competitive LECs to test ordering functionality related to directory listings.[533] In addition, Qwest added the capability of running the pre-order test listings reconciliation query to SATE in IMA release 11.0 on October 19, 2002, pursuant to a change request prioritized through the CMP.[534] Finally, although WorldCom's request with respect to directory listing information was only added in October, 2002, competing LECs are also able to test the facilities based directory listing capability through the Interoperability test environment.[535]

143. With respect to WorldCom's concerns regarding test scenarios, we conclude that the record demonstrates that Qwest's practice of adding test scenarios for competing LECs upon request adequately addresses WorldCom's concern. The record demonstrates that Qwest's practice of adding test scenarios for competing LECs upon request allows competing LECs to test scenarios based on their individual business needs, while ensuring that the data document is not constantly changing.[536] WorldCom asserts that this practice results in harm to competitive LECs because they may be unaware that such test scenarios exist and bear the consequences in production.[537] We find, however, that the record belies this concern; competitive LECs were aware of this approach and agreed to it, indicating that other LECs do not share WorldCom's concern.[538] We are also comforted by Qwest's practice of adding test scenarios that are requested by multiple competitive LECs to the test deck.

144. *Documentation Adequacy.* As discussed above in the section addressing *Organization and Accessibility* of the CMP, we find that Qwest provides sufficient

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[533] Qwest III Notarianni & Doherty Reply Decl. at para. 169. See also Letter from R. Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 14, 2002) (Qwest Nov. 14a *Ex Parte* Letter). In fact, WorldCom ultimately determined that it could obtain directory listing information in the manner described by Qwest. However, WorldCom asserts that Qwest's method for obtaining directory listing information requires that WorldCom develop "complex logic" and that such a process would be difficult, expensive, and time consuming. WorldCom Nov. 6 *Ex Parte* Letter at 5. Accordingly, we find that Qwest does make directory listing information available to competitive LECs in a nondiscriminatory manner. Although WorldCom alleges that Qwest's manner of making such information available may cause competitive LECs to incur development expenses, WorldCom presents no evidence that such costs are competitively significant or discriminatory.

[534] Qwest III Notarianni & Doherty Reply Decl. at para. 168.

[535] *Id.* Indeed, the record demonstrates that several competing LECs have used the Interoperability test environment for testing Facility Based Directory Listings and are in production for these products. *Id.* at n. 262.

[536] Qwest states that it currently does not add test scenarios that are requested by a single competitive LEC to the current or future SATE versions, which would make such test scenarios available to all competitive LECs, because the infinite number of test scenarios threatens to clutter the SATE Data Document with unnecessary test scenarios created at the request of individual competitive LECs. *Id.* at paras. 171-172. *See also* Qwest Nov. 6 *Ex Parte* Letter at 1-2.

[537] WorldCom Qwest III Comments at 17.

[538] Qwest Nov. 6 *Ex Parte* Letter at 2.

documentation to allow competitive LECs to design their OSS interfaces. We agree with the Colorado Commission that the documentation supplied to competing carriers by Qwest is robust.[539] Qwest provides competing carriers with an EDI development process, interface specifications, technical specifications, change notifications and an actual walk-through if requested.[540] We base our decision that Qwest provides adequate documentation in large part on Qwest's demonstration, discussed above, that several competitive carriers are using electronic interfaces in production.

(iii) Adherence to the Change Management Process

145. We find that Qwest demonstrates that it adequately adheres to the CMP.[541] Although KPMG did not perform a third-party test of Qwest's adherence to its CMP, we rely on the findings of the commissions of the nine application states in finding that Qwest follows its documented processes. As in previous section 271 decisions, we consider whether the BOC accepts change requests, whether the BOC adheres to its CMP by demonstrating it implements change requests prioritized by competing carriers, and whether the BOC establishes a pattern of compliance with its CMP's intervals for notification of system changes.[542]

146. In reaching our conclusion, we rely on the findings of the state commissions, which closely participated in the CMP process. According to the evidence, Qwest conducts monthly meetings with competing carriers, tracks and documents change requests, discusses its responses during the monthly CMP meetings, modifies responses based on competing carrier input when appropriate, and provides competing carriers web-based access to change requests and related documentation.[543]

[539] Colorado Commission Qwest I Comments at 52.

[540] *Id.* We recognize that, because discussions between Qwest and competitive LECs regarding CMP changes are ongoing and will continue to be for the foreseeable future, KPMG was unable to review certain aspects of CMP, which were either too new, or not yet mature enough to evaluate. KPMG Final Report at 17. Accordingly, KPMG was not able to verify that Qwest has defined and documented all aspects of the new CMP. *Id.*

[541] The Colorado Commission concluded that Qwest's CMP is sufficiently in place and documented. Colorado Commission Qwest I Comments at 48. The Colorado Commission argues that, although KPMG could not determine, due to ongoing redesign negotiations, whether the CMP was fully implemented or documented, Qwest has already implemented and posted to its website processes that go beyond any change management process previously approved by this Commission. *Id.*

[542] *BellSouth Georgia/Louisiana Order* at paras. 192-96.

[543] North Dakota Commission Qwest I Comments, Consultative Report at 174. Further, the North Dakota Commission found that Qwest has developed and maintains a competing carrier and Qwest CMP point of contact list and has established a pattern of quickly implementing the agreements reached in the redesign process. *Id.*; *see also* Department of Justice Qwest I Evaluation at 26 n.122 (stating "no [competitive LEC] has alleged with specificity any Qwest failure to meet a CMP-mandated, [competitive LEC]-affecting deadline since establishment of the revised CMP").

147. We reject commenters' contentions that, because certain parts of the change management process were revised earlier this year, Qwest has not had an adequate opportunity to demonstrate a pattern of compliance.[544] In light of the robust change management process that has been collaboratively designed, and the fact that Qwest has met each milestone to date regarding implementation of the CMP,[545] we find that competitive LECs have a sufficient opportunity to participate in the change management process.[546] We base our decision here on the analysis of the commissions of the nine application states, the commercial performance data indicating that Qwest is successfully processing change requests, and the fact that Qwest has an adequate notification process in place, both through its website and through its monthly meetings.[547] We also rely on KPMG's conclusions that CMP responsibilities and activities are defined,[548] the CMP is in place and documented,[549] a framework exists to evaluate, categorize,

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[544] WorldCom Qwest I Comments at 19. *See also* Eschelon Qwest I Comments at 28. We note, however, that WorldCom recognizes that Qwest has "significantly improved" its CMP. WorldCom Qwest I Lichtenberg Decl. at paras. 3, 74-79 (recognizing that Qwest "has worked with CLECs in the last two years to significantly improve its OSS and to develop a third-party test of that OSS"). Although KPMG was unable to evaluate Qwest's adherence to three criteria measuring the implementation of the product and process change management process, the Colorado Commission's evaluation of these criteria since April 2002 found that Qwest adheres to this process. Colorado Commission Qwest I Comments at 48 (referencing test criteria 23-2-7, 23-2-8, and 23-2-9). We reject AT&T's claims that Qwest has not adhered to the CMP by failing to notify competitive LECs of Qwest's ability to provision ISDN loops with pair gain. AT&T Qwest I Finnegan/Connolly/Menezes Decl. at paras. 70-72. We find that this issue, at most, represents an isolated error on Qwest's part and, further, appears to have been sufficiently resolved. We also reject AT&T's claims regarding NC/NCI codes, local service freezes, and DUF returns. AT&T claims that these issues reflect a failure by Qwest to follow the CMP, yet AT&T does not identify which states these issues involve and, further, AT&T makes only general references to what part of the CMP Qwest violates. AT&T Qwest I Finnegan/Connolly/Menezes Decl. at paras. 73-82. We find that these issues are isolated incidents and appear to all have been resolved in a timely fashion. *Id.*

[545] Qwest I Filip Decl. at para. 144.

[546] *Id.* at paras. 143-44. AT&T claims that many of Qwest's milestones are "ministerial" and thus irrelevant to a finding of compliance. AT&T Qwest I Finnegan/Connolly/Menezes Decl. at paras. 48. We disagree, however, and find that many of the milestones that AT&T criticizes, such as conducting scheduled meetings, and diligently following each part of the change request process, are indeed the type of milestones we consider. *Id.* at 47. AT&T appears to ask us to reject these milestones because they do not demonstrate or reflect the "effectiveness" of such meetings. *Id.* at para. 49. To the contrary, there has been no objective measure proposed on this record that would capture the "effectiveness" of a meeting as AT&T apparently envisions. Moreover, the record does not reflect any contention that the meetings were not an appropriate part of the implementation of the change management process. Instead, we note that Qwest's CMP has a robust dispute resolution process that allows competitive LECs to escalate issues that are not effectively or adequately addressed at change request meetings. Further, in light of the state commissions' active participation in this process to date, we find it instructive that no commission has indicated that Qwest's milestones were insufficient.

[547] Qwest I Filip Decl. at para. 145. Qwest has conducted change management meetings with competitive LECs at least once a month since 1999. *Id.* at para. 147. Qwest distributes change request notifications at these meetings and also, *since August 2001, posts the minutes of these meetings on its website. Id.*

[548] KPMG Final Report at 513 (referencing Test 23-1-1).

and prioritize proposed changes,[550] the CMP includes procedures for allowing input from all interested parties,[551] and the CMP defines intervals for considering and notifying customers about proposed changes.[552] Lastly, we agree with the Department of Justice's conclusion that Qwest has demonstrated its compliance with the basic CMP elements that have been in place for more than nine months, as well as the procedures implemented after April 1, 2002.[553]

148. We reject claims that Qwest's actions over the course of the past few months demonstrate that Qwest does not adhere to its CMP.[554] Qwest, in fact, agrees that one of the instances cited by WorldCom was a violation of its CMP,[555] but persuasively argues that isolated instances of noncompliance with CMP are not sufficient to undercut the overall strong performance Qwest has demonstrated.[556] In addition, Qwest has met the benchmark for the relevant PID for each of the previous four months.[557]

149. We also reject claims that the CMP must be finalized before we can review a BOC's compliance. As of September 30, 2002, when the instant applications were filed, only small details remained to be discussed in the redesign process.[558] We agree with the Iowa Board that even though final language is not complete and the CMP is not perfected, the change management process is, by its very nature an evolving and dynamic process.[559] For purposes of

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549 KPMG Final Report at 514 (referencing Test 23-1-2). KPMG was able to observe, through change requests submitted by both Qwest and competitive LECs, all four types of system changes: regulatory; industry guideline; Qwest-originated; and competitive LEC-originated. *Id.*

550 KPMG Final Report at 514-15 (referencing Test 23-1-3).

551 KPMG Final Report at 516 (referencing Test 23-1-4).

552 KPMG Final Report at 517 (referencing Test 23-1-5). KPMG also concluded that documentation regarding CMP changes is properly distributed. KPMG Final Report at 517-18 (referencing Test 23-1-6).

553 Department of Justice Qwest I Evaluation at 26-27 (noting that the "CMP redesign and implementation is a dynamic process"). From June through September 2002, Qwest met over 100% of the milestones for processing Qwest-originated product and process change requests. Qwest III Reply App. A, Tab 18, Reply Declaration of Dana L. Filip (Qwest III Filip Reply Decl). at para. 6; Letter from R. Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket. No. 02-314 at 1 (filed Nov. 12, 2002) (Qwest Nov. 12a *Ex Parte* Letter). From June through September 2002, Qwest met 100% of the milestones for processing competitive LEC-initiated product and process change requests. Qwest III Filip Reply Decl. at para. 6; Qwest Nov. 12a *Ex Parte* Letter at 2.

554 WorldCom Qwest II Reply Comments at 13-15; WorldCom Qwest III Comments at 18.

555 *See* Qwest III Filip Reply Decl. at para. 12.

556 *Id.* at para. 8.

557 PO-16: Timely Release Notifications.

558 Qwest III Filip Reply Decl. at para. 5.

559 Qwest I Application App. C, Vol. 1, Tab 15, IUB Conditional Statement Regarding Change Management Process Compliance at 8-9; *see also* Department of Justice Qwest I Evaluation at 26.

this section 271 analysis, we find Qwest has presented a complete and organized CMP that is readily accessible to competing carriers in Qwest's SGAT and on Qwest's website.[560]

150. *Accepting Change Requests*. Qwest also demonstrates that it validates change requests for acceptance into the process in a timely manner and in accordance with the intervals specified in the CMP. Qwest notes that it has met 98% of its commitments in processing product and process change requests since November 2001.[561] Between June 1 and September 30, 2002, Qwest processed 60 OSS interface change requests.[562] During the same period, Qwest processed 16 competitive LEC-initiated product and process change requests.[563]

151. *Implementation of Prioritized Changes*. We also find that Qwest adheres to the CMP in part because Qwest demonstrates that it promptly implements change requests prioritized by competing carriers through the CMP.[564] We find that, as language was agreed to between Qwest and competitive carriers during the redesign process, this language was promptly added to the CMP and implemented by Qwest in a timely fashion.[565] We find that the bulk of the change management provisions have been in place for months and Qwest has adhered to these provisions.[566]

152. *Notification Adequacy and Timeliness*. We find that Qwest has established a pattern of compliance with the intervals established in the CMP for notification of a variety of

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[560] *Id.* Qwest maintains the most recent version of the change management process on its website and continues to file monthly change management status reports with the Iowa Board on meetings held with competing carriers to redesign the process. Iowa Board Qwest I Comments at 38-39.

[561] Qwest I Filip Decl. at para. 144.

[562] Qwest Nov. 12a *Ex Parte* Letter at 2.

[563] *Id.*

[564] The Colorado Commission found that Qwest adheres to the change management process, specifically with regard to defining standards for the prioritization system and for severity coding under test criterion 23-1-8. Colorado Commission Qwest I Comments at 47. Although KPMG reached an "unable to determine" result regarding this test, the Colorado Commission found that Qwest and the competing carriers have in fact sufficiently prioritized the IMA releases 10.0 and 11.0, and that the change in classification of change requests did not affect the prioritization process. Colorado Commission Qwest I Comments at 47. The Colorado Commission also notes that the Colorado performance plan has a 100% benchmark for initial and subsequent release notifications, carrying daily penalties ranging from $50 – 200 per day. *Id.* at 46-47. Qwest has met the benchmark in all of the previous four months for timely release notifications. *See* PO-16 (Timely Release Notifications).

[565] Because the CMP revision process is uniform across the nine application states, we rely on the finding of the Colorado Commission that Qwest demonstrates that it revises and implements changes to the CMP in a timely fashion. Colorado Commission Qwest I Comments at 52. The Colorado Commission also finds that Qwest has continued to follow the basic prioritization process for IMA releases 10.0 and 11.0. *Id.*

[566] Colorado Commission Qwest I Comments at 52-53.

system changes.[567] The commercial data reflect that Qwest has adequate performance with regard to timeliness of release notifications. In addition, Qwest has made significant improvements to its tracking and release notification internal procedures by designating a project manager to ensure release notifications are tracked and issued on a timely basis.[568]

f. Maintenance and Repair

153. Based on the evidence in the record, we conclude, as did the nine state commissions, that Qwest provides nondiscriminatory access to its maintenance and repair OSS functions.[569] We find that Qwest has "deployed the necessary interfaces, systems, and personnel to enable requesting carriers to access the same maintenance and repair functions" that Qwest provides itself.[570] Competing carriers have access to these functions in substantially the same time and manner as Qwest's retail operations, and with an equivalent level of quality.[571] Qwest demonstrates that competitive LECs have equivalent access to the same information as Qwest retail representatives[572] and the same access to maintenance and repair functionality as Qwest's retail operations.[573] Below, we briefly discuss how the commercial data[574] and the findings of

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[567] The Commission's prior section 271 orders recognize the importance of a BOC's provision of timely, complete, and accurate notice of alterations to its systems and processes and, therefore, the Commission requires that a BOC have "established a pattern of compliance with the relevant notification and documentation intervals in its Change Agreement." *SWBT Texas Order*, 15 FCC Rcd at 18415, para. 126.

[568] Qwest I Filip Decl. at para. 162-63. These new procedures became effective on April 1, 2002 with all subsequent release notifications being issued on a timely basis.

[569] *See, e.g.*, Montana Commission Qwest II Comments at 19-23; Utah Commission Qwest II Comments at 1; Washington Commission Qwest II Comments at 1, 33 (recommending approval of application generally; the Washington Commission Comments do not specifically address maintenance and repair); Wyoming Commission Qwest II Comments at 6.

[570] *Bell Atlantic New York Order*, 15 FCC Rcd at 4067, para. 211.

[571] *Bell Atlantic New York Order*, 15 FCC Rcd at 4067, para. 211.

[572] We reject any claims that Qwest must provide an application-to-application maintenance and repair interface. The Commission raised concerns in the *BellSouth Second Louisiana Order* about the importance of integrating maintenance and repair databases. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20694-96, paras. 149-52. More recently, however, the Commission found that "a BOC is not required, for the purpose of satisfying checklist item 2, to implement an application-to-application interface for maintenance and repair functions – provided it demonstrates that it provides equivalent access to its maintenance and repair functions in another manner." *Bell Atlantic New York Order*, 15 FCC Rcd at 4068, para. 215; *SWBT Texas Order*, 15 FCC Rcd at 18458 n.565. Nonetheless, while we do not require an application-to-application maintenance and repair interface here because Qwest provides equivalent access, we are encouraged by the Iowa Board's finding that Qwest maintains a test environment that is more than sufficient to enable competing carriers to successfully test their electronic interfaces with Qwest's maintenance and repair functions prior to production. Qwest I Application App. C, Vol. 1, Tab 15, IUB Conditional Statement Regarding Change Management Process Compliance at 16-18.

[573] *See Bell Atlantic New York Order*, 15 FCC Rcd at 4069-70, para. 215.

[574] We note that, in its comments, AT&T lists without elaboration various performance metrics missed by Qwest for particular months. *See* Section I, *supra*. Because AT&T neither provides specific evidence regarding these (continued....)

KPMG's third-party test demonstrate that Qwest's systems are functional and provide service to competitive LECs in a nondiscriminatory manner.[575]

154. *Commercial Data.* We conclude that the commercial data demonstrate that Qwest addresses trouble complaints for competing carriers in substantially the same time and manner that it addresses complaints from its own retail customers.[576] We base our conclusion on the fact that, for the months June through September 2002, Qwest missed few parity performance measures. Qwest's overall performance in promptly clearing out-of-service orders, clearing troubles in a timely fashion,[577] responding to customer calls on a timely basis,[578] restoring service,[579] and meeting repair appointments[580] indicates that Qwest performs these functions in substantially the same time and manner for both competitive LECs and Qwest's retail customers. We also note that the record reflects very few complaints from competitive LECs regarding Qwest's maintenance and repair performance.[581]

155. *Third Party Test.* The results of the Third Party Test demonstrate that Qwest is capable of providing competing LECs with maintenance and repair services in a

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missed metrics, nor demonstrates any harm or discrimination resulting from the misses, we do no find that the missed metrics listed by AT&T alter our conclusion that Qwest provides nondiscriminatory access to its maintenance and repair functions.

575 *See* KPMG Final Report at 16.

576 *Bell Atlantic New York Order*, 15 FCC Rcd at 4072, paras. 220-22.

577 MR-3 (Out of Service Cleared within 24 Hours); MR-4 (All Troubles Cleared within 48 Hours); MR-5 (All Troubles Cleared within 4 Hours).

578 MR-2 (Calls Answered within 20 Seconds – Interconnect Repair Center).

579 MR-6 (Mean Time to Restore).

580 MR-9 (Repair Appointments Met).

581 *But see* WorldCom Qwest I Comments at 16 (arguing that Qwest's "region wide" UNE-P repair performance is unsatisfactory). *See also* Eschelon Qwest I Comments at 9, arguing that Qwest is not prepared to deal with DSL repair issues. In particular, Eschelon claims that "Qwest has said it does not have back end system records containing the DSL technical information needed for repair of Centron/Centrex Plus lines with DSL." *Id.* However, the record indicates that Qwest developed a manual process to address this problem and that a change management request submitted by Eschelon for a mechanized solution is being investigated by Qwest. Qwest I Simpson Reply Decl. at paras. 3-5; Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 (filed August 19, 2002) (Qwest August 19a *Ex Parte* Letter). Eschelon observes that Qwest's manual workaround is only for orders on a going forward basis and that Qwest has not offered a solution for Eschelon's customers that already have DSL. Eschelon Qwest III Comments at 39. However, Qwest explains that it currently has approximately 20 accounts in service that meet the parameters of Eschelon's concern, and all of those accounts contain the required DSL information. Letter from R. Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-314 (filed Oct. 11, 2002) (Qwest Oct. 11d *Ex Parte* Letter). Accordingly, we find that Eschelon's concern is adequately addressed by Qwest and does not present a competitively significant problem.

nondiscriminatory manner.[582] Although KPMG identified four exceptions during its review that were closed as unresolved,[583] for the reasons discussed below, we find that none of these issues is competitively significant. First, KPMG noted that in the end-to-end trouble reporting process, problems arose involving the accuracy of closeout codes describing the nature and location of the UNE-P and Resale POTS repairs placed on trouble tickets by Qwest field technicians.[584] Qwest asserts, and we agree, that its performance rises to a satisfactory level when the trouble ticket's narrative field is viewed in conjunction with the closeout code.[585] That is, a proper determination regarding the nature and location of the trouble is far more likely to occur when the narrative description is taken into consideration. In addition, Qwest has instituted an internal audit process and additional training of its technicians to improve coding of trouble tickets.[586] In view of the rise in Qwest's performance when the narrative field is considered and its corrective actions, we find that Qwest's performance in this category, which involves an identical process for both retail and wholesale customers, provides competitive carriers with the same quality service Qwest provides itself.[587]

156. Similarly, KPMG found that Qwest's maintenance and repair records reflected UNE-P, Resale, and Centrex 21 repair information that was inconsistent with the nature of the actual faults introduced by KPMG.[588] In this "troubles" category, which is measured by a KPMG-set 95 percent standard, Qwest successfully repaired these services 92.28 percent of the time. We agree, however, with Qwest's assertion that the relevant consideration in this category is whether the repair process is identical for its retail and wholesale customers.[589] We find the process that KPMG reviewed is identical for competitive LECs and Qwest retail customers.[590] Moreover, we find Qwest's miss of less than 3 percent in comparison to KPMG's benchmark to be *de minimis* and competitively insignificant.

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582 Qwest I Application at 125-126; KPMG Report at 319-337, 344-345, 351-355, 363-385, 390-406, 658-667.

583 These four exceptions relate to Qwest's trouble reporting process.

584 Qwest I Application at 126; KPMG Final Report at 353-54 (referencing Test 18-6-1 and Exception 3055). We note that there was no PID (ROC established measure) for the test; KPMG established the 95% benchmark.

585 Qwest I Application at 126. Qwest's performance in this category rises from 88% to over 95% when the narrative field is considered. *Id.*

586 Qwest I Notarianni and Doherty Decl. at paras. 474-75.

587 We note the conclusion of the Idaho Commission that the correct information is usually contained in the narrative field. Idaho Commission Qwest I Comments at 10. While the Idaho Commission supports additional ongoing improvements in this area, it found that the current performance does not appear to prevent a competing carrier from having a meaningful opportunity to compete. *Id.*

588 Qwest I Application at 126-27; KPMG Final Report at 355 (referencing Test 18-7-1 and Exception 3058).

589 Qwest I Notarianni and Doherty Decl. at paras. 462, 479-80.

590 *Id.*

157. In addition, we find that the final two exceptions issued by KPMG, Exception 3053 where Qwest incorrectly entered only one out of ten total DS1 circuit trouble "close-out" codes, and Exception 3107 where Qwest missed the 24-second benchmark for processing non-design edit transactions by three seconds, to be *de minimis* in nature and not competitively significant.[591]

158. We reject AT&T's claim that Qwest fails to process competing carriers' trouble reports in a timely manner, that Qwest's fails to provide an adequate rate of successful repairs, and that Qwest fails to maintain adequate repair records for competing carriers.[592] We also reject AT&T's claim that Qwest fails to provide adequate access to maintenance and repair functions because its trouble rates for UNE-P customers are higher than for its own customers. As discussed herein, the commercial evidence demonstrates that Qwest has missed few measures and, further, that the differences in performance for the missed measures are not competitively significant.

159. Finally, Eschelon raises a series of complaints about Qwest's maintenance and repair capabilities, none of which rises to the level of an adverse checklist finding. Eschelon claims that, for unbundled loops, Qwest does not include circuit identification information in Eschelon's bills for maintenance and repair charges.[593] The resulting effect, Eschelon claims, is that if Eschelon has multiple trouble tickets for the same circuit identification number it is unable to itemize maintenance and repair charges for each trouble.[594] Because Eschelon does not provide any evidence that this practice is either discriminatory or unreasonable under our precedent, and because it does not appear that any coding errors are involved, we are unable to find such a practice, if true, to be competitively significant. Rather, it appears that this is an issue more appropriately addressed by submitting a change request to Qwest's change management process.

160. Eschelon also claims that Qwest fails to provide a statement of time, materials and charges at the time repair work is completed, as it does for its own customers.[595] Again, we find that Eschelon fails to demonstrate that this process is discriminatory or competitively significant, particularly given that Qwest offers a process for disputing repair bills and is currently considering a process change request submitted by Eschelon on this subject.[596] Eschelon also contends that Qwest closes tickets with the incorrect cause and disposition

[591] Qwest I Application at 127; Qwest I Notarianni and Doherty Decl. at paras. 462, 479-80.

[592] AT&T Qwest I Comments at 44.

[593] Eschelon Qwest I Comments at 14.

[594] *Id.*

[595] *Id.* at 12-13.

[596] Qwest III Application at 39; Qwest I Notarianni & Doherty Reply Decl. at para. 167.

codes.[597] Eschelon claims, without providing any additional information or detail, that bill verification becomes "virtually impossible" for bills that Eschelon considers "untimely."[598] In addition, Eschelon contends that many erroneous "NTFs" are charged to the competitive LEC.[599] Eschelon does not demonstrate that Qwest's billing result is competitively significant. To the contrary, Qwest states that "less than 0.1% of Qwest's wholesale billing is associated with" maintenance and repair charges."[600] Qwest further explains that it does not issue bills that are over 45 days old.[601] Eschelon's remaining issues similarly do not rise to the level of checklist non-compliance.[602]

g. Provisioning

161. Based on the evidence in the record and in accordance with the findings of the nine state commissions,[603] we find that Qwest provisions competitive LEC orders for UNE-platform and resale services in a nondiscriminatory manner in the nine application states.[604] Below, we briefly discuss Qwest commercial performance and KPMG's third-party test with regard to provisioning.

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597 Eschelon Qwest III Comments at 40-41. Eschelon states that for the week of September 9, 2002, 42 percent of design tickets Qwest coded as NTF were incorrectly coded. *Id.* Qwest states that its coding accuracy for the week of September 9, 2002 was 97 percent for total design troubles reported by Eschelon. Qwest III Application at 38. Given Eschelon's provision of what appears to be raw data (some of it regarding states not relevant to this proceeding) without additional explanation or supporting analysis (*see* Eschelon Qwest III Comments at Exhibit 36), we do not find evidence that Qwest makes coding errors that are discriminatory or competitively significant - particularly in light of KPMG's finding that Qwest adequately handled design trouble tickets during the third party test. *See* Qwest III Application at 38.

598 Eschelon Qwest I Comments at 14; Eschelon Qwest III Comments at 42.

599 Eschelon Qwest III Comments at 41-42.

600 Qwest I Notarianni & Doherty Reply Decl. at para. 238.

601 *Id.*

602 Eschelon also asserts that Qwest leaves branded billing statements with Eschelon's end users. *See* Eschelon Qwest I Comments at 13. Finally, in related issues, Eschelon complains about Qwest's policy regarding "optional" testing and associated charges. Eschelon Qwest I Comments at 15-16. However, Eschelon fails to demonstrate that Qwest's actions are unreasonable or to explain why Qwest's billing dispute resolution provides an inadequate remedy. Similarly, Eschelon complains, without providing any specific instances or details that "Qwest will not accept charges from Eschelon for testing that Eschelon conducts for Qwest." Eschelon Qwest I Comments at 16; Eschelon Qwest II Comments at 28. As the Commission has stated previously, it will not consider allegations in a section 271 proceeding that are not pleaded with specificity.

603 *See* Colorado Commission Qwest I Comments at 15-17; Idaho Commission Qwest I Comments at 5-12; Iowa Board Qwest I Comments at 27-41; Montana Commission Qwest II Comments at 17-23; Nebraska Commission Qwest I Comments at 9; North Dakota Commission Qwest I Comments at 16; Utah Commission Qwest II Comments at 1; Washington Commission Qwest II Comments at 12; Wyoming Commission Qwest II Comments at 6.

604 Provisioning of loops is covered under checklist item 4 discussion, *infra.*

(i) Commercial Data

162. We find that the commercial data demonstrate that Qwest provides nondiscriminatory access to UNE combos, UNE-platform, and resale. Qwest's wholesale performance reflects few missed benchmarks, with the few misses generally occurring in low volume categories.[605] Based on the evidence in the record, we reject AT&T's claim that Qwest is unable to provision orders for EELs adequately.[606] Although Qwest missed the benchmark for Colorado EELs installation commitments for all four months,[607] we find that the performance disparities do not appear to be competitively significant. When we consider the relatively small number of missed installations that cause Qwest to miss this benchmark in combination with Qwest's improved performance, we find that Qwest meets it obligation here.[608] Moreover, we are encouraged by the Colorado Commission's commitment to closely monitor Qwest's EELs performance.[609] Should Qwest's performance in this area deteriorate, we will pursue appropriate enforcement action.

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[605] *See* OP-3 (Installation Commitments Met), OP-4 (Installation Interval), OP-5 (New Service Installation Quality), OP-6A (Delayed Days for Non-Facility Reasons), and OP-6B (Delayed Days for Facility Reasons) for resale, UNE-platform, UNE-platform Centrex orders, and UNE combos in the nine-state region. We note that Qwest missed the parity standard for Washington for OP-5 (New Service Installation Quality) in June, July, August, and September for resale business lines, and in July for resale Centrex lines. However, we note that competing LEC volumes for resale Centrex in Washington are less than 10 in every month. Although there are significant volumes of resold business lines in Washington associated with the OP-5 misses, Qwest has noted these troubles and is addressing them. *See* Letter from Hance Haney, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 18, 2002) (Qwest Nov. 18c *Ex Parte* Letter) at 1-2. For example, Qwest has noted that 23% of the OP-5 trouble tickets are troubles associated with a non-inward line activity, such as billing-only type orders, that should not be captured in OP-5. *Id.* at 2. The metric will not include these troubles starting in November. *Id.* Other issues relating to OP-5 are discussed in the ordering section *supra*.

[606] *See* AT&T Qwest I Comments at 43, AT&T Qwest III Comments App. Tab F, Declaration of John F. Finnegan at paras. 49-51, 66, 100, 107.

[607] OP-3 (Installation Commitments Met, EELs). With a benchmark of 90%, Qwest's performance in Colorado for OP-3 is 87.34%, 80.15%, 82.90%, and 88.82% in June through September, 2002. Qwest also failed to meet the benchmark for this PID in Idaho and Utah in July, August, and September with Idaho showing (80%, 84.62%, 86.67%) and Utah showing (85.71%, 71.43%, 81.82 %). Qwest also missed in June and July in Washington (75%, 70%). However, the volume of orders in these states is less than 20 in any month.

[608] As the Commission has found in previous section 271 applications, performance data based on low volumes of orders or other transactions is not as reliable an indicator of checklist compliance as performance based on larger numbers of observations. It is thus not possible to place the same evidentiary weight upon – and draw the same types of conclusions from – performance data where volumes are low, as for data based on more robust activity. *See, e.g., SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6254, para. 36.

[609] Colorado Commission Qwest I Comments at 41-42. In addition, we note that Qwest recently instituted corrective measures which include retraining of its personnel and revisions to the methods and procedures documentation that are used by central office and field technicians. Qwest I Application, App. A, Tab 9, Declaration of Karen A. Stewart and Lori Simpson (Qwest I Stewart/Simpson Decl.) at paras. 95-96.

163. We reject claims that Qwest's wholesale provisioning intervals for UNE-platform orders are discriminatory.[610] Although Qwest misses the provisioning interval in several states,[611] we do not rely on Qwest's performance under the average completed interval metric as a measure of Qwest's timeliness in provisioning resale or UNE-platform Centrex. Instead, we conclude, as we have in prior section 271 orders,[612] that the missed appointment metric (or installation commitments met metric, as it is called in the Qwest territory), which Qwest passed in most months in the nine application states for both dispatch and non-dispatch UNE-platform Centrex orders, is a more reliable indicator of provisioning timeliness. Installation commitments met measures Qwest's performance in provisioning UNE-platform Centrex at the scheduled time that competitive LECs request.[613] Based on the installation commitments met data, we find that Qwest meets its obligation with respect to timely UNE-platform Centrex provisioning.

164. We reject AT&T's arguments that Qwest does not provide nondiscriminatory access to unbundled network elements because of its policies relating to the building of new facilities to serve customers.[614] AT&T argues that Qwest's policy of refusing to build new facilities necessary to provision a competing LEC's UNE order as well as Qwest's ability to cancel a competing LEC's order if Qwest concludes that facilities are not available is discriminatory.[615] We find that Qwest's policy on its obligation to build is comparable to policies we have accepted in previous successful section 271 applications.[616] The record shows

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610 AT&T Qwest I Comments at 43; AT&T Qwest I Finnegan/Connolly/Menezes Decl. at para. 141; AT&T Qwest II Comments at 44; AT&T Qwest III Comments at 81.

611 Qwest missed the dispatch installation interval for resale Centrex in Wyoming in July, August, and September. *See* OP-4 (Installation Interval, Centrex) showing 5 days to install for competing LECs versus 2.88 days for Qwest retail customers (July); 5.5 days to install for competing LECs versus 2.71 days for Qwest retail customers (Aug.); and 5 days to install for competing LECs versus 3.29 days for Qwest retail customers (Sept.). In Colorado, Qwest missed the non-dispatch installation interval for UNE-platform Centrex in June (4.63 days versus 1 day) and July (4.01 days versus 0.88 days). In Wyoming, Qwest missed the non-dispatch installation interval for UNE-platform Centrex in July (5.5 days versus 2.88 days), August (5.48 days versus 2.71 days), and September (4.29 days versus 3.29 days). *See* OP-4 (Installation Interval, UNE-platform Centrex) in Colorado and Wyoming. OP-4 measures the timeliness of Qwest's installation of services for customers, focusing on the average time to install service. *See* ROC 271 Working PID Version 5.0 at 30.

612 *See Verizon New Jersey Order*, 17 FCC Rcd at 12342-43, para. 138; *see also Verizon Massachusetts Order*, 16 FCC Rcd at 9038-39, para. 92; *Bell Atlantic New York Order*, 15 FCC Rcd at 4061-66, paras. 202-210.

613 We note that Qwest did miss the parity standard for OP-3 (Installation Commitments Met, Centrex) in Washington and Iowa for resale Centrex and resale Centrex 21, in one month of the previous four. However, the competitive LEC volumes were below 10 in both states when the parity standard was missed, and Qwest's overall four-month performance demonstrates Qwest's overall compliance. *See* OP-3 (Installation Commitments Met, Centrex) in Washington and Iowa.

614 *See* AT&T Qwest I Comments at 81-85; AT&T Qwest II Comments at 106-109; AT&T Qwest III Comments at 81. *See* related arguments concerning building to an interconnection point in Checklist Item 1 below.

615 AT&T Qwest II Comments at 106-109.

616 *See, e.g.*, *Verizon Pennsylvania Order*, 16 FCC Rcd at 17469-70 at paras. 91-92.

that Qwest attempts to locate compatible facilities for competing LECs, performs incremental facility work to make UNEs available, and will hold competing LEC orders for a reasonable period of time.[617]

(ii) Third-Party Test

165. Our conclusions concerning Qwest's ability to provision UNE-platform and resale services in a nondiscriminatory manner are not undermined by the results of the KPMG test which found disparity in installation intervals provided for competing LECs versus Qwest retail customers.[618] Although Qwest concedes its failure to meet KPMG's criteria, Qwest argues that the Commission should rely on the commercial data as evidence of Qwest meeting its obligation to install competing LEC services in a nondiscriminatory manner.[619] We agree and find that Qwest's commercial performance, in combination with Qwest's recent changes and otherwise satisfactory overall performance in the third-party test, sufficiently demonstrates that Qwest meets its nondiscrimination obligation.[620]

(iii) Other Provisioning Issues

166. *DSL Disconnects.* We find that the record shows that the DSL disconnect problems raised by Eschelon, which have since been fixed, do not have a competitively

[617] Qwest I Reply at 74. Additionally, § 9.1.2.1.2 of Qwest's SGAT states that "If cable capacity is available, Qwest will complete incremental facility work (*i.e.* conditioning, place a drop, add a Network Interface Device, card existing subscriber Loop carrier systems at the Central Office and remote terminal, add Central Office tie pairs, add field cross jumpers) in order to complete facilities to the Customer premises." Furthermore, the Commission is currently reconsidering the extent of an incumbent's obligation to provide access to certain unbundled network elements in its Triennial Review. *See Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01- 338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96- 98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd 22781 (2001) (*Triennial Review*).

[618] Qwest missed installation intervals for UNE-platform. KPMG Final Report at 198 (referencing Test 14-1-36 and Exception 3086); WorldCom Qwest I Comments at 16 (citing tests 14-1-34 and 14-1-36); WorldCom Qwest I Lichtenberg Decl. at paras. 57-56. Qwest, in its East region took an average of 2.8 days to install 145 orders tested, as compared with 1.5 days for retail installation. KPMG Final Report at 198. In Qwest's Central region, Qwest took an average of 2.6 days to install 140 orders tested, as compared to 2.1 days for retail installation. *Id.* In the Western Region, Qwest took an average of 2.9 days to install 141 orders tested, as compared to 2.2 days for retail installation. *Id.*

[619] We reject WorldCom's request that Qwest be required to complete UNE-platform orders on the same day that they are received by Qwest. WorldCom Qwest I Comments at 15. Qwest complies with the intervals and benchmarks that were established through the collaborative ROC process, and that is sufficient for purposes of the instant application.

[620] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3993, para. 89; *SWBT Texas Order*, 15 FCC Rcd at 18399-18400, para. 98.

significant effect.[621] Eschelon has to resubmit DSL orders only on the infrequent occasion that the customer record does not show that the customer currently has DSL.[622] If any disconnects in error do occur, Qwest has committed to respond promptly and efficiently to restore such outages.[623].

167. Additionally, the record shows that the problem of DSL service disconnection before voice service occurs for both Qwest DSL and wholesale DSL disconnection orders.[624] Qwest states that it is currently investigating alternative solutions that would allow the DSL service to remain functional until the time the voice service is converted to UNE-platform.[625] The record shows that Qwest cannot currently force its systems to work the Qwest DSL service "disconnection" order at the same time as the "new installation" order is worked. This constraint applies to both retail and wholesale DSL disconnection orders, whether the disconnection order is to truly disconnect service, or is part of a move of service to a new address, or is part of a conversion to another local service provider.[626] Because there does not appear to be discriminatory treatment between Qwest retail and competing LEC services, we do not find that this problem rises to the level of checklist non-compliance.

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[621] *See* Eschelon Qwest I Comments at 10-12; Qwest Aug. 13b *Ex Parte* Letter at 2. Eschelon argues that when it converts a customer from Qwest or converts its own customer from resale POTS or Centrex to UNE-platform, Qwest at times either disconnects the customer's DSL in error or disconnects the customer's DSL early, leaving the customer without DSL. Eschelon Qwest I Comments at 10-12. Qwest has shown that it has modified internal procedures to ensure these disconnects in error do not occur. As of July 11, 2002, Qwest's representatives have been advised to include the FID "ADSL" after the access line USOC on conversion service orders to ensure appropriate assignments are retained for Qwest DSL. Qwest found that without the ADSL FID, the service order may be completed without the DSL service, which results in DSL disconnects in error. Qwest reviewed 133 conversion orders after July 11, 2002, and found that no disconnection of Qwest DSL in error occurred when the ADSL FID was used. *See* Qwest Aug. 13b *Ex Parte* Letter at 2

[622] *See* Letter from R. Hance Haney, Executive Director-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 (filed Aug. 14, 2002) at 21 (Qwest Aug. 14 *Ex Parte* Letter). Additionally, Qwest states that there was only a single instance that Eschelon did need to submit an LSR. *See* Qwest Aug. 23a *Ex Parte* Letter at Attach.

[623] *Qwest I Simpson* Reply Decl. at para. 10. We note that Eschelon argues that Qwest has not provided competing LECs with a written process that ensures that same day escalations will continue after section 271 approval is granted when the DSL is disconnected in error. *See* Eschelon Qwest III Comments at 40. However, the record shows that the escalation process is documented on Qwest's website. *See* Qwest III Reply, App. A, Tab 1, Reply Declaration of Lori A. Simpson at para. 10 (Qwest III Lori Simpson Reply). Qwest has stated that it will maintain processes or procedures that it has implemented in response to this issue until and unless such processes or procedures are no longer necessary or are replaced with other such processes or procedures that address the issue. *Id.*

[624] Qwest III Lori Simpson Reply Decl. at para. 11.

[625] *Id.*

[626] *Id.*

168. *Loss and Completion Report Issues.* Eschelon alleges that Qwest discriminates between competing LECs and itself because Qwest provides to its retail operations accurate customer loss information, but such information is not provided to competing LECs.[627] In particular, Eschelon complains that the loss reports received from Qwest "do not provide [competing] LECs with the intended ability to identify which customers have left the [competing] LEC for another carrier."[628] The record demonstrates that Qwest has adequately addressed this concern by modifying the loss and completion reports to allow competing LECs to distinguish between end users that move to a different provider and those end users that are changing products but not changing providers.[629] We note that the information provided by Qwest, in combination with information Eschelon has about its own customers, would allow Eschelon to distinguish between customers it lost, and those for whom it has recently requested a change. Accordingly, although Eschelon complains about the format of Qwest's reports and the ease with which it can use them, it has not shown that Qwest fails to provide it with necessary information.

h. UNE Combinations

169. In order to satisfy section 271(c)(2)(B)(ii), a BOC must demonstrate that it provides nondiscriminatory access to network elements in a manner that allows requesting carriers to combine such elements and that the BOC does not separate already combined elements, except at the specific request of the competing carrier.[630] We conclude, as did the commissions of the nine application states, that Qwest meets its obligation to provide access to UNE combinations in compliance with Commission rules.[631]

[627] Eschelon Qwest I Comments at 17.

[628] *Id.*

[629] Letter from Hance Haney, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 at 10 (filed Aug. 13, 2002) (Qwest Aug. 13d *Ex Parte* Letter).

[630] 47 U.S.C. § 271(c)(2)(B)(ii); 47 C.F.R. § 51.313(b). Overturning a 1997 decision of the Eighth Circuit Court of Appeals, on May 13, 2002, the U.S. Supreme Court upheld sections 51.315(c)-(f) of the Commission's rules, which, subject to certain limitations, require incumbent LECs to provide combinations of unbundled network elements "not ordinarily combined in the incumbent LEC's network" and to "combine unbundled network elements with the elements possessed by the requesting telecommunications carrier." *Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646 (2002). In a prior decision, the Supreme Court upheld the Commission's authority to adopt sections 51.315(a)-(b) of the Commission's rules, which establish the general obligation of an incumbent LEC to provide combinations of network elements and require an incumbent LEC not to separate requested elements that it currently combines, except upon request. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385, 393-95 (1999). We note that other unbundled network elements are required pursuant to the checklist, but we discuss them in the context of other checklist items.

[631] *See, e.g.*, Nebraska Commission Qwest III Comments at 1; Iowa Board Qwest III Comments at 1-2; Colorado Commission Qwest I Comments at 15; Montana Commission Qwest II Comments at 17-19; Wyoming Commission Qwest III Comments at 2.

170. We reject Eschelon's claim that Qwest interferes with Eschelon's customers by way of a Qwest-initiated project to increase copper availability.[632] Eschelon claims that a problem occurs with conversions of customers to Eschelon using UNE-P and resale, *i.e.*, on orders that do not otherwise generally require a dispatch.[633] Eschelon claims that Qwest nonetheless dispatches a technician to change cable and pair, and instead of the expected seamless conversion, a Qwest technician appears and informs the competitive LEC's customer that the technician is going to take down that customer's service.[634] Based on the record before us, we do not have adequate evidence in this proceeding to make a finding of discrimination with regard to these installations. We will monitor Qwest's actions following release of this decision, however, to ensure that Qwest complies with the conditions of approval in this order.

171. We also reject AT&T's claim that Qwest's Colorado SGAT allows Qwest to unlawfully restrict UNE combinations by imposing EEL-like restrictions on all UNEs.[635] Specifically, AT&T claims that Qwest's Colorado SGAT is discriminatory in that Qwest refuses to connect UNE combinations to certain offerings such as "voice messaging, DSL, Access Services, Private Lines, resold services, and other services that [the Colorado Commission] or the FCC expressly prohibit to be connected to UNE combinations."[636] We find, however, because there are no examples in the record of Qwest unlawfully imposing UNE restrictions, and additionally that this SGAT language is expressly limited in scope to the restrictions permitted under the Commission's rules, that there is no evidence of discrimination.

2. Pricing of Unbundled Network Elements

a. Introduction

172. Checklist item two of section 271 states that a BOC must provide "nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)" of the Act.[637] Section 251(c)(3) requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible

[632] Eschelon Qwest I Comments at 7-8; Eschelon Qwest II Comments at 19.

[633] Eschelon Qwest I Comments at 7-8.

[634] *Id.* at 8.

[635] AT&T Qwest I Comments at 88. We note that AT&T discusses the SGAT language and does not provide any examples of Qwest actually imposing EEL-like restrictions on all UNEs. *Id.* The dispute between AT&T and Qwest apparently stems from a proceeding at the Colorado Commission, in which Qwest argued that the Commission's commingling prohibition for tariffed special access services, *i.e.*, the EELs restriction, extends to all UNEs. Colorado Commission Qwest I Comments at 17. The hearing commissioner, however, disagreed and instead found that the prohibition applies only to loop-transport combinations. *Id.* Qwest subsequently modified its SGAT to provide that UNEs may be connected to what Qwest calls "finished services" unless it is expressly prohibited by existing state or federal rules. *Id.*

[636] AT&T Qwest I Comments at 88 (citing Colorado SGAT § 9.23.1.2.2).

[637] 47 U.S.C. § 271(c)(2)(B)(ii).

point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[638] Section 252(d)(1) provides that a state commission's determination of the just and reasonable rates for network elements, must be nondiscriminatory, based on the cost of providing the network elements, and may include a reasonable profit.[639] Pursuant to this statutory mandate, the Commission has determined that prices for UNEs must be based on the total element long run incremental cost (TELRIC) of providing those elements.[640]

173. In applying the Commission's TELRIC pricing principles in this application, we do not conduct a *de novo* review of a state's pricing determinations.[641] We will, however, reject an application if "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."[642] We note that different states may reach different results that are each within the range of what a reasonable application of TELRIC principles would produce. Accordingly, an input rejected elsewhere might be reasonable under the specific circumstances here.

174. Based on the evidence in the record before us, we find that Qwest's UNE rates in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming are just, reasonable, and nondiscriminatory, and are in accordance with section 252(d)(1). Thus, Qwest's UNE rates in these states satisfy checklist item two.

b. Overarching Issues

175. Qwest has taken a different approach to pricing issues compared to other BOCs whose applications we previously have approved under section 271. Qwest made a series of voluntary rate reductions in Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming prior to filing its section 271 applications. Those reductions were specifically calculated to produce rates that would enable those states to pass a benchmark comparison to rates in Colorado. Qwest made further reductions to certain rates during the course of this

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638 47 U.S.C. § 251(c)(3).

639 47 U.S.C. § 252(d)(1).

640 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15844-47, paras. 674-79 (1996) (*Local Competition First Report and Order*) (subsequent history omitted); 47 C.F.R. §§ 51.501-51.515 (2001). The Supreme Court has recently upheld the Commission's forward-looking pricing methodology in determining the costs of UNEs. *Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646, 1679 (2002).

641 *Verizon Pennsylvania Order*, 16 FCC Rcd at 17453, para. 55 (citations omitted). *See also Sprint v. FCC*, 274 F.3d 549, 556 (D.C. Cir. 2001) ("When the Commission adjudicates § 271 applications, it does not – and cannot – conduct *de novo* review of state rate-setting determinations. Instead, it makes a general assessment of compliance with TELRIC principles.").

642 *Verizon Pennsylvania Order*, 16 FCC Rcd at 17453, para. 55 (citations omitted).

proceeding.[643] We discuss below the details of Qwest's rate proceedings in each state, as well as issues related to the benchmarking process. In this section, we discuss a number of concerns raised by the parties with respect to how Qwest has presented the applications, as well as other challenges that are not specific to any of the states in this application.

176. *Complete-as-Filed Rule.* We waive the complete-as-filed requirement on our own motion pursuant to section 1.3 of the Commission's rules to the limited extent necessary to consider rate reductions taken by Qwest during the course of this proceeding.[644] The Commission maintains certain procedural requirements governing BOC section 271 applications.[645] In particular, the complete-as-filed requirement provides that when an applicant files new information after the comment date, the Commission reserves the right to re-start the 90-day review period or to accord such information no weight in determining section 271 compliance.[646]

177. This rule provides interested parties with a fair opportunity to comment on the BOC's application, to ensure that the Attorney General and the state commissions can fulfill their statutory consultative roles, and to afford the Commission adequate time to evaluate the record.[647] The Commission can waive its procedural rules, however, if "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[648]

178. We find that a waiver is appropriate in these circumstances. Qwest has changed its rates subsequent to filing its applications.[649] In prior cases in which the Commission has considered post-filing rate changes, our primary concern has been to ensure that "this is not a situation where a BOC has attempted to maintain high rates only to lower them voluntarily at the

643 *See* Letter from David L. Sieradzki, Counsel for Qwest Communications International, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Oct. 7, 2002) (Qwest Oct. 7 Pricing *Ex Parte* Letter); Letter from David L. Sieradzki, Counsel for Qwest Communications International Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314, Attachs. (filed Nov. 12, 2002) (Qwest Nov. 12 *Ex Parte* Letter).

644 47 C.F.R. § 1.3 (2001).

645 *See Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 16 FCC Rcd 6923 (Comm. Carr. Bur. 2001).

646 *See Verizon Rhode Island Order*, 17 FCC Rcd at 3306, para. 8; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6247, para. 21.

647 *See Verizon Rhode Island Order*, 17 FCC Rcd at 3305-06, para. 7; *Ameritech Michigan Order*, 12 FCC Rcd at 20572-73, paras. 52-54.

648 *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). *See also* 47 U.S.C. § 154(j); 47 C.F.R. § 1.3 (2001).

649 *See* Qwest Oct. 7 Pricing *Ex Parte* Letter at Attach. 1 (summarizing rate reductions to be filed with state commissions after the September 30th filing date of Qwest's section 271 applications).

eleventh hour in order to gain section 271 approval."[650] We find no evidence that Qwest has engaged in this type of gamesmanship in this case. Qwest explained that it took voluntary rate reductions prior to filing its applications with the Commission, and that it had done so with the intent of benchmarking the rates in Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming to TELRIC-compliant rates in Colorado.[651] We find that these pre-filing reductions constitute evidence of Qwest's good faith effort to present TELRIC-compliant rates at the time of filing. As explained below, we find that Qwest's post-filing rate reductions were an appropriate response to concerns identified by parties in this proceeding.

179. Another major concern that we have identified in prior cases where rates have changed during a proceeding is that interested parties be afforded a sufficient opportunity to review the new rates, and that the analytical burden of doing so is not too great in light of the time constraints inherent in the section 271 application process.[652] Again, we find no cause for concern with respect to Qwest's post-filing rate reductions. Qwest specifically identified all of its post-filing rate changes on day seven of the 90-day period, more than a week before comments were due on the application,[653] and it filed revised statements of generally available terms (SGATs) the same week the comments were filed.[654] In prior cases we have considered rate reductions made much later in the 90-day application cycle.[655] We also find that the burden associated with analyzing the new rates was not significant. Although Qwest made changes to its SGATs in all eight states, it provided a summary sheet that identified all the relevant rate changes before the comments were due.[656]

180. Finally, in prior cases we have found cause to grant a waiver of the complete-as-filed rule where the changes in rates are responsive to criticisms in the record, as compared to

[650] *Verizon Rhode Island Order*, 17 FCC Rcd at 3307, para. 9.

[651] Qwest II Application at 159-62; Qwest I Application at 149.

[652] *Verizon Rhode Island Order*, 17 FCC Rcd at 3308, paras. 10-11.

[653] Qwest Oct. 7 Pricing *Ex Parte* Letter at Attach. 1.

[654] Qwest III Reply Comments, Tab 14, Reply Declaration of Jerrold L. Thompson and Thomas R. Freeberg, Cost-Based Rates for Unbundled Network Elements and Interconnection, para. 4 n.6 (stating that revised SGAT Exhibit A's were filed with the state commissions between October 16-18, 2002) (Qwest III Thompson/Freeberg Reply Decl.); Qwest Nov. 12 *Ex Parte* Letter at Attachs.

[655] *See, e.g. Verizon Rhode Island Order*, 17 FCC Rcd at 3306-10, paras. 8-17 (considering changes in rates filed on day 80 of the application); *SWBT Kansas/Oklahoma Order* 16 FCC Rcd at 6247-49, paras. 22-26 (considering changes in rates filed on day 63 of the application); *Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware*, WC Docket No. 02-157, Memorandum Opinion and Order, 17 FCC Rcd 18660, 18666-67, para. 11 (2002) (*Verizon Delaware/New Hampshire Order*) (considering changes in rates filed on day 64 of the application).

[656] Qwest Oct. 7 Pricing *Ex Parte* Letter at Attach. 1.

new information that "consists of additional arguments or information" concerning current pricing.[657] The rate reductions made by Qwest in this case satisfy this standard. The changes were responsive to arguments in the record of Qwest's prior section 271 applications,[658] and in each case the effect of the rate change was to reduce the prices that competitive LECs will pay for unbundled network elements. We find that it is fully consistent with our precedent under section 271 to consider this type of responsive information without requiring the BOC to make a new filing.

181. *Timing.* In prior cases in which we have applied a benchmark analysis, the "anchor" state had already received section 271 approval prior to the filing of the application for the benchmark state.[659] Some parties in this case argue that Qwest's departure from that practice, i.e., its decision to file simultaneously the anchor state (Colorado) and eight benchmark states (Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming), should be rejected because it prejudices parties that oppose the applications.[660] We disagree. Parties to this docket were not prevented from making arguments about the prices established in individual states, nor were they prevented from making arguments about the benchmarking process. Other than the condensed time frame, this is no different than if an application for Colorado had been filed first and approved before the other eight states. Although Qwest's decision to file its first nine states simultaneously has resulted in a substantial work load for parties and for the Commission, we do not think any party has been prejudiced by the simultaneous consideration of the anchor state and the benchmark states.

182. *SGAT Billing.* Eschelon argues that, when a charge is not included in Eschelon and Qwest's interconnection agreement, Qwest improperly charges SGAT rates that have not been approved by the state commissions, even though Eschelon has not opted in to Qwest's SGATs.[661] Instead, Eschelon argues that Qwest should either negotiate a rate pursuant to its interconnection agreements with Eschelon, obtain state commission approval for the rates, or reach agreement on using state commission-approved cost models and processes to calculate these rates.[662] Eschelon requests that the Commission "state whether an [incumbent] LEC may

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[657] *Verizon Rhode Island Order*, 17 FCC Rcd at 3308-09, para. 12.

[658] *See* AT&T Qwest II Comments at 55, Tab C, Declaration of Michael R. Lieberman and Brian F. Pitkin, paras. 21, 24 (AT&T Qwest II Lieberman/Pitkin Decl.) (arguing that Qwest's switching rates in rural states should be benchmarked against Colorado's rates exclusive of transport and tandem-switching).

[659] *Verizon Rhode Island Order*, 17 FCC Rcd at 3320, para. 39; *SWBT Kansas/Oklahoma Order* 16 FCC Rcd at 6276, para. 82.

[660] Integra Qwest III Comments at 5-6; OneEighty Qwest III Comments at 4-5; AT&T Qwest II Comments at 85-95; OneEighty Qwest II Comments at 4; AT&T Qwest I Comments at 49; Integra Qwest I Comments at 5.

[661] Eschelon Qwest III Comments at 43 n.54; Eschelon Qwest II Comments at 33; Eschelon Qwest I Comments at 20.

[662] Eschelon Qwest III Comments at 43 n.54; Eschelon Qwest II Comments at 33; Eschelon Qwest I Comments at 20.

unilaterally impose on a [competitive] LEC that has not opted in to an SGAT a rate that has not been approved in a commission cost docket or using the commission approved cost model."[663] In response, Qwest notes that the claims raised by Eschelon represent company-specific billing disputes that should not affect a finding of overall compliance with section 271.[664] We find that Eschelon's allegations amount to a contract dispute regarding whether Qwest is billing Eschelon pursuant to their interconnection agreement. Such disputes are best resolved by the state commissions and should not be decided by the Commission in a section 271 proceeding.[665]

183. *Discrimination.* AT&T argues that Qwest is not in compliance with the nondiscrimination requirements of our pricing rules because certain favored parties have been able to purchase UNEs at discounted rates.[666] We address this argument in the public interest section below.[667] AT&T also argues that the fact that Qwest was willing to provide UNEs at lower rates to favored parties demonstrates that the higher rates available under Qwest's SGATs are in excess of forward-looking cost.[668] The basis for this argument is that it would never be in a carrier's interest to provide UNEs at a rate less than a TELRIC-based rate.[669] As evidence, AT&T identifies one agreement in which Qwest purportedly agreed to provide a competitive LEC with a "flat 10 percent discount on all purchases."[670] Even if we assume that AT&T's characterization of this agreement is accurate, the agreement identified by AT&T was terminated before Qwest filed its section 271 application, and before Qwest made its most recent rate reductions.[671] On the record before us, we find no evidence that Qwest is providing UNEs at

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[663] *Ex Parte* Comments of Eschelon Telecom, Inc. in Opposition to the Consolidated Application of Qwest Communications International Inc. for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota, WC Docket No. 02-148, 51 (filed Aug. 15, 2002) (Eschelon Aug. 15 *Ex Parte* Comments).

[664] Qwest II Reply at 52; Qwest I Reply at 51.

[665] *Verizon New Jersey Order*, 17 FCC Rcd at 12357, para. 159; *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Vermont*, CC Docket No. 00-65, Memorandum Opinion and Order, 17 FCC Rcd 7625, 7658, para. 58 (2002) (*Verizon Vermont Order*); *SWBT Texas Order*, 15 FCC Rcd at 18394, para. 88.

[666] AT&T Qwest III Comments at 42; AT&T Qwest II Comments at 28-29; AT&T Qwest I Comments at 27-28.

[667] Part VII.C., *infra*.

[668] AT&T Qwest II Comments at 29; AT&T Qwest I Comments at 28.

[669] AT&T Qwest II Comments at 29; AT&T Qwest I Comments at 28.

[670] AT&T Qwest II Comments at 28-29; AT&T Qwest I Comments at 28.

[671] *See* Letter from Peter A. Rohrbach, Counsel for Qwest Communications International Inc., to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148 and 02-189, at 1-2 (filed Aug. 13, 2002) (Qwest Aug. 13 *Ex Parte* Letter) (08/13/02e); Qwest Nov. 12 *Ex Parte* Letter at Attachs. AT&T raised its price discrimination claim before Qwest had finished reducing its rates, therefore it is possible that the new UNE rates are less than the prior rates with the 10 percent discount.

rates below those contained in its SGATs, and therefore no basis to find that the SGAT rates exceed TELRIC-compliant levels. Even if Qwest provided rates below those in its SGATs, this does not demonstrate that the SGAT rates are outside of the TELRIC range.

184. *Price Squeeze.* AT&T, OneEighty, and WorldCom make the argument that residential competition is not economically viable in portions of the states under review in this application because of the narrow margins available to competitors that provide service through the UNE platform (UNE-P).[672] Not only do they argue that this is a violation of the public interest section, AT&T also argues that it violates the nondiscriminatory pricing requirement in checklist item two.[673] We disagree. Section 252 requires that UNEs be priced on the basis of cost, and our analysis of Qwest's rates for purposes of this checklist requirement is intended to determine whether those rates are cost-based in accordance with this statutory requirement. The potential revenues that can be generated from purchasing UNEs, and the resulting margin, are irrelevant for purposes of assessing a carrier's compliance with this checklist item. We address the details of the price squeeze argument in the public interest section below.[674]

185. *Old Cost Data.* AT&T argues that the cost studies relied on by several of the state commissions in the benchmark states used data from 1998 or earlier, therefore rates set using these data cannot be TELRIC-based today.[675] As discussed below, prior to filing its section 271 application with the Commission, Qwest voluntarily reduced many of its recurring charges and non-recurring charges (NRCs) in the application states below the rates set by the state commissions.[676] In addition, and as discussed more fully below, we evaluate Qwest's rates through a benchmark comparison to rates in Colorado that we find to be TELRIC-compliant.[677] Given that we do not rely on the state commission-set rates in states other than Colorado, we need not address AT&T's argument on this matter.

c. Colorado

(i) Background

[672] AT&T Qwest III Comments at 78-79; OneEighty Qwest III Comments at 5-6; WorldCom Qwest III Comments at 26; AT&T Qwest II Comments at 52-53, 95-96; OneEighty Qwest II Comments at 5-6; WorldCom Qwest II Comments at 35-36; AT&T Qwest I Comments at 69-71; WorldCom Qwest I Comments at 32-34.

[673] AT&T Qwest III Comments at 78; AT&T Qwest II Comments at 52-53, 95-96; AT&T Qwest I Comments at 69-70.

[674] Part VII.A., *infra*.

[675] *See* AT&T Qwest II Comments at 60 (cost proceedings in Montana, Utah, Washington, and Wyoming took place in 1997 and 1998 and relied on earlier data); AT&T Qwest III Comments, Tab G, Declaration of Natalie J. Baker, Arleen M. Starr, and Douglass Denney, para. 13 (AT&T Qwest III Baker/Starr/Denney Decl.) (Iowa prices based on a record from 1996-97); AT&T Qwest III Baker/Starr/Denney Decl. at para. 25 (Idaho rates are stale); AT&T Qwest III Baker/Starr/Denney Decl. at para. 55 (North Dakota rates last arbitrated in 1997).

[676] Qwest II Application at 159-62; Qwest I Application at 149, 163-67.

[677] Part IV.A.2.d.(ii)(c), *infra*.

186. The Colorado Commission conducted two extensive cost proceedings in developing rates for interconnection and unbundled network elements. The Colorado Commission first set permanent rates in 1997 in Docket No. 96S-331T.[678] The Colorado Commission revisited those rates, and established additional rates, in its review of Qwest's SGAT in Docket No. 99A-577T, concluding in 2002.[679]

187. *Docket No. 96S-331T.* The Colorado Commission initiated Docket No. 96S-331T on July 1, 1996, to consider tariffs proposed by Qwest. More than a dozen parties participated in the case. The Commission held eight days of hearings, including live cross-examination of witnesses.[680] The Colorado Commission issued an order adopting rates in Docket No. 96S-331T on July 28, 1997. The Colorado Commission did not select a specific cost model to use in calculating rates, although it stated that all the cost studies submitted by the parties were consistent with TELRIC principles.[681]

188. *Docket No. 99A-577T.* Qwest filed its SGAT with the Colorado Commission on November 30, 1999 in Docket No. 99A-577T. Qwest filed cost studies in support of its proposed rates and responded to hundreds of discovery requests. Phase I of the proceeding ultimately involved "thousands of pages of filed testimony, hundreds of exhibits, two full weeks of hearings and several computer-generated models with thousands of input variables."[682]

189. The Colorado Commission issued an order in Docket No. 99A-577T on December 21, 2001. The Colorado Commission made clear its intention to apply TELRIC principles in its decision. Specifically, the Colorado Commission stated that "[d]isputes about TELRIC as a pricing methodology . . . are immaterial to our deliberation here. Our duty is to follow the FCC's TELRIC mandate."[683] The Colorado Commission relied primarily on the HAI Model submitted by competitive LECs in establishing recurring charges for UNEs, although it

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678 *Investigation and Suspension of Tariff Sheets filed by U S WEST Communications, Inc., with Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services*, Docket No. 96S-331T, Decision No. C97-739 (Colo. PUC 1997) (*Colorado 331T Order*).

679 *U S WEST Communications, Inc.'s Statement of Generally Available Terms and Conditions*, Docket No. 99A-577T, Decision No. C01-1302 (Colo. PUC Dec. 21, 2001) (*Colorado Pricing Order*). The Colorado Commission subsequently made changes to the rates established in the *Colorado Pricing Order* in two separate orders on reconsideration. *See U S WEST Communications, Inc.'s Statement of Generally Available Terms and Conditions*, Docket No. 99A-577T, Decision No. C02-409 (Colo. PUC Apr. 17, 2002) (*Colorado Pricing Reconsideration Order*); Decision No. C02-636 (Colo. PUC June 6, 2002) (*Colorado Pricing Further Reconsideration Order*).

680 Qwest I Application at 9.

681 *Colorado 331T Order* at 36-37.

682 *Colorado Pricing Order* at 4.

683 *Colorado Pricing Order* at 10. *See also Colorado Pricing Reconsideration Order* at 4 ("Finally, this RRR decision endeavors to make the wholesale rates more accurately TELRIC by modifying cost model inputs to better estimate the forward-looking costs that an efficient telecommunications provider will incur.").

relied on Qwest's cost studies to establish NRCs and collocation rates.[684] In deciding on inputs for the HAI Model, the Colorado Commission relied on a number of assumptions that it described as "aggressive," which Qwest asserts had the effect of lowering UNE rates below those that an efficient carrier would incur today.[685]

190. Qwest states that its SGAT includes rates for a small number of products and services that have not yet been addressed by the Colorado Commission. In addition, some rates set by the Colorado Commission are identified as interim rates.[686] The Colorado Commission has stated that it will adopt rates for these products and services in Phase II of Docket No. 99A-577T.[687]

(ii) Recurring Charges

191. In setting recurring charges for UNEs, the Colorado Commission relied primarily on the HAI model advocated by AT&T, WorldCom and XO Communications.[688] The Colorado Commission then selected inputs for the model based on its judgment of the costs an efficient provider would expect to incur on a forward-looking basis, based on the record before it.[689]

192. AT&T argues that the loop and switching rates established by the Colorado Commission exceed the rates that would be produced by a proper application of the Commission's TELRIC requirements.[690] Specifically, AT&T challenges five of the loop inputs selected by the Colorado Commission in running the HAI model, and three of the switching inputs.[691] Covad challenges the Colorado Commission's decision to establish a positive recurring

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[684] *Colorado Pricing Order* at 38-40; *Colorado Pricing Reconsideration Order* at 26 (clarifying that Qwest's LoopMod cost model was used only as a secondary "check" on the HAI results and was not used to derive any rates).

[685] Qwest I Application at 22 (citing *Colorado Pricing Reconsideration Order* at 31).

[686] Although identified as "interim," these rates are not subject to a retroactive true-up based on future rates established by the Colorado Commission. Accordingly, these rates are the effective rates in Colorado for the indefinite future. *See Colorado Pricing Reconsideration Order* at 11-12.

[687] *See Colorado Pricing Reconsideration Order* at 10-11; *Colorado Pricing Further Reconsideration Order* at 12, 15.

[688] *Colorado Pricing Order* at 38-39; *Colorado Pricing Reconsideration Order* at 26.

[689] *Colorado Pricing Order* at 12; *Colorado Pricing Reconsideration Order* at 27.

[690] AT&T Qwest III Comments at 69, 70-73; AT&T Qwest I Comments at 50.

[691] AT&T Qwest III Comments, Tab I, Joint Declaration of Dean Fassett and Robert Mercer at paras. 29-64 (AT&T Qwest III Fassett/Mercer Decl.), Tab H, Joint Declaration of Richard Chandler and Robert Mercer at paras. 23-42 (AT&T Qwest III Chandler/Mercer Decl.); AT&T Qwest I Comments, Tab F, Joint Declaration of Dean Fassett and Robert Mercer, paras. 14-18 (AT&T Qwest I Fassett/Mercer Decl.); Declaration of Richard Chandler and Robert Mercer at para. 15 (AT&T Qwest I Chandler/Mercer Decl.).

charge for the high-frequency portion of the loop.[692] For the reasons explained below, we conclude that the recurring charges adopted by the Colorado Commission are consistent with TELRIC principles and meet the requirements of checklist item two.[693]

(a) Loop

193. *Plant Mix.* The HAI model includes inputs that allow the user to decide what portion of plant is placed on aerial structures, underground (in conduit) or buried in trenches (without conduit). As a general matter, according to AT&T, aerial placement is the least expensive and underground placement is the most expensive.[694] AT&T asserts that the Colorado Commission selected a plant mix that included too little aerial plant and too much underground plant. Specifically, the Colorado Commission assumes 20 percent of facilities would be placed on aerial structures, rather than the 28.9 percent advocated by AT&T or the 12.3 percent advocated by Qwest. In addition, rather than assigning the 8.9 percent difference (between AT&T's proposal and the figure selected by the Colorado Commission) to buried placement, the next least expensive method of placement, the Colorado Commission assigned half to buried and half to underground. AT&T asserts that this TELRIC error has the effect of overstating loop rates by $0.48 per month.[695]

194. In deciding to assume 20 percent aerial plant, the Colorado Commission rejected a lower percentage submitted by Qwest. At the same time, the Colorado Commission found that the default number in the HAI model neglected the public's aesthetic preference for buried plant.[696] The Colorado Commission explained that the plant mix inputs it adopted "reflect our judgment of the forward-looking plant mix for the various types of plant."[697] In response to AT&T's assertion that the Colorado Commission improperly distributed the difference of 8.9 percent between buried and underground placement, the Colorado Commission explained that it did not merely "split the difference," but instead it selected different sets of inputs for four different classifications of outside plant, based on information provided in the record.[698] Based

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692 Covad Qwest III Comments at 3; Covad Qwest I Comments at 5.

693 We find that the recurring charges in Colorado comply with section 252(d)(2) on their own merit and not based on a comparison to any other state. We take comfort, however, in the fact that the rates established by the Colorado Commission are in the range of rates in states that have already received section 271 approval. For example, accounting for cost differences between states, loop rates in Colorado are 1 percent higher than loop rates in Texas, while non-loop rates are 10 percent less than non-loop rates in Texas (using our "standard assumptions" regarding minutes-of-use and traffic patterns.) See Part IV.A.2.d.(ii)(b)(i) below for a discussion of the use of standard assumptions in comparing non-loop rates.

694 AT&T Qwest I Comments at 63; AT&T Qwest III Fassett/Mercer Decl. at para. 30.

695 AT&T Qwest I Comments at 64; AT&T Qwest III Fassett/Mercer Decl. at para. 38.

696 *Colorado Pricing Reconsideration Order* at 31.

697 *Colorado Pricing Further Reconsideration Order* at 8.

698 *Id.* at 7-8.

on the analysis performed by the Colorado Commission with regard to this fact-specific issue, we find no clear error in its decision with respect to plant mix.

195. *Placement Costs*. Placement costs are the costs associated with placing cable, such as trenching, boring or plowing. In its initial pricing decision, the Colorado Commission adopted the competitive LECs' position that the cost of plowing would not exceed $0.80 per foot.[699] On reconsideration, the Colorado Commission increased this rate to $1.30 per foot.[700] AT&T states that the Colorado Commission erred in its decision to increase the plowing rate to $1.30 per foot. According to AT&T, Qwest proposed an average plowing cost based on a study that had been prepared previously by AT&T's expert witness, but not submitted by AT&T in the Colorado pricing docket. AT&T states that, under TELRIC, the Colorado Commission should have selected the lowest price identified in the study, not the average price, for performing this activity.[701] In addition, AT&T states that the contracts in the study relied on by Qwest were for limited projects, rather than large projects, and overstate the cost of reconstructing an entire network.[702] The effect of these errors, AT&T asserts, is to overstate loop costs by $0.09 per month.[703]

196. In its second reconsideration order, the Colorado Commission notes that the "record contains extensive evidence from the parties regarding the appropriate assumptions for cable placement costs."[704] The Colorado Commission made clear that its "chosen input reflects our best judgment of the accurate forward-looking cost for cable placement."[705] The Colorado Commission appropriately recognized that diverse soil conditions exist in Colorado and it adopted different costs in different density zones to reflect this fact.[706] To the extent Qwest's proposal of $1.44 per foot was based on construction in difficult terrain, the Colorado Commission reduced this figure to reflect that the HAI model already includes a multiplier for difficult terrain.[707] Given the analysis of this fact-intensive issue by the Colorado Commission, we find no clear violation of TELRIC requirements.

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699 AT&T Qwest III Fassett/Mercer Decl. at para. 39; AT&T Qwest I Fassett/Mercer Decl. at para. 36; *Colorado Pricing Order* at 45.

700 *Colorado Pricing Reconsideration Order* at 20.

701 AT&T Qwest III Fassett/Mercer Decl. at para. 44; AT&T Qwest I Fassett/Mercer Decl. at para. 41.

702 AT&T Qwest III Fassett/Mercer Decl. at paras. 45-46; AT&T Qwest I Fassett/Mercer Decl. at paras. 42-43.

703 AT&T Qwest III Fassett/Mercer Decl. at para. 47; AT&T Qwest I Fassett/Mercer Decl. at para. 44.

704 *Colorado Pricing Further Reconsideration Order* at 5.

705 *Id.* at 5.

706 *Colorado Pricing Reconsideration Order* at 30.

707 *Id.*

197. *Drop Lengths*. Drop length is the length of wire from a pole-mounted terminal or buried pedestal to a customer's premises. AT&T submitted evidence to the Colorado Commission that the average statewide drop length would not exceed 69 feet. Qwest proposed an average drop length of 136 feet. The Colorado Commission rejected both proposals and found that "an average (statewide) drop length of 75 feet is a reasonable middle ground that gives recognition to the flaws of both proposals."[708] On reconsideration, the Colorado Commission concluded that it had "underestimated the average drop lengths in the least dense zones," and it adopted a new set of drop lengths with a statewide average of 87.2 feet.[709] AT&T states that the Colorado Commission erred in its initial selection of 75 feet, and the subsequent increase to 87.2 feet.[710] AT&T asserts that the Colorado Commission's explanation on reconsideration – that the 75-foot estimate did not reflect longer drop lengths in rural areas – is unsupported in the record and inconsistent with the fact that the initial 75-foot estimate was based on Qwest's embedded network.[711] According to AT&T, the effect of this error is to overstate loop costs by $0.10 per month.

198. In its second reconsideration order, the Colorado Commission explained more fully the basis for its decision. Specifically, the Colorado Commission explained that the evidence submitted by Qwest demonstrated that there was a wide variation in drop lengths among the different density zones.[712] Although the Colorado Commission accepted Qwest's evidence on the variability in drop lengths, it did not accept the actual distances proposed by Qwest on the grounds that Qwest's proposal did not adequately reflect the presence of multi-tenant units.[713] We find no clear error in the manner in which the Colorado Commission weighed the evidence before it and selected the drop length input to be used in the model.

199. *Strand Distance*. According to AT&T, the HAI model uses a measure called "strand distance" to ensure that the distribution route distance calculated by the model matches the amount of distribution route distance actually required to connect actual customer locations.[714] The model includes a strand distance normalization (SDN) option, which AT&T describes as a mechanism similar to the Minimum Spanning Tree (MST) approach utilized by the Commission's Synthesis Model.[715] AT&T states that the Colorado Commission improperly turned off the SDN option when it ran the HAI model, which caused the model to assume

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708 *Colorado Pricing Order* at 43.

709 *Colorado Pricing Reconsideration Order* at 42-43.

710 AT&T Qwest III Fassett/Mercer Decl. at paras. 59-60; AT&T Qwest I Fassett/Mercer Decl. at paras. 56-57.

711 AT&T Qwest III Fassett/Mercer Decl. at para. 59; AT&T Qwest I Fassett/Mercer Decl. at para. 56.

712 *Colorado Pricing Further Reconsideration Order* at 9.

713 *Colorado Pricing Order* at 43.

714 AT&T Qwest III Fassett/Mercer Decl. at para. 48; AT&T Qwest I Fassett/Mercer Decl. at para. 45.

715 AT&T Qwest III Fassett/Mercer Decl. at para. 49; AT&T Qwest I Fassett/Mercer Decl. at para. 46.

incorrectly that customers are spread uniformly throughout each cluster, rather than concentrated around schools, office parks and other areas.[716] In its comments, AT&T stated that the effect of this alleged error is to increase loop rates by $0.62 per month.[717]

200. AT&T also states that the Colorado Commission's decision to turn off the SDN option "substantially distorts" the deaveraging process.[718] As a result, only 5 percent of lines are in zone 1, as compared to almost 60 percent if the SDN option is turned on.[719] AT&T states that this approach is inconsistent with Colorado's demographics because only four wire centers in downtown Denver are in zone 1, while all the other wire centers in the Denver metropolitan area are in zone 2.[720] According to AT&T, the effect of this error is to raise the average loop rate for customers who should be in zone 1 (with the SDN option turned on) by $1.63 per line.[721] Qwest responds that the Colorado Commission reasonably declined to use the MST approach.[722] Similarly, Qwest argues that AT&T's deaveraging claim should be rejected because the Colorado Commission's approach is reasonable and TELRIC-compliant.[723] Qwest further notes that, in any event, the Colorado Commission will re-examine issues related to AT&T's claim during the upcoming phase of its UNE pricing proceeding.[724]

201. In its first pricing order, the Colorado Commission explained its decision not to use the MST algorithm in the HAI model. Specifically, the Colorado Commission found that "customer placement based on MST is not representative of the real world considerations that are properly taken into account in a TELRIC study. Despite the scorched node approach, TELRIC does not require ignoring other real world limitations or sources of network placement cost such as buildings, rivers, lakes, etc."[725] AT&T did not request reconsideration on this particular issue, and it does not appear that it raised the deaveraging issue at all. We find that the standard applied by the Colorado Commission is not inconsistent with TELRIC requirements and we find no clear error in its decision not to use the SDN option. The Colorado Commission

[716] AT&T Qwest III Fassett/Mercer Decl. at para. 50; AT&T Qwest I Fassett/Mercer Decl. at para. 47.

[717] AT&T Qwest III Fassett/Mercer Decl. at para. 51; AT&T Qwest I Fassett/Mercer Decl. at para. 48.

[718] AT&T Qwest III Fassett/Mercer Decl. at paras. 65-72.

[719] AT&T Qwest III Fassett/Mercer Decl. at para. 68; AT&T Qwest I Reply, Reply Declaration of Dean Fassett and Robert Mercer at para. 7 (AT&T Qwest I Fassett/Mercer Reply Decl.).

[720] AT&T Qwest III Fassett/Mercer Decl. at para. 69; AT&T Qwest I Fassett/Mercer Reply Decl. at para. 8.

[721] AT&T Qwest III Fassett/Mercer Decl. at para. 70; AT&T Qwest I Fassett/Mercer Reply Decl. at para. 9.

[722] Qwest III Thompson/Freeberg Reply Decl. at paras. 15-16.

[723] Qwest III Thompson/Freeberg Reply Decl. at para. 16.

[724] *Id.*

[725] *Colorado Pricing Order* at 42.

is considering loop deaveraging issues in Phase II of its cost proceeding, and we encourage AT&T to raise this issue with the Colorado Commission during that proceeding.

202. *Network Operations Expense.* Network operations expense represents Qwest's costs associated with specific operations activities. According to AT&T, the network operations expense factor in the HAI model is used to reduce the current level of network operations expense in order to recognize TELRIC-compliant forward-looking savings.[726] AT&T asserts that the Colorado Commission committed clear error when it adopted Qwest's proposed 100 percent network operations factor, which assumes that Qwest will achieve no expense reductions on a forward-looking basis. AT&T identifies a number of specific expense accounts that should be reduced in a forward-looking environment.[727]

203. In its initial pricing decision, the Colorado Commission selected the 100 percent network operations expense factor advocated by Qwest, and rejected the 50 percent factor advocated by the competitive LECs.[728] The Colorado Commission found that the competitive LECs had not provided adequate support on the record for the proposition that Qwest would incur only half its current expenses in a forward-looking environment. Contrary to AT&T's assertions, the Colorado Commission did "agree that there should be some degree of recognition that the utilization of forward-looking technologies will likely reduce future Network Operations Expense."[729] Specifically, the Colorado Commission reduced network operations expense by applying a 4 percent productivity (net of inflation) factor to bring 1999 expenses forward to 2001.[730] Based on the Colorado Commission's assessment of the record before it, we find no clear error in the manner in which the Colorado Commission calculated network operations expense.

204. Nor are we persuaded by AT&T's argument that the Colorado Commission "appears" to have been "misled" by Qwest concerning adoption of a lower network operations expense factor than AT&T advocates.[731] AT&T asserts that the Colorado Commission adopted a per-line network operations expense additive that is more than double the additives proposed by either AT&T or Qwest.[732] Qwest responds that AT&T mischaracterized Qwest's position with

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726 AT&T Qwest III Fassett/Mercer Decl. at para. 61; AT&T Qwest I Fassett/Mercer Decl. at para. 58.

727 AT&T Qwest III Fassett/Mercer Decl. at para. 63; AT&T Qwest I Fassett/Mercer Decl. at paras. 60-64.

728 *Colorado Pricing Order* at 62-63.

729 *Id.* at 63.

730 *Id.* at 63, 71.

731 *See* AT&T Qwest III Comments at 71-73, Tab K, Declaration of Douglas Denney at paras. 8-14 (AT&T Qwest III Denney Decl.); Letter from Alan C. Geolot, Counsel for AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 12, 2002) (AT&T Nov. 12 *Ex Parte* Letter) at Attach. Supplemental Declaration of Douglas Denney (AT&T Supp. Denney Decl.).

732 AT&T Qwest III Comments at 72-73; AT&T Qwest III Denney Decl. at paras. 10-11; AT&T Nov. 12 *Ex Parte* Letter at AT&T Supp. Denney Decl., paras. 5-6.

respect to Colorado loop costs. Qwest had proposed its own loop cost model, which treated network operating expense as a percentage factor applied to direct investment amounts.[733] In the alternative, if the Colorado Commission adopted use of the HAI Model, Qwest opposed use of a 50 percent network operations expense adjustment, arguing that its current costs already reflect the efficiencies of a modern network.[734] As discussed above, the Colorado Commission rejected AT&T's proposed 50 percent adjustment, but felt some adjustment was appropriate, so it applied a 4 percent adjustment to reflect anticipated productivity improvements, offset by inflation.[735] Therefore, it does not appear that the Colorado Commission was "misled," but that it made a reasonable decision based on the record before it on this issue.

(b) Switching

205. In the *Colorado Pricing Order*, the Colorado Commission elected to retain the switching rates it adopted in 1997 in the 331T proceeding.[736] The competitive LECs requested reconsideration of that decision, and in response Qwest stated that it was willing to set switching rates using the HAI model, as proposed by the competitive LECs, provided that six specific input adjustments were made. The Colorado Commission adopted Qwest's proposal, noting that the proposed reductions were supported by the evidentiary record in the case.[737] The competitive LECs again sought reconsideration, and in response Qwest proposed rates that included only four of its original input adjustments. The Colorado Commission again adopted Qwest's proposal, subject to reexamination in its upcoming Phase II proceeding.[738] Before filing its current section 271 application, and in response to comments from AT&T, Qwest voluntarily reduced its Colorado port rate by eliminating a $0.38 vertical features software cost additive.[739] AT&T now challenges the Colorado Commission's decision on two grounds.

206. *Fill Factor*. The HAI model proposed by the competitive LECs included a 94 percent fill factor for switching. In the Qwest proposal ultimately adopted by the Commission,

[733] Qwest III Thompson/Freeberg Reply Decl. at para. 10.

[734] Qwest III Thompson/Freeberg Reply Decl. at para. 11.

[735] Qwest III Thompson/Freeberg Reply Decl. at para. 12.

[736] *Colorado Pricing Order* at 79. The port rate adopted in 1998 was $1.78 per month and the usage rate was $0.00283 per minute.

[737] *Colorado Pricing Reconsideration Order* at 6-7.

[738] *Colorado Pricing Further Reconsideration Order* at 12.

[739] Qwest I Reply at 96-97; Letter from David L. Sieradzki, Counsel for Qwest Communications International, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148 (filed Aug. 8, 2002) (Qwest Aug. 8 Pricing *Ex Parte* Letter) (08/08/02d). Because Qwest established switching rates in the other eight states based on a benchmark to Colorado, Qwest also reduced switching rates in those states. Qwest I Reply, Reply Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements and Interconnection, para. 79 (Qwest I Thompson Reply Decl.).

the fill factor is set at 82.5 percent.[740] AT&T states that the reduction in the fill factor from 94 percent to 82.5 percent is unjustified. Specifically, AT&T states that Qwest's argument that a lower fill factor is needed to cover increases in demand ignores the fact that the HAI model includes a default maximum line size of 80,000 lines per switch, even though switches have the capacity to serve at least 100,000 lines.[741] The result of this error, according to AT&T, is to inflate switching costs by 8.6 percent.[742]

207. Although the Colorado Commission did not provide an analysis of this specific issue, it did note in the *Colorado Pricing Reconsideration Order* that there was evidence on the record supporting Qwest's first compromise proposal.[743] Specifically, Qwest submitted testimony, and made its witness available for cross-examination, explaining the basis for its proposal to use a fill factor of less than 94 percent.[744] Based on this record evidence, we do not think the Colorado Commission committed TELRIC error in adopting the second Qwest compromise proposal with the 82.5 percent fill factor. Furthermore, Qwest has provided additional material in this proceeding that demonstrates why a fill factor of 94 percent may not be sufficient.[745]

208. *Port/Usage Split.* In their proposed run of the HAI model, the competitive LECs urged the Colorado Commission to allocate 60 percent of switch costs to flat-rate port charges and 40 percent to per-minute usage charges. One of the adjustments advocated by Qwest, and adopted by the Colorado Commission, was to change this allocation so that 30 percent of switch costs are allocated to ports and 70 percent are allocated to usage. AT&T asserts that the Colorado Commission's decision to accept Qwest's proposal to use a 30/70 split in allocating switch costs between port and usage does not reflect the realities of a forward-looking network. Because most of the costs of a switch occur at the time it is placed in operation and do not vary

740 *Colorado Pricing Further Reconsideration Order* at 12.

741 AT&T Qwest III Chandler/Mercer Decl. at para. 31; AT&T Qwest I Chandler/Mercer Decl. at para. 28.

742 AT&T Qwest III Chandler/Mercer Decl. at para. 32; AT&T Qwest I Chandler/Mercer Decl. at para. 29.

743 *Colorado Pricing Reconsideration Order* at 7 n.2.

744 *U S WEST Communications, Inc.'s Statement of Generally Available Terms and Conditions*, Docket No. 99A-577T, Rebuttal and Cross Answer Testimony of Robert Brigham at 142-54 (July 20, 2001).

745 Qwest I Thompson Reply Decl. at paras. 30-36. For example, Qwest argues that a 94 percent fill factor would not provide sufficient capacity to leave lines connected after a customer terminates service ("warm dial tone"). Qwest also explained that the 80,000 line maximum switch size in the HAI model does not justify the use of a higher fill factor because this input only affects the fixed component of switch investment, not the variable (per-line) component of switch investment. *Id.* at para. 36. For example, rather than calculate the cost of a single switch serving 90,000 lines, the model would spread those lines over two switches. This increases the fixed cost (by adding the fixed investment of a second switch), but the variable cost still is calculated based on 90,000 lines. The 80,000 line maximum therefore has little impact on the switching cost in Colorado because: (1) variable costs represent 82 percent of per-line switch costs on an average switch; and (2) only a handful of switches are large enough to be split by the model. *Id.*

with usage, AT&T argues that a 60/40 split would be more appropriate.[746] According to AT&T, the effect of this error is to increase switching usage costs by 75 percent, thereby deterring competitive LECs from serving high-usage customers.[747]

209. AT&T is correct in stating that our TELRIC rules establish the general principle that costs should be recovered in the manner in which they are incurred.[748] The Commission has not, however, interpreted this principle to mandate a particular allocation of switch costs between flat-rate port charges and per-minute usage charges. To the contrary, we previously have approved section 271 applications in which the state commission adopted the same 30/70 split used by the Colorado Commission.[749] Accordingly, we find that the decision by the Colorado Commission to adopt a 30/70 split does not constitute a TELRIC error.[750]

(c) Line Sharing

210. The *Colorado Pricing Order* established a rate of $4.89 per month for the High Frequency Portion of the Loop (HFPL) that carriers purchase under the Commission's line sharing requirements.[751] In setting this rate, the Colorado Commission applied an imputation test to determine whether Qwest's charges for retail DSL service cover the direct cost of the service plus an imputation of the wholesale price Qwest charges for the HFPL.[752] In applying that test, the Colorado Commission found that Qwest's retail price of $29.95 "is far above a reasonable estimate of Qwest's direct costs for providing HFPL and our proposed wholesale price."[753]

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746 AT&T Qwest III Chandler/Mercer Decl. at paras. 36-37; AT&T Qwest I Chandler/Mercer Decl. at paras. 33-34.

747 AT&T Qwest III Chandler/Mercer Decl. at para. 41; AT&T Qwest I Chandler/Mercer Decl. at para. 37.

748 *See Local Competition First Report and Order*, 11 FCC Rcd at 15874, para. 743.

749 *Verizon Maine Order* at para. 29. AT&T attempts to distinguish the Maine decision on the ground that the Maine Commission provided a more extensive analysis in support of its decision. Although AT&T is correct that the Colorado Commission did not provide an extensive analysis of this specific issue, Qwest filed testimony in support of this adjustment and the Colorado Commission referenced that testimony in the *Colorado Pricing Reconsideration Order*. Although a more complete discussion by the Colorado Commission would have been helpful, we do not find that the absence of such a discussion on this issue means that we should second-guess a state decision that is consistent with our prior decisions.

750 As to AT&T's argument that Qwest's allocation of costs between port and usage charges has the effect of making high-usage customers less attractive to competitive carriers, we note that it also would seem to make low-usage customers more attractive. Given the suggestion elsewhere in AT&T's comments that it plans to serve all customers (i.e., to enter markets on a state-wide basis), we do not see how AT&T is harmed by the port/usage allocation adopted by the Colorado Commission. AT&T Qwest I Comments at 141, Declaration of Michael Lieberman, para. 20 (AT&T Qwest I Lieberman Decl.).

751 *Colorado Pricing Order* at 114-18.

752 *Colorado Pricing Order* at 117-18.

753 *Id.* at 118.

Covad requested reconsideration of this decision, and the Colorado Commission affirmed its initial decision.[754] Covad again requested reconsideration, and in response Qwest expressed its willingness to provide the HFPL at a rate of zero on a temporary basis. The Colorado Commission rejected Qwest's proposal to provide the HFPL at a rate of zero and retained the $4.89 rate in Qwest's SGAT.[755] On August 5, 2002, Qwest filed an amended SGAT with the Colorado Commission reducing the HFPL rate in zone 1 and zone 2 on an interim basis, pending a final decision on deaveraging of loop rates in Phase II of the 577T docket.[756] Covad argues that the Colorado Commission's decision to set a positive rate for the HFPL violates the *Line Sharing Order,* our TELRIC pricing requirements and the nondiscrimination provisions of the Act.

211. Covad argues that the Colorado Commission's decision to establish a $4.89 monthly charge for the HFPL violates the Commission's *Line Sharing Order*. According to Covad, "Qwest must be required to set the price for the [HFPL] at the same price Qwest continues to charge itself: $0."[757] Covad relies on the section of the *Line Sharing Order* in which the Commission stated that "states may require that incumbent LECs charge no more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services."[758] According to Covad, Qwest has acknowledged that it does not include any loop costs in its filed cost studies supporting its federal tariffs for retail DSL service,[759] and therefore any rate in excess of zero violates our rules.

212. We agree that the Colorado Commission did not follow the *Line Sharing Order*'s guidelines for pricing the HFPL. As mentioned, the *Line Sharing Order* announced that "states may require that incumbent LECs charge no more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services."[760] The use of the term "may" could suggest that the rule is permissive – that states have discretion to adopt a different pricing rule. On the other hand, however, the *Line Sharing Order* uses language that suggests the Commission meant to impose a mandatory rule. For example, the Commission stated that "[b]y *requiring* incumbent LECs to provide access to the shared local loops for no more than they allocate to their own xDSL services, the price squeeze may be redressed by ensuring competitive LECs and ILECs incur the same cost for access to the bandwidth required to provide xDSL

[754] *Colorado Pricing Reconsideration Order* at 87-88.

[755] *Colorado Pricing Further Reconsideration Order* at 17-18.

[756] The HFPL rate is now $1.82 in zone 1 and $3.80 in zone 2. *See* Qwest Aug. 8 Pricing *Ex Parte* Letter (08/08/02d).

[757] Covad Qwest I Comments at 5. *See also* Covad Qwest III Comments at 3.

[758] *Line Sharing Order*, 14 FCC Rcd at 20975-76, para. 139.

[759] Covad Qwest III Comments at 8-9; Covad Qwest I Comments at 8.

[760] *Line Sharing Order*, 14 FCC Rcd at 20975, para. 138.

services."[761] In fact, in a subsequent order, the Commission stated that the pricing rule was required. Characterizing the *Line Sharing Order*'s pricing rule as mandatory, the Commission stated in the *CALLS Order* that "[t]he *Line Sharing Order* concluded that states should not permit incumbent LECs to charge more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services."[762]

213. Because the Commission has not conclusively determined whether the HFPL guidelines are required, we decline to do so in the context of this section 271 proceeding. The Commission has typically deferred resolution of such novel issues to separate proceedings.[763] We intend to address this issue in our pending proceeding on line sharing. We expect that Qwest, working with the Colorado Commission, will adjust its HFPL rate or its retail DSL tariff, if necessary, to comply with the rules the Commission adopts in the pending proceeding.

(iii) Non-Recurring Charges

[761] *Line Sharing Order*, 14 FCC Rcd at 20976, para. 141 (emphasis added). In addition, under the *Local Competition First Report and Order*, states already had discretion to adopt this pricing rule. There, the Commission stated that states could – but did not have to – require that incumbent LECs charge no more to competitive LECs for access to unbundled elements than the amount they charged at retail for services using the same elements. *Local Competition First Report and Order*, 11 FCC Rcd at 15920, para. 850. Yet the *Line Sharing Order* spends four pages discussing how the HFPL should be priced, which seems odd if it meant only to re-emphasize the point already established in the *Local Competition First Report and Order*.

[762] *Access Charge Reform*, 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, 15 FCC Rcd 12962, 13001, para. 98 (2000) (*CALLS Order*). At the same time, we note that all of the Commission's line sharing rules, including the HFPL pricing guidelines, were held invalid by the United States Court of Appeals for the D.C. Circuit. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002). Indeed, the court determined that these rules "must be vacated," and these rules would no longer be in effect but for the court's decision to stay the vacatur of the *Line Sharing Order* until January 2, 2003. *See id.*; *USTA v. FCC*, No. 00-1012, Order (D.C. Cir., filed Sept. 4, 2002). The Commission has recently sought an additional extension of this stay until February 20, 2003. The Commission is currently considering line sharing in a pending proceeding. *See Triennial Review Notice*, 16 FCC Rcd at 22805-06, paras. 53-54.

[763] *See, e.g.*, *SBC Arkansas/Missouri Order*, 16 FCC Rcd at 20759-60, para. 82; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17470, para. 92 ("As we have stated in other section 271 orders, new interpretative disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding."), para. 97 (concerning resale of DSL in combination with UNE-platform voice service) and para. 100 (concerning single points of interconnection). *See also Verizon Massachusetts Order*, 16 FCC Rcd at 8993, para. 10; *SWBT Texas Order*, 15 FCC Rcd at 18366, para. 23. Courts have held that the Commission is not required to solve all ambiguities in the context of a section 271 proceeding. *See, e.g.*, *Bell Atlantic New York Order*, 15 FCC Rcd at 4117-4124, paras. 316-336, *aff'd AT&T v. FCC*, 220 F.3d 607, 622-625 (D.C. Cir. 2000) (agreeing with the Commission that "the statute is ambiguous with respect to the precise issue [nondiscriminatory access to DSL loops]" and upholding the Commission's decision not to require a separate evidentiary showing with respect to DSL loops).

214. The NRCs established by the Colorado Commission in the *Colorado Pricing Order* were derived from the cost model submitted by Qwest. Qwest's model calculates NRCs by identifying each individual element of an activity, determining how many minutes it takes to accomplish each element, multiplying that figure by how often the element is likely to occur, and finally multiplying the resulting number of minutes by the appropriate labor rate.[764] The competitive LECs sought reconsideration of the Colorado Commission's initial decision with respect to NRCs, and in the *Colorado Pricing Reconsideration Order* the Colorado Commission reduced the frequency estimates for a number of activities, which resulted in reductions in the NRCs.[765]

215. Notwithstanding these reductions, AT&T argues that the NRCs established by the Colorado Commission are not consistent with TELRIC requirements. AT&T identifies three principal flaws in the Colorado Commission's analysis: activities and time estimates that are not sufficiently forward-looking, recovery of costs that should be recovered through recurring charges, and recovery of disconnect costs as part of installation charges.[766] As proof that the Colorado Commission committed clear TELRIC error, AT&T attempts to show that the NRCs in Colorado are significantly higher than charges for comparable activities in other states that have received section 271 approval.[767]

216. *Forward-Looking vs. Actual.* AT&T argues that the NRC study adopted by the Colorado Commission reflects activities and time estimates that are not sufficiently forward-looking. Specifically, AT&T states that the Qwest study reflects the costs of several manual activities that would, and currently can, be performed electronically.[768] AT&T also states that the Qwest study assumes an unreasonably high level of fallout (10 percent) and that a much lower fallout rate (2 percent) is appropriate for forward-looking OSS.[769] AT&T states that the NRC study approved by the Colorado Commission improperly develops time estimates for each activity based on the opinion of a single subject matter expert, which is neither objective nor statistically valid.[770] The result, AT&T asserts, is that the time estimates for numerous activities are overstated.

217. We find that the arguments advanced by AT&T are not sufficient to demonstrate that the Colorado Commission committed clear TELRIC error. The Colorado Commission was presented with two cost studies that offered extremely different opinions of the activities that are

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764 Qwest I Thompson Reply Decl. at para. 21.

765 *Colorado Pricing Reconsideration Order* at 61-62.

766 AT&T Qwest I Comments at 62.

767 *Id.* at 61-62.

768 AT&T Qwest I Comments, Declaration of Thomas Weiss at paras. 17-19 (AT&T Qwest I Weiss Decl.).

769 *Id.* at paras. 32-33.

770 *Id.* at paras. 20-26.

necessary in a forward-looking environment, and the time and frequency associated with each activity. The Colorado Commission selected the Qwest cost study, but in its first reconsideration order the Colorado Commission made a number of adjustments to the frequencies to make them more forward-looking, as requested by the competitive LECs.[771] Based on the record before it, the Colorado Commission was required to make a significant number of highly fact-specific decisions. We are reluctant to interfere with state commissions with respect to these decisions, and we find that AT&T has not provided sufficient reason for us to do so here.

218. *Disconnect Costs.* AT&T states that the Colorado Commission erred by allowing Qwest to include disconnection costs in its installation NRCs.[772] According to AT&T, these costs should be recovered at the time they are incurred, if they are incurred at all. To the extent that Qwest has concerns about non-payment, AT&T states that the situation with respect to wholesale customers is distinguishable from the situation for retail customers, and there are other means by which Qwest can address the potential for non-payment by wholesale customers.[773]

219. As a conceptual matter, we do not find the decision by the Colorado Commission to allow Qwest to recover disconnection costs at the time of installation is necessarily a violation of TELRIC. As the parties note, recovery of disconnect costs at the time of installation is a well-established practice with respect to retail customers. Although AT&T may be correct that there are differences between retail and wholesale customers, we find that it is for the states to decide in the first instance the most appropriate manner of balancing the competitive LEC interest in reducing up-front charges with the need to protect incumbent LECs against the risk of non-payment by wholesale customers.[774] Where, as here, the state commission has engaged in a reasoned analysis of the merits of allowing an incumbent LEC to recover these costs at the time of installation,[775] we will not interfere with that decision.

220. A second concern advanced by AT&T is that the level of the disconnect costs included in the installation NRCs overstates the costs associated with disconnection because in most cases Qwest leaves facilities in place when a customer terminates service.[776] Qwest disputes this argument, noting that, in the case of non-platform UNE loops, the customer's loop would always have to be disconnected from the competitive LEC's switch on the date that the competitive LEC's service ended.[777] For UNE-P loops, Qwest agrees that it leaves the

[771] *Colorado Pricing Reconsideration Order* at 61-62.

[772] AT&T Qwest I Weiss Decl. at para. 11.

[773] *Id.* at para. 13.

[774] *Local Competition First Report and Order*, 11 FCC Rcd at 15875-76, paras. 749-51 (giving states discretion with respect to recovery of non-recurring costs).

[775] *Colorado Pricing Order* at 57; *Colorado Pricing Reconsideration Order* at 64-65.

[776] AT&T Qwest I Weiss Decl. at para. 14.

[777] Qwest I Thompson Reply Decl. at para. 16.

connection in place where there is a high degree of dedicated inside plant. For this reason, however, Qwest significantly reduces disconnection costs included in the UNE-P installation NRC.[778] As with other aspects of NRCs, we defer to the Colorado Commission on this issue. The Colorado Commission was presented with evidence from Qwest and the competitive LECs with respect to the time and frequency of various activities, including disconnect activities, and we are reluctant to interfere with the manner in which the Colorado Commission assessed the record before it. Although there are elements of the Colorado Commission's approach that raise questions, such as the failure to consider reducing the disconnect costs based on the time value of money,[779] overall we find that the Colorado Commission appropriately considered this issue in setting installation NRCs, and there were no clear TELRIC errors.

221. *Recovery Through Recurring Charges*. AT&T states that the Colorado Commission erred by allowing Qwest to recover the costs of certain activities through NRCs, even though the activities produce a benefit that will last for longer than one year and should be recovered through recurring charges.[780] AT&T also states that Qwest's NRCs include cost loading, such as product management and sales expenses, that should not be attributed to non-recurring functions.

222. The Commission's TELRIC rules provide general guidance with respect to whether costs should be recovered through recurring charges or NRCs, but they do not specifically address the issue raised by AT&T.[781] While we prohibit states from permitting incumbent LECs to recover recurring costs through NRCs, AT&T has not argued that any of the costs Qwest seeks to recover through NRCs are in fact recurring costs. Rather, AT&T is arguing that these non-recurring costs are more appropriately recovered through a recurring charge because of the nature of the cost (i.e., because the benefit lasts longer than one year).[782] Our rules do give states the authority to require that non-recurring costs be recovered through recurring charges, but we have not mandated such treatment for any particular type of non-recurring cost.[783] Accordingly, we find that the decisions made by the Colorado Commission on these issues are within the discretion of the state commissions under our TELRIC rules.

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[778] Qwest I Thompson Reply Decl. at para. 17.

[779] For example, the Nebraska Commission included only 60 percent of disconnect costs in installation rates to reflect the fact that a customer may stay with the competitive LEC, and it discounted the cost over a five-year period to reflect that competitive LECs are paying today for activities that will be performed at some time in the future. *See Nebraska Pricing Order* at 48.

[780] AT&T Qwest I Weiss Decl. at paras. 34-35.

[781] 47 C.F.R. § 51.507(e) (2001); *Local Competition First Report and Order*, 11 FCC Rcd at 15875-76, paras. 749-51.

[782] AT&T Qwest I Weiss Decl. at para. 35.

[783] 47 C.F.R. § 51.507(e) (2001); *Local Competition First Report and Order*, 11 FCC Rcd at 15875-76, paras. 749-51.

223. We also disagree with AT&T's argument that the Colorado Commission committed clear TELRIC error by including cost loadings as part of NRCs. The Commission's rules specifically allow for recovery of forward-looking common costs, and there is no prohibition on recovering common costs through NRCs, as long as the total recovery does not exceed the forward-looking economic cost associated with an element.[784] As with the argument that certain costs should be recovered on a recurring basis, the position advocated by AT&T would extend our TELRIC rules beyond what they presently require. Therefore we defer to the decision made by the Colorado Commission.

224. *Comparison to Other States*. AT&T states that the NRCs approved by the Colorado Commission are well in excess of comparable NRCs in states that have received section 271 approval. For example, AT&T states that Qwest charges $171.88 for coordinated installation with testing (a "hot cut") while Verizon charges $4.07 in Pennsylvania and $35 in New York and New Jersey.[785] AT&T states that this is an "apples-to-apples" comparison because the Qwest and Verizon NRCs both include testing. Similarly, AT&T states that Qwest charges $55.27 for a basic installation. According to AT&T, the corresponding rates in New York, New Jersey, Pennsylvania, and Georgia are $0.13, $23.15, $3.01, and $34.22 respectively.[786]

225. Qwest makes a number of points in response. First, Qwest provided information demonstrating that its rate for a hot cut is $59.81, and that this charge includes the same testing that Verizon provides with its hot cut.[787] According to Qwest, the $171.88 charge referenced by AT&T includes specialized testing that goes beyond what is provided with a basic hot cut.[788] In support of its position that the $59.81 charge is the relevant charge for comparison purposes, Qwest notes that in 2001 in Colorado, only 17 percent of all orders for installed loops included a competitive LEC request for cooperative testing, while the remaining 83 percent of orders did not include cooperative testing.[789] Based on this evidence, we agree with Qwest that its $59.81 charge is the NRC for a hot cut and the appropriate charge to consider for purposes of comparison to hot cut NRCs in states that already have obtained section 271 authority.

226. In its application, Qwest included an exhibit demonstrating that its $59.81 hot cut NRC was comparable to rates in previously approved states (primarily SWBT states).[790] Qwest

784 47 C.F.R. § 51.505(c) (2001); 47 C.F.R. § 51.507(e) (2001).

785 AT&T Qwest I Comments at 61.

786 *Id.*

787 Qwest I Thompson Reply Decl. at para. 7.

788 *Id.* at para. 5.

789 *Id.* at para. 9.

790 Qwest I Application, App. A, Tab 29, Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements and Interconnection in Colorado, Ex. JLT-CO-4 (Qwest I Thompson Colorado Decl.).

argues that the charges AT&T identifies from other states do not include the same functionality as Qwest provides in its installation charges. For example, Qwest demonstrates that the $0.13 NRC for New York cited by AT&T only includes provisioning costs, and does not include service order charges or central office wiring.[791] In its reply comments, Qwest provided additional information showing that its hot cut NRC compares favorably to similar NRCs in previously-approved states.[792]

227. AT&T argues that we should compare Qwest's hot cut NRC only with the comparable charges in Verizon states.[793] According to AT&T, competitive LECs only recently became concerned with hot cut charges and the comparisons relied on by Qwest are to states where the issue was not heavily litigated.[794] AT&T's suggestion that competitive LECs were unconcerned with the hot cuts in the SWBT states is inaccurate. Various aspects of the hot cut issue were litigated in most of these states, both at the state level and before this Commission in section 271 applications.[795] In conclusion, we find that Qwest's hot cut NRC is comparable to NRCs in other states for similar activities and is consistent with our TELRIC requirements.

d. Benchmark States

(i) TELRIC Analyses

228. In each of the eight benchmark states – Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming – Qwest, until recently, provided UNEs at rates established by the state commission in an arbitration or generic cost proceeding. Shortly before filing its section 271 application with the Commission, Qwest voluntarily reduced its recurring charges for loop and non-loop UNEs in each of the eight states, as well as many of its NRCs. Qwest reduced these rates with the specific intent of passing a benchmark comparison to rates in Colorado.[796] Qwest also argues, however, that the current rates are TELRIC-compliant because they are lower than the TELRIC-complaint rates established by the states.[797] In this section of

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791 *See* Letter from David L. Sieradzki, Counsel, Qwest Communications International, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148 at 19 (filed July 22, 2002) (Qwest July 22 *Ex Parte* Letter).

792 Qwest I Thompson Reply Decl., Reply Ex. JLT-1.

793 AT&T Qwest I Reply at 56-57.

794 *Id.*

795 *SWBT Texas Order*, 15 FCC Rcd at 18486-95, paras. 259-77; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6336-40, paras. 200-07.

796 With respect to NRCs, Qwest reduced its installation NRCs to levels equal to the charges established by the Colorado Commission in recognition of the fact that the benchmark process, which reflects cost differences between states, has not been applied to NRCs. Qwest I Application at 166.

797 Qwest II Application at 160 ("The State Commissions of Montana , Utah, Washington and Wyoming each conducted pricing proceedings that were intended to, and did, produce TELRIC-compliant rates."); Qwest I (continued….)

the order, we describe the relevant state proceedings, and identify challenges to Qwest's claim that rates established in the state commission proceedings comply with our TELRIC pricing requirements. In the end, we need not decide whether the earlier state proceedings produced TELRIC-compliant rates, because we find that Qwest's current, voluntarily-reduced rates benchmark to the rates in Colorado. We do, however, resolve certain issues with respect to rates not included in our benchmark analysis, such as NRCs.

(a) Idaho

229. *Background.* The process leading to Qwest's current rates in Idaho began in a 1997 interconnection arbitration proceeding with AT&T. In this proceeding, the parties engaged in extensive discovery, briefing and the presentation of evidence at multiple arbitration hearings. The Arbitrator appointed by the Idaho Commission issued several orders resolving areas of dispute.[798] With respect to pricing, the Arbitrator adopted the Hatfield Cost Model, making adjustments to certain inputs and assumptions. The Arbitrator deemed the rates interim, noting that permanent UNE prices would be established in a separate UNE cost proceeding.[799] The Idaho Commission reviewed and modified the Arbitrator's orders after allowing additional opportunity for briefing and oral argument.[800] The rates established in this interconnection arbitration and approved on an interim basis by the Idaho Commission form the basis of Qwest's initial SGAT filed with the Idaho Commission. The Idaho Commission is currently conducting a separate cost proceeding to establish permanent UNE rates which it expects to complete before the end of this year.[801]

(Continued from previous page)
Application at 162 ("The regulatory agencies for Idaho, Iowa, Nebraska and North Dakota each conducted thorough pricing proceedings that were intended to, and did, produce TELRIC-compliant rates.").

798 *See* Qwest I Application App. A, Tab 30, Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements and Interconnection in Idaho, paras. 3-4 (Qwest I Thompson Idaho Decl.).

799 *See id.* at paras. 7-19. *See also AT&T Communications of the Mountain States, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms and Conditions of Interconnection with US West,* Case No. USW-T-96-15/ATT-T-96-2, First Arbitration Order at 38 (Idaho PUC Mar. 24, 1997) (*Idaho Commission First Arbitration Order*); *AT&T Communications of the Mountain States, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms and Conditions of Interconnection with US West,* Case No. USW-T-96-15/ATT-T-96-2, Second Arbitration Order at 41-42 (Idaho PUC June 6, 1997) (*Idaho Commission Second Arbitration Order*).

800 *See AT&T Communications of the Mountain States, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms and Conditions of Interconnection with US West,* Case No. USW-T-96-15/ATT-T-96-2, Order No. 27050 (Idaho PUC July 16, 1997) (*Idaho Commission July 16 Arbitration Order*); *AT&T Communications of the Mountain States, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 of the Rates, Terms and Conditions of Interconnection with US West,* Case No. USW-T-96-15/ATT-T-96-2, Order No. 27236 (Idaho PUC Dec. 1, 1997) (*Idaho Commission Dec.1 Arbitration Order*).

801 *See* Idaho Commission Qwest I Comments at 4. *See also* Idaho Commission Qwest III Comments (adopting and incorporating by reference its Qwest I Comments).

230. On February 8, 2000, the Idaho Commission opened a separate proceeding to assess Qwest's compliance with the Commission's section 271 requirements.[802] On April 19, 2002, the Idaho Commission issued an order stating that "[t]here is no evidence showing that Qwest's UNE prices reached through an arbitration that occurred four years ago satisfy current FCC TELRIC pricing requirements," and that: "[t]he lack of UNE prices for Qwest remains a gap in Qwest's record for compliance with Section 271 requirements."[803] Subsequently, on May 24, 2002, Qwest filed a revised SGAT with the Idaho Commission in which it made voluntary rate reductions based on its benchmark analysis against rates established by the Colorado Commission.[804] On June 10, 2002, the Idaho Commission issued an order observing, without elaboration, that the revised prices for unbundled loops and local switching are "based on TELRIC prices established by the Colorado Commission" and concluding that "[i]n the words of AT&T, the resulting price adjustments are 'closer to being TELRIC compliant.'"[805] The Idaho Commission states that it "is satisfied with the interim UNE rates filed by Qwest [in Qwest's May 24, 2002 SGAT] and expects to complete its UNE cost docket to establish permanent TELRIC rates before the end of the year."[806] On this basis, the Idaho Commission recommended that the Commission approve Qwest's section 271 application on July 3, 2002.[807] In an effort to address concerns raised by competitive LECs and the Department of Justice, Qwest made further rate reductions on August 5, 2002 and on October 16, 2002.[808]

231. *Discussion.* AT&T raises a number of concerns regarding Qwest's rates in Idaho established in the 1997 interconnection arbitration proceeding. AT&T specifically challenges the structure sharing assumptions and common cost factor used in the 1997 arbitration to establish loop and switching rates. With respect to structure sharing assumptions, AT&T argues that those adopted by the Arbitrator – 33 percent for aerial cable, 50 percent for buried cable, and 90 percent for underground cable – are "at odds with the forward-looking costs of an efficient provider" and conflict with the Commission's determination in the *Inputs Order.*[809] With

[802] *See US West Communications, Inc.'s Motion for an Alternative Procedure to Manage its Section 271 Application*, Case No. USW-T-00-3, Order at 2 (Idaho PUC Apr. 19, 2002) (*Idaho Commission Apr. 19 Section 271 Order*).

[803] *See id.* at 11.

[804] Qwest I Thompson Idaho Decl. at para. 6. *See also US West Communications, Inc.'s Motion for an Alternative Procedure to Manage its Section 271 Application,* Case No. USW-T-00-3, Order at 7 (Idaho PUC June 10, 2002) (*Idaho Commission June 10 Section 271 Order*).

[805] *Idaho Commission June 10 Section 271 Order* at 7.

[806] Idaho Commission Qwest I Comments at 4.

[807] *See* Idaho Commission Qwest I Comments at 14.

[808] *See* Qwest Aug. 8 Pricing *Ex Parte* Letter, Idaho Attach. (08/08/02d); Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, Idaho Attach.

[809] *See* AT&T Qwest III Baker/Starr/Denney Decl. at para. 31; AT&T Qwest I Comments, Tab C, Declaration of Natalie J. Baker, Arleen M. Starr, and Douglas Denny at para. 31 (AT&T Qwest I Baker/Starr/Denny Decl.).

respect to common cost factor, AT&T argues that the 13 percent common cost factor set by the Arbitrator is far above forward-looking levels as evidenced by the fact that the average BOC (including Qwest) had an overhead of 10.5 percent in 1998 and 8.3 percent in 2000.[810] AT&T also argues that Qwest's 1997 loop and switching costs are not TELRIC-compliant because loop and switching costs have declined since 1997 due to the substantial growth in demand for local telecommunications services that has occurred since that time.[811]

232. AT&T also challenges Qwest's 1997 loop rates on the basis that they were not geographically deaveraged in accordance with the Commission's regulations.[812] Although the rates established by the Arbitrator in Qwest's 1997 interconnection arbitration with AT&T were not deaveraged, Qwest subsequently deaveraged its rates into three zones in compliance with Commission regulations and in coordination with the Idaho Commission staff. Therefore, because Qwest is now in compliance with Commission deaveraging regulations, and because the rates proposed by Qwest in this proceeding are deaveraged accordingly, the Arbitrator's decision not to deaverage rates in 1997 is not of concern in this proceeding. Because the rates before us were derived by benchmarking to new rates ordered in Colorado, we conclude that it is unnecessary to determine whether the Idaho Commission committed TELRIC errors in establishing UNE rates in the 1997 interconnection arbitration proceeding between Qwest and AT&T.

(b) Iowa

233. *Background.* In 1996, the Iowa Board conducted an arbitration proceeding involving Qwest, MCI and AT&T, under section 252(b) of the 1996 Act. In a preliminary arbitration decision, the Iowa Board established interconnection and UNE rates using rates proposed by AT&T (and accepted by MCI).[813] The Iowa Board made two additional pricing decisions in its final arbitration decision. First, the Iowa Board set collocation rates at levels that it had determined in a pre-1996 Qwest cost docket. Second, the Iowa Board did not require Qwest to provide zone pricing for loop and subloop rates.[814]

234. At the outset of the above-described arbitration proceeding, Qwest filed a tariff as required in response to a requirement that it file a local network interconnection tariff, using total

810 *See* AT&T Qwest III Baker/Starr/Denney Decl. at para. 32; AT&T Qwest I Baker/Starr/Denney Decl. at para. 32.

811 *See* AT&T Qwest I Comments at 54; AT&T Qwest I Lieberman Decl. at paras. 15-19.

812 *See* AT&T Qwest III Baker/Starr/Denney Decl. at para. 30; AT&T Qwest I Baker/Starr/Denny Decl. at para. 30.

813 Qwest I Application App. A, Tab 31, Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements in Iowa, at para. 6 (Qwest I Thompson Iowa Decl.) (citing *Arbitration of AT&T Communications of the Midwest, Inc., and MCI Metro Access Transmission Services, Inc. and U S WEST, Communications, Inc.,* Docket Nos. ARB-96-1 and ARB-96-2, Preliminary Arbitration Decision at 2 (Iowa Util. Bd. Oct. 18, 1996)).

814 Qwest I Thompson Iowa Decl. at para. 7 (citing *Iowa Board Final Arbitration Decision* at 8, 11-12).

service long-run incremental cost methodology (TSLRIC), containing UNE and interconnection charges.[815] When parties filed objections, the Iowa Board suspended Qwest's tariff and docketed it as Docket No. RPU-96-9. This docket lasted nearly two years and yielded two decisions that "include[d] a detailed analysis of the pricing issues presented to the Board, including the cost model to be used as the basis for pricing decisions, the key inputs to be used with that model, and the treatment of non-recurring costs."[816] While the Iowa Board subsequently deaveraged rates by defining three geographic areas, it refused to reconsider its previous UNE pricing determinations.[817]

235. On May 16 and May 21, 2002, Qwest voluntarily lowered its rates in Iowa in anticipation of filing its section 271 application.[818] AT&T opposed Qwest's tariff revisions on the ground that they added "many" UNEs that might cause competitive LECs to pay higher overall wholesale rates, and voiced concern that the Exhibit A filed with Qwest's updated SGAT was inconsistent with Qwest's filed tariff because "there appeared to be many additional rate elements which are not contained in the [prior tariff, the] revised Iowa Tariff No. 5."[819] The Iowa Consumer Advocate objected because Qwest had not explained "whether and how the proposed rates [were] cost-based."[820] Despite these arguments, the Iowa Board approved Qwest's voluntary reductions, effective June 7, 2002, and noted that the lower rates would immediately benefit competitive LECs currently purchasing relevant services from Qwest.[821] The Iowa Board also noted that Qwest's new UNE rates appeared to be less than, or equal to, rates previously approved by the Iowa Board, with the exception of NRCs for DS3-type facilities.[822] On June 10, 2002, Qwest filed an updated SGAT setting forth new rates derived through benchmarking to Colorado rates. The Iowa Board found those rates to be in compliance with certain "conditional statements" the Iowa Board had issued to resolve impasse issues identified during a multi-state

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815 Qwest I Thompson Iowa Decl. at para. 8 (citing Tariff TF-95-280 (filed July 18, 1995)).

816 Qwest I Thompson Iowa Decl. at para. 9 (citing *US West Communications, Inc.*, Docket No. RPU-96-9, Final Decision and Order, 14-15 (Iowa Util. Bd. Apr. 23, 1998) (*Iowa Board 1998 Pricing Order*) and *U S West Communications, Inc.*, Docket No. 96-9, Order Granting Rehearing in Part for Purposes of Clarification and Correction (Iowa Util. Bd. June 12, 1998)).

817 *See Order Sustaining Objections to Consideration of Certain Remand Issues*, Docket No. RPU-00-1, 9-10 (Iowa Util. Bd. Aug. 2, 2000). *See also* Qwest I Thompson Iowa Decl. at para. 13.

818 *Qwest Corporation*, Docket No. TF-02-202, Order Approving Tariff, 1 (Iowa Util Bd. June 7, 2002) (*Iowa Board Rate-Reduction Order*).

819 *Iowa Board Rate-Reduction Order* at 2.

820 *Id.*

821 *Id.* at 4. The Iowa Board further noted that "there [was] no apparent harm in permitting these lower rates to become effective as of June 7, 2002." *Id.*

822 *Iowa Board Rate-Reduction Order* at 4.

collaborative process concerning Qwest's anticipated section 271 application.[823] The Iowa Board also concluded that Qwest had adequately addressed each of the section 271 requirements and recommended that the Commission approve Qwest's section 271 application.[824] Qwest filed additional rate reductions on August 5, 2002, and on October 18, 2002, in response to concerns raised by commenters.[825]

236. *Discussion.* AT&T raises a number of concerns regarding Qwest's rates established in the Iowa Board's cost proceeding. AT&T generally claims that the Iowa Board "set rates for loop, switching and other critical elements on the basis of Qwest's 'actual' costs rather than efficient forward-looking costs as TELRIC requires."[826] More specifically, AT&T claims that Iowa's loop rates are inflated because loop-related costs have fallen 22 percent since the Iowa Board, using old data, held its cost proceedings.[827] AT&T argues that, even had the Iowa Board applied TELRIC principles, the cost proceedings relied on old data, and that, since these proceedings, Qwest's switching costs have fallen by 25 percent.[828] As noted above, because the rates before us were derived by benchmarking to the new rates ordered in Colorado, we conclude that it is unnecessary to determine whether the Iowa Board committed TELRIC errors in its cost proceeding.

(c) Montana

237. *Background.* The Montana Commission initially established interim rates for UNEs, interconnection and collocation in 1997 as part of its decisions in the arbitration between AT&T and Qwest.[829] The Montana Commission generally relied on the Hatfield Model

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823 *See U S West Communications, Inc., a/k/a Qwest Corporation,* Docket Nos. INU-00-2 & SPU-00-11, Final Statement Regarding Qwest Corporation's Compliance with 47 U.S.C. §§ 271 and 272 Requirements at 7 (Iowa Util. Bd. June 12, 2002).

824 Iowa Board Qwest I Comments at 1. *See also* Iowa Board Qwest III Comments at 1 (adopting by reference its Qwest I Comments).

825 *See* Qwest Aug. 8 Pricing *Ex Parte* Letter (08/08/02); Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, Iowa Attach.

826 AT&T Qwest III Baker/Starr/Denny Decl. at para. 12; AT&T Qwest I Baker/Starr/Denney Decl. at paras. 12-14.

827 AT&T Qwest I Comments at 54 (citing AT&T Qwest I Lieberman Decl. at Table 4).

828 AT&T Qwest I Comments at 54 (citing AT&T Qwest I Lieberman Decl. at Table 6).

829 *The Petition of AT&T Communications of the Mountain States, Inc. Pursuant to 47 U.S.C. Section 252(b) for Arbitration of Rates, Terms and Conditions of Interconnection with U S West Communications, Inc.*, Montana Commission Docket No. D96.11.200, Arbitration Decision and Order, Order No. 5961b at 29-30, 43-49, 78-87, 92 (March 20, 1997) (*Montana Arbitration Order*), Order on Petitions for Reconsideration, Order No. 5961c at 20, 22, 28-31, 38-44, 48 (July 9, 1997) (*Montana Arbitration Reconsideration Order*); Qwest II Application App. A, Tab 28, Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements and Interconnection in Montana, para. 3 (Qwest II Thompson Montana Decl.); AT&T Qwest II Comments at 75-76.

sponsored by AT&T, with some input adjustments, for setting UNE rates, and on the Qwest cost model for setting collocation rates.[830] The Montana Commission found that the cost studies filed by both Qwest and AT&T were flawed.[831] The recurring loop rate in this proceeding was not deaveraged, but was set as a statewide-average rate.[832] In this proceeding, the Montana Commission stated that it would establish permanent rates in a future proceeding.[833]

238. The Montana Commission established deaveraged loop rates in December 2000.[834] The Montana Commission adopted a rate deaveraging structure proposed by Qwest, in which four rate zones were established. These rate zones were based on distance from each wire center, resulting in four concentric rate zones around each wire center.[835]

239. On July 24, 2000, the Montana Commission initiated a cost docket to establish permanent UNE, interconnection and collocation rates.[836] The Montana Consumer Counsel and several small competitive LECs intervened in the docket.[837] On June 6, 2001, after testimony had been filed in the cost docket, Qwest, Montana Wireless, Touch America, Avista and the Montana Consumer Counsel entered into a stipulation setting rates.[838] Loop rates were deaveraged pursuant to the methodology established in the *Montana Deaveraging Order*.[839] The Montana

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830 *Montana Arbitration Reconsideration Order* at 42-44. *See also* Qwest II Thompson Montana Decl. at para. 3; AT&T Qwest II Comments at 75-76.

831 *Montana Arbitration Order* at 81-83. *See also* AT&T Qwest II Comments at 76.

832 *Montana Arbitration Order* at 83. *See also* AT&T Qwest II Comments at 76-77.

833 *Montana Arbitration Order* at 81-82. *See also* AT&T Qwest II Comments at 76.

834 *Implementation of 47 C.F.R. § 51.507(f), Establishing Different Rates for Network Elements in Different Geographic Areas Within the State*, Montana Commission Docket Nos. D99.12.277, D96.11.200, Final Order, Order Nos. 6227b, 5961j (Dec. 18, 2000) (*Montana Deaveraging Order*). *See also* Qwest II Thompson Montana Decl. at para. 4.

835 *Montana Deaveraging Order* at 10-11, 20-21. *See also* AT&T Qwest II Comments at 77.

836 Qwest II Thompson Montana Decl. at para. 5; Montana Commission Qwest II Comments at 4.

837 *Filing by Qwest Corporation, f/k/a U S West Communications, Inc. to Determine Wholesale Discounts, Prices for Unbundled Network Elements, Collocation, Line Sharing, and Related Matters*, Montana Commission Docket No. D2000.6.89, Final Order on Stipulation, Order No. 6260b at 2 (Oct. 12, 2001) (*Montana Rate Stipulation Order*). The competitive LECs participating in the docket included ASCENT, Avista, McLeodUSA, Montana Wireless, New Edge Networks, Touch America and Western Wireless. AT&T and WorldCom did not participate in this proceeding.

838 *Montana Rate Stipulation Order* at 2-4. *See also* Qwest II Thompson Montana Decl. at paras. 6-7; Montana Commission Qwest II Comments at 56; AT&T Qwest II Comments at 78.

839 *Montana Rate Stipulation Order*, Attach. at 2.

Commission conditionally approved the stipulation, expressly reserving its right to review the rates in the section 271 review proceeding.[840]

240. In its review of Qwest's section 271 application, the Montana Commission found that there was "no evidence to conclude that Qwest's [originally proposed] estimated loop UNE rate of $40.75 or the 33 percent lower stipulated rate is not within the range of reasonable TELRIC values."[841] The Montana Commission noted that it has yet to pronounce judgment on numerous pricing issues, including approximately 100 UNE rate elements in Qwest's SGAT.[842] The Montana Commission required Qwest to initiate a new, generic cost docket to cure these potential pricing deficiencies,[843] and Qwest did so on July 8, 2002.[844]

241. On July 9, 2002, Qwest reduced its loop, switch port, local switching usage and shared transport recurring rates pursuant to its benchmark analysis of UNE rates in Colorado, as well as certain installation non-recurring rates based on a comparison to Colorado rates, and revised its SGAT to incorporate these lower rates.[845] The Montana Commission allowed these revised rates to go into effect on July 10, 2002.[846] Qwest revised its Montana SGAT to reflect further rate reductions on August 30, 2002 and on October 17, 2002.[847] The Montana Commission conditioned its recommendation that the Commission grant Qwest's section 271 application upon Qwest's filing of a new revenue requirement and rate design case to mitigate concerns about a possible price squeeze between Qwest's retail intrastate toll rates and intrastate

[840] *Montana Rate Stipulation Order* at 3-4. *See also* Qwest II Thompson Montana Decl. at para. 7; Montana Commission Qwest II Comments at 4-5, 56; AT&T Qwest II Comments at 78.

[841] *The Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Montana Commission Docket No. D2000.5.70, Final Report on Qwest's Compliance with the Public Interest Requirement at 14-15 (July 5, 2002) (*Montana Commission Public Interest Report*); Montana Commission Qwest II Comments at 56-57.

[842] *Montana Commission Public Interest Report* at 47-50.

[843] *Montana Commission Public Interest Report* at 47-50; Montana Commission Qwest II Comments at 4-5, 56-57.

[844] Montana Commission Qwest II Comments at 4-5; Letter from Peter A. Rohrbach, Mace J. Rosenstein and Brad C. Ceutsch, Attorneys for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-189, Attach. 3 para. 23 (July 29, 2002) (revising Qwest II Thompson Montana Decl. at para. 23) (Qwest July 29 *Ex Parte* Letter) (07/29/02e).

[845] Qwest II Thompson Montana Decl. at paras. 13-23; *The Review of Qwest Communications' Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Montana Commission Docket No. D2000.6.80, Order No. 6425 at 1 (July 9, 2002) (*Montana Commission SGAT Order*).

[846] *Montana Commission SGAT Order* at 1.

[847] Letter from R. Hance Haney, Executive Director—Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189, Montana Attach. (filed Aug. 30, 2002) (Qwest Aug. 30 Pricing *Ex Parte* Letter) (08/30/02d); Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, Montana Attach.

access charges.[848] On October 15, 2002, the Montana Commission filed comments on Qwest's refiled section 271 application, noting that Qwest had failed to file the required intrastate case and recommending that the Commission, therefore, deny Qwest's application.[849] We discuss the Montana Commission's price squeeze concerns in the public interest section below.

242. *Discussion.* OneEighty and AT&T claim that the UNE rates in Montana are not TELRIC-compliant, and therefore that the Commission should reject Qwest's section 271 application for Montana.[850] First, OneEighty argues that Qwest's average loop rate in Montana of $23.72 is higher than the national average loop rate of $13.43.[851] Second, OneEighty claims that the Montana Commission's failure to evaluate the UNE rates in a contested proceeding requires that the Commission reject the section 271 application for Montana.[852] Similarly, AT&T claims that the Montana Commission never affirmatively found the UNE rates to be TELRIC-compliant, and therefore the Commission has no independent basis (absent benchmarking) to conclude that the rates comply with TELRIC.[853] The Montana Commission, moreover, noted that it had not ruled on numerous pricing issues.[854] Therefore, it required Qwest to initiate a new cost docket.[855]

243. To comply with checklist item two of section 271, an incumbent LEC must provide UNEs at rates and terms that are just, reasonable, and nondiscriminatory, and that allow the incumbent LEC to recover a reasonable profit.[856] OneEighty's comparison between UNE loop rates in one state and a national average of UNE loop rates does not address whether the rates in a specific state are just, reasonable, and nondiscriminatory. Rather it simply compares

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848 Montana Commission Qwest II Comments at 5-7.

849 Montana Commission Qwest III Comments at 1.

850 *See* OneEighty Qwest III Comments at 3; AT&T Qwest II Comments at 75-79; OneEighty Qwest II Comments at 4-5.

851 OneEighty Qwest III Comments at 5; OneEighty Qwest II Comments at 4-5. Integra similarly argues that Qwest's average UNE loop rate in Washington of $14.56 is too high as compared to the national average loop rate of $13.43. Integra Qwest III Comments at 14-15; Integra Qwest II Comments at 9-10. Both OneEighty and Integra rely on the "Survey of Unbundled Network Element Prices in the United States (Updated July 1, 2002)", available at URLs: http://www.nrri.ohio-state.edu/programs/telecommunications.html and http://www.cad.state.wv.us/Intro%20to@20Matrix.htm#N_1_, as the source for the nationwide average UNE loop rate.

852 OneEighty Qwest III Comments at 2-3; OneEighty Qwest II Comments at 2-3.

853 AT&T Qwest II Comments at 75-79. *See also* AT&T Qwest III Fassett/Mercer Decl. at para. 123 (loop rates); AT&T Qwest III Chandler/Mercer Decl. at para. 71 (switching rates).

854 *Montana Commission Public Interest Report* at 47-50; Montana Commission Qwest II Comments at 4-5.

855 *Montana Commission Public Interest Report* at 50; Montana Commission Qwest II Comments at 4-5, 56.

856 47 U.S.C. § 271(c)(2)(B)(ii) (citing 47 U.S.C. §§ 251(c)(3) and 252(d)(1)).

rates in absolute terms, ignoring any cost differences between states.[857] Under the Commission's TELRIC analysis, we would expect that UNE loop rates in a state would exceed the national average if the forward-looking costs to provide access to unbundled loops in that state exceed those same costs on a national average. Indeed, this is the very sort of comparison that the Commission's benchmark analysis is designed to perform.[858] Therefore, we reject OneEighty's assertion that we must deny Qwest's section 271 application because the Montana UNE loop rates exceed the national average.[859]

244. As AT&T and OneEighty point out, however, the Montana Commission has yet to perform a full UNE cost analysis. Therefore, we are not able to rely on the underlying state analysis to determine that the rates contained in Qwest's Montana SGAT are TELRIC-compliant. Although Qwest contends that the stipulated rates adopted in the *Montana Rate Stipulation Order* are TELRIC-compliant,[860] we agree with AT&T that the Montana Commission did not make such a finding.[861] Qwest, however, does not rely on the stipulated recurring rates for loops, shared transport, and switching, but instead relies on voluntarily-reduced UNE rates benchmarked to Colorado rates, which the Montana Commission permitted to take effect on July 10, 2002, and which were further adjusted by Qwest on August 30, 2002 and on October 17, 2002.[862] Therefore, because we base our determination of compliance with checklist item two on the current rates, we need not decide the question of whether the stipulated rates in Montana are TELRIC-compliant. Rather, we review the current loop, shared transport, and switching charges Qwest now relies on to satisfy checklist item two using our benchmark analysis.[863] Because we are relying on these comparisons to Colorado costs and rates to determine whether Montana UNE rates are within the reasonable range of TELRIC, we disagree with OneEighty that the lack of TELRIC evaluation at the state level requires a rejection of Qwest's section 271 application in Montana.[864] Indeed, this is the same approach we took in evaluating switching rates in Rhode Island, which had been set without a rate proceeding.[865]

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857 *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6277-6278, para. 84.

858 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6277-6278, para. 84. *See also* Part IV.A.2.d.(ii)(c), *infra.*

859 The same reasoning we apply here in analyzing Qwest's UNE loop rates in Montana also applies to Integra's allegations that Qwest's UNE loop rates in Washington improperly exceed the national average. *See infra*, para. 262; Integra Qwest III Comments at 14-15; Integra Qwest II Comments at 9-10.

860 Qwest II Application at 161.

861 *Montana Rate Stipulation Order* at 1-5 and attached stipulation.

862 Qwest Aug. 30 Pricing *Ex Parte* Letter at Attach. (Montana SGAT) (08/30/02d); Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, Montana Attach.

863 Part IV.A.2.d.(ii)(c), *infra.*

864 *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd (continued….)

(d) Nebraska

245. *Background.* In September 1996, the Nebraska Commission opened a docket to investigate cost studies and establish rates for interconnection, UNEs, and resale services for Qwest.[866] On April 17, 2001, the Nebraska Commission opened a separate docket to receive evidence on the same issues because the commission was concerned that the evidence in the previous docket was stale.[867] The Nebraska Commission allowed any interested parties to participate by filing cost models or methodologies, briefs, plans or recommendations regarding the pricing of UNE loops.[868] The Nebraska Commission divided the proceeding into three phases and received evidence and conducted hearings on August 8 and 9, September 19 and October 16, 2001.[869] After each phase, the Nebraska Commission reviewed and considered evidence and testimony presented by the parties.[870]

246. The Nebraska Commission issued a final order on April 23, 2002, that established rates to become effective prior to August 8, 2002.[871] On May 3, 2002, Qwest submitted a compliance filing reflecting adjustments mandated by the Nebraska Commission's April 23, 2002 order.[872] On May 24, 2002, Qwest filed a revised SGAT with rates set forth in Exhibit A.[873] On May 31, 2002, Qwest filed a substitute Exhibit A which included: (1) rates established by the Nebraska Commission in the UNE cost docket; (2) proposed rate reductions for several UNEs and local interconnection service elements previously established in the UNE cost docket; and (3) proposed rates for new UNEs developed subsequent to Qwest's proposed rate filing in the

(Continued from previous page)
20719, 20746-20747, 20752, paras. 56-57, 68 (2001) (*SBC Arkansas/Missouri Order*); *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6277-6279, paras. 84-89.

865 *Verizon Rhode Island Order*, 17 FCC Rcd at 3316, 3319, paras. 29, 36. *See also Verizon Maine Order*, 17 FCC Rcd at 11678-80, paras. 31-33; *SBC Arkansas/Missouri Order*, 16 FCC Rcd at 20744, 20751-20752, paras. 52, 67-68.

866 *The Commission, on its Own Motion, to Investigate Cost Studies to Establish Qwest Corporation's Rates for Interconnection, Unbundled Network Elements, Transport and Termination, and Resale*, Application No. C-2516/PI-49, Order at 3 (Nebraska PSC Apr. 23, 2002) (*Nebraska Commission April 23 Cost Order*).

867 *See id.* at 4. *See also* Nebraska Commission Qwest I Comments at 6.

868 *See Nebraska Commission April 23 Cost Order* at 4.

869 *Id.* at 5.

870 *Id.*

871 *Id.* at 59. *See also The Commission, on its Own Motion, to Investigate Cost Studies to Establish Qwest Corporation's Rates for Interconnection, Unbundled Network Elements, Transport and Termination, and Resale*, Application No. C-2516/PI-49, Order, 1 (Nebraska PSC June 5, 2002) (*Nebraska Commission June 5 Cost Order*).

872 *Nebraska Commission June 5 Cost Order* at 1.

873 Nebraska Commission Qwest I Comments at 6.

UNE cost docket.[874] On June 5, 2002, the Nebraska Commission approved these rates and permitted them to go into effect as of June 7, 2002, with the caveat that the rates for new UNEs would be subject to review in a separate cost proceeding.[875] In an effort to address concerns raised by competitive LECs and the Department of Justice, Qwest made further rate reductions on August 5, 2002, and on October 18, 2002.[876] The Nebraska Commission advised the Commission that it believes that Qwest has adequately addressed the section 271 requirements in Nebraska and recommends that the Commission grant Qwest's section 271 application.[877]

247. *Discussion.* The Nebraska Commission approved the rates set forth in the May 31, 2002 amendment to the May 24, 2002 SGAT noting that "[t]he lower rates create no apparent harm and may actually provide a benefit to Qwest's wholesale customers through the opportunity to have lower rates."[878] The Nebraska Commission further noted that new rates contained in the May 24, 2002 SGAT would be subject to comment by interested parties and review by the Nebraska Commission.[879] AT&T raises a number of concerns regarding Qwest's rates established by the Nebraska Commission in its recent cost proceeding. The Nebraska Commission determined that three cost models presented in the proceeding – the HCPM, BCPM and HAI – are TELRIC-compliant, and the Nebraska Commission took the average of the loop rates produced by the three models in setting loop rates for each zone in Nebraska.[880] AT&T states that the Nebraska Commission erred in relying on the BCPM.[881] AT&T argues that the BCPM is fully discredited and that the Commission criticized the BCPM's loop cost calculation methodology in its *Platform Order,* and rejected several of the BCPM's key inputs in its *Platform Order* and *Inputs Order*. AT&T argues that by averaging in the rates of a flawed cost model, the Nebraska Commission produced excessive, non-TELRIC-compliant loop rates.[882] For non-loop UNE rates, AT&T states that the Nebraska Commission erred in relying on Qwest's proprietary model, the ICM, which is not appropriately forward-looking and allows Qwest to

874 *Id.* at 6-7.

875 *Nebraska Commission June 5 Cost Order* at 3.

876 Qwest Aug. 8 Pricing *Ex Parte* Letter, Nebraska Attach.; Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, Nebraska Attach.

877 Nebraska Commission Qwest I Comments at 8. *See also* Nebraska Commission Qwest III Comments at 2 (readopting and reaffirming its Qwest I Comments).

878 *Nebraska Commission June 5 Cost Order* at 3.

879 *See id.* at 2-3.

880 *See Nebraska Commission April 23 Cost Order* at 12-13, 21-22.

881 *See* AT&T Qwest I Comments at 7, 56-58; AT&T Qwest III Baker/Starr/Denny Decl. at paras. 35-40.

882 *See* AT&T Qwest III Baker/Starr/Denney Decl. at para. 39-40; AT&T Qwest I Baker/Starr/Denny Decl. at para. 37.

recover actual costs of switching and interoffice transmission UNEs.[883] AT&T also states that certain default inputs are patently excessive and do not produce TELRIC-compliant rates. Specifically, AT&T challenges the inflation and overhead factors used in the cost model to establish switching rates.[884] As with the other benchmark states, we conclude that it is unnecessary to evaluate whether the Nebraska Commission committed TELRIC errors in establishing these recurring rates because the rates before us were derived by benchmarking to new rates ordered in Colorado.

(e) North Dakota

248. *Background.* Qwest's UNE prices in North Dakota, with the exception of deaveraged 2-wire unbundled loop UNE prices, originally were developed through arbitration between AT&T and Qwest.[885] AT&T proposed using the Hatfield model Version 2.2 and Qwest proposed using another model (the RLCAP model) that was based on Qwest's existing network, to provide estimates of the costs of unbundled loops, unbundled ports, and other network features.[886] The Arbitrator used the Hatfield Model cost estimates for the base line and adjusted these estimates using certain Qwest assumptions for inputs in the Hatfield Model that the Arbitrator believed were appropriate. The Arbitrator required that AT&T recalculate the Hatfield model using some of Qwest's assumptions and the results of the recalculation would serve as the interim TELRIC in North Dakota.[887] The arbitrated interconnection agreement was approved by the North Dakota Commission as interim rates subject to true-up upon the completion of a subsequent cost proceeding in 1997.[888]

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[883] *See* AT&T Qwest III Baker/Starr/Denny Decl. at paras. 41-42; AT&T Qwest I Baker/Starr/Denney Decl. at 41-42.

[884] *See* AT&T Qwest III Baker/Starr/Denney Decl. at para. 42-7; AT&T Qwest I Baker/Starr/Denny Decl. at para. 42.

[885] *See AT&T Communications of the Midwest Inc. Interconnection Arbitration Application*, Case No. PU-453-96-497, Order Approving Arbitrated Agreement (North Dakota PSC June 23, 1997); *Consultative Report of the North Dakota Public Service Commission*, Case No. PU-314-97-193, 261 (North Dakota PSC July 1, 2002) (*North Dakota Commission Consultative Report*).

[886] *See AT&T Communications of the Midwest Inc. Interconnection Arbitration Application*, Case No. PU-453-96-497, Arbitrator's Decision (North Dakota PSC Mar. 26, 1997). *See also North Dakota Commission Consultative Report* at 262.

[887] *See North Dakota Commission Consultative Report* at 262.

[888] *Id. See also AT&T Communications of the Midwest Inc. Interconnection Arbitration Application*, Case No. PU-453-93-497, Order Approving Arbitrated Agreement (North Dakota PSC June 23, 1997). On January 8, 1997, the North Dakota Commission opened Case No. PU-314-97-12 to determine the permanent rates for UNEs. Even though no permanent rates were determined in that proceeding, the North Dakota Commission considered the deaveraging of the existing interim prices for UNEs. The Case No. PU-314-97-12 was closed on March 28, 2001 without further determination. *See North Dakota Commission Consultative Report* at 263.

249. In 2000, the North Dakota Commission approved a three-zone interim rate structure for 2-wire loops, based on a joint stipulation filed by interested parties, without adopting any particular cost methodology or price deaveraging mechanism.[889] On June 9, 2000, Qwest filed an SGAT, including all the interim prices set previously in the AT&T arbitration and the deaveraging docket, with the North Dakota Commission and the rates became effective by the operation of law on August 8, 2000.[890] On July 10, 2001 in response to a Qwest petition requesting the review of its SGAT prices for interconnection, network elements and resale services, the North Dakota Commission opened a new cost proceeding.[891] In this proceeding, Qwest proposes prices based on the use of its Integrated Cost Model (ICM) and other cost models.[892] On May 16, 2002, Qwest filed a revised SGAT, setting forth new lower rates for interconnection, UNEs and resale derived by benchmarking to new rates ordered in Colorado. The North Dakota Commission allowed the new rates to go into effect on June 7, 2002, and stated that it will establish a procedural schedule in the new cost investigation in the near future.[893] The North Dakota Commission permitted rates set forth in the May 16, 2002 SGAT to go into effect noting that all rates will be reviewed in the North Dakota Commission's new cost proceeding. Qwest further reduced its rates and filed a revised SGAT on October 16, 2002.[894] The North Dakota Commission filed comments recommending that the Commission grant Qwest's section 271 application.[895]

250. *Discussion.* AT&T raises a number of concerns regarding Qwest's rates established in the 1997 interconnection arbitration in North Dakota. AT&T argues that North Dakota's arbitrated rates cannot be found TELRIC-compliant on their own merits. Specifically, AT&T argues that these rates were interim rates, subject to true-up, established on the basis of old cost data, and have never been adjusted to reflect changes in Qwest's costs since 1997.[896] AT&T also argues that the arbitrated rates violate TELRIC because the North Dakota Commission relied on several of Qwest's unsupported claims in determining the appropriate cost

[889] *See* Qwest I Application App. A, Tab. 33, Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements in North Dakota, para. 17 (Qwest I Thompson North Dakota Decl.); *US West Communications, Inc. Interconnection/Wholesale Price Investigation*, Case No. PU-314-97-12, Findings of Fact, Conclusions of Law and Order (North Dakota PSC Apr. 27, 2000) (*North Dakota Commission Geographic Deaveraging Order*).

[890] Qwest I Thompson North Dakota Decl. at para. 7.

[891] *See North Dakota Commission Consultative Report* at 264.

[892] *Id.*

[893] *Id.* at 260 and 264. *See also* North Dakota Commission Qwest I Comments at 2.

[894] Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, North Dakota Attach.

[895] North Dakota Commission Qwest I Comments at 7-8. *See also* North Dakota Commission Qwest III Comments at 1 (reaffirming and incorporating by reference its Qwest I Comments).

[896] AT&T Qwest I Comments at 58-59; AT&T Qwest III Baker/Starr/Denney Decl. at paras. 55-60; AT&T Qwest I Baker/Starr/Denney Decl at paras. 55-60.

of capital.[897] Because the rates before us were derived by benchmarking to new rates ordered in Colorado, we conclude that it is unnecessary to determine whether the North Dakota Commission committed TELRIC errors in the 1997 arbitration proceeding.

251. We also conclude that, based on the record before us, it is unnecessary to wait for the North Dakota Commission first to review the benchmarked rates to determine whether the prices charged to competitive LECs are just and reasonable, as proposed by Integra.[898] A state commission's full review of the prices, before our review of a section 271 application, is not a prerequisite for granting section 271 authority, or to fulfill our obligations under section 271. If we can conclude that rates are comparable to rates in another state that we have found has properly applied TELRIC, we do not need to require prior state review as a condition of granting section 271 authority.

(f) Utah

252. *Background.* In June 1999, the Utah Commission set permanent rates for unbundled loops and non-loop UNEs by averaging the costs derived from AT&T's HAI cost model and Qwest's ICM.[899] In averaging the results of the two models, the Utah Commission concluded that neither model was satisfactory by itself.[900] The Utah Commission set rates for a number of other network UNEs, such as subloop elements (Network Interface Device, Loop Distribution, Loop Feeder, and Loop Concentrator/Digital Loop Carrier), local switch ports, unbundled local switching, and unbundled tandem switching, by a similar averaging of HAI and ICM costs.[901] The Utah Commission required vertical features (which it referred to as "Feature Groups") to be priced as a separate rate element, rather than including vertical features in the rate for the local switch port.[902] Finally, the Utah Commission geographically deaveraged prices for loops and unbundled switching, based on classifying Utah wire centers as urban, suburban or rural.[903]

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[897] AT&T Qwest I Comments at 58-59; AT&T Qwest III Baker/Starr/Denney Decl. at para. 57; AT&T Qwest I Baker/Starr/Denney Decl. at para. 57.

[898] Integra Qwest III Comments at 3; Integra Qwest I Comments at 3.

[899] *Investigation into Collocation and Expanded Interconnection, Phase III, Part C: USWC's Unbundled Network Element TELRIC Costs and Prices,* Docket No. 94-999-01, Report and Order (Pub. Serv. Comm'n of Ut. 1999) (*1999 Utah UNE Pricing Order*). Phase I of the docket dealt with the setting of wholesale prices for resale services based on avoided retail costs. Phase II set interim rates for unbundled loops.

[900] *Id.* at 6.

[901] *Id.* at 8-9.

[902] *Id.* at 8-9. The Utah Commission set the statewide average price for Feature Group 1 and Feature Group 2 at $0.77 and $3.71, respectively.

[903] *Id.* at 8. For this deaveraging, the Utah Commission accepted the classification of Utah wire centers, based on the relationship of the host to the remote switch, proposed by the parties in a Joint Exhibit in the docket.

253. In June 2002, the Utah Commission set rates for NRCs and recurring charges not addressed previously.[904] The Utah Commission found AT&T's NRC cost model to be flawed, so it set NRCs based on Qwest's model with some adjustments.[905] The Utah Commission found that Qwest incurs the same costs in providing unbundled dedicated interoffice transport (UDIT) between two Qwest central offices as it does for entrance facilities linking a competitive LEC point of presence to a Qwest office, therefore it required Qwest to either remove the entrance facility charge or set the same price for both entrance facility and UDIT.[906] The Utah Commission also set the rate for line sharing (i.e., use of the high frequency portion of the loop) at $0.00, because it found that Qwest recovers all of its loop costs from the loop rates set in the *1999 Utah UNE Pricing Order*.[907]

254. In late 2001, the Utah Commission initiated a new UNE pricing investigation. On June 11, 2002, the Utah Commission announced that the docket would again look at cost models and recurring charges for most unbundled loop and non-loop UNEs.[908] This proceeding is currently ongoing.[909]

255. On July 2, 2002, in anticipation of filing its section 271 application, Qwest voluntarily reduced rates for a number of UNEs in Utah, based on a benchmark analysis to Colorado UNE rates.[910] Qwest reduced the recurring rates for all vertical features to $0.00.[911] Qwest did not reduce Utah NRCs because they were lower than the corresponding rates set by the Colorado Commission.[912] The Utah Commission allowed these benchmark reductions to

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904 *Application of Qwest Corporation for Commission Determination of Prices for Wholesale Facilities and Services*, Docket No. 00-049-105, Order (Pub. Serv. Comm'n of Ut. 2002) (*2002 Utah UNE Pricing Order*).

905 *2002 Utah UNE Pricing Order* at 9-11. The Utah Commission required Qwest to use the 26.7 percent general overhead factor the Utah Commission had set in Docket No. 00-049-106. The Utah Commission also reduced Qwest's labor price estimates by 40 percent and its total installation factor from 200 to 125 percent, while increasing Qwest's flow-through percentages from 85 to 90 percent. The Utah Commission ordered Qwest to remove disconnection charges from its installation NRCs.

906 *2002 Utah UNE Pricing Order* at 21. Qwest elected to remove the entrance facility charge from its Utah SGAT.

907 *Id.* at 15-16.

908 *Determination of the Cost of the Unbundled Loop of Qwest Corporation,* Docket No. 01-049-85, Procedural Order (Pub. Serv. Comm'n of Utah 2002).

909 The Utah Commission has already received party-sponsored cost models and testimony; hearings are scheduled for November 19-21, 2002. *Id.* at 2.

910 Qwest II Application App. A, Tab 29, Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements and Interconnection in Utah, paras. 37-47 (Qwest II Thompson Utah Decl.).

911 *Id.* at para. 45.

912 *Id.* at para. 46.

become effective on July 10, 2002.[913] Based on the record before it, the Utah Commission filed comments stating that it believes that Qwest has met the requirements of section 271, which includes the pricing requirement for UNEs under checklist item two.[914] On August 30, 2002 and October 16, 2002, Qwest revised its Utah SGAT to reflect further rate reductions.[915]

256. *Discussion.* AT&T argues that the Utah UNE loop and switching rates are significantly overstated because the Utah Commission did not use a TELRIC-compliant cost model to set them.[916] Specifically, AT&T notes that the Utah Commission "arbitrarily set rates on the basis of the simple average of the costs calculated by the HAI model and [Qwest's] embedded ICM model."[917] AT&T further notes that the Utah Commission had found AT&T's HAI model to be "appropriately forward looking," but did not rely solely on it because of concerns regarding its use of proxies to determine some customer locations.[918] AT&T observes that the Utah Commission found that Qwest's ICM "does not produce a forward-looking economically efficient network," relies on embedded costs and that it yields "overstated" rates.[919] AT&T contends that the Utah Commission's averaging of HAI-derived costs with ICM-derived costs only slightly reduced the overstatement of costs produced by using the non-TELRIC-compliant ICM.[920] Indeed, AT&T asserts that the TELRIC errors inflate Qwest's loop rates by more than $2.00.[921] AT&T further argues that federal courts have concluded that state commission processes that set rates by averaging non-TELRIC-compliant cost studies cannot yield TELRIC-based rates.[922] Integra goes further, arguing that by voluntarily reducing the loop

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913 *Application of Qwest Corporation for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)*, Docket No. 00-049-08, Final Order Regarding Qwest § 271 Compliance, 4 (Pub. Serv. Comm'n of Utah 2002).

914 Utah Commission Qwest II Comments at 5. *See also* Utah Commission Qwest III Comments at 1 (adopting and incorporating by reference its Qwest II Comments).

915 Qwest Aug. 30 Pricing *Ex Parte* Letter at Attach. (Utah SGAT) (08/30/02d); Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, Utah Attach.

916 AT&T Qwest II Comments at 72-77; AT&T Qwest III Chandler/Mercer Decl. at para. 62.

917 AT&T Qwest II Comments. at 73; AT&T Qwest III Chandler/Mercer Decl. at para. 63 (both citing *1999 Utah UNE Pricing Order* at 7).

918 AT&T Qwest II Comments at 73; AT&T Qwest III Chandler/Mercer Decl. at para. 62 (both citing *1999 Utah UNE Pricing Order* at 7).

919 AT&T Qwest II Comments at 72; AT&T Qwest III Chandler/Mercer Decl. at para. 59 (both citing *1999 Utah UNE Pricing Order* at 6).

920 AT&T Qwest II Comments at 73.

921 AT&T Qwest II Comments at 52.

922 AT&T Qwest II Comments at 74, Tab F, Declaration of Richard Chandler and Robert Mercer, para. 36 (AT&T Qwest II Chandler/Mercer Decl.); AT&T Qwest III Chandler/Mercer Decl. at para. 64 (both citing *AT&T of N.J. v. Bell Atlantic-N.J.*, Civ. No. 97-5762 (KSH), slip op. (D.N.J. June 6, 2000)).

rates under its benchmark analysis, Qwest has effectively admitted that the Utah loop rates are not TELRIC-compliant.[923]

257. AT&T also asserts that the Utah UNE rate for switch ports allows Qwest to over-recover some of its costs.[924] AT&T notes that the Utah Commission set charges for vertical features (referred to as "Feature Group 1" and "Feature Group 2") separate from the port charge,[925] even though the HAI cost model, on which the switching rates were based in part, incorporates vertical features in the functionality of the port and, thus, are included in the HAI port rate.[926] Indeed, AT&T argues that Qwest has admitted that the HAI includes vertical features by stating in its Qwest I reply that it cannot "refute AT&T's assertion that there is no need for the $0.38 adjustment that was incorporated into Qwest's Colorado switch rate in order to recover the cost of applications software used to provide vertical features."[927] AT&T argues that, given the amount of the charge, $3.71 per port for the most popular Feature Group 2, this over-recovery significantly disadvantages competitive LECs.[928] AT&T notes that Qwest has removed its separate vertical features charge from its Colorado rates and should do so in Utah as well.[929]

258. Qwest argues in its application that the loop and non-loop rates set by the Utah Commission are TELRIC-compliant,[930] but Qwest does not rely on those rates in this application.[931] Rather, Qwest relies on the voluntarily-reduced rates it filed with the Utah Commission on July 2, 2002, and the revised rates filed on August 30, 2002 and October 16, 2002.[932] With respect to its switching rates, Qwest reduced the charge for all vertical features to

923 Integra Qwest II Comments at 4.

924 AT&T Qwest II Comments at 74; AT&T Qwest III Chandler/Mercer Decl. at para. 65.

925 AT&T Qwest II Comments at 74 (citing *1999 Utah UNE Pricing Order* at 11, Table A).

926 AT&T Qwest II Comments at 74; AT&T Qwest III Chandler/Mercer Decl. at para. 65 (both citing AT&T's Post-Hearing Brief in Docket No. 94-999-01 at 21 (filed Feb. 17, 1999)).

927 AT&T Qwest III Chandler/Mercer Decl. at para. 65 (quoting Qwest I Thompson Reply Decl. at para. 38). AT&T states that Qwest's reply declaration recognizes that the switch maintenance factor used in the HAI model, 0.0558, is greater than the actual ARMIS-derived value of 0.04209 for Qwest in Colorado. AT&T further asserts that the contrast between the two values is even greater in Utah, where the ARMIS-based value is 0.01272, which is less than one-fourth the default value (also 0.0558) in the HAI model.

928 AT&T Qwest II Comments at 74; AT&T Qwest III Chandler/Mercer Decl. at para. 65. *See also 1999 Utah UNE Pricing Order* at 9.

929 AT&T Qwest III Chandler/Mercer Decl. at para. 65.

930 Qwest II Thompson Utah Decl. at para. 37.

931 *See* Qwest II Thompson Utah Decl. at paras. 40-45. *See* also Qwest Sixth Revised SGAT, Ex. A: Utah Rates.

932 Qwest II Thompson Utah Decl. at para. 37; Qwest Aug. 30 Pricing *Ex Parte* Letter (08/30/02d); Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, Utah Attach.

$0.00.[933] In performing its benchmark analysis, Qwest states that it used a statewide average Utah port rate of $0.91.[934] Because we base our determination of compliance with checklist item two on Qwest's current, reduced rates, we need not decide whether the Utah Commission committed TELRIC errors. Rather, we review the current loop and switching charges Qwest now relies on to satisfy checklist item two using our benchmark analysis.[935]

(g) Washington

259. *Background.* The Washington Commission initiated a generic cost proceeding on November 21, 1996.[936] The Washington Commission conducted this proceeding in three phases: Phase I examined UNE costs and the wholesale discount applicable to resold services; Phase II addressed common costs and other loadings to establish permanent UNE rates, collocation rates and the recovery of certain OSS costs; and Phase III focused on deaveraging loop rates into five pricing zones.[937] More than twenty parties participated in the proceeding, which included extensive evidentiary hearings with cross-examination of witnesses.[938] The Washington Commission found that, while the models submitted by the parties, the RLCAP, Hatfield and BCPM models, each used TELRIC methods, each contained shortcomings.[939] The Washington Commission relied on an average of the adjusted results of the RLCAP, Hatfield, and BCPM models to determine loop costs, and of the Hatfield and Qwest models for tandem switching.[940] For local switching and analog ports, the Washington Commission relied on a Federal

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933 Qwest II Thompson Utah Decl. at para. 45. *See also* Qwest's Sixth Revised SGAT, Ex. A: Utah Rates, Section 9.11.2, at 12-13.

934 *Id.* Qwest notes that the Utah Commission actually set deaveraged urban, suburban and rural port charges of $0.89, $0.90 and $1.02, respectively. *See* Qwest SGAT, Ex. A: Utah Rates, Section 9.11.1, at 11. *See also 1999 UNE Pricing Order* at 9, Table A.

935 Part IV.A.2.d.(ii)(c), *infra.*

936 *Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale,* Docket Nos. UT-960369, UT-960370, Order Instituting Investigations (Wash. UTC 1996).

937 *Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale,* Docket Nos. UT-960369, UT-960370, Eighth Supplemental Order at 2 (Wash. UTC 1998) (*Washington Commission 8th Supp. Pricing Order*); *Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale,* Docket Nos. UT-960369, 960370, 960371, Twenty-fourth Supplemental Order at 4 (Wash. UTC 2000) (*Washington Commission 24th Supp. Pricing Order*).

938 Qwest II Application App. A, Tab 30, Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements and Interconnection in Washington, para. 6 (Qwest II Thompson Washington Decl.).

939 *Washington Commission 8th Supp. Pricing Order* at 14-15.

940 *Washington Commission 8th Supp. Pricing Order* at 53-54, *Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale,* Docket Nos. UT-960369, 960370, 960371, Ninth Supplemental Order on Clarification at 7 (Wash. UTC 1998).

Communications Commission staff analysis of switching costs.[941] The Washington Commission accepted Qwest's NRC cost studies, with some adjustments.[942]

260. On February 17, 2000, the Washington Commission established an additional, concurrent docket to address cost and pricing issues that had not been addressed in other dockets, as well as new issues arising from more recent Commission orders, such as the *UNE Remand Order* and the *Line Sharing Order*.[943] Sixteen different parties participated in this docket by filing opening and reply comments, propounding and responding to discovery requests, and conducting cross-examination of witnesses in hearings.[944]

261. On June 11, 2002, Qwest filed a revised SGAT and tariffs that included reductions to loop rates under Qwest's benchmark analysis, and reductions to certain NRCs.[945] Qwest did not reduce the switch port, local switching usage, and shared transport rates in Washington because the combination of these rates was lower than in the anchor state of Colorado, and so would already meet a benchmark test with Colorado.[946] The Washington Commission allowed these rates to go into effect on July 10, 2002.[947] On August 30, 2002, and October 16, 2002, Qwest revised its Washington SGAT to reflect further rate reductions.[948] In its comments on Qwest's application, the Washington Commission asserts that Qwest has satisfied the requirements of checklist item two and, therefore, recommends that the Commission grant Qwest's section 271 application.[949]

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941 *Washington Commission 8th Supp. Pricing Order* at 64.

942 *Washington Commission 8th Supp. Pricing Order* at 87-92.

943 *See Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, Thirteenth Supplemental Order (Wash. UTC 2001) (*Washington 13th Supp. Pricing Order*).

944 *See* Qwest II Thompson Washington Decl. at para. 8.

945 Qwest II Thompson Washington Decl. at paras. 9, 36.

946 *Id.* at para. 36.

947 On June 20, 2002, the Washington Commission issued an order setting forth additional requirements to be reflected by Qwest in a revised SGAT. *Investigation into US West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket Nos. UT-003022, UT-003040, 37th Supplemental Order at 33 (Wash. UTC 2002). Qwest filed a revised SGAT on June 25, 2002, and the Washington Commission approved Qwest's request to let the SGAT become effective on July 10, 2002. *Investigation into US West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket Nos. UT-003022, UT-003040, 39th Supplemental Order at 7, 13 (Wash. UTC 2002).

948 Qwest Aug. 30 Pricing *Ex Parte* Letter at Attach. (Washington SGAT) (08/30/02d); Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, Washington Attach.

949 Washington Commission Qwest II Comments at 12. *See also* Washington Commission Qwest III Comments at 2 (incorporating by reference its Qwest II Comments).

262. *Discussion.* AT&T argues that the Washington Commission did not adopt any of the three loop models presented, finding that they were not "open, reliable, and economically sound," but instead adjusted some inputs and averaged the three models' results to derive loop costs.[950] AT&T also alleges that the Washington Commission did not explain its method of averaging the loop cost model results, and the loop cost adopted by the Washington Commission was higher than any of the three individual models' results.[951] Integra's argument that Washington's loop rates exceed the national average is identical to OneEighty's argument with respect to Montana's loop rates, so we reject it for the same reasons set forth above.[952]

263. AT&T also challenges Qwest's Washington switching rates, stating that for Qwest, the Washington Commission adopted, in its May 11, 1998 order, GTE's 1995 embedded switching cost estimate with no forward-looking adjustment, and no time-of-purchase adjustment to make the number representative of the then-current price.[953] AT&T also argues that the switching cost figure adopted by the Washington Commission erroneously assumes a fixed cost for all switch sizes.[954] According to AT&T, switch costs, when expressed per line, fall as a function of switch size, because a sizeable "getting started" cost can be spread over a greater number of lines.[955] AT&T states that, on average, Qwest's switches are larger and serve more lines than Verizon's switches in Washington.[956] Furthermore, AT&T asserts that, except for the very smallest switches, the per-line costs adopted by the HAI Model and the Commission's Synthesis Model are well below the $150 amount adopted for Qwest by the Washington Commission.[957]

264. Although Qwest asserts that the rates set by the Washington Commission are TELRIC-compliant,[958] it does not rely on those loop rates in this proceeding. Rather, Qwest relies on voluntarily-reduced loop rates filed with the Washington Commission on August 30,

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950 AT&T Qwest II Comments at 62-65; AT&T Qwest III Fassett/Mercer Decl. at paras. 76-84; AT&T Qwest II Comments, Tab E, Joint Declaration of Dean Fassett and Robert Mercer, paras. 16-24 (AT&T Qwest II Fassett/Mercer Decl.).

951 AT&T Qwest II Comments at 65-66; AT&T Qwest III Fassett/Mercer Decl. at paras. 85-86; AT&T Qwest II Fassett/Mercer Decl. at paras. 25-26.

952 Integra Qwest III Comments at 14-15; Integra Qwest II Comments at 9-10. *See* paras. 242-43, *supra*.

953 AT&T Qwest II Comments at 70; AT&T Qwest III Chandler/Mercer Decl. at para. 52; AT&T Qwest II Chandler/Mercer Decl. at paras. 23-24.

954 AT&T Qwest III Chandler/Mercer Decl. at para. 53; AT&T Qwest II Chandler/Mercer Decl. at paras. 25-26.

955 AT&T Qwest III Chandler/Mercer Decl. at para. 53; AT&T Qwest II Chandler/Mercer Decl. at paras. 25-26.

956 AT&T Qwest III Chandler/Mercer Decl. at para. 53; AT&T Qwest II Chandler/Mercer Decl. at para. 25.

957 AT&T Qwest III Chandler/Mercer Decl at paras. 53-54; AT&T Qwest II Chandler/Mercer Decl. at para. 26.

958 *See* Qwest II Application at 159-60.

2002.[959] Because we base our determination of compliance with checklist item two on the current rates, we need not decide the question of whether Qwest's Washington loop rates set in the state proceeding are TELRIC-compliant. Instead, we review the current Washington loop rates and non-loop rates using our benchmark analysis.[960]

(h) Wyoming

265. *Background.* On November 22, 1996, AT&T filed a petition with the Wyoming Commission for arbitration to establish rates for interconnection, UNEs, and resale pursuant to section 252 of the Communications Act, as amended.[961] On April 23, 1997, the Wyoming Commission issued an order establishing interim rates at the average of rates generated by AT&T's and Qwest's cost models, after adjusting for certain cost inputs.[962]

266. In a rehearing order issued on March 22, 1999, the Wyoming Commission adopted Qwest's proposed rate structure, which consists of four concentric zones around each central office, and adopted Qwest's RLCAP model.[963] On June 30, 1999, the Wyoming Commission issued a further rehearing order reaffirming these decisions, and clarifying that it approved the entire suite of cost models that Qwest used to develop its UNE costs.[964]

267. On July 31, 2001, Qwest initiated a generic cost proceeding before the Wyoming Commission.[965] AT&T, Contact Communications, and the Consumer Advocate Staff intervened, although AT&T withdrew without filing testimony.[966] On June 19, 2002, Qwest, Contact

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[959] *See* Qwest II Application at 163; Qwest II Thompson Washington Decl. at paras. 36-43.

[960] Part IV.A.2.d.(ii)(c), *infra*.

[961] *See* Qwest II Application App. A, Tab 31, Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements and Interconnection in Wyoming, para. 3 (Qwest II Thompson Wyoming Decl.).

[962] *See Arbitration by the Public Service Commission of an Interconnection Agreement between U S West Communications, Inc., and AT&T Communications of the Mountain States, Inc., under 47 USC § 252*, Docket Nos. 70000-TF-319 and 72000-TF-96-95, Order, 19-20 (Wyoming Commission 1997) (*Wyoming Arbitration Order*).

[963] *See Arbitration by the Public Service Commission of an Interconnection Agreement between U S West Communications, Inc., and AT&T Communications of the Mountain States, Inc., under 47 USC § 252*, Docket Nos. 70000-TF-319 and 72000-TF-96-95, Order on Rehearing, 41 (Wyoming Commission 1999) (*Wyoming Rehearing Order*).

[964] *See Arbitration by the Public Service Commission of an Interconnection Agreement between U S West Communications, Inc., and AT&T Communications of the Mountain States, Inc., under 47 USC § 252*, Docket Nos. 70000-TF-319 and 72000-TF-96-95, Order on Petitions for Rehearing of U S West Communications, Inc., and AT&T Communications of the Mountain States, Inc., and Amending Previous Orders, 21 (Wyoming Commission 1999) (*Wyoming Further Rehearing Order*).

[965] *See* Qwest II Thompson Wyoming Decl. at para. 4. *See also Qwest's Request to Open an Unbundled Network Elements TELRIC Cost Docket*, Docket No. 7000-TA-01-700 (Record No. 6768), Stipulation and Agreement dated June 19, 2002, 1 (*Wyoming Stipulation Agreement*).

[966] *See* Qwest II Thompson Wyoming Decl. at para. 4.

Communications, and the Consumer Advocate Staff settled outstanding disputes by stipulation.[967] The parties jointly adopted UNE and interconnection rates proposed by the Consumer Advocate Staff, and stipulated to collocation rates and certain NRCs relating to loop provisioning that mirror the rates established by the Colorado Commission.[968] Qwest also stipulated that it would file new rates within two years with the Wyoming Commission for approval.[969] On June 28, 2002, the Wyoming Commission approved the stipulation agreement and adopted the stipulated rates as TELRIC-compliant in its regular open meeting.[970] The approved stipulation retained the Wyoming Commission's earlier adopted concentric zone deaveraging scheme.[971]

268. On July 1, 2002, Qwest filed revised SGAT rates in compliance with the stipulation agreement, and voluntarily reduced five non-loop rates to meet a benchmark comparison with the rates established by the Colorado Commission.[972] On July 9, 2002, the Wyoming Commission approved the SGAT, with the exception of certain rates that were not addressed in the stipulation agreement, as TELRIC-compliant.[973] The Wyoming Commission allowed these rates to go into effect as of July 10, 2002.[974] On August 29, 2002 and October 16, 2002, Qwest revised its Wyoming SGAT to reflect further rate reductions.[975] The Wyoming Commission found that Qwest met the pricing requirements for UNEs under checklist item two and recommended that the Commission grant Qwest's section 271 application.[976]

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967 *Wyoming Stipulation Agreement* at 5.

968 Qwest II Thompson Wyoming Decl. at para. 6.

969 *Wyoming Stipulation Agreement* at 3.

970 *Application of Qwest Corporation Regarding Relief Under Section 271Process and Approval of its Statement of Generally Available Terms*, Docket No. 7000-TA-00-599 (Record No. 5920), Order on SGAT Compliance, 1 (Wyoming Commission 2002) (*Wyoming Order on SGAT Compliance*).

971 Qwest II Thompson Wyoming Decl. at para. 11.

972 Qwest II Thompson Wyoming Decl. at para. 10. The rate elements are End Office Call Termination: per minute of use; Tandem Switched transport: Tandem Switching, per minute of use; Shared Transport: per minute of use – TELRIC based rate; Local Tandem Switching: per minute of use; and Local Switching: Local Usage: per minute of use. *See Wyoming Order on SGAT Compliance* at 2.

973 *Wyoming Order on SGAT Compliance* at 2. Certain rates in the Wyoming SGAT were not addressed in the *Wyoming Stipulation Agreement*, and the Wyoming Commission stated that it expresses no opinion about the TELRIC-compliance of these rates. *See* Wyoming Commission Qwest II Comments at 7. *See also* "footnote 1" identifier of the Wyoming SGAT, Ex. A dated July 1, 2002.

974 *Wyoming Order on SGAT Compliance* at 3.

975 Qwest Aug. 30 Pricing *Ex Parte* Letter at Attach. (Wyoming SGAT) (08/30/02d); Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, Wyoming Attach.

976 Wyoming Commission Qwest II Comments at 7. *See also* Wyoming Commission Qwest III Comments at 1-2 (adopting and incorporating by reference its Qwest II Comments).

269. *Discussion.* AT&T asserts that Wyoming's recurring loop and switching charges are not TELRIC-compliant.[977] AT&T contends that Wyoming's UNE loop rates are inflated because the Wyoming Commission improperly adopted Qwest's RLCAP cost model.[978] According to AT&T, this model replicates Qwest's embedded network costs, rather than relying on forward-looking network costs, and is a "black-box," filled with inaccessible and unverifiable Qwest-specific information.[979] As support, AT&T asserts that the Wyoming Commission seemingly reversed its earlier decision that rejected RLCAP after acknowledging that the model relies on Qwest's embedded costs.[980] Furthermore, AT&T asserts that the RLCAP model accommodates the allegedly improper deaveraging scheme that the Wyoming Commission also adopted.[981]

270. AT&T also asserts that the Wyoming switching rates are non-TELRIC compliant because the Wyoming Commission improperly adopted Qwest's switching model (SCM) that calculates investments associated with switching based on Qwest's embedded costs.[982] AT&T states that critical investment inputs are buried in password-protected database files and the SCM does not show fundamental calculations used to compute switching investments.[983] AT&T further asserts that Qwest's last-minute reduced rates are not TELRIC-compliant because the Wyoming Commission failed to conduct any adversarial proceeding or make any findings concerning their compliance with TELRIC, and these reductions demonstrate that Qwest recognizes that its switching rates are inflated.[984]

271. Qwest states that its UNE rates are TELRIC-compliant.[985] The Wyoming Commission states that the generic cost proceeding involved thousands of pages of cost studies and testimony from Qwest and intervening parties to establish TELRIC rates.[986] We note that

[977] AT&T Qwest II Comments at 81-85.

[978] AT&T Qwest II Comments at 81-84; AT&T Qwest III Fassett/Mercer Decl. at paras. 104-122; AT&T Qwest II Fassett/Mercer Decl. at paras. 41-58.

[979] AT&T Qwest II Comments at 81, 83-84; AT&T Qwest III Fassett/Mercer Decl. at para. 105; AT&T Qwest II Fassett/Mercer Decl. at paras. 45-57.

[980] AT&T Qwest II Comments at 83; AT&T Qwest III Fassett/Mercer Decl. at 105, 114; AT&T Qwest II Fassett/Mercer Decl. at paras. 54-58.

[981] AT&T Qwest II Comments at 83-84; AT&T Qwest III Fassett/Mercer Decl. at paras. 113-117; AT&T Qwest II Fassett/Mercer Decl. at paras. 53-57. We discuss the Wyoming deaveraging scheme at Part IV.A.2.d.(i)(i), *infra.*

[982] AT&T Qwest II Comments at 49, 85; AT&T Qwest III Chandler/Mercer Decl. at para. 67-68; AT&T Qwest II Chandler/Mercer Decl. at paras. 39-40.

[983] AT&T Qwest III Chandler/Mercer Decl. at para. 67; AT&T Qwest II Chandler/Mercer Decl. at paras. 39-40.

[984] AT&T Qwest II Comments at 85; AT&T Qwest III Chandler/Mercer Decl. at para. 69; AT&T Qwest II Chandler/Mercer Decl. at para. 41.

[985] Qwest II Thompson Wyoming Decl. at para. 2.

[986] Wyoming Commission Qwest II Reply at 2.

Qwest's Wyoming loop rates are mainly stipulated rates resulting from that proceeding, and the current Wyoming switching rates include stipulated rates and certain voluntarily-reduced rates that Qwest filed with the Wyoming Commission on July 1, 2002 and revised on August 29, 2002, and October 16, 2002, to meet a benchmark test with the Colorado rates.[987] As discussed below, however, these rates pass a benchmark analysis and fall within the reasonable range of rates that a TELRIC-based proceeding would produce.[988]

(i) Deaveraged Rate Zones

272. AT&T asserts that the deaveraged rate zones in Montana and Wyoming are not cost-based, and the Department of Justice urges the Commission to take notice of the unusual rate zones in these states.[989] The deaveraged rate zones in these states are based on the distance of a customer from the wire center, and consist of four concentric circles around each wire center.[990] AT&T argues that the Montana and Wyoming state commissions did not adopt deaveraged zones to reflect the density-based cost differences between urban, suburban and rural wire centers as contemplated by the Commission's rules.[991] Because the customer costs of a wire center vary significantly with physical location and demographic characteristics, AT&T contends that Qwest's Montana and Wyoming loop rates are not cost-based in compliance with checklist item two.[992] AT&T further argues that the Commission's benchmarking analysis aggregates UNE rates for all UNE zones, so benchmarking does not reveal TELRIC errors in the deaveraging process.[993]

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987 *Wyoming Order on SGAT Compliance* at 2-3. *See also* Qwest II Thompson Wyoming Decl. at para. 12; Qwest Aug. 30 Pricing *Ex Parte* Letter (08/30/02d); Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest Nov. 12 *Ex Parte* Letter, Wyoming Attach. The Wyoming Commission states that only five non-loop rates were "accepted as benchmarks" that were not part of the Wyoming TELRIC (generic cost) proceeding. *See* Wyoming Commission Qwest II Reply at 3. There were also 38 elements out of more than 900 elements, approximately three percent of Qwest's total rates for interconnection, collocation, wholesale discounts and UNEs, that were not specifically addressed by the Wyoming Commission. *See* Wyoming Commission Qwest II Reply at 4. *See also* "footnote 1" identifier of the Wyoming SGAT, Ex. A.

988 Part IV.A.2.d.(ii)(c), *infra*.

989 Department of Justice Qwest II Evaluation at 20-21; AT&T Qwest II Comments at 54, 77, 83; AT&T Qwest III Fassett/Mercer Decl. at paras. 113, 125; AT&T Qwest II Fassett/Mercer Decl. at paras. 53, 65; AT&T Qwest II Lieberman/Pitkin at para. 7.

990 AT&T Qwest II Comments at 77, 83; AT&T Qwest III Fassett/Mercer Decl. at paras. 113, 125; AT&T Qwest II Fassett/Mercer Decl. at paras. 53, 65.

991 AT&T Qwest II Comments at 54, 77, 83; AT&T Qwest III Fassett/Mercer Decl. at paras. 113, 124 (citing 47 C.F.R. § 51.507(f)); AT&T Qwest II Fassett/Mercer Decl. at paras. 53, 65 (citing 47 C.F.R. § 51.507(f)).

992 AT&T Qwest II Comments at 54; AT&T Qwest II Lieberman/Pitkin Decl. at para. 7.

993 AT&T Qwest II Comments at 54; AT&T Qwest II Lieberman/Pitkin Decl. at para. 7.

273. In response, Qwest argues that distance from the wire center and density are the most significant factors driving loop costs, and in states with relatively few high-density areas, such as Montana and Wyoming, it is appropriate to base rate zones on distance.[994] According to Qwest, density-based rate zones do not account for the distance-based differences in loop costs within a given wire center, or differences in costs between wire centers in the same zones.[995] Qwest asserts that the distance-based rate zones in Montana and Wyoming, however, account for cost differences in both distance and density.[996] Qwest argues that in sparsely-populated, rural states such as Montana and Wyoming where one switch may serve a large community, the density of the serving area tends to decrease as the distance from the wire center increases.[997] Therefore Qwest claims that the distance-based rate zones also reflect density cost differences, while density-based rate zones would not reflect distance-related costs.[998] In addition to this implicit density-based component, Qwest notes that the Wyoming Commission added an explicit density-based component to the rate zones in that state.[999] The Wyoming Commission established pricing zones with different distances based on the population densities of the wire centers.[1000] Qwest also notes that the Commission's former Common Carrier Bureau (now the Wireline Competition Bureau) granted a waiver to allow the calculation of universal service support on the basis of the distance-based rate zones in Wyoming.[1001]

274. We disagree with AT&T that the rate zone structures in Montana and Wyoming violate our rules. Section 51.507(f) allows state commissions to rely on density-related zone pricing plans, "or other such cost-related zone plans established pursuant to state law."[1002] Therefore, AT&T is incorrect in asserting that rate zones must be based on density. Further, Qwest has adequately demonstrated that zones based on distance are cost-related. As Qwest explains in its reply, the two primary factors that drive loop costs are density of customers within

[994] Qwest II Reply at 99; Qwest II Reply, Reply Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements and Interconnection, para. 45 (Qwest II Thompson Reply Decl.).

[995] Qwest II Thompson Reply Decl. at para. 46.

[996] Qwest II Thompson Reply Decl. at para. 47.

[997] Qwest II Thompson Reply Decl. at paras. 47-48.

[998] Qwest II Thompson Reply Decl. at paras. 47-48.

[999] Qwest II Thompson Reply Decl. at para. 49.

[1000] In wire centers with greater population densities (determined based on the number of lines served by the switch), the Wyoming Commission established pricing zones based on longer distances than in smaller, less dense wire centers. The zones will have smaller widths for switches that serve fewer lines and will have larger widths for switches that serve more lines. Qwest II Thompson Reply Decl. at paras. 49-50.

[1001] Qwest II Reply at 99-100 n.72; Qwest II Thompson Reply Decl. at para. 54 (citing *Wyoming Public Service Commission*, CC Docket No. 96-45, Order, 16 FCC Rcd 5350 (Comm. Carr. Bur. 2001)).

[1002] 47 C.F.R. § 51.507(f) (2001).

an area, and customers' distance from the wire center.[1003] AT&T agrees that distance from the wire center is an important factor in determining loop costs.[1004] We find that the distance-based rate zone structures adopted by the Montana and Wyoming Commissions are cost-related as required by our rules.

275. AT&T argues that, because the Commission's benchmark analysis examines aggregate loop costs, it does not account for errors in disaggregating those costs among rate zones.[1005] Specifically, AT&T asserts that Qwest's deaveraging methodology in Montana and Wyoming artificially inflates the costs of higher-density areas by averaging them with costs of more rural areas.[1006] First, we note that, unless each loop is priced individually, any method of deaveraging contains some amount of averaging higher and lower cost loops. The more traditional density-based rate zones average different loop costs within wire centers,[1007] and average the different costs between wire centers in the same zones. Second, we find that the Wyoming Commission took both distance and density into account in establishing different zone sizes. Indeed, because the Wyoming Commission took both factors into account, it is possible that Wyoming's rate deaveraging zones may even be more closely tied to cost than are density-based zones. Finally, although the Montana Commission did not provide the same safeguards as did the Wyoming Commission to account for cost differences based on wire center densities, we find that the statewide average loop rates in Montana are cost-based pursuant to a benchmark comparison with Colorado, and, as discussed above, the Montana rate zone structure is cost-related as required by our rules. Therefore, even if the Montana Commission could have adopted a deaveraging method that better reflected differences in loop costs, the current rate zone structure complies with our rules.[1008]

(j) *Line Sharing*

276. Qwest charges positive rates for the HFPL that carriers purchase under the Commission's line sharing requirements in three of the benchmark states, Montana, Washington and Wyoming.[1009] Qwest filed amendments to its SGATs in Montana and Wyoming on August

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1003 Qwest II Thompson Reply Decl. at para. 45.

1004 AT&T Qwest II Reply, Declaration of Brian F. Pitkin at para. 6 (AT&T Qwest II Pitkin Reply Decl.).

1005 AT&T Qwest II Comments at 54; AT&T Qwest II Lieberman/Pitkin Decl. at para. 7.

1006 AT&T Qwest II Pitkin Reply Decl. at para. 7.

1007 For example, if two customers are in the same wire center, but one is 500 feet from the central office while the other is 12,000 feet away, a density-based rate zone structure will establish identical loop rates for the two, even though the cost of serving the first customer is significantly less than the cost of serving the second customer.

1008 Because some universal service support is distributed on a different disaggregated basis, we note that even though Montana's rate zone structure complies with our rules, it creates arbitrage opportunities for competitive LECs in certain high-cost wire centers.

1009 *See* Qwest II Thompson Montana Decl. at para. 12; Qwest II Thompson Washington Decl. at para. 35; Qwest II Thompson Wyoming Decl. at para. 9.

30, 2002 and August 29, 2002, respectively, so that the average HFPL rates are at or below the Colorado HFPL rate, and are deaveraged across zones.[1010] In Washington, Qwest reduced its HFPL rate from $4.00 to $2.00, but did not deaverage the rate.[1011] Covad and WorldCom argue that, as in Colorado, Qwest's positive HFPL charges in these states violate the *Line Sharing Order* and our TELRIC pricing requirements.[1012] For the reasons stated above in our discussion of the positive HFPL rate in Colorado, we decline to reach these arguments in the context of a section 271 application and we intend to address this issue in our pending proceeding on line sharing.[1013]

(k) Non-Recurring Charges

277. AT&T argues that Qwest's NRCs in the benchmark states are based on the same NRC model on which Qwest's Colorado NRCs are based.[1014] AT&T argues that Qwest's NRC model contains TELRIC errors, including (1) improper collection of disconnect charges as part of installation charges; (2) recovery of costs for manual work that should be performed electronically; (3) recovery of unnecessary costs; (4) reliance on improper time estimates; (5) recovery of non-recurring costs that should be collected as recurring charges; and (6) allocation of network-related costs that are not properly attributable to NRCs.[1015] AT&T's raises the same arguments here that we have already rejected with respect to Qwest's Colorado NRCs.[1016] We found that the Colorado Commission's use of the model to set NRCs resulted in TELRIC-based rates.[1017] In the instant application, Qwest relies on a comparison of its NRCs in the benchmark states to the Colorado NRCs.[1018] We find this comparison reasonable, and AT&T has not produced any evidence that it is not. Therefore, because we have determined that the Colorado NRCs are consistent with TELRIC requirements, and because the rates for NRCs in Montana,

[1010] *See* Qwest Aug. 30 Pricing *Ex Parte* Letter at Attach. (08/30/02d). In Montana, Qwest reduced the HFPL rate to $4.76 in zone 1 and $4.89 in zones 2 through 4. In Wyoming, Qwest reduced the HFPL rate to $4.16 in the base rate area and retained the $4.89 rate in zones 1 through 3.

[1011] *See* Qwest III Application, Tab 10 at 4; Qwest Nov. 12 *Ex Parte* Letter, Washington Attach.

[1012] Covad Qwest III Comments at 3; Covad Qwest II Comments at 3; WorldCom Qwest II Reply at 19-20.

[1013] *See* Part IV.A.2.c.(ii)(c), *supra*.

[1014] AT&T Qwest II Comments at 70, 75; AT&T Comments, Tab G, Declaration of Thomas H. Weiss, para. 8 (AT&T Qwest II Weiss Decl.). *See also* AT&T Qwest III Comments, Tab J, Declaration of Thomas H. Weiss (AT&T Qwest III Weiss Decl.) (stating that his testimony in the Qwest II declaration remains accurate).

[1015] AT&T Qwest II Weiss Decl. at paras. 11-36.

[1016] *See* Part IV.A.2.c.(iii), *supra*.

[1017] *See* Part IV.A.2.c.(iii), *supra*.

[1018] Qwest II Application at 165; Qwest II Thompson Montana Decl. at para. 15; Qwest II Thompson Utah Decl. at para. 46; Qwest II Thompson Washington Decl. at paras. 47-48; Qwest II Thompson Wyoming Decl. at para. 17.

Utah, Washington, and Wyoming are comparable to the rates for NRCs in Colorado, we reject AT&T's arguments and reach the same conclusion with respect to the NRCs in these states.[1019]

278. AT&T also challenges Qwest's NRCs in Nebraska. AT&T asserts that the Nebraska Commission improperly calculated NRCs by relying on embedded costs, specifically, by multiplying the amount of time Qwest's employees spend on a particular activity (using largely manual processes), by the existing labor rate.[1020] AT&T argues that the Nebraska Commission improperly labeled NRCs forward-looking finding that they "reflect all planned improvements due to additional mechanization of the service order process."[1021] AT&T states that the Federal District Court in Delaware rejected such an argument in *Bell Atlantic-Delaware, Inc. v. McMahon*.[1022] AT&T argues that this precedent and TELRIC principles require a "blank slate approach that disregards Qwest's existing processes and looks to determine the 'most efficient, currently available' methods for provisioning UNEs."[1023] AT&T also asserts that the Nebraska Commission improperly included 60 percent of the costs of disconnecting a competitive LEC customer in its initial billing charge.[1024] AT&T argues that the effect of including these costs is to create a huge competitive disadvantage in winning the customer in the first place.[1025] Specifically, AT&T opposes recovery of any disconnection charge as part of an initial billing charge. AT&T argues that imposing such charges creates a barrier to entry.

279. AT&T's challenges to the NRCs established in Nebraska are similar to arguments raised with respect to NRCs in Colorado. As we concluded in our discussion of Colorado NRCs, we will examine state decisions to determine if there are clear TELRIC errors, but we typically will defer to a state commission's assessment of the record before it with respect to detailed factual determinations, such as how many minutes a particular activity should take or how frequently it will occur. In its April 23, 2002 order, the Nebraska Commission took steps to minimize the impact of disconnection costs on competitive LECs, such as reducing the costs by 40 percent to reflect the fact that a customer may stay with a competitive LEC, and discounting the costs over five years to reflect the time value of money.[1026] In any event, in Qwest's May 31,

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[1019] AT&T Qwest II Weiss Decl. at paras. 38-44. *See* Part IV.A.2.c.(iii), *supra*.

[1020] AT&T Qwest III Baker/Starr/Denney Decl. at para. 49; AT&T Qwest I Baker/Starr/Denny Decl. at para 49.

[1021] AT&T Qwest III Baker/Starr/Denney Decl. at para. 49; AT&T Qwest I Baker/Starr/Denney Decl. at para. 49 (both citing, *Nebraska Commission April 23 Cost Order* at paras. 179-180).

[1022] 80 F. Supp. 2d 218, 250-51 (D. Del. 2000); AT&T Qwest III Baker/Starr/Denney Decl. at para. 50; AT&T Qwest I Baker/Starr/Denny Decl at para. 50.

[1023] AT&T Qwest III Baker/Starr/Denney Decl. at para. 52; AT&T Qwest I Baker/Starr/Denney Decl. at para. 52. *See also* AT&T Qwest I Weiss Decl. at para. 17 ("A TELRIC-compliant non-recurring cost study would compute NRCs on the most efficient forward-looking technology available to the ILEC.").

[1024] AT&T Qwest III Baker/Starr/Denney Decl. at para 53; AT&T Qwest I Baker/Starr/Denney Decl. at para. 53.

[1025] AT&T Qwest III Baker/Starr/Denney Decl. at para. 53; AT&T Qwest I Baker/Starr/Denney Decl. at para. 53; AT&T Qwest I Weiss Decl. at para. 12.

[1026] *See Nebraska Commission April 23 Cost Order* at 48.

2002 amendment to its May 24, 2002 SGAT, Qwest reduced certain installation NRCs to the levels adopted by the Colorado Commission for corresponding services.[1027] Because we find that the Colorado NRCs are consistent with TELRIC requirements, we reach a similar conclusion with respect to the Nebraska NRCs. Similarly, in discussing the issue of disconnection costs in Colorado, we stated that states have discretion in protecting incumbent LECs against the risk of non-payment by competitive LECs.[1028] Thus, we conclude that recovering disconnection costs at the time of installation is not necessarily a TELRIC violation.[1029]

(ii) Benchmark Analysis

(a) Introduction

280. The comments raise a number of concerns with respect to the ratesetting process in Iowa, Idaho, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming. As noted above, we will not reject an application "because isolated factual findings by a commission might be different from what we might have found if we were arbitrating the matter. . . ."[1030] Rather, when a state commission does not apply TELRIC principles or does so improperly (e.g., the state commission made a major methodological mistake or used an incorrect input or several smaller mistakes or incorrect inputs that collectively could render rates outside the reasonable range that TELRIC would permit), we will look to rates in other section 271-approved states to see if the rates nonetheless fall within the range that a reasonable TELRIC-based rate proceeding would produce.[1031]

281. With respect to rates for the loop and switching-related elements, the Commission has used its Synthesis Model to take into account the differences in the underlying costs between the applicant state and the comparison state.[1032] To determine whether a comparison with a particular state is reasonable, the Commission will consider whether the two states have a common BOC; whether the two states have geographic similarities; whether the two states have similar, although not necessarily identical, rate structures for comparison purposes; and whether

[1027] *See* Qwest I Application App. A., Tab 32, Declaration of Jerrold L. Thompson, Cost-Based Rates for Unbundled Network Elements and Interconnection in Nebraska, para. 39 (Qwest I Thompson Nebraska Decl.).

[1028] *See* Part IV.A.2.c.(iii), *supra*.

[1029] *See id.*

[1030] *Bell Atlantic New York Order*, 15 FCC Rcd at 4084, para. 244, *aff'd, AT&T Corp v. FCC*, 220 F.3d at 615-16.

[1031] *See Verizon Rhode Island Order*, 17 FCC Rcd at 3320, para. 38; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17456-57, para. 63; *see also SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para. 82.

[1032] *See Verizon Massachusetts Order*, 16 FCC Rcd at 9000, para. 22; *SBC Arkansas/Missouri Order*, 16 FCC Rcd at 20746, para. 57; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 65; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6277, para. 84.

the Commission has already found the rates in the comparison state to be TELRIC-compliant.[1033] For elements or services not included in the Synthesis Model, such as collocation or NRCs, the Commission compares rates in the applicant state to rates in an approved state to ensure that the rates in the applicant state are in the range that TELRIC would be expected to produce.[1034] If the rates in the applicant state do not pass a benchmark analysis or other comparison, and if "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce," then we will reject the application.[1035]

282. The Commission's benchmark process considers separately the reasonableness of loop and non-loop rates.[1036] When we benchmark both loop and non-loop rates, both sets of rates are benchmarked to the same anchor state's rates.[1037] Key non-loop rate elements (line port, end office switch usage, transport, and signaling) are benchmarked collectively, rather than rate element by rate element.[1038] We have allowed use of both standard and state-specific assumptions regarding minutes of use (MOUs) in performing the non-loop rate benchmark analysis.[1039] The Commission has not used a benchmark analysis to review NRCs, but it has compared NRC costs between states.[1040] We have followed a similar approach with respect to charges for a Daily Usage File (DUF).[1041] We consider these items outside of the benchmark

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[1033] *See Verizon Rhode Island Order*, 17 FCC Rcd at 3320, para. 38; *SBC Arkansas/Missouri Order* 16 FCC Rcd at 20746, para. 56; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 63; *Verizon Massachusetts Order*, 16 FCC Rcd at 9002, para. 28; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para. 82. We note, however, that in the *Verizon Pennsylvania Order*, we found that several of these criteria should be treated as indicia of the reasonableness of the comparison. *Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 64.

[1034] *See SBC Arkansas/Missouri Order*, 16 FCC Rcd at 20755-56, paras. 74-75; *Verizon New Jersey Order*, 17 FCC Rcd at 12303-04, para. 66.

[1035] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17453, para. 55.

[1036] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17458, para. 67; *Verizon Maine Order*, 17 FCC Rcd at 11673, para. 25; *SBC Arkansas/Missouri Order*, 16 FCC Rcd at 20747, para 58; *Verizon Rhode Island Order*, 17 FCC Rcd at 3320, para. 40.

[1037] *SBC Arkansas/Missouri Order*, 16 FCC Rcd at 20747, para. 58; *Verizon Rhode Island Order*, 17 FCC Rcd at 3320-21, para. 40. In other words, we do not benchmark loop rates to one state and non-loop rates to a different state.

[1038] *Verizon New Jersey Order*, 17 FCC Rcd at 12297, para. 52.

[1039] *Verizon Rhode Island Order*, 17 FCC Rcd at 3327, para. 55 n. 149; *Verizon New Jersey Order*, 17 FCC Rcd at 12297-98, para. 53.

[1040] *SBC Arkansas/Missouri Order*, 16 FCC Rcd at 20755-56, paras. 74-75; *Verizon New Jersey Order*, 17 FCC Rcd at 12303-04, para. 66.

[1041] *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9062, para. 86.

process because the Synthesis Model does not consider underlying costs associated with these items.[1042]

283. Qwest voluntarily reduced its rates in Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming prior to filing its application, and made further reductions in revised SGATs that were filed October 16-18, 2002.[1043] These reductions were calculated to produce rates that would satisfy a benchmark comparison to the rates in Colorado. Notwithstanding these reductions, a number of parties argue that Qwest has not performed the benchmarking analysis properly, and the rates it relies on here do not pass a benchmark comparison to Colorado. We address these arguments below.

(b) Challenges to Benchmarking

(i) Standard vs. State-Specific Usage

284. Qwest states that it followed the Commission's standard benchmarking methodology to develop a composite per-line rate for the non-loop portion of the UNE platform (UNE-P) for Colorado and each of the other states, combining per-line and usage-sensitive rate elements.[1044] Both WorldCom and AT&T challenge this approach, arguing that Qwest should have used state-specific data in its benchmark analysis. WorldCom argues that Qwest's assumption of 1200 originating and terminating local minutes, and 370 toll and access minutes is inconsistent with the Commission's prior benchmark analyses.[1045] Specifically, WorldCom argues that computation of a non-loop benchmark requires a combination of several rate elements with different demand units, yet Qwest uses a constant set of demand in all states. WorldCom claims that this contradicts the Commission's use of state-specific demand data in New York and New Jersey.[1046]

285. Similarly, AT&T argues that Qwest's non-loop benchmark analysis is flawed because it is based on national average "minutes of use" (MOU) estimates.[1047] AT&T contends that the *Verizon New Jersey Order* rejected arguments that a benchmarking analysis should be

[1042] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17458, para. 65 n.248.

[1043] Qwest III Thompson/Freeberg Reply Decl. at para. 4 n.6; Qwest Oct. 7 Pricing *Ex Parte* Letter.

[1044] Qwest II Application at 164; Qwest I Application at 165.

[1045] WorldCom Qwest II Comments at 32 and n.31; WorldCom Qwest I Comments at 31 n.13. *See also* WorldCom Qwest III Comments at 25-26 (incorporating same argument).

[1046] WorldCom Qwest II Comments at 32 (citing *Verizon New Jersey Order*, 17 FCC Rcd at 12297-98, para. 53); WorldCom Qwest I Comments at 31 (citing *Verizon New Jersey Order*, 17 FCC Rcd at 12297-98, para. 53). *See also* WorldCom Qwest III Comments at 25-26 (incorporating same argument).

[1047] AT&T Qwest III Comments at 73-76; AT&T Qwest II Comments at 55-58; AT&T Qwest I Comments at 52; AT&T Qwest III Comments, Tab L, Declaration of Michael R. Lieberman and Brian F. Pitkin, paras. 8-13 (AT&T Qwest III Lieberman/Pitkin Decl.); AT&T Qwest II Lieberman/Pitkin Decl. at para. 10; AT&T Qwest I Lieberman Decl. at para. 12.

based on national averages.[1048] AT&T claims that Qwest has state-specific MOU data and must use them, otherwise Qwest could unilaterally determine which MOU data to use in its benchmark analysis.[1049] AT&T claims that the Commission has determined that state-specific data more accurately reflect relative cost and rate differences among states.[1050] AT&T proposes that the Commission conduct its benchmarking analysis using state-specific MOU data where available, and standard MOU estimates where state-specific data is not available.[1051] AT&T argues that a benchmarking analysis using state-specific MOU estimates yields switching rates in five states, and total non-loop rates in two states, that fail the Commission's benchmarking test.[1052]

286. AT&T and WorldCom are correct that the *Verizon New Jersey Order* identified a number of reasons why the use of state-specific data might be appropriate in conducting a benchmark analysis. The Commission noted, for example, that state commissions may establish rates by dividing a carrier's costs by state-specific estimates of demand, and therefore we concluded the use of state-specific data was appropriate for purposes of comparing New Jersey rates with New York rates.[1053] The *Verizon New Jersey Order* did not, however, mandate the use of state-specific data or establish only a limited exception to such a requirement. We specifically stated that there might be other reasons to use standard assumptions, including, but not limited to, the absence of the relevant state-specific data.[1054] Indeed, in prior section 271 decisions we have allowed carriers to use either state-specific data or standard assumptions for the purpose of demonstrating that a particular set of rates is in the range that a proper application of TELRIC principles would produce.[1055] Implicit in these decisions is the notion that neither TELRIC generally, nor benchmarking in particular, is an exact science. The fact that Qwest's rates might be lower in some states had it used state-specific data in calculating its rates does not in itself mean that rates calculated using standard assumptions are outside the range that TELRIC would produce.

1048 AT&T Qwest I Comments at 52-53.

1049 AT&T Qwest III Comments at 75-76; AT&T Qwest II Comments at 57; AT&T Qwest I Comments at 53.

1050 *AT&T Qwest III Comments at 75-76; AT&T Qwest II Comments at 57; AT&T Qwest I Comments at 53.*

1051 *See* AT&T Qwest III Comments at 75. State-specific data delineating the number or percentages of originating and terminating intraLATA toll, intrastate interLATA, and interstate interLATA minutes per line per month, broken down on an intra-switch, inter-switch,.and tandem-routed basis, is not available. Qwest II Application at 164 n.79.

1052 AT&T Qwest III Comments at 73-76; AT&T Qwest III Lieberman/Pitkin Decl. at paras. 8-20.

1053 *Verizon New Jersey Order,* 17 FCC Rcd at 12297-98, para. 53.

1054 *Id.*

1055 *See id.* (applying state-specific assumptions); *Verizon Maine Order,* 17 FCC Rcd at 11679-80, para. 33 (applying standard assumptions).

287. In light of the benefits of using state-specific data that we identified in the *Verizon New Jersey Order*, the question in this case is whether Qwest has provided sufficient support for its decision to use standard assumptions. We conclude that it has. As an initial matter, Qwest has stated that it will use standard assumptions for all benchmark states in its region.[1056] Qwest argues that while Verizon filed section 271 applications for single states *seriatim* (or at most, two states simultaneously), Qwest from the beginning made clear its intent to file section 271 applications for as many of its fourteen states as possible within a short time period.[1057] Qwest states that the use of standardized assumptions is the most straightforward and predictable approach for such region-wide analysis, and will best avoid controversy over which state-specific data to use in the analysis.[1058] We agree with Qwest that the use of standard assumptions simplifies the comparison of switching rates across multiple states.

288. AT&T argues that allowing a BOC to choose whether it will use state-specific data or standard assumptions gives the BOC "unilateral power" to select the approach that is most beneficial. In this case, we are convinced that the use of standard assumptions is not an effort by Qwest to "game" the system. In fact, the use of standard assumptions may be necessary for certain states in this region, due to the distortive effect that sales of exchanges can have on a benchmark analysis.[1059] In addition, Qwest has demonstrated that in some of these states the use of standard assumptions will result in lower rates than would the use of state-specific data.[1060] Qwest conducted this analysis by comparing the approach used in its applications (i.e., the Commission's standardized assumptions for both MOU and traffic pattern data) and the "hybrid" approach advocated by AT&T and WorldCom (i.e., mixing state-specific MOUs with the Commission's standardized assumptions for traffic patterns.)[1061] Conducting these analyses using three separate years of state-specific MOU data, Qwest determined that use of the Commission's standardized assumptions for both MOUs and traffic patterns (as compared with the use of AT&T and WorldCom's hybrid approach) produced lower benchmarks in eight, four, and five of Qwest's thirteen states for the years 1999, 2000, and 2001, respectively.[1062]

[1056] *See* Qwest I Thompson Reply Decl. at para. 84; Qwest July 22 *Ex Parte* Letter at 4.

[1057] *See* Qwest I Thompson Reply Decl. at para. 84; Qwest July 22 *Ex Parte* Letter at 4.

[1058] *See* Qwest I Thompson Reply Decl. at para. 84; Qwest July 22 *Ex Parte* Letter at 4.

[1059] I.e., in North Dakota, Qwest's exchange sales resulted in MOU data that included traffic from lines no longer present in the line counts, thereby creating a mismatch of data. Qwest I Thompson Reply Decl. at para. 88. Similarly, Qwest's exchange sales in Idaho, Iowa, and Utah may have artificially lowered the benchmark rates in these states when state-specific MOU data are used.

[1060] *See* Qwest I Thompson Reply Decl. at para. 86-88; Qwest July 22 *Ex Parte* Letter at 4.

[1061] *See* Qwest I Thompson Reply Decl. at para. 86, Reply Ex. JLT-7; Qwest July 22 *Ex Parte* Letter at 4.

[1062] *See* Qwest I Thompson Reply Decl. at para. 87. *See also* Qwest July 22 *Ex Parte* Letter at 4 (slightly different results, but supporting Qwest's conclusions).

289. WorldCom takes issue with "Qwest's implicit claim that the use of standard assumptions throughout its region would result in roughly the same rates overall" because the use of state-specific minutes would require large rate reductions in five states, Montana, Nebraska, North Dakota, Utah, and Washington, but only *de minimis* increases in the other three states, Idaho, Iowa, and Wyoming.[1063] We note that WorldCom's analysis was conducted prior to Qwest's recent rate reductions, therefore it is not clear how the rate changes would affect WorldCom's analysis. Qwest provided information about these rate changes on day seven of this 90-day application period, therefore, WorldCom has had ample time to update its analysis. Because WorldCom has not updated this information in light of the current rates, we cannot rely on WorldCom's analysis.

290. We also agree with Qwest that the certainty associated with our standard assumptions is beneficial. In this case, Qwest has stated that it does not possess state-specific data on traffic patterns, such as interswitch versus intraswitch calls.[1064] Qwest asserts that while standardized data regarding traffic patterns and state-specific data regarding total MOUs could be combined in theory, such an approach would not necessarily be valid.[1065] We are concerned that requiring an applicant to mix state-specific MOU data and standard assumptions regarding other elements of the analysis (e.g., percentage of intraswitch calls) introduces unnecessary complexity without any demonstrated increase in the accuracy of the results.[1066]

(ii) Rate Structure/Charges to be Included

291. *Non-Recurring OSS Charges.* AT&T challenges several of Qwest's OSS NRCs, including an increased NRC from $0.36 to $1.38 in Iowa, a $14.44 and a $1.41 charge per order in Montana, a $14.65 and a $2.52 charge in Nebraska, and a $3.49 charge in North Dakota.[1067] AT&T argues, "Qwest bears the burden of proving that its OSS costs are in fact appropriately recovered as a one-time expense, and that the new NRC is TELRIC-compliant."[1068] Further,

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[1063] *See* WorldCom Qwest II Comments at 35; WorldCom Qwest I Reply, Reply Declaration of Chris Frentrup, para. 7 (WorldCom Qwest I Frentrup Reply Decl.).

[1064] Qwest I Thompson Reply Decl. at para. 81.

[1065] Qwest I Thompson Reply Decl. at paras. 81-83.

[1066] *Id.* at 3-4 (AT&T's "mix and match methodology is based on subjective selection and undocumented data," "combines apples and oranges," and is "less reliable than either consistent use of standardized assumptions or consistent use of actual state-specific data (when the complete set of information is available).").

[1067] AT&T Qwest I Comments at 52; AT&T Qwest II Lieberman/Pitkin Decl. at para. 26; AT&T Qwest I Lieberman Decl. at para. 10 and Ex. A-1.

[1068] AT&T Qwest I Reply, Reply Declaration of Michael Lieberman, para. 13 (AT&T Qwest I Lieberman Reply Decl.).

AT&T asserts that Qwest must explain why these OSS NRCs are appropriate in some of its states, but not in others.[1069]

292. In response, Qwest explained that it is not actually imposing any of these NRCs at the present time, and that it only will impose such charges with affirmative approval from the state commissions.[1070] The Montana, Nebraska, and North Dakota commissions have not addressed this issue yet, and these commissions have pending cost proceedings in which AT&T and other competitive LECs may challenge Qwest's OSS charges.[1071] We believe that fact-specific determinations, such as the costs associated with providing access to OSS, are more appropriately made by the state commission in the first instance. Because the proposed NRCs are not yet being imposed by Qwest and will not be imposed until they are approved by the state commissions, we believe it is unnecessary for the Commission to address this issue here. We are confident that these state commissions will apply TELRIC principles in their review of these proposed charges.

293. The factual situation is slightly different with respect to Iowa because the Iowa Board approved Qwest's imposition of an OSS charge in its April 23, 1998 cost order.[1072] Although Qwest is not actually imposing an OSS charge at the present time, it has indicated that it plans to impose a charge of $0.36 in the near future. In addition, Qwest had proposed an additional OSS charge of $1.02, but it has stated that it will not impose any additional charge without further approval from the Iowa Board.[1073] We expect the Iowa Board to apply TELRIC principles in its review of any additional OSS charge. As to the $0.36 NRC previously approved by the Iowa Board, we trust that the Iowa Board, in its consideration of any additional OSS charges, will modify this charge if it concludes that it is not justified under TELRIC principles. Moreover, we find the amount of the charge to be *de minimis* and not to impose any type of barrier to entry. Accordingly, we do not find the previously approved, but not yet imposed, charge of $0.36 per order to constitute a checklist violation.

1069 *Id.*

1070 Qwest II Thompson Reply Decl. at para. 4; Letter from David L. Sieradzki, Counsel for Qwest Communications International Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148, Attach. at 2 (filed Aug. 5, 2002) (Qwest Aug. 5 Pricing *Ex Parte* Letter) (08/05/92a); Letter from David L. Sieradzki, Counsel for Qwest Communications International Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-189, Attach. at 10 (filed Aug. 15, 2002) (Qwest Aug. 15 Pricing *Ex Parte* Letter) (08/15/02c); Letter from David L. Sieradzki, Counsel for Qwest Communications International Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-189 (filed Aug. 21, 2002) (Qwest Aug. 21 Pricing *Ex Parte* Letter) (08/21/02b). Qwest also clarified that it similarly will not apply NRCs for OSS in Utah or Wyoming until those state commissions approve such charges. Qwest II Thompson Reply Decl. at para. 4.

1071 *See* Qwest July 29 *Ex Parte* Letter (07/29/02e); *Nebraska Commission June 5 Cost Order* at 2-4; *North Dakota Commission Consultative Report* at 264; North Dakota Commission Qwest I Comments at 2.

1072 *See* Qwest I Thompson Reply Decl. at para. 90 n.118. *See also Iowa Board 1998 Pricing Order* at 39.

1073 *See* Qwest Aug. 8 Pricing *Ex Parte* Letter, Iowa Attach., SGAT Ex. A, § 12.1, 12.2 (08/08/02d).

294. *Grooming Charges*. At the time Qwest filed its first section 271 application, Qwest's SGAT for Nebraska included a grooming charge of $1.17 per month.[1074] AT&T states that Qwest added a new recurring rate for grooming in North Dakota of $1.35. AT&T states that Qwest's benchmarking analysis is flawed because Qwest failed to account for these grooming charges. If these charges are included in the benchmark analysis, AT&T argues that both states would have higher loop rates than Colorado.[1075]

295. Qwest argues that grooming charges are akin to daily usage file (DUF) charges that the Commission has not included in the benchmark comparisons in prior section 271 proceedings.[1076] In order to minimize controversy over this issue and ensure comparability, Qwest subsequently reduced its grooming charges in Nebraska and North Dakota.[1077] These new grooming charges were derived by multiplying the grooming charge in Colorado ($2.06) by the proportion of loops served by IDLC (9 percent).[1078] Because Qwest's reduced grooming charges are plainly comparable to those in Colorado, we find no TELRIC violation as a result of these charges, whether they are considered as part of the benchmark analysis or separately.

296. Integra argues that Qwest, in performing its benchmark analysis, improperly compared the Washington UNE-P loop rate, rather than the stand-alone UNE loop rate, to the Colorado stand-alone UNE loop rate.[1079] Integra claims that the Washington UNE-P loop rate is lower than the Washington stand-alone loop rate, and therefore the difference between the Washington rate and the Colorado rate is smaller and the benchmarked Washington loop rate is too high.[1080] We note that the stand-alone UNE loop rate in Colorado does not include a grooming charge, but that the stand-alone UNE loop rate in Washington includes a $0.55 grooming charge.[1081] This charge is not included in the Washington UNE-P loop rate. Therefore,

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[1074] Grooming charges recover "the incremental costs that would be incurred by the [incumbent] LEC, with integrated digital loop carrier [IDLC], to separate a DS-1 signal into individual DS-0 analog signals if the [competitive] LEC is unwilling to take a full DS-1 digital signal from the [incumbent] LEC switch to its collocation area." *See* AT&T Qwest I Lieberman Decl. at para. 10 n.5.

[1075] Colorado has a grooming charge of $2.06, but it only applies to loops that are actually groomed.

[1076] *See* Qwest I Thompson Reply Decl. at para. 93 (citing *BellSouth Georgia/Louisiana Order,* 17 FCC Rcd at 9062, para. 86). Qwest further argues that even if it were appropriate to account for grooming costs in the benchmark analysis, doing so would not produce significantly different loop rates among the states. *See* Qwest I Thompson Reply Decl. at para. 93.

[1077] Qwest reduced 2-wire and 4-wire grooming charges to $0.19 and $0.38 in Nebraska and North Dakota. *See* Qwest Aug. 8 Pricing *Ex Parte* Letter, Nebraska and North Dakota Atts., Section 9.2.1 (08/08/02d).

[1078] *See* Qwest I Thompson Reply Decl. at paras. 95-97.

[1079] Integra Qwest III Comments at 12-14; Integra Qwest II Comments at 7-9.

[1080] Integra Qwest III Comments at 12; Integra Qwest II Comments at 7-8.

[1081] *See* Qwest II Thompson Washington Decl. at para. 18; Qwest II Thompson Reply Decl. at para. 42.

when performing a benchmark analysis, Qwest appropriately compared the Colorado and Washington loop rates that exclude grooming charges.

297. Using the same methodology it used to adjust the grooming charges in Nebraska and North Dakota, Qwest reduced the Washington stand-alone loop rate so that the difference between it and the UNE-P loop rate is now $0.19.[1082] Because Qwest's reduced stand-alone loop rate in Washington is comparable to the sum of the loop rate plus the grooming charge in Colorado, we find no TELRIC violation as a result of this charge, whether this charge is considered part of the benchmark analysis or separately.[1083]

298. *Cross-connect Charges*. In its comments on the Qwest I section 271 application, AT&T states that Qwest added cross-connect charges in certain, unspecified Qwest I states.[1084] AT&T argues that Qwest's benchmarking analysis is flawed because Qwest failed to account for these cross-connect charges.[1085]

299. Qwest states that it did not add new cross-connect charges in its May 24, 2002 SGAT.[1086] A review of AT&T's own exhibit on this issue reflects that Qwest's cross-connect charges were not added by Qwest in its May 24, 2002 SGATs and thus, previously were approved by the Iowa, Idaho, Nebraska and North Dakota commissions.[1087] In its reply comments, Qwest argues that the cross-connect charge is a "collocation-related rate that is associated with establishing a cross-connection for the [competitive] LEC from the intermediate distribution frame to the main distribution frame."[1088] Because the charge is collocation-related and not loop-related, Qwest asserts that it would be inappropriate to include this rate in a loop-rate comparison.[1089]

300. The cross-connect charges in these states are all within pennies of the Colorado charge, which is not challenged here. As discussed in the benchmarking analysis discussion below, including these charges in the benchmark analysis would not cause Qwest to fall out of compliance with this checklist item. Alternatively, if we considered these charges as part of

1082 *See* Qwest II Thompson Reply Decl. at paras. 40-43 (*citing* Qwest I Thompson Reply Decl. at para. 97); Qwest Aug. 15 Pricing *Ex Parte* Letter, Attach. at 10 (08/15/02c).

1083 *See* Qwest Aug. 30 Pricing *Ex Parte* Letter at Attach. (Washington SGAT) (08/30/02d).

1084 *See* AT&T Qwest I Comments at 8, 49 and 52; AT&T Qwest I Lieberman Decl. at para. 10, Ex. A-1.

1085 *See id.*

1086 *See* Qwest I Thompson Reply Decl. at para. 90 n.118.

1087 *See* AT&T Qwest I Lieberman Decl. Ex. A-1.

1088 Qwest I Thompson Reply Decl. at para. 92.

1089 *See* Qwest I Thompson Reply Decl. at para. 92. Qwest notes that, in any event, Qwest's cross-connect charges are essentially equivalent in all states in the benchmarking analysis, and thus have almost no impact on the benchmarking analysis. *See id.*

collocation, as Qwest advocates, we also would find no TELRIC violation because there is so little difference between these charges and the charge in Colorado.

(iii) Benchmarking Criteria

301. Integra and OneEighty argue that Qwest has not demonstrated that Colorado is an appropriate state against which to benchmark rates in the states of Montana, North Dakota, Utah, and Washington.[1090] Integra and OneEighty claim that the Commission established a four-part test to determine when benchmarking is appropriate: (1) the states have the same BOC; (2) geographic similarities exist between the states; (3) rate structure similarities exist between the states; and (4) the Commission has found the rates in the comparison state to be reasonable.[1091] Integra and OneEighty allege that, other than showing that the same BOC serves these states, Qwest has not demonstrated any of the necessary criteria.[1092] Qwest responds by claiming that each criterion is satisfied and that the Commission has previously found that the only criterion that unequivocally must be satisfied is that the rates in the comparison state are reasonable.[1093]

302. We find that Colorado is a permissible state for comparison purposes.[1094] In the *Verizon Pennsylvania Order*, the Commission determined that the only mandatory benchmarking criterion is that the comparison state's rates must be found to be reasonable.[1095] The remaining criteria are not absolute requirements, but rather "should be treated as indicia of the reasonableness of the comparison."[1096] Notably, after reaching this determination, the

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[1090] Integra Qwest III Comments at 2, 5-6 (North Dakota, Utah, and Washington); OneEighty Qwest III Comments at 4-5; Integra Qwest II Comments at 5-7 (Utah and Washington); OneEighty Qwest II Comments at 4 (Montana). Because neither Integra nor OneEighty discuss rates in any of the other Qwest states in this application, our discussion only includes Montana, North Dakota, Utah, and Washington. The substance of the analysis, however, applies equally to the applicability of benchmarking in the other states.

[1091] Integra Qwest III Comments at 5-6 (citing *Verizon Pennsylvania Order*, 16 FCC Rcd at 17456-17457, para. 63); OneEighty Qwest III Comments at 4-5 (citing same); Integra Qwest II Comments at 5-7 (citing same); OneEighty Qwest II Comments at 4 (citing same).

[1092] Integra Qwest III Comments at 5-6; OneEighty Qwest III Comments at 4-5; Integra Qwest II Comments at 5; OneEighty Qwest II Comments at 4.

[1093] Qwest II Reply at 91-92 n.67 (*citing Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 64); Qwest II Thompson Reply Decl. at paras. 8-10.

[1094] As a preliminary matter, we note that while Integra and OneEighty allege that Qwest failed to demonstrate that it satisfies three of the benchmarking criteria, neither commenter introduced factual evidence of any kind, including evidence showing that Colorado is an inappropriate state to anchor the benchmarking analysis. *See Updated Section 271 Filing Requirements Public Notice*, 16 FCC Rcd 6923. Nevertheless, to ensure the completeness of this order, we address the substance of the commenters' claim.

[1095] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 64. *See also* Qwest II Reply at 91-92 n.67; Qwest II Thompson Reply Decl. at para. 9 (citing same).

[1096] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 64. *See also* Qwest II Reply at 91-92 n.67; Qwest II Thompson Reply Decl. at para. 9 (citing same).

Commission approved the use of a state as the benchmark state when only three of the four criteria were met.[1097]

303. Contrary to the assertions of Integra and OneEighty, the Commission has determined that the rates in Colorado are reasonable.[1098] Accordingly, Qwest's reliance on Colorado as the anchor state satisfies our sole mandatory benchmarking criterion. Qwest, moreover, satisfies at least two of the other three criteria. Qwest is the BOC in Colorado, Montana, North Dakota, Utah, and Washington, and, contrary to the commenters' claims, Qwest has similar wholesale rate structures in Colorado and in Montana, North Dakota, Utah, and Washington.[1099] On the final criterion, geographic similarity between the states, Qwest claims that all of the states in this application are geographically similar because they are collectively contiguous, located in the western United States, and are large states with geographically dispersed populations.[1100] We note that the Commission has repeatedly found that the Synthesis Model provides a reasonable basis for comparing cost differences between states.[1101] In this instance, therefore, we find that Colorado is a reasonable anchor state for benchmark comparisons of the other application states.[1102]

(iv) "Bottom Up" Approach

304. Integra and OneEighty argue that UNE rates must be established by the state commission from the "bottom up," based on the BOC's forward-looking costs, plus a reasonable profit.[1103] Because the rates in Montana, North Dakota, Utah, and Washington were established

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1097 *See Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 64.

1098 *See* Part IV.A.2.c., *supra*.

1099 *Compare* Qwest Aug. 8 Pricing *Ex Parte* Letter (08/08/02d) *with* Qwest Aug. 30 Pricing *Ex Parte* Letter at Attach. (state SGATs) (08/30/02d).

1100 Qwest II Reply at 91-92 n.67; Qwest II Thompson Reply Decl. at para. 8.

1101 *See, e.g., Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd at 20456, para. 42 (1999) (*Universal Service Ninth Report and Order*), *aff'd in pertinent part and rev'd in part on other grounds, Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001).

1102 *See Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 64. Furthermore, we note that the D.C. Circuit has afforded the Commission "special deference" in examining whether state rates are TELRIC-compliant in a section 271 proceeding. *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000); *WorldCom, Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002).

1103 Integra Qwest III Comments at 4, 11 (citing *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9180, para. 287); OneEighty Qwest III Comments at 4, 11(citing same); Integra Qwest II Comments at 3-4 (citing same); OneEighty Qwest II Comments at 3-4 (citing same).

using a benchmarking analysis rather than a bottom-up analysis, Integra and OneEighty claim that Qwest's benchmarking efforts do not show that its rates conform to TELRIC.[1104]

305. In evaluating section 271 applications, the Commission examines rates to determine if they fall within the range that a reasonable TELRIC-based rate proceeding would produce.[1105] When a state commission does not apply TELRIC principles or does so improperly, we apply our benchmark analysis to determine whether the rates fall within the reasonable range that TELRIC would permit, an approach that has been upheld on appeal. "To create a distinction between properly derived cost-based rates and rates that were equal to them . . . 'would promote form over substance, which, given the imprecise nature of setting TELRIC-based pricing, is wholly unnecessary.'"[1106] Here, we have found the anchor state's rates to be TELRIC-compliant. Therefore, it is appropriate to conduct a benchmark analysis to review the remaining states' rates.

(v) Temporary Rates in Utah

306. AT&T expresses concern that the UNE rate reductions Qwest made in Utah on July 2, 2002 are only temporary, for purposes of obtaining section 271 approval, and that Qwest will subsequently raise them to their previous, non-TELRIC-compliant levels.[1107] AT&T asserts that, in the ongoing Utah UNE rate proceeding, Qwest has "proposed to set rates that are at the same levels as the rates that were in place prior to the [July 2] reductions."[1108] On June 21, 2002, Qwest submitted direct testimony, in which it asked the Utah Commission to set UNE rates on the basis of Qwest's cost model.[1109] In its application, Qwest states that it has committed to keep the lower rates in effect until the Utah Commission establishes different rates in a cost docket; Qwest and a given competitive LEC negotiate mutually-acceptable, lower rates; or a change in law triggers a rate change.[1110]

307. The existence of a pending UNE rate investigation in Utah does not lead us to conclude that Qwest's current Utah rates are impermissibly temporary. As we have noted

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1104 Integra Qwest III Comments at 3-4, 11 (North Dakota and Washington); OneEighty Qwest II Comments at 3-4 (Montana); Integra Qwest II Comments at 3-4, 6-7 (Utah and Washington); OneEighty Qwest II Comments at 3-4 (Montana). Neither Integra nor OneEighty makes any comments regarding the other application states.

1105 *See, e.g., Verizon Rhode Island Order*, 17 FCC Rcd at 3315, para. 27.

1106 *Sprint v. FCC*, 274 F.3d 549, 561 (D.C. Cir. 2001) (*quoting SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para. 82). *See also Verizon Rhode Island Order*, 17 FCC Rcd at 3319-3320, paras. 37-38; *Verizon Pennsylvania Order* at 17456-17457, para. 63. *See also WorldCom Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002) (the Commission may accept states' rates based on a benchmark analysis without independently examining those rates).

1107 AT&T Qwest II Comments at 50.

1108 *Id.*

1109 Qwest Aug. 21 Pricing *Ex Parte* Letter at Attach. (08/21/02b).

1110 Qwest II Thompson Utah Decl. at para. 38.

previously, we perform our section 271 analysis on the rates before us.[1111] If we find these rates to be TELRIC-compliant, then Qwest has met its obligation to price UNEs in compliance with checklist item two. If, in the future, Qwest were to raise those rates above the range that a reasonable application of TELRIC principles would produce, Qwest would, arguably, contravene the requirements of section 271. We cannot now assume that the proposed rates Qwest has filed with the Utah Commission are not cost-justified or that, if they are not justified, that the Utah Commission would approve them. Section 271 provides a mechanism, section 271(d)(6)(B), to challenge any UNE rates as not being TELRIC-based.[1112] Under section 271(d)(6)(A), the Commission has the authority to review future Qwest rate increases and, upon determining that such increases are not TELRIC-based in compliance with checklist item two, the Commission may suspend or revoke Qwest's section 271 authority or impose other penalties.[1113]

(vi) Benchmarking Switching on a Stand-Alone Basis

308. AT&T argues that the Synthesis Model overstates transport and tandem switching costs, and thus aggregate non-loop costs, in less densely populated states relative to more densely populated areas, and therefore the Commission should exclude transport and tandem switching from its benchmark analysis of non-loop elements.[1114] AT&T claims that such an approach, and the use of state-specific MOU data, demonstrates that Montana, Nebraska, North Dakota, Washington, and Wyoming non-loop rates exceed Colorado non-loop rates on a cost-adjusted basis.[1115] Also using its own analysis (with state-specific MOUs), AT&T further concludes that Qwest's Montana and Wyoming switching rates do not pass a benchmark comparison with Colorado's switching rates.[1116] AT&T also argues that TELRIC rates are calculated on the basis of individual elements and that Qwest must show that the rates for *each* of its UNEs complies with TELRIC principles.[1117] According to AT&T, because Qwest's

[1111] *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9066-67, para. 97 (citing *Verizon Rhode Island Order*, 17 FCC Rcd at 3317, para. 31).

[1112] 47 U.S.C. § 271(d)(6)(B).

[1113] 47 U.S.C. § 271(d)(6)(A).

[1114] *See* AT&T Qwest III Comments at 76-77; AT&T Qwest III Lieberman/Pitkin Decl. at paras. 14-20.

[1115] AT&T Qwest III Comments at 77; AT&T Qwest III Lieberman/Pitkin Decl. at para. 20. AT&T claims that a "properly applied" non-loop benchmarking analysis using state-specific MOUs demonstrates that Qwest's North Dakota and Washington cost-adjusted non-loop rates exceed those of Colorado. AT&T Qwest III Lieberman/Pitkin Decl. at para. 13.

[1116] AT&T Qwest II Comments at 59; AT&T Qwest II Lieberman/Pitkin Decl. at paras. 22-25; AT&T Qwest II Reply at 56.

[1117] AT&T Qwest II Comments at 59-60; AT&T Qwest II Reply at 56 n.190. In support of its argument that the Commission must look at the rates for each individual element, AT&T cites section 252(d)(1), which states that a BOC's rates for a network element comply with checklist item two only if they are "based on the cost . . . of providing . . . *the* network element." AT&T Qwest II Comments at 59 (citing 47 U.S.C. § 252(d)(1)) (emphasis in AT&T Qwest II Comments).

switching rates cannot be justified based on a valid benchmark comparison, Qwest must prove that its Montana and Wyoming switching rates are TELRIC-compliant using a stand-alone analysis, which Qwest has failed to do.[1118]

309. We note that, in response to AT&T's argument, Qwest has voluntarily lowered its switching usage rates in seven states (Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, and Wyoming), and reduced its transport rate in Washington.[1119] After these reductions, in each state Qwest's switching rates and transport rates separately, as well as its aggregated non-loop rates, benchmark to the corresponding Colorado rates, using standard MOU assumptions.[1120] Therefore, AT&T's argument regarding benchmarking the switching elements separately from transport is moot.

(c) Analysis

310. Having determined that the Colorado rates are appropriate rates for the benchmark comparison, we compare Qwest's Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming rates to the Colorado rates under our benchmark analysis, using our standard assumptions for weighting rates.[1121] As shown in the tables below, we compare the difference between the benchmark state's rates and Colorado's rates to the difference between the benchmark state's and Colorado's costs according to the Synthesis Model. We compare rates and costs for loops and for aggregated non-loop elements. We have also compared rates and costs for the switching elements[1122] and for transport separately.[1123] Because the percentage differences between Qwest's Colorado rates and the benchmark state rates do not exceed the percentage differences between Qwest's Colorado costs and the benchmark state's costs according to the Synthesis Model, we find that Qwest's rates in Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming satisfy our benchmark analysis.

[1118] AT&T Qwest II Comments at 58-60; AT&T Qwest II Reply at 57-58.

[1119] Qwest Oct. 7 Pricing *Ex Parte* Letter at Attach. 1; Letter from David L. Sieradzki, Counsel for Qwest Communications International Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314, Attach. 4 (filed Oct. 11, 2002) (Qwest Oct. 11 Pricing *Ex Parte* Letter).

[1120] Part IV.A.2.d.(ii)(c), *infra*.

[1121] *See Verizon Pennsylvania Order*, 16 FCC Rcd at 17458, para. 65 (describing our standard assumptions).

[1122] Qwest's switching element rates, excluding transport rates, include rates for the port, unbundled switching usage, and signaling.

[1123] AT&T's analysis is premised on the use of state-specific MOU data, where available, and standard assumptions where the data is not available. As discussed above in Part IV.A.2.d.(ii)(b)(i), we have declined to require Qwest to use AT&T's MOU assumptions, and find that use of standard MOU assumptions is appropriate. Using standard assumptions, Qwest's switching element rates and transport rates benchmark to the corresponding Colorado rates.

Loop Analysis[1124]		
State vs. Colorado	Rates Percentage Difference	Synthesis Model Costs Percentage Difference
Idaho vs. Colorado	28%	28%
Iowa vs. Colorado	1%	1%
Montana vs. Colorado	50%	50%
Nebraska vs. Colorado	10%	10%
North Dakota vs. Colorado	3%	3%
Utah vs. Colorado	(18%)	(18%)
Washington vs. Colorado	(12%)	(12%)
Wyoming vs. Colorado	48%	71%

Non-Loop Analysis		
State vs. Colorado	Rates Percentage Difference	Synthesis Model Costs Percentage Difference
Idaho vs. Colorado	(8%)	1%
Iowa vs. Colorado	(2%)	2%
Montana vs. Colorado	5%	50%
Nebraska vs. Colorado	7%	28%
North Dakota vs. Colorado	(4%)	10%
Utah vs. Colorado	(9%)	(8%)
Washington vs. Colorado	(20%)	(14%)
Wyoming vs. Colorado	(4%)	26%

Switching Elements Analysis		
State vs. Colorado	Rates Percentage Difference	Synthesis Model Costs Percentage Difference
Idaho vs. Colorado	(9%)	(7%)
Iowa vs. Colorado	(3%)	(1%)
Montana vs. Colorado	7%	7%
Nebraska vs. Colorado	9%	9%
North Dakota vs. Colorado	(4%)	(3%)
Utah vs. Colorado	(9%)	(8%)
Washington vs. Colorado	(17%)	(12%)

[1124] If cross-connect charges were included, the results would be as follows: Qwest's loop rates in Idaho, Iowa, Nebraska and North Dakota are higher than Qwest's loop rates in Colorado by 26.5 percent, 0.5 percent, 10.2 percent, and 2.7 percent, respectively. Comparing the costs, we find that the Idaho, Iowa, Nebraska and North Dakota loop costs are higher than the Colorado loop costs by 28.8 percent, 3.9 percent, 10.5 percent, and 12.2 percent, respectively. Because the percentage differences between Qwest's Colorado loop rates and Qwest's loop rates in each of the other states do not exceed the percentage differences between Qwest's loop costs in Colorado and Qwest's costs in each of the other states, we conclude that Qwest's Idaho, Iowa, Nebraska and North Dakota recurring loop rates satisfy our benchmark analysis.

Wyoming vs. Colorado	(4%)	(4%)

Transport Analysis		
State vs. Colorado	Rates Percentage Difference	Synthesis Model Costs Percentage Difference
Idaho vs. Colorado	0%	69%
Iowa vs. Colorado	0%	29%
Montana vs. Colorado	0%	393%
Nebraska vs. Colorado	0%	182%
North Dakota vs. Colorado	0%	111%
Utah vs. Colorado	(11%)	(7%)
Washington vs. Colorado	(32%)	(31%)
Wyoming vs. Colorado	0%	264%

311. These conclusions eliminate any remaining concerns as to whether Qwest's Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming UNE rates fall within a range of rates that a reasonable application of TELRIC would produce. For the foregoing reasons, we find that Qwest has demonstrated that its Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming UNE rates satisfy the requirements of checklist item two.

V. OTHER CHECKLIST ITEMS

A. Checklist Item 1 – Interconnection

312. Section 271(c)(2)(B)(i) requires a BOC to provide equal-in-quality interconnection on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of sections 251 and 252.[1125] Based on our review of the record, we conclude, as did each state commission,[1126] that Qwest complies with the requirements of this checklist item.[1127] In reaching this conclusion, we have examined Qwest's performance in

[1125] 47 U.S.C. § 271(c)(2)(B)(i); *see also* Appendix K at paras. 17-24.

[1126] Qwest I Colorado Commission Comments at 13-15; Qwest I Idaho Commission Comments at 14; Qwest I Iowa Commission Comments at 24; Qwest II Montana Commission Comments at 13-17; Qwest I Nebraska Commission Comments at 8; Qwest I North Dakota Commission Comments at 46, 64; Qwest II Utah Commission Comments at 1; Qwest II Washington Commission Comments at 11-12; Qwest II Wyoming Commission Comments at 2.

[1127] Qwest II Application App. A., Tab 6, Declaration of Thomas R. Freeberg (Qwest II Freeberg-Interconnection Decl.) at paras. 13-112; Qwest I Application App. A., Tab 7, Declaration of Thomas R. Freeberg (Qwest I Freeberg-Interconnection Decl.) at paras. 13-142.

providing collocation and interconnection trunks to competing carriers, as we have done in prior section 271 proceedings.[1128]

313. *Interconnection Quality and Timeliness*. We find, based on the record, that Qwest's performance for trunk blockage satisfies its statutory obligations regarding interconnection quality and timeliness.[1129] Although AT&T claims that Qwest's trunk blockage performance could be indirectly affected "if CLECs did not contain their growth" as a result of Qwest's trunk forecasting policies, AT&T does not contend that Qwest's performance is currently affected in this manner.[1130] Accordingly, we dismiss AT&T's comments in this regard as speculative.

314. *Collocation*. We conclude that Qwest meets its collocation obligations.[1131] Eschelon, however, asserts that Qwest's collocation performance is inadequate due to its refusal to provide "off-site adjacent collocation."[1132] Without elaborating, Eschelon cites to correspondence between Qwest and Eschelon regarding an impasse on collocation issues,[1133] in which Eschelon "proposes that Qwest permit Eschelon to collocate on property next to Qwest's premises."[1134] Eschelon's unsupported assertion here is insufficient to establish a violation of this checklist item as Qwest's SGATs specifically require Qwest to permit competitive LECs to place equipment in adjacent facilities when space is unavailable in the Qwest premise and provide "physical Collocation services and facilities."[1135] In addition, to the extent that Eschelon is asking Qwest to provide collocation space in or on a third party's property, the Commission's

[1128] *See, e.g., BellSouth Georgia/Louisiana Order*, FCC 02-147, 17 FCC Rcd at 9133-9137, paras. 201-206; *Verizon Massachusetts Order*, 16 FCC Rcd at 9092-95, 9098, paras. 183-87, 195.

[1129] *See* 47 U.S.C. § 271(c)(2)(B)(i).

[1130] *See* AT&T August 21, 2002 *Ex Parte* Letter at 2. We further discuss Qwest's trunk forecasting policies below. AT&T also notes that the NI-1 PID is deficient as a performance measure in that it "is an aggregate blocking number, which can hide serious blocking problems on individual trunks." AT&T August 21, 2002 *Ex Parte* Letter at 2. We reject AT&T's concern here and note that the development of the commercial performance measurements was subject to participation by all interested parties.

[1131] We also conclude that Qwest provides legally binding terms and conditions for collocation in its interconnection agreements and SGATs. *See* Colorado SGAT § 8.0; Idaho SGAT § 8.0; Iowa SGAT § 8.0; Montana SGAT § 8.0; Nebraska SGAT § 8.0; North Dakota SGAT § 8.0; Utah SGAT § 8.0; Washington SGAT § 8.0; and Wyoming SGAT § 8.0. *See also* Qwest II Application App. A., Tab 7, Declaration of Margaret S. Bumgarner (Qwest II Bumgarner Collocation Decl.) at para. 15; Qwest I Application App. A., Tab 8, Declaration of Margaret S. Bumgarner (Qwest I Bumgarner-Collocation Decl.) at para. 15.

[1132] Eschelon Qwest II Comments at 41-42; Eschelon Qwest I Comments at 27.

[1133] Eschelon Qwest II Comments at 42, Ex. 13; Eschelon Qwest I Comments at 27, Ex. 6 at 1.

[1134] Eschelon Qwest II Comments at 42, Ex. 13; Eschelon Comments at 27, Ex. 6 at 1.

[1135] Colorado SGAT § 8.1.1.6; Idaho SGAT § 8.1.1.6; Iowa SGAT § 8.1.1.6; Montana SGAT § 8.1.1.6; Nebraska SGAT § 8.1.1.6; North Dakota SGAT § 8.1.1.6; Utah SGAT § 8.1.1.6; Washington SGAT § 8.1.1.6; and Wyoming SGAT § 8.1.1.6.

rules state that "[a]n incumbent LEC must make available . . . collocation in adjacent controlled environmental vaults, controlled environmental huts, or similar structures *located at the incumbent LEC premises*."[1136] Consequently, we find Eschelon's argument here unavailing.

315. *Interconnection Terms.*[1137] AT&T claims that Qwest imposes a 50-mile limitation on interconnection trunking that unlawfully limits a competitive LEC's ability to choose its own point of interconnection.[1138] We disagree, and find that Qwest provides competing LECs with interconnection arrangements that satisfy the Commission's rules. AT&T objects to language contained in Qwest's SGATs in the application states regarding Qwest's provisioning of direct trunked transport (DTT) (*i.e.*, transport between two Qwest switches).[1139] Specifically, if facilities are not available, and the distance between the switches is greater than 50 miles, then (depending on the specific language in each state) the competing LEC may have to pay a portion of the construction costs.[1140] AT&T states that this policy compromises a competitive LEC's ability to choose its own point of interconnection because "it must either pay for the expansion of Qwest's network, or it must build to a meet-point and establish a point of interconnection that it does not necessarily want or need."[1141] AT&T also argues that it is Qwest's responsibility to carry traffic to and from a competing LEC's point of interconnection, and to build whatever additional trunking is necessary to meet those obligations.[1142]

[1136] 47 C.F.R. § 51.323(k)(3)(emphasis added).

[1137] AT&T argues that Qwest's "entrance facility" charges are "anticompetitive and inconsistent with the statute's requirement that the rates for interconnection be nondiscriminatory, just, and reasonable." AT&T Qwest II Wilson Decl. at para. 7; AT&T Qwest I Wilson Decl. at para. 7. In particular, AT&T claims that Qwest's flat-rated and non-distance sensitive entrance facility is really a loop charge and is unlawful because it fails to reflect the way these costs are incurred. *Id.* at paras. 9-10. AT&T's concerns are addressed in our discussion of unbundled local transport under checklist item 5 below, where we conclude that Qwest's policies do not represent a violation of our existing rules.

[1138] *See* AT&T Qwest II Wilson Decl. at para. 38; AT&T Qwest I Wilson Decl. at para. 36.

[1139] *See* AT&T Qwest II Wilson Decl. at para. 35; AT&T Qwest I Wilson Decl. at para. 33; Colorado SGAT § 7.2.2.1.5; Idaho SGAT § 7.2.2.1.5; Iowa SGAT § 7.2.2.1.5; Nebraska SGAT § 7.2.2.1.5; North Dakota SGAT § 7.2.2.1.5; Utah SGAT § 7.2.2.1.5; Washington SGAT § 7.2.2.1.5; and Wyoming SGAT § 7.2.2.1.5. The Montana SGAT contains no 50-mile limitation on direct trunked transport.

[1140] In Colorado, Iowa, and Washington, Qwest will construct the facilities and charge the competing LEC half the cost, or will require the competing LEC to build to a meet-point. *See* Qwest I Reply Declaration of Thomas R. Freeberg (Qwest I Freeberg-Interconnection Reply Decl.) at para. 24; Colorado SGAT § 7.2.2.1.5; Iowa SGAT § 7.2.2.1.5; and Washington SGAT § 7.2.2.1.5. In Idaho, Nebraska, North Dakota, Utah, and Wyoming, when the parties cannot agree on a cost-sharing arrangement, the issue may be submitted to the particular state commission for resolution. *See* Qwest I Freeberg-Interconnection Reply Decl. at para. 23; Idaho SGAT § 7.2.2.1.5; Nebraska SGAT § 7.2.2.1.5; North Dakota SGAT § 7.2.2.1.5; Utah SGAT § 7.2.2.1.5; and Wyoming SGAT § 7.2.2.1.5.

[1141] AT&T Qwest II Wilson Decl. at para. 38; AT&T Qwest I Wilson Decl. at para. 36.

[1142] AT&T Qwest II Wilson Decl. at para. 37; AT&T Qwest I Wilson Decl. at para. 35.

316. Except in Montana, each of the state commissions have approved Qwest's SGAT language.[1143] We note that these states approved cost-sharing only where existing facilities are unavailable and where the trunk length is greater than 50 miles. We also note that the issue presented by AT&T—which party should bear the costs of transport to distant POIs—is an open issue in a pending rulemaking proceeding before this Commission.[1144] In light of the states' approval and because the issue is open in our *Intercarrier Compensation NPRM*, we find that Qwest's cost-sharing approach does not violate our rules and thus does not warrant a finding of checklist noncompliance.[1145]

317. We also reject AT&T's contention that, in seven of the nine application states (excluding Colorado and Washington), terms in Qwest's SGATs are unlawful and discriminatory in that they prohibit competitive LECs from combining local and toll traffic onto a single trunk group.[1146] The Utah SGAT allows for the combining of traffic that AT&T seeks.[1147] In Montana, AT&T's interconnection agreement with Qwest contemplates the combining of traffic on interconnection trunks.[1148] In Wyoming, Qwest states that its SGAT is nondiscriminatory because Qwest has long maintained one set of trunk groups to carry exchange access traffic for interexchange carriers and a second set for its own local traffic.[1149] Although Qwest's SGATs in Idaho, Iowa, Nebraska, and North Dakota prohibit the combination of local exchange service traffic with switched access traffic on the same trunk group,[1150] existing interconnection agreements in those states between Qwest and competitive LECs that do not prohibit such combinations are available for adoption by other competitive LECs under section 252(i) of the

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1143 Qwest II Freeberg-Interconnection Reply Decl. at paras. 23-24; Qwest I Freeberg-Interconnection Reply Decl. at paras. 23-24.

1144 Developing a Unified Intercarrier Compensation Regime, FCC 01-132, *Notice of Proposed Rule Making*, 16 FCC Rcd 9610, 9652, para. 114 (2001).

1145 *See Verizon Pennsylvania Order*, FCC 01-269, 16 FCC Rcd 17419, 17474-14475, para. 100 (2001) (noting that the *Intercarrier Compensation* rulemaking proceeding would resolve certain financial responsibility issues). We note, however, that Qwest will have to comply with any rule adopted in the *Intercarrier Compensation* proceeding to remain in compliance with section 271.

1146 AT&T Qwest III Comments at 80; AT&T Qwest II Wilson Decl. at paras. 13-14; AT&T Qwest I Wilson Decl. at paras. 26-28.

1147 Qwest II Freeberg-Interconnection Reply Decl. at para. 18; Qwest II Reply at 67; Utah SGAT § 7.2.2.9.3.2.

1148 Qwest II Reply at 67; Qwest II Freeberg-Interconnection Reply Decl. at 19; Qwest II Application App. L, Qwest/AT&T Montana Interconnection Agreement, Attach. 5 at § 8.2.1 ("If Local Traffic and Toll Traffic are combined into one (1) group, AT&T shall provide a measure of the amount of Local and Toll traffic relevant for billing purposes to US WEST.").

1149 Qwest II Reply at 67; Qwest II Freeberg-Interconnection Reply Decl. at para 20.

1150 Idaho SGAT § 7.2.2.9.3.2; Iowa SGAT § 7.2.2.9.3.2; Nebraska SGAT § 7.2.2.9.3.2; North Dakota SGAT § 7.2.2.9.3.2.

Commission's rules.[1151] Consequently, we find that AT&T's allegations here do not establish that Qwest has failed to meet its obligation to provide nondiscriminatory access to interconnection.

318. Similarly, we find no merit in AT&T's assertion that Qwest fails to provide reasonable and nondiscriminatory terms for interconnection because it does not permit competitive LECs to use the same facilities for both private line and interconnection trunks. AT&T states that it leases special access facilities (also called private line facilities), such as DS3 or OCn, from Qwest to transport end-user traffic directly to the competitive LEC wire center.[1152] AT&T alleges that while Qwest allows AT&T to use the private line facility for interconnection, it charges for the facility as if the facility were entirely private line.[1153]

319. We find that AT&T is actually challenging Qwest's policy involving its tariffed private line service. As we have explained in prior section 271 orders, the terms and conditions of special access services such as this are not properly the subject of a section 271 inquiry.[1154] We do not believe that checklist compliance is intended to encompass the provision of tariffed interstate access services simply because these services use some form of the same physical facilities as a checklist item.[1155] Nevertheless, to the extent that parties are experiencing problems in the provisioning of special access services ordered from Qwest's federal tariffs, we note that these issues are appropriately addressed in the Commission's section 208 complaint process.[1156]

320. *Other Issues.* AT&T also takes issue with the trunk forecasting and utilization provisions found in Qwest's SGATs.[1157] Specifically, AT&T states that it is "unreasonable and discriminatory" for Qwest to require a construction deposit before building competitive LEC-

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[1151] Qwest I Freeberg-Interconnection Reply Decl. at paras. 17-19; Qwest I Freeberg-Interconnection Decl. at paras 17-19.

[1152] AT&T Qwest III Comments at 80; AT&T Qwest II Wilson Decl. at para. 32; AT&T Qwest I Wilson Decl. at para 30.

[1153] AT&T Qwest II Wilson Decl. at para. 32; AT&T Qwest I Wilson Decl. at para 30.

[1154] *See SBC Texas Order*, 15 FCC Rcd at 18520, para. 335; *Bell Atlantic New York Order*, 15 FCC Rcd at 4126-27, para. 340.

[1155] *See SBC Texas Order*, 15 FCC Rcd at 18520, para. 335; *Bell Atlantic New York Order*, 15 FCC Rcd at 4126-27, para. 340.

[1156] *See SWBT Texas Order*, 15 FCC Rcd at 18520, para. 335; *Bell Atlantic New York Order*, 15 FCC Rcd at 4127, para. 341.

[1157] AT&T Qwest III Comments at 80; AT&T Qwest II Wilson Decl. at para. 14; AT&T Qwest I Wilson Decl. at para. 13; AT&T August 21, 2002 *Ex Parte* Letter. PageData also references an agreement involving US West/New Vector. PageData Reply at 5. Qwest states that it has explained in proceedings before the Idaho Commission that this agreement is not designed for paging interconnection. Qwest III Reply at 61, n.69.

requested local interconnection service (LIS) trunks.[1158] The deposit would be forfeited if the competitive LEC's utilization does not reach fifty percent of the forecasted amount within six months.[1159] We do not find that Qwest's trunk forecasting and utilization policies run afoul of our requirements for this particular checklist item. In addition, AT&T has provided no evidence that Qwest's policies here have resulted in decreased trunk blockage performance.[1160] We also note that the Colorado Commission has found that Qwest should be allowed to require a deposit as a form of protection against the "over forecasting" of trunks.[1161]

321. Except in Washington, AT&T also criticizes Qwest for its policy of unilaterally reclaiming trunks from competitive LECs where usage is less than fifty percent of that forecasted for any consecutive three-month period.[1162] Qwest states that while trunk reductions may occur when there is a need for such facilities, Qwest reclaims such trunks only after the competitive LEC has agreed to the reduction.[1163] We find Qwest's policy, particularly in light of its explanation that it would work closely with an affected competitive LEC prior to taking any action, to be reasonable. We further note that no competing LEC, including AT&T, has alleged that it has been specifically harmed by Qwest's policy, and that a unilateral reclamation of trunks by Qwest has not occurred in any of the application states.[1164]

322. *Interconnection Pricing.* Checklist item one requires a BOC to provide "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[1165] Section 251(c)(2) requires incumbent LECs to provide interconnection "at any technically

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1158 AT&T Qwest II Wilson Decl. at para. 17; AT&T Qwest I Wilson Decl at para 16. The deposit is only required whenever competitive LEC forecasts exceed Qwest forecasts and when in each of the preceding eighteen months, the trunks required by a competitive LEC constitute less than fifty percent of trunks in service. *See* Qwest II Freeberg-Interconnection Reply Decl. at 4-5, paras. 8-9; Qwest I Freeberg-Interconnection Reply Decl. at 4-5, paras. 8-9. *See also* Colorado SGAT § 7.2.2.8.6.1; Iowa SGAT § 7.2.2.8.6.1; Idaho SGAT § 7.2.2.8.6.1, Nebraska SGAT § 7.2.2.8.6.1; North Dakota SGAT § 7.2.2.8.6.1; Montana SGAT § 7.2.2.8.6.1; Utah SGAT § 7.2.2.8.6.1; Washington SGAT § 7.2.2.8.6-7.2.2.8.6.1; and Wyoming SGAT § 7.2.2.8.6.1.

1159 AT&T Qwest II Wilson Decl. at para. 16; AT&T Qwest I Wilson Decl. at para. 15.

1160 *See* NI-1 (Trunk Blocking).

1161 Qwest I Colorado Commission Comments at 14.

1162 AT&T Qwest II Wilson Decl. at para. 23; AT&T Qwest I Wilson Decl. at para. 25. *See* Colorado SGAT § 7.2.2.8.13; Idaho SGAT § 7.2.2.8.13; Iowa SGAT § 7.2.2.8.13; Nebraska SGAT § 7.2.2.8.13; North Dakota SGAT § 7.2.2.8.13; Montana SGAT § 7.2.2.8.13; Utah SGAT § 7.2.2.8.13; and Wyoming SGAT § 7.2.2.8.13. In Washington, a competitive LEC may prevent Qwest from reclaiming unused facilities by providing reasons why it needs to retain the excess capacity. Washington SGAT § 7.2.2.8.13.

1163 *See* Qwest II Freeberg-Interconnection Reply Decl. at para. 14; Qwest I Freeberg-Interconnection Reply Decl. at para 13.

1164 *See* Qwest II Freeberg-Interconnection Reply Decl. at para 14; Qwest I Freeberg-Interconnection Reply Decl. at para. 13.

1165 47 U.S.C. § 271(c)(2)(B)(i).

feasible point within the carrier's network . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[1166] Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.[1167] The Commission's pricing rules require, among other things, that in order to comply with its collocation obligations, an incumbent LEC provide collocation at prices that are based on TELRIC.[1168]

323. Level 3 contends that Qwest violates checklist item one by requiring Level 3 to pay Qwest for the interconnection facilities that transport Qwest-originated traffic to Level 3 for termination.[1169] Level 3 alleges that Qwest violates the Commission's interconnection rules by excluding Internet traffic originated by Qwest end users in calculating the relative use of the shared facilities carrying that traffic to Level 3 for termination. Specifically, Level 3 argues that, although the Commission concluded that Internet traffic is not subject to reciprocal compensation, it did not alter other regulatory obligations of the originating LEC, including the obligation to carry traffic to a single point of interconnection.[1170] Furthermore, Level 3 claims that the plain language of section 51.703(b) of the Commission's rules prohibits Qwest from imposing such charges.[1171] According to Level 3, Qwest's policy of excluding Internet traffic when calculating its relative use of shared transport facilities requires Level 3 to bear the cost of transport for Qwest-originated calls.[1172]

324. In response, Qwest claims that the dispute should be decided under checklist item 13, where we have previously determined that Internet traffic is not subject to the reciprocal compensation provisions of sections 251(b)(5) and 252(d)(2) of the Act.[1173] Qwest contends that the Commission's rules that exempt Internet-related traffic for reciprocal compensation purposes also exempt such traffic in the calculation of relative use. Specifically, Qwest claims that section 51.709(b) of the Commission's rules establishes that Internet traffic should be excluded from the relative use calculations that determine Qwest's proportionate financial responsibility for its

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1166 *Id.* § 251(c)(2).

1167 *Id.* § 252(d)(1).

1168 *See* 47 C.F.R. §§ 51.501-07, 51.509(g) (2001); *Local Competition First Report and Order*, 11 FCC Rcd at 15812-16, 15844-61, 15874-76, 15912, paras. 618-29, 674-712, 743-51, 826.

1169 Level 3 Qwest III Comments at 1.

1170 Level 3 Qwest III Comments at 7 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9187, para. 78 n.149 (2001) (*ISP Remand Order*)).

1171 Level 3 Qwest III Reply at 2.

1172 Level 3 Qwest III Comments at 5.

1173 Qwest III Thompson/Freeberg Reply Decl. at para. 29; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9172, para. 272.

interconnection trunks.[1174] Qwest states that, under this rule, carriers allocate the costs for the interconnection trunks connecting their networks based on the amount of traffic each carrier originates over the trunks.[1175] Furthermore, Qwest claims this traffic excludes interstate or intrastate exchange access by virtue of section 51.701(b)(1).[1176] Because Internet traffic is interstate access, Qwest claims it is excluded from the determination of relative use of interconnection trunks.[1177]

325. We recognize that the relative use issue has been arbitrated by Level 3 and Qwest before various state commissions with different outcomes, and is the subject of two court proceedings.[1178] As we noted in the *SWBT Texas Order*, the 1996 Act authorizes the state commissions to resolve specific carrier-to-carrier disputes, and it authorizes federal courts to ensure that the results of the state arbitration process are consistent with federal law.[1179] We find that this issue is part of a carrier-to-carrier dispute that is appropriately addressed through state commission and federal court proceedings. Moreover, the Commission has not clearly addressed the issue raised here – the treatment of Internet-related traffic in the intercarrier allocation of shared facilities costs.[1180] Level 3 relies on footnote 149 of the *ISP Remand Order*, which provides, "This interim regime affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection."[1181] This language suggests that the Commission was concerned only with the intercarrier compensation *rate* for ISP-bound traffic and did not intend to alter any other obligations. On the other hand, Qwest relies on section 51.701(b)(1), which the Commission revised so as to exclude "information access" (ISP-bound traffic) from the scope of subpart H of part 51 of the Commission's rules.[1182] Subpart H includes section

[1174] Qwest III Thompson/Freeberg Reply Decl. at para. 30.

[1175] *Id.*

[1176] *Id.*

[1177] *Id.*

[1178] Level 3 Qwest II Comments at 2. The Arizona Commission decided in favor of Level 3, while the Colorado and Oregon commissions decided for Qwest. Level 3 has appealed the Oregon and Colorado state commission decisions on relative use to the relevant federal district courts. *See id.* n.2. Level 3 is also engaged in arbitration proceedings with Qwest in Minnesota, Washington, New Mexico, and Nebraska on this issue. The Administrative Law Judge presiding over the Minnesota arbitration proceeding has decided that relative use is not covered under reciprocal compensation rules. Letter from Staci L. Pies, Director, Federal Regulatory Affairs, Level 3 Communications, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314, Attach. (filed Nov. 5, 2002) (Level 3 Nov. 5 *Ex Parte* Letter).

[1179] *SWBT Texas Order*, 15 FCC Rcd at 18541, para. 383.

[1180] *See ISP Remand Order*, 16 FCC Rcd at 9169-72, 9187, paras. 35, 36, 39, 42-43.

[1181] *ISP Remand Order*, 16 FCC Rcd at 9187, para. 78 n.149 (emphasis in original).

[1182] 47 C.F.R. § 51.701(b)(1) (2001).

51.703(b), upon which Level 3 relies.[1183] It is not clear, therefore, whether the rule section relied upon by Level 3 (section 51.703(b)) represents "compensation" obligations that were modified by the *ISP Remand Order*, or whether they are "other obligations under out Part 51 rules" that were unaffected by the *ISP Remand Order*. As we previously stated, "new interpretive disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding."[1184] We note that Level 3 may raise these issues in another Commission proceeding, such as the *Intercarrier Compensation NPRM*, which would provide a more appropriate forum for Level 3's concerns.[1185] Therefore, we decline to find Qwest out of compliance with checklist item one on this basis.

326. In two states, Idaho and Nebraska, AT&T asserts that the collocation rates set by the state commissions do not comply with TELRIC requirements. In Idaho, AT&T states that the Arbitrator expressly disclaimed setting TELRIC-compliant collocation charges and set interim rates based on Qwest's tariff rates for collocation because neither Qwest nor AT&T "proposed collocation prices that [were] supported by sound cost analysis."[1186]

327. In Nebraska, AT&T asserts that the Nebraska Commission erroneously adopted Qwest's proposed rates despite expressing concerns about Qwest's cost study, and absent a finding of TELRIC compliance.[1187] According to AT&T, the Nebraska Commission noted, among other deficiencies, that certain costs such as engineering may be incurred once but charged to more than one job, thereby allowing for multiple recovery.[1188] Nonetheless, the Nebraska Commission adopted Qwest's proposed rates as a "starting point for determining the appropriate TELRIC compliant rates."[1189] Qwest notes that AT&T did not challenge the collocation rates proposed by Qwest during the state proceeding, nor did it seek reconsideration of the Nebraska Commission's decision.[1190] Although we prefer that parties raise their concerns to the state in the first instance, in this case AT&T is alerting the Commission to findings made by the state commission and therefore it is appropriate for us to consider these claims.

1183 47 C.F.R. § 51.703(b) (2001).

1184 *Joint Application by BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Docket No. 02-150, Memorandum Opinion and Order, 17 FCC Rcd 17595, 17721-22, para. 227 (2002) (*BellSouth Multistate Order*) (quoting *Verizon Pennsylvania Order*, 16 FCC Rcd at 17470, para. 92).

1185 *Intercarrier Compensation NPRM*, 16 FCC Rcd 9610; Qwest III Thompson/Freeberg Reply Decl. at para. 31 n. 63.

1186 AT&T Qwest I Baker/Starr/Denney Decl. at para. 33; *Idaho First Arbitration Order* at 34.

1187 AT&T Qwest I Baker/Starr/Denney Decl. at para. 54.

1188 *Nebraska April 23 Cost Order* at 53.

1189 *Nebraska April 23 Cost Order* at 53.

1190 Qwest I Thompson Reply Decl. at 63 n.132.

328. We have concerns about the manner in which collocation rates were established in both of these states. A review of the Idaho record reveals that, while the Arbitrator initially adopted Qwest's tariff rates for collocation subject to a true-up provision, subsequently the Arbitrator reduced these rates to the levels proposed by Qwest in the arbitration proceeding.[1191] In any event, it appears that neither the Arbitrator nor the Idaho Commission made a determination that Qwest's collocation rates are TELRIC-compliant. In Nebraska, we believe the concerns identified by the Nebraska Commission about Qwest's cost study raise doubts as to whether the process used to establish rates was TELRIC-compliant.

329. Where the process used by a state commission may not be consistent with TELRIC, the Commission nevertheless may approve rates that are in the range of rates that a proper application of TELRIC would produce. In this case, we perform a facial comparison of the collocation rates in Nebraska and Idaho to the rates in Colorado, which were thoroughly litigated before the Colorado Commission and are not challenged here. As noted by Qwest, there is no reason to believe that there are significant differences in collocation costs among Qwest's states. Specifically, the types of facilities to be constructed do not vary by state, and Qwest has centralized procurement and standard vendor contracts across its region.[1192] No commenter has demonstrated that cost differences between Colorado, on the one hand, and Nebraska and Idaho, on the other hand, undermine the usefulness of such a comparison.

330. Qwest has provided evidence comparing the rates it charges for collocation in Nebraska and Idaho to the rates in Colorado. For Nebraska, Qwest demonstrates that the total NRCs are substantially less than the total NRCs in Colorado, and the recurring rates are less than the corresponding rates in Colorado, with the exception of charges for power consumption.[1193] Because the Nebraska Commission has expressed its willingness to reconsider Qwest's collocation rates, and because the substantially lower NRCs more than compensate for the slightly higher recurring charges, we do not believe that the power charges in Nebraska require us to find that Qwest is not in compliance with this checklist item.[1194] We encourage the Nebraska Commission to focus on this issue in any future proceeding regarding collocation rates.

331. The comparison is similar with respect to Idaho, in that the total NRCs are less than the total NRCs in Colorado, but the recurring charges for power consumption are much higher than those for Colorado.[1195] Qwest explains that the rates in its SGAT were ordered by the

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1191 *Idaho Fifth Arbitration Order* at 6-7.

1192 *See* Qwest Aug. 5a Pricing *Ex Parte* Letter at 4.

1193 Qwest I Thompson Reply Decl. at Ex. JLT-9.

1194 The NRCs for cageless collocation are $37,085 in Nebraska, as compared to $44,216 in Colorado. The NRCs for caged collocation are $56,993 in Nebraska, as compared to $66,019 in Colorado. *See* Qwest I Thompson Reply Decl. at Ex. JLT-9. In contrast to these significant differences, the total recurring charges in Nebraska are only $115 per month higher than Colorado for cageless collocation, and only $31 per month higher for caged collocation. *Id.*

1195 Qwest I Thompson Reply Decl. at Ex. JLT-9.

Idaho Commission in its arbitration with AT&T in 1997, and that it has proposed significantly lower rates in the pending Idaho cost docket.[1196] On August 5, 2002, Qwest filed a revised SGAT with the Idaho Commission that offers the lower rates proposed in the cost docket on a going-forward basis.[1197] Based on this reduction, we conclude that the collocation rates in Idaho are comparable to Colorado and therefore consistent with our TELRIC requirements.

332. OneEighty challenges Qwest's NRCs for engineering in collocation facilities in Montana. OneEighty states that Qwest violated checklist item one by imposing unjust, unreasonable, and discriminatory charges for allowing OneEighty to put cable between two bays.[1198] Specifically, OneEighty challenges Qwest's imposition of a $1,043 CLEC to CLEC Quote Preparation Fee (QPF) and a $3,735 Design Engineering & Installation – No Cables flat charge.[1199] OneEighty claims that Qwest's actual work that formed the basis for imposing these charges on OneEighty consisted of approximately fifteen minutes of measuring in the collocation space and noting the results in a spreadsheet.[1200] OneEighty notes that charges for "engineering labor, per half hour" elsewhere in Qwest's Montana SGAT reflect engineering rates of about $35.00.[1201] OneEighty also claims that Qwest's imposition of two $3,500 charges for changing the name of its predecessor to its name on the same two collocation facilities is unreasonable and discriminatory.[1202]

333. In response, Qwest states that the charges were agreed upon, included in the stipulation signed by Avista, a company acquired by OneEighty, and approved by the Montana Commission.[1203] Qwest contends that provisioning of this service includes many other activities than those identified by OneEighty, and that the rates are TELRIC-compliant.[1204] Nevertheless, Qwest has recently implemented an augment QPF in Montana that offers collocation augments to a competitive LEC's facilities at lower rates than those charged to OneEighty for this service.[1205] In regard to the name change charge, Qwest responds that this "change of responsibility" was not a standard service at the time of the request, but that OneEighty

1196 *Id.*

1197 *See* Qwest Aug. 8d Pricing *Ex Parte* Letter.

1198 *See* OneEighty Qwest II Comments at 7-8.

1199 *See id.*

1200 *See id.*

1201 *See id.* at 8.

1202 *See id.*

1203 Qwest II Thompson Reply Decl. at para. 66.

1204 *Id.*

1205 *See* Qwest Aug. 30d Pricing *Ex Parte* Letter at 3.

negotiated an amendment to its agreement for a lower rate, and is entitled to a credit for the difference from the quoted amount.[1206]

334. On August 29, 2002, Qwest filed a revised SGAT in Montana to include the new augment fee.[1207] We find that these measures address OneEighty's concerns regarding the collocation engineering charges. We also find that the issues regarding the name change, or "change of responsibility" rates and credit are part of a carrier-to-carrier dispute that is being resolved by the Montana Commission.

335. *Interconnection Pricing.* Checklist item one requires a BOC to provide "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[1208] Section 251(c)(2) requires incumbent LECs to provide interconnection "at any technically feasible point within the carrier's network . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[1209] Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.[1210] The Commission's pricing rules require, among other things, that in order to comply with its collocation obligations, an incumbent LEC provide collocation at prices that are based on TELRIC.[1211]

336. Level 3 contends that Qwest violates checklist item one by requiring Level 3 to pay Qwest for the interconnection facilities that transport Qwest-originated traffic to Level 3 for termination.[1212] Level 3 alleges that Qwest violates the Commission's interconnection rules by excluding Internet traffic originated by Qwest end users in calculating the relative use of the shared facilities carrying that traffic to Level 3 for termination. Specifically, Level 3 argues that, although the Commission concluded that Internet traffic is not subject to reciprocal compensation, it did not alter other regulatory obligations of the originating LEC, including the obligation to carry traffic to a single point of interconnection.[1213] Furthermore, Level 3 claims

1206 Qwest II Thompson Reply Decl. at para. 66. Qwest asserts that OneEighty negotiated a rate of $2,721 for the "change of responsibility" service. This rate has been reviewed by the competitive LECs participating in the Change Management Process in Montana.

1207 *See* Qwest Aug. 30d Pricing *Ex Parte* Letter. Currently, the "Augment Quote Preparation Fee" is $1,412.96 in Montana.

1208 47 U.S.C. § 271(c)(2)(B)(i).

1209 *Id.* § 251(c)(2).

1210 *Id.* § 252(d)(1).

1211 *See* 47 C.F.R. §§ 51.501-07, 51.509(g) (2001); *Local Competition First Report and Order*, 11 FCC Rcd at 15812-16, 15844-61, 15874-76, 15912, paras. 618-29, 674-712, 743-51, 826.

1212 Level 3 Qwest III Comments at 1.

1213 Level 3 Qwest III Comments at 7 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9187, para. 78 n.149 (2001) (*ISP Remand Order*)).

that the plain language of section 51.703(b) of the Commission's rules prohibits Qwest from imposing such charges.[1214] According to Level 3, Qwest's policy of excluding Internet traffic when calculating its relative use of shared transport facilities requires Level 3 to bear the cost of transport for Qwest-originated calls.[1215]

337. In response, Qwest claims that the dispute should be decided under checklist item 13, where we have previously determined that Internet traffic is not subject to the reciprocal compensation provisions of sections 251(b)(5) and 252(d)(2) of the Act.[1216] Qwest contends that the Commission's rules that exempt Internet-related traffic for reciprocal compensation purposes also exempt such traffic in the calculation of relative use. Specifically, Qwest claims that section 51.709(b) of the Commission's rules establishes that Internet traffic should be excluded from the relative use calculations that determine Qwest's proportionate financial responsibility for its interconnection trunks.[1217] Qwest states that, under this rule, carriers allocate the costs for the interconnection trunks connecting their networks based on the amount of traffic each carrier originates over the trunks.[1218] Furthermore, Qwest claims this traffic excludes interstate or intrastate exchange access by virtue of section 51.701(b)(1).[1219] Because Internet traffic is interstate access, Qwest claims it is excluded from the determination of relative use of interconnection trunks.[1220]

338. We recognize that the relative use issue has been arbitrated by Level 3 and Qwest before various state commissions with different outcomes, and is the subject of two court proceedings.[1221] As we noted in the *SWBT Texas Order*, the 1996 Act authorizes the state commissions to resolve specific carrier-to-carrier disputes, and it authorizes federal courts to

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1214 Level 3 Qwest III Reply at 2.

1215 Level 3 Qwest III Comments at 5.

1216 Qwest III Thompson/Freeberg Reply Decl. at para. 29; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9018, para. 272.

1217 Qwest III Thompson/Freeberg Reply Decl. at para. 30.

1218 *Id.*

1219 *Id.*

1220 *Id.*

1221 Level 3 Qwest II Comments at 2. The Arizona Commission decided in favor of Level 3, while the Colorado and Oregon commissions decided for Qwest. Level 3 has appealed the Oregon and Colorado state commission decisions on relative use to the relevant federal district courts. *See id.* n.2. Level 3 is also engaged in arbitration proceedings with Qwest in Minnesota, Washington, New Mexico, and Nebraska on this issue. The Administrative Law Judge presiding over the Minnesota arbitration proceeding has decided that relative use is not covered under reciprocal compensation rules. Letter from Staci L. Pies, Director, Federal Regulatory Affairs, Level 3 *Communications, to Marlene Dortch, Secretary, Federal Communications Commission,* WC Docket No. 02-314, Attach. (filed Nov. 5, 2002) (Level 3 Nov. 5 *Ex Parte* Letter).

ensure that the results of the state arbitration process are consistent with federal law.[1222] We find that this issue is part of a carrier-to-carrier dispute that is appropriately addressed through state commission and federal court proceedings. Moreover, the Commission has not clearly addressed the issue raised here – the treatment of Internet-related traffic in the intercarrier allocation of shared facilities costs.[1223] Level 3 relies on footnote 149 of the *ISP Remand Order*, which provides, "This interim regime affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under our Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection."[1224] This language suggests that the Commission was concerned only with the intercarrier compensation *rate* for ISP-bound traffic and did not intend to alter any other obligations. On the other hand, Qwest relies on section 51.701(b)(1), which the Commission revised so as to exclude "information access" (ISP-bound traffic) from the scope of subpart H of part 51 of the Commission's rules.[1225] Subpart H includes section 51.703(b), upon which Level 3 relies.[1226] It is not clear, therefore, whether the rule section relied upon by Level 3 (section 51.703(b)) represents "compensation" obligations that were modified by the *ISP Remand Order*, or whether they are "other obligations under out Part 51 rules" that were unaffected by the *ISP Remand Order*. As we previously stated, "new interpretive disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding."[1227] We note that Level 3 may raise these issues in another Commission proceeding, such as the *Intercarrier Compensation NPRM*, which would provide a more appropriate forum for Level 3's concerns.[1228] Therefore, we decline to find Qwest out of compliance with checklist item one on this basis.

339. In two states, Idaho and Nebraska, AT&T asserts that the collocation rates set by the state commissions do not comply with TELRIC requirements. In Idaho, AT&T states that the Arbitrator expressly disclaimed setting TELRIC-compliant collocation charges and set

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1222 *SWBT Texas Order*, 15 FCC Rcd at 18541 at para. 383.

1223 *See ISP Remand Order*, 16 FCC Rcd at 9169-72, 9187, paras. 35, 36, 39, 42-43.

1224 *ISP Remand Order*, 16 FCC Rcd at 9187, para. 78 n.149 (emphasis in original).

1225 47 C.F.R. § 51.701(b)(1) (2001).

1226 47 C.F.R. § 51.703(b) (2001).

1227 *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Docket No. 02-150, Memorandum Opinion and Order, 17 FCC Rcd 17595, 17721-22, para. 227 (2002) (*BellSouth Multistate Order*) (quoting *Verizon Pennsylvania Order*, 16 FCC Rcd at 17470, para. 92).

1228 *Intercarrier Compensation NPRM*, 16 FCC Rcd 9610; Qwest III Thompson/Freeberg Reply Decl. at para. 31 n. 63.

interim rates based on Qwest's tariff rates for collocation because neither Qwest nor AT&T "proposed collocation prices that [were] supported by sound cost analysis."[1229]

340. In Nebraska, AT&T asserts that the Nebraska Commission erroneously adopted Qwest's proposed rates despite expressing concerns about Qwest's cost study, and absent a finding of TELRIC compliance.[1230] According to AT&T, the Nebraska Commission noted, among other deficiencies, that certain costs such as engineering may be incurred once but charged to more than one job, thereby allowing for multiple recovery.[1231] Nonetheless, the Nebraska Commission adopted Qwest's proposed rates as a "starting point for determining the appropriate TELRIC compliant rates."[1232] Qwest notes that AT&T did not challenge the collocation rates proposed by Qwest during the state proceeding, nor did it seek reconsideration of the Nebraska Commission's decision.[1233] Although we prefer that parties raise their concerns to the state in the first instance, in this case AT&T is alerting the Commission to findings made by the state commission and therefore it is appropriate for us to consider these claims.

341. We have concerns about the manner in which collocation rates were established in both of these states. A review of the Idaho record reveals that, while the Arbitrator initially adopted Qwest's tariff rates for collocation subject to a true-up provision, subsequently the Arbitrator reduced these rates to the levels proposed by Qwest in the arbitration proceeding.[1234] In any event, it appears that neither the Arbitrator nor the Idaho Commission made a determination that Qwest's collocation rates are TELRIC-compliant. In Nebraska, we believe the concerns identified by the Nebraska Commission about Qwest's cost study raise doubts as to whether the process used to establish rates was TELRIC-compliant.

342. Where the process used by a state commission may not be consistent with TELRIC, the Commission nevertheless may approve rates that are in the range of rates that a proper application of TELRIC would produce. In this case, we perform a facial comparison of the collocation rates in Nebraska and Idaho to the rates in Colorado, which were thoroughly litigated before the Colorado Commission and are not challenged here. As noted by Qwest, there is no reason to believe that there are significant differences in collocation costs among Qwest's states. Specifically, the types of facilities to be constructed do not vary by state, and Qwest has centralized procurement and standard vendor contracts across its region.[1235] No commenter has

[1229] AT&T Qwest I Baker/Starr/Denney Decl. at para. 33; *Idaho First Arbitration Order* at 34.

[1230] AT&T Qwest I Baker/Starr/Denney Decl. at para. 54.

[1231] *Nebraska April 23 Cost Order* at 53.

[1232] *Nebraska April 23 Cost Order* at 53.

[1233] Qwest I Thompson Reply Decl. at 63 n.132.

[1234] *Idaho Fifth Arbitration Order* at 6-7.

[1235] *See* Qwest Aug. 5 Pricing *Ex Parte* Letter at 4 (08/05/02a).

demonstrated that cost differences between Colorado, on the one hand, and Nebraska and Idaho, on the other hand, undermine the usefulness of such a comparison.

343. Qwest has provided evidence comparing the rates it charges for collocation in Nebraska and Idaho to the rates in Colorado. For Nebraska, Qwest demonstrates that the total NRCs are substantially less than the total NRCs in Colorado, and the recurring rates are less than the corresponding rates in Colorado, with the exception of charges for power consumption.[1236] Because the Nebraska Commission has expressed its willingness to reconsider Qwest's collocation rates, and because the substantially lower NRCs more than compensate for the slightly higher recurring charges, we do not believe that the power charges in Nebraska require us to find that Qwest is not in compliance with this checklist item.[1237] We encourage the Nebraska Commission to focus on this issue in any future proceeding regarding collocation rates.

344. The comparison is similar with respect to Idaho, in that the total NRCs are less than the total NRCs in Colorado, but the recurring charges for power consumption are much higher than those for Colorado.[1238] Qwest explains that the rates in its SGAT were ordered by the Idaho Commission in its arbitration with AT&T in 1997, and that it has proposed significantly lower rates in the pending Idaho cost docket.[1239] On August 5, 2002, Qwest filed a revised SGAT with the Idaho Commission that offers the lower rates proposed in the cost docket on a going-forward basis.[1240] Based on this reduction, we conclude that the collocation rates in Idaho are comparable to Colorado and therefore consistent with our TELRIC requirements.

345. OneEighty challenges Qwest's NRCs for engineering in collocation facilities in Montana. OneEighty states that Qwest violated checklist item one by imposing unjust, unreasonable, and discriminatory charges for allowing OneEighty to put cable between two bays.[1241] Specifically, OneEighty challenges Qwest's imposition of a $1,043 CLEC to CLEC Quote Preparation Fee (QPF) and a $3,735 Design Engineering & Installation – No Cables flat charge.[1242] OneEighty claims that Qwest's actual work that formed the basis for imposing these charges on OneEighty consisted of approximately fifteen minutes of measuring in the collocation

1236 Qwest I Thompson Reply Decl. at Ex. JLT-9.

1237 The NRCs for cageless collocation are $37,085 in Nebraska, as compared to $44,216 in Colorado. The NRCs for caged collocation are $56,993 in Nebraska, as compared to $66,019 in Colorado. *See* Qwest I Thompson Reply Decl. at Ex. JLT-9. In contrast to these significant differences, the total recurring charges in Nebraska are only $115 per month higher than Colorado for cageless collocation, and only $31 per month higher for caged collocation. *Id.*

1238 Qwest I Thompson Reply Decl. at Ex. JLT-9.

1239 *Id.*

1240 *See* Qwest Aug. 8 Pricing *Ex Parte* Letter (08/08/02d).

1241 *See* OneEighty Qwest II Comments at 7-8.

1242 *See id.*

space and noting the results in a spreadsheet.[1243] OneEighty notes that charges for "engineering labor, per half hour" elsewhere in Qwest's Montana SGAT reflect engineering rates of about $35.00.[1244] OneEighty also claims that Qwest's imposition of two $3,500 charges for changing the name of its predecessor to its name on the same two collocation facilities is unreasonable and discriminatory.[1245]

346. In response, Qwest states that the charges were agreed upon, included in the stipulation signed by Avista, a company acquired by OneEighty, and approved by the Montana Commission.[1246] Qwest contends that provisioning of this service includes many other activities than those identified by OneEighty, and that the rates are TELRIC-compliant.[1247] Nevertheless, Qwest has recently implemented an augment QPF in Montana that offers collocation augments to a competitive LEC's facilities at lower rates than those charged to OneEighty for this service.[1248] In regard to the name change charge, Qwest responds that this "change of responsibility" was not a standard service at the time of the request, but that OneEighty negotiated an amendment to its agreement for a lower rate, and is entitled to a credit for the difference from the quoted amount.[1249]

347. On August 29, 2002, Qwest filed a revised SGAT in Montana to include the new augment fee.[1250] We find that these measures address OneEighty's concerns regarding the collocation engineering charges. We also find that the issues regarding the name change, or "change of responsibility" rates and credit are part of a carrier-to-carrier dispute that is being resolved by the Montana Commission.

B. Checklist Item 4 – Unbundled Local Loops

348. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching

[1243] *See id.*

[1244] *See id.* at 8.

[1245] *See id.*

[1246] Qwest II Thompson Reply Decl. at para. 66.

[1247] *Id.*

[1248] *See* Qwest Aug. 30 Pricing *Ex Parte* Letter at 3 (08/30/02d).

[1249] Qwest II Thompson Reply Decl. at para. 66. Qwest asserts that OneEighty negotiated a rate of $2,721 for the "change of responsibility" service. This rate has been reviewed by the competitive LECs participating in the Change Management Process in Montana.

[1250] *See* Qwest Aug. 30 Pricing *Ex Parte* Letter, (08/30/02d). Currently, the "Augment Quote Preparation Fee" is $1,412.96 in Montana.

or other services."[1251] Based on the evidence in the record, we conclude, as did the commissions of the nine application states, that Qwest provides unbundled local loops in accordance with the requirements of section 271 and our rules.[1252] Our conclusion is based on our review of Qwest's performance for all loop types – which include, as in past section 271 orders, voice grade loops, xDSL-capable loops, and high capacity loops – as well as hot cut provisioning and our review of Qwest's processes for line sharing and line splitting.[1253] As of September 30, 2002, competitors have acquired from Qwest and placed into use approximately 63,546 stand-alone unbundled loops in Colorado,[1254] 5,882 stand-alone unbundled loops in Idaho,[1255] 44,946 stand-alone unbundled loops in Iowa,[1256] 3,293 stand-alone unbundled loops in Montana,[1257] 18,662 stand-alone unbundled loops in Nebraska,[1258] 16,742 stand-alone unbundled loops in North

[1251] 47 U.S.C. § 271(c)(2)(B)(iv); *see also* Appendix K at paras. 48-52 (regarding requirements under checklist item four).

[1252] *See* Colorado Commission Comments at 21; Idaho Commission Comments at 14; Iowa Board Comments at 44-45; Montana Commission Comments at 28-29; Nebraska Commission Comments at 5; North Dakota Commission Comments at 5; Utah Commission Comments at 1; Washington Commission Comments at 19; Wyoming Commission Comments at 7-8. The Department of Justice concluded that Qwest has succeeded in opening its local markets in the applicant states in many respects. *See* Department of Justice Qwest I Evaluation at 2, 33; Department of Justice Qwest II Evaluation at 2, 21. The Department of Justice further concluded that the record has improved with respect to issues about which it previously expressed some reservation, and it recommended approval of Qwest's application, subject to the Commission's assuring itself that all concerns raised have been resolved. *See* Department of Justice Qwest III Evaluation at 4, 10.

[1253] We note that our review encompasses Qwest's performance and processes for all loop types, but as noted below, our discussion does not address every aspect of Qwest's loop performance where our review of the record satisfies us that Qwest's performance is in compliance with the applicable parity and benchmark measures.

[1254] *See* Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 at 2 (dated November 7c, 2002) (Qwest Nov. 7c *Ex Parte* Letter). In Colorado, as of September 30, 2002, Qwest had in service 53,138 unbundled voice grade analog loops, 9,322 xDSL-capable loops, 1,086 high capacity loops, and 5,855 unbundled shared loops. *See id.* at 2, 3.

[1255] *See* Qwest Nov. 7c *Ex Parte* Letter at 2. In Idaho, as of September 30, 2002, Qwest had in service 5,271 unbundled voice grade analog loops, 576 xDSL-capable loops, 35 high capacity loops, and 4 unbundled shared loops. *See id.* at 2, 3.

[1256] *See* Qwest Nov. 7c *Ex Parte* Letter at 2. In Iowa, as of September 30, 2002, Qwest had in service 42,998 unbundled voice-grade analog loops, 1,916 xDSL-capable loops, 32 high capacity loops, and 312 unbundled shared loops. *See id.* at 2, 3.

[1257] *See* Qwest Nov. 7c *Ex Parte* Letter at 2. In Montana, as of September 30, 2002, Qwest had in service 1,725 unbundled voice grade analog loops, 1,351 xDSL-capable loops, 217 high capacity loops, and 309 unbundled shared loops. *See id.* at 2, 3.

[1258] *See* Qwest Nov. 7c *Ex Parte* Letter at 2. In Nebraska, as of September 30, 2002, Qwest had in service 16,465 unbundled voice grade analog loops, 2,180 xDSL-capable loops, 17 high capacity loops, and 126 unbundled shared loops. *See id.* at 2, 3.

Dakota,[1259] 31,290 stand-alone unbundled loops in Utah,[1260] 61,190 stand-alone unbundled loops in Washington,[1261] and 486 stand-alone unbundled loops in Wyoming.[1262]

349. Consistent with the Commission's prior section 271 orders, we do not address every aspect of Qwest's loop performance where our review of the record satisfies us that Qwest's performance is in compliance with the parity and benchmark measures established in the nine application states.[1263] Instead, we focus our discussion on those areas where the record indicates discrepancies in performance between Qwest and its competitors. In making our assessment, we review performance measurements comparable to those the Commission has relied upon in prior section 271 orders, primarily those associated with measuring the timeliness and quality of loop provisioning and loop maintenance and repair.[1264] As in past section 271 proceedings, in the course of our review, we look for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete.[1265] Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.[1266]

350. Finally, we note that order volumes with respect to certain categories of loops, or order volumes with respect to a specific metric for a certain category of loop, in a given month

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[1259] *See* Qwest Nov. 7c *Ex Parte* Letter at 2. In North Dakota, as of September 30, 2002, Qwest had in service 12,704 unbundled voice grade analog loops, 3,951 xDSL-capable loops, 87 high capacity loops, and no unbundled shared loops. *See id.* at 2, 3.

[1260] *See* Qwest Nov. 7c *Ex Parte* Letter at 2. In Utah, as of September 30, 2002, Qwest had in service 27,352 unbundled voice grade analog loops, 3,677 xDSL-capable loops, 261 high capacity loops, and 1,858 unbundled shared loops. *See id.* at 2, 3.

[1261] *See* Qwest Nov. 7c *Ex Parte* Letter at 2. In Washington, as of September 30, 2002, Qwest had in service 47,186 unbundled voice grade analog loops, 10,941 xDSL-capable loops, 3,063 high capacity loops, and 5,850 unbundled shared loops. *See id.* at 2, 3.

[1262] *See* Qwest Nov. 7c *Ex Parte* Letter at 2. In Wyoming, as of September 30, 2002, Qwest had in service 5 unbundled voice grade analog loops, 475 xDSL-capable loops, 6 high capacity loops, and 95 unbundled shared loops. *See id.* at 2, 3.

[1263] *See, e.g., Application by Verizon New York, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, Memorandum and Order, 16 FCC Rcd 14147, 14151-52, para. 9 (2001) (*Verizon Connecticut Order*).

[1264] *See Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, 16 FCC Rcd 8988, 9078-89, para. 162 (2001) (*Verizon Massachusetts Order*).

[1265] *See Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

[1266] *See Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

for one or more of the states included in this application may be too low to provide a meaningful result.[1267] As such, we may look to Qwest's performance in Colorado, where volumes are generally higher,[1268] to inform our analysis.

351. *Voice Grade Loops.* We find that Qwest provisions voice grade loops to competitors in a nondiscriminatory manner.[1269] Touch America argues that Qwest fails to achieve parity under the delayed days metric, which measures the average number of days that late orders are completed beyond the committed due date.[1270] We note, however, that Qwest only misses the parity standard in Colorado and Iowa for two of the relevant months from June to September, with performance improving to parity in September.[1271] As such, we disagree that Qwest has failed to achieve parity for the delayed days metric.

352. *xDSL-Capable Loops.* Qwest also demonstrates that it provides xDSL-capable loops in a nondiscriminatory manner. Touch America argues, however, that for several months Qwest fails to meet parity under the new installation quality measure for a subcategory of xDSL loops provided in Washington – ISDN capable loops.[1272] Although Qwest does miss parity

[1267] Specifically, we note that order volumes are extremely low in Iowa and North Dakota for the Installation Commitments Met metric for conditioned loops. *See* Iowa OP-3 (Installation Commitments Met); North Dakota OP-3 (Installation Commitments Met).

[1268] *See generally* Colorado OP-3 (Installation Commitments Met); OP-4 (Average Installation Interval); OP-5 (New Service Installation Quality); MR-3 (Out of Service Cleared Within 24 Hours); MR-4 (All Troubles Cleared Within 48 Hours); MR-6 (Mean Time to Restore); MR-7 (Repair Repeat Report Rate); and MR-8 (Trouble Rate).

[1269] In the nine states included in this application, Qwest generally has met the benchmark and parity standards for provisioning quality, and the quality and timeliness of maintenance and repair functions. *See generally* OP-5 (New Service Installation Quality); MR-3 (Out of Service Cleared Within 24 Hours); MR-4 (All Troubles Cleared Within 48 Hours); MR-6 (Mean Time to Restore); MR-7 (Repair Repeat Report Rate); and MR-8 (Trouble Rate) for voice grade loops.

[1270] *See* Touch America Qwest II Comments at Exhibit A, A-3; Qwest III Comments at 26.

[1271] *See* OP-6A (Delayed Days) for analog loops, indicating a disparity in Colorado in July and August, with average competitive LEC results of 7.95 and 8.44 days, and Qwest results of 4.26 and 4.61 days. *See also* OP-6A (Delayed Days) for analog loops, indicating a disparity in Iowa in July and August, with average competitive LEC results of 4.2 and 13.56 days, and Qwest results of 2.51 and 3.44 days. Qwest argues that these disparities should be evaluated in light of Qwest's performance under the primary installation metrics traditionally reviewed by the Commission. Qwest I Campbell Loops Decl. at para. 75. As stated above, isolated cases of performance disparity generally will not warrant a finding of checklist noncompliance.

[1272] *See* Touch America Qwest II Comments at Exhibit A, A-3. *See also* OP-5 (New Service Installation Quality) for ISDN capable loops in Washington, indicating a disparity in June and July with competitive LEC trouble free installation results of 88.17% and 92.39% compared to Qwest results of 96.23% and 98.02% respectively. Qwest states that its commercial performance under this metric was adversely affected by low provisioning volumes in June and July, and by the inclusion of trouble tickets in the OP-5 metric where Qwest's network was found not to be the cause of the trouble. *See* Qwest Nov. 7c *Ex Parte* Letter at 5. Qwest further notes that its performance improves to 91.40% in June, and 94.57% in July, when tickets are removed where the line tested ok, or no trouble was found. *Id.*

under this measure for two months during the relevant period, we note that Qwest's performance improves to parity later during the relevant period.[1273] We also note that Qwest achieved parity under this measure for all relevant months with respect to 2-wire non-loaded loops, which constitute the majority of xDSL loops ordered by competitive LECs in Washington.[1274] We therefore find that Qwest performance with regard to ISDN loops in Washington does not result in a finding of checklist noncompliance. Eschelon asserts that 21 percent of its new DSL installations in September resulted in a repair before the DSL service would function for the end-user customer.[1275] Although the record is unclear regarding Eschelon's figures for the total percentage of troubles for new DSL installations, we find that Eschelon's assertions are not reflected in Qwest's general performance for new service installation quality.[1276] We therefore find that Eschelon's allegations do not result in a finding of checklist noncompliance. Finally, we recognize that Qwest does not meet parity for some months with respect to installation commitments met for conditioned loops.[1277] However, we do not find these performance disparities to be competitively significant.[1278]

353. With respect to maintenance and repair, Touch America notes that Qwest fails to achieve parity for several months under a measure of repair and maintenance quality that is similar to a measure we have relied upon in prior section 271 orders.[1279] Although Qwest's

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[1273] *See also* OP-5 (New Service Installation Quality) for ISDN capable loops in Washington.

[1274] Qwest states that 2-wire non-loaded loops comprise approximately 60 percent of the xDSL-capable loops ordered by competitive LECs in Washington. Qwest II Application App. A, Tab 13, Declaration of William M. Campbell (Qwest II Campbell Loops Decl.) at para. 81. *See* OP-5 (New Service Installation Quality) for 2-wire non-loaded loops in Washington.

[1275] Eschelon Qwest III Comments at 38-39.

[1276] See Qwest III Application Reply, Tab 1, Reply Declaration of Lori A. Simpson (Qwest III Lori Simpson Reply Decl.) at para. 7 (showing that Eschelon's trouble rate for new DSL installations is only 7.1 percent).

[1277] *See generally* OP-3 (Installation Commitments Met) for conditioned loops in Colorado, Iowa, North Dakota and Nebraska, indicating a disparity for two months each.

[1278] Although Qwest missed the 90% benchmark for installation commitments met for two months in Iowa, North Dakota, and Nebraska, the volumes of unbundled loops ordered in those states are very small. *See* OP-3 (Installation Commitments Met) for conditioned loops in Iowa, North Dakota and Nebraska. In addition, if we look to Qwest's performance in Colorado, we note that Qwest missed the benchmark in September, but its performance for the previous three months showed no serious deficiencies. *See* OP-3 (Installation Commitments Met) for conditioned loops in Colorado.

[1279] *See* Touch America Qwest II Comments at Exhibit A, A-3; *see also* MR-8 (Trouble Rate) for ISDN-capable loops in Colorado, indicating a disparity in June and August with competitive LEC rates of 2.29% and 2.26% and Qwest rates of 1.31% and 1.69%; MR-8 (Trouble Rate) for ISDN-capable loops in Iowa, indicating a disparity in June, August and September with competitive LEC rates of 2.32%, 3.63%, and 1.84% and Qwest rates of 1.11%, 0.64% and 1.03%; MR-8 (Trouble Rate) for ISDN-capable loops in Montana, indicating a disparity in June and September with competitive LEC rates of 4.08% and 7.94% and Qwest rates of 0.75% and 1.13%; MR-8 (Trouble Rate) for ISDN-capable loops in Nebraska, indicating a disparity in August and September with competitive LEC rates of 1.67% and 1.17% and Qwest rates of 0.92% and 0.47%; MR-8 (Trouble Rate) for ISDN-capable loops in Utah, indicating a disparity in June and August, with competitive LEC rates of 1.70% and 2.93% and Qwest rates of (continued....)

performance under the trouble rate metric in Iowa and Washington, in particular, indicates a disparity for several months with regard to ISDN-capable loops, we do not find that this disparity warrants a finding of checklist non-compliance. Given the evidence in all of these states of nondiscriminatory performance under this metric for other categories of xDSL-capable loops, and the relatively low competitive LEC trouble rate and slight disparity observed for the ISDN subcategory of xDSL loops, we find that these disparities are not competitively significant.[1280] We note that Qwest also fails to achieve parity in Colorado and Montana for some months during the relevant period under the mean time to restore metric.[1281] We note, however, that for most of the months missed in Colorado, the disparity was close to only one hour and thus not competitively significant, and that low competitive LEC volumes observed in Montana during those months make it difficult to draw strong conclusions regarding this data. We will monitor Qwest's performance after approval. If this situation deteriorates, we will not hesitate to take appropriate enforcement action pursuant to section 271(d)(6).

354. *High Capacity Loops*. Qwest demonstrates that it provides high capacity loops in a nondiscriminatory manner.[1282] Touch America, however, points out that Qwest does not achieve parity for several months under measures of maintenance and repair timeliness and

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1.00% and 1.07% respectively; MR-8 (Trouble Rate) for ISDN-capable loops in Washington, indicating a disparity in June, July and August, with competitive LEC rates of 1.67%, 1.34%, and 1.33% and Qwest rates of 0.92%, 0.96%, and 0.99% respectively.

[1280] Qwest argues that some of these observed performance disparities are mitigated by the fact that the competitive LEC trouble rate was never higher than 2% during the relevant period. Qwest II Campbell Loops Decl. at paras. 82 (regarding performance in Washington). While troubles for competitive LECs in Colorado, Iowa and Utah were reported slightly more often for competitive LECs than for Qwest's retail customers, and sometimes at rates higher than 2%, the average in these states for the relevant period shows that this is still less than 3% of the time, which we have found to be acceptable in past section 271 orders. *See Verizon Maine Order*, 17 FCC Rcd at 11691, para. 49 n.209.

[1281] *See* MR-6 (Mean Time to Restore) for 2-wire non-loaded loops in Colorado, indicating a disparity in June and July with competitive LEC durations of 2:43 and 3:17, and Qwest durations of 1:51 and 2:14; MR-6 (Mean Time to Restore) for ISDN loops in Colorado, indicating a disparity in June and July with competitive LEC durations of 3:17 and 3:00, and Qwest durations of 1:51 and 2:14; MR-6 (Mean Time to Restore) for 2-wire non-loaded loops in Montana, indicating a disparity in June and July with competitive LEC durations of 4:00 and 2:30, and Qwest durations of 1:46 and 1:03, but with low competitive LEC volumes of 9 and 7 in June and July; MR-6 (Mean Time to Restore) for ISDN loops in Montana, indicating a disparity in July and September with competitive LEC durations of 3:38 and 2:44, and Qwest durations of 1:03 and 1:27, but with low competitive LEC volumes of 2 and 5 respectively.

[1282] *See generally* OP-3 (Installation Commitments Met), OP-4 (Average Installation Interval), and OP-5 (New Service Installation Quality) for DS-1 capable loops. From June through September, Qwest achieved parity performance under these metrics in all relevant states, except for Colorado and Iowa under OP-5 (Qwest missed in August with Colorado competitive LEC and Qwest results of 84.38% and 89.49%, and Iowa results (with a low competitive LEC volume of 5) of 60% and 93.69% respectively. *See also* OP-6A (Delayed Days for Non-Facility Reasons) for DS-1 capable loops, indicating parity performance in all relevant states except for Washington in June, where the delay for competitive LECs was recorded at 26.28 days compared to 14.4 days for Qwest.

quality.[1283] With respect to maintenance and repair timeliness, Qwest argues that in spite of the disparity under the mean time to restore metric, the average mean time to repair competitive LEC high capacity loops during the relevant period was still within the four hour target for such services.[1284] In addition, with respect to maintenance and repair quality, Qwest submits that a contributing factor to the disparity under the trouble rate metric is the disproportionate number of legitimate "no trouble found" (NTF) trouble reports received from competitive LECs.[1285] According to Qwest, when the performance results are recalculated to exclude trouble reports for which no troubles are found, the trouble rates for competitive LECs are lower than the trouble rates before the recalculation.[1286] We recognize that some of the competitive LEC

1283 *See* Touch America Qwest II Comments at Exhibit A, A-4; *see also* MR-6 (Mean Time to Restore) for DS-1 capable loops in Washington, indicating a disparity in June with a competitive LEC result in hours and minutes of 2:43 compared to a Qwest result of 1:59; MR-8 (Trouble Rate) for DS-1 capable loops in Utah, indicating a disparity in June and August, with competitive LEC rates of 4.19% and 3.97%, and Qwest rates of 1.97% and 1.79% respectively; MR-8 (Trouble Rate) for DS-1 capable loops in Washington, indicating a disparity in June, July, and August with competitive LEC rates of 2.60%, 2.47%, and 2.19%, and Qwest rates of 1.75%, 1.87%, and 1.64% respectively. We also note that there are some disparities under maintenance and repair measures that Touch America does not specifically reference. *See* MR-5 (All Troubles Cleared Within 4 Hours) for DS-1 capable loops in Colorado, Iowa, Montana and North Dakota, indicating a disparity for only one month during the relevant period in each state; MR-6 (Mean Time to Restore) for DS-1 capable loops in Colorado, indicating a disparity in June and July with competitive LEC results in hours and minutes of 3:36 and 2:29, compared to Qwest results of 1:57 and 1:58; MR-6 (Mean Time to Restore) for DS-1 capable loops in North Dakota, indicating a disparity in September with a competitive LEC result in hours and minutes of 16:40 (with low volume), compared to a Qwest result of 2:29; MR-6 (Mean Time to Restore) for DS-1 capable loops in Utah, indicating a disparity in July with a competitive LEC result in hours and minutes of 6:01, compared to a Qwest result of 2:22; MR-8 (Trouble Rate) for DS-1 capable loops in Colorado, indicating a disparity in June, July, August and September, with competitive LEC rates of 6.76%, 6.60%, 6.74% and 5.48%, and Qwest rates of 2.47%, 2.87%, 2.84%, and 2.56% respectively; and MR-8 (Trouble Rate) for DS-1 capable loops in Iowa, Idaho, Montana, and North Dakota, indicating a disparity for only one month during the relevant period in each state.

1284 *See, e.g.*, Qwest II Campbell Loops Decl. at para. 86. Qwest also cites to its performance under the metric measuring the rate at which trouble reports are cleared within the standard estimate for those services (MR-5 (All Troubles Cleared Within 4 Hours)). *See, e.g.*, Qwest II Campbell Loops Decl. at para. 86.

1285 *See, e.g.*, Qwest I Williams Decl. at para. 213; Qwest II Campbell Loops Decl. at para. 86. Qwest states, for example, that for high capacity loops in Washington, it receives nearly two times as many NTF tickets from competitive LECs than for its retail comparative. *See* Qwest II Campbell Loops Decl. at para. 86; *see also* Qwest I Williams Decl. at para. 213.

1286 *See, e.g.*, Qwest I Campbell Loops Decl. at para. 85. Qwest has developed the MR-8* PID to track this trend. Qwest I Williams Decl. at para. 213. The MR-8* PID calculates the trouble rate by excluding all trouble reports that were originally coded to NTF because no trouble was found, and which after the first report was closed, received no other trouble report within 30 days of the original report. *Id.* We recognize that Covad challenges the accuracy of any data produced pursuant to the "*" PIDs, and argues that they have not been audited by a third party. *See* Covad Qwest I Comments at 33; Covad Qwest II Comments at 42-43. We note, however, that Qwest has stated that while the ROC TAG could not reach agreement on adopting the "*" PID approach for Qwest's modified versions of three PIDs, OP-5*, MR-7* and MR-8*, these results are reported as additional information to help explain apparent disparities, and to provide evidence that the apparent disparities are not due to discrimination. *See* Letter from R. Hance Haney, Executive Director - Federal Regulatory, Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 at 1 (dated August 29b, 2002) (Qwest Aug. 29b *Ex Parte* Letter). Qwest submits that these "*" PIDs provide data results where competitive LECs may be (continued....)

troubles reported under the trouble report rate may not entirely be attributed to Qwest's performance. Given Qwest's nondiscriminatory performance for all other categories of loops, and further recognizing that high capacity loops make up a very small percentage of overall loop orders in all of the relevant states,[1287] we find that Qwest's performance with respect to high capacity loops does not warrant a finding of checklist non-compliance.[1288]

355. *Line Sharing and Line Splitting.* We find that Qwest demonstrates that it provides nondiscriminatory access to the high frequency portion of the loop, and access to network elements necessary for competing carriers to provide line splitting.[1289] Qwest provides line sharing pursuant to its SGAT and state-approved interconnection agreements.[1290] According to Qwest, as of September 30, 2002, it had in service approximately 5,855 unbundled shared loops in Colorado, 4 unbundled shared loops in Idaho, 312 unbundled shared loops in Iowa, 309

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partially responsible for the troubles. *See* Qwest I Williams Decl. at para. 20. Thus, we find it appropriate to consider the adjusted results from the modified PIDs as part of Qwest's performance data. Qwest's performance for competitive LECs in Colorado under the MR-8* metric does appear to improve slightly in June and July with competitive LEC rates of 5.19% and 5.64% and Qwest rates of 1.58% and 1.84%. Performance in Utah under the MR-8* metric appears to improve slightly under available data for June with a competitive LEC rate of 2.02% and a Qwest rate of 1.38%. Qwest's performance in Washington under the MR-8* metric also indicates lower competitive LEC trouble rates under available data for June and July with competitive LEC rates of 1.96% and 1.72% compared to Qwest rates of 1.08% and 1.20%. *See* MR-8* (Trouble Rate) for DS-1 capable loops in Colorado, Utah and Washington.

[1287] As of September 30, 2002, Qwest had provisioned 1,086 high capacity loops in Colorado, which is approximately 1.7% of the total loops Qwest has in service for competitive LECs in Colorado. *See* Nov. 7c *Ex Parte* Letter at 2. Qwest had in service 35 high capacity loops in Idaho, 32 high capacity loops in Iowa, 17 high capacity loops in Nebraska, and 87 high capacity loops in North Dakota. High capacity loops comprise less than 1% (0.6%, 0.07%, 0.09%, and 0.5%, respectively) of the loops Qwest has in service for competitive LECs in those states. *See id.* Qwest also shows that, as of September 30, 2002, high capacity loops only represent approximately 6.6% of the total competitive LEC loops in service in Montana, 0.8% in Utah, 5.0% in Washington, and 1.2% in Wyoming. *See id.* Qwest also states that, other than in Idaho where Qwest has one DS-3 loop in service, DS-1 loops comprise all of the unbundled high capacity loops in service in the applicant states. *Id.*

[1288] *See, e.g., Application by Verizon New Jersey Inc, Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in New Jersey,* WC Docket No. 02-67, Memorandum Opinion and Order, 17 FCC Rcd 12275, 12349, at para. 150 (2002) (*Verizon New Jersey Order*).

[1289] As discussed in footnote 39, *supra*, the D.C. Circuit recently stated that "the *Line Sharing Order* must be vacated and remanded." *USTA v. FCC*, 290 F.3d 415, 429. The court also stated that it "grant[ed] the petitions for review[] and remand[ed] the *Line Sharing Order*...to the Commission for further consideration in accordance with the principles outlined." Id. at 430. On September 4, 2002, the D.C. Circuit denied petitions for rehearing filed by the Commission and others. *See Order*, Nos. 00-1012 and 00-1015 (D.C. Circuit, filed Sept. 4, 2002). The court's mandate has been stayed until January 2, 2003, leaving the *Line Sharing Order* in effect. We are addressing the line sharing rules as part of our *Triennial Review Proceeding*. *See Triennial Review Notice*, 16 FCC Rcd at 22805, paras. 53-54.

[1290] *See* Qwest I Stewart Line Sharing/Line Splitting Decl. at para. 2; Qwest II Application App. A, Tab 14, Declaration of Karen A. Stewart (Qwest II Stewart Line Sharing/Line Splitting Decl.) at para. 2.

unbundled shared loops in Montana, 126 unbundled shared loops in Nebraska, no unbundled shared loops in North Dakota, 1,858 unbundled shared loops in Utah, 5,850 unbundled shared loops in Washington, and 95 unbundled shared loops in Wyoming.[1291]

356. Both Covad and Touch America argue that Qwest's performance under measures of maintenance and repair timeliness reveals multiple disparities.[1292] We recognize that Qwest's performance with regard to the line sharing maintenance and repair measure – the All Troubles Cleared Within 24 hours metric – is out of parity for some months in Colorado, Utah and Washington,[1293] but we do not find that these disparities warrant a finding of checklist noncompliance given the relatively low volumes observed during these months and the difficulties associated with drawing strong conclusions based on low volumes of data.

357. We note that Qwest's performance with regard to two other line-sharing maintenance and repair measures – the All Troubles Cleared Within 48 Hours and the Mean Time to Restore metrics – is also out of parity for some recent months in Colorado, Utah and Washington. First, the All Troubles Cleared Within 48 Hours metric shows that Qwest missed the parity standard for two of the relevant months in Colorado, Utah, and Washington.[1294] Next, Qwest's performance for the Mean Time to Restore metric indicates that Qwest missed parity

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1291 *See* Nov. 7c *Ex Parte* Letter at 3.

1292 *See* Covad Qwest II Comments at 42-43; Touch America Qwest II Comments at Exhibit A, A-5.

1293 *See* MR-3 (Out of Service Cleared Within 24 Hours) for line sharing requiring dispatch in Utah, indicating a disparity in June, August and September with competitive LEC rates of 0%, 50.00%, and 66.67%, and Qwest rates of 90.18%, 90.59%, and 88.33%, but with low competitive LEC volumes of 1 and 4 in June and August, and a volume of 15 in September; MR-3 (Out of Service Cleared Within 24 Hours) for line sharing requiring dispatch in Washington, indicating a disparity in July, August, and September with competitive LEC rates of 42.86%, 76.92%, and 71.43%, and Qwest rates of 90.77%, 92.31%, and 92.93, but with relatively low competitive LEC volumes of 7, 13, and 7 respectively. *See also* MR-3 (Out of Service Cleared Within 24 Hours) for line sharing requiring dispatch in Colorado, indicating a disparity in July and September with competitive LEC rates of 46.15% and 71.43%, and Qwest rates of 92.09% and 91.84%, but with a relatively low competitive LEC volume of 13 in July; MR-3 (Out of Service Cleared Within 24 Hours) for line sharing not requiring dispatch in Colorado, indicating a disparity in June and September with competitive LEC rates of 62.50% and 84%, and Qwest rates of 96.70% and 96.42%, but with a low competitive LEC volume of 8 in June; MR-3 (Out of Service Cleared Within 24 Hours) for line sharing not requiring dispatch in Utah, indicating a disparity in July and September with competitive LEC rates of 66.67% and 83.33%, and Qwest rates of 95.58% and 96.88%, but with relatively low competitive LEC volumes of 9 and 18.

1294 *See* MR-4 (All Troubles Cleared Within 48 Hours) for non-dispatch line sharing in Colorado, indicating a disparity in August and September, with competitive LEC rates of 96.43% and 90.20%, and Qwest rates of 99.80% and 99.55% respectively; MR-4 (All Troubles Cleared Within 48 Hours) for non-dispatch line sharing in Utah, indicating a disparity in July and September, with competitive LEC rates of 92.86% and 84.21%, and Qwest rates of 99.58% and 99.86% respectively; MR-4 (All Troubles Cleared Within 48 Hours) for line sharing requiring dispatch in Washington, indicating a disparity in June and July, with competitive LEC rates of 72.73% and 87.50%, and Qwest rates of 98.37% and 97.67% respectively; MR-4 (All Troubles Cleared Within 48 Hours) for non-dispatch line sharing in Washington, indicating a disparity in June and July, with competitive LEC rates of 95.24% and 94.44%, and Qwest rates of 99.65% and 99.70% respectively.

for dispatch orders for two of the relevant months in Colorado and Utah,[1295] and for three of the relevant months in Washington.[1296]

358. With respect to its maintenance and repair problems under the All Troubles Cleared Within 48 Hours metric, Qwest contends that all of the restoration interval and mean time to restore measures in Washington are adversely affected by occurrences beyond its control.[1297] Specifically, Qwest claims that a prominent data local exchange carrier in Washington makes requests for "future" repair work as opposed to immediate repairs approximately 10% of the time, and that this waiting time is included in these measures and inappropriately attributed to Qwest's performance in providing timely maintenance and repair services.[1298] For example, Qwest shows that for non-dispatch orders in September, 33 of the 119 (27.7%) trouble reports were competitive LEC requests for future appointments, and that the competitive LEC requested a hold time of greater than 48 hours for 9 of the 33 requests for future repairs, thus making it impossible for Qwest to meet the 48-hour objective under the All Troubles Cleared Within 48 Hours metric.[1299] We agree that the disparity in Qwest's performance under these measures may not always be attributed to Qwest, and that in some instances the recorded disparity does not appear to be competitively significant. Therefore, we decline to find that these disparities warrant a finding of checklist noncompliance. We will monitor Qwest's performance after approval. If this situation deteriorates, we will not hesitate to take appropriate enforcement action pursuant to section 271(d)(6).

359. With respect to Qwest's performance under the Mean Time to Restore metric, Qwest contends that it is commonplace for shared lines to receive a higher percentage of trouble

[1295] *See* MR-6 (Mean Time to Restore) for line sharing requiring dispatch in Colorado, indicating a disparity in June and July, with competitive LEC average times of 19:46 and 1:03:32, and Qwest average times of 14:51 and 14:37 respectively; MR-6 (Mean Time to Restore) for line sharing not requiring dispatch in Colorado, indicating a disparity in June and September, with competitive LEC average times of 9:53 and 15:21, and Qwest average times of 6:17 and 6:22 respectively; MR-6 (Mean Time to Restore) for line sharing requiring dispatch in Utah, indicating a disparity in June and July, with competitive LEC average times of 1:12:39 and 1:04:38, and Qwest average times of 15:58 and 16:51 respectively, but with low volumes of 10 and 9; MR-6 (Mean Time to Restore) for line sharing not requiring dispatch in Utah, indicating a disparity in July and September, with competitive LEC average times of 13:08 and 13:58, and Qwest average times of 7:48 and 7:44 respectively, but with relatively low volumes of 14 and 19 respectively.

[1296] *See* MR-6 (Mean Time to Restore) for line sharing requiring dispatch in Washington, indicating a disparity in June, July, and August, with competitive LEC average times of 1:13:49, 1:15:47, and 21:31, and Qwest average times of 13:37, 14:40, and 14:03 respectively.

[1297] *See* Qwest II Stewart Line Sharing/Line Splitting Decl. at para. 48. *See also* MR-3 (Out of Service Cleared Within 24 Hours) for line sharing , MR-4 (All Troubles Cleared Within 48 Hours) for line sharing, MR-6 (Mean Time to Restore) for line sharing.

[1298] *See* Qwest II Stewart Line Sharing/Line Splitting Decl. at para. 48. *See also* Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 (dated August 20g, 2002) (Qwest Aug. 20g *Ex Parte* Letter).

[1299] *See* Nov. 7c *Ex Parte* Letter at 5.

reports than other loops due to the shared lines' unique characteristic of providing both voice and data on the same circuit, and that many of these troubles are for other than "out-of-service" situations.[1300] For example, Qwest states that in January 2002, it received 52 competitive LEC trouble reports for line-shared loops that did not require a technician dispatch and of these reports, only 18 (35%) were for "out-of-service" situations.[1301] The retail comparison for line shared loops, however, is an aggregate of residential and business POTS, and for Qwest retail, 52% of the troubles reported in January were "out-of-service" situations.[1302] Since "out-of-service" situations have a higher priority in the repair queue than non-"out-of-service" situations, a higher percentage of Qwest retail trouble reports had a higher priority.[1303] Thus, Qwest demonstrates why the mean time to restore was often shorter for its retail comparison than for competitive LECs.[1304] Furthermore, Qwest argues that when its mean time to restore performance for competitive LECs in Washington is averaged for both dispatch and non-dispatch orders, it still manages to clear competitive LEC troubles on average within the 24 hour objective for clearing out line-shared loop troubles.[1305] In light of these explanations, and

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[1300] *See* Qwest I Stewart Line Sharing/Line Splitting Decl. at para. 46; *see also* Qwest I Williams Decl. at para. 248.

[1301] *See* Qwest I Stewart Line Sharing/Line Splitting Decl. at para. 46; *see also* Qwest I Williams Decl. at para. 248.

[1302] *See* Qwest I Stewart Line Sharing/Line Splitting Decl. at para. 46; *see also* Qwest I Williams Decl. at para. 248.

[1303] *See* Qwest I Stewart Line Sharing/Line Splitting Decl. at para. 46; *see also* Qwest I Williams Decl. at para. 248, Letter from Yaron Dori, Counsel to Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-148 at 23 (dated July 19, 2002) (Qwest July 19 *Ex Parte* Letter).

[1304] Covad asserts that Qwest's explanation, as stated in Karen Stewart's Declaration, regarding Qwest's trouble rate and mean time to restore measures, is contradicted by an earlier testimony made by another Qwest witness, Michael Williams, during a state proceeding. According to Covad, Michael Williams, in response to AT&T and Covad's questions regarding how Qwest defined "out of service" for data or line-shared loops, stated that Qwest had changed its procedure to treat all line-shared trouble reports as "out of service" reports. In light of the Williams testimony, Covad argues that all line-shared loop UNE trouble tickets should be coded as "out of service" reports and given priority in the repair queue. Thus, Covad asserts that Stewart's declaration regarding Qwest's trouble reports performance is inaccurate and inapplicable as an explanation. *See* Covad Qwest I Comments at 33. In response, Qwest states that Covad misinterpreted Michael Williams' statement. According to Qwest, while Michael Williams' statement that all line-shared loop trouble reports will be treated as "out of service" reports is true, he also stated that the policy change would take place via the change management process. The change management process was originally intended to begin in March or April of 2002. Qwest stated that, due to delay, it began a notice period for the change on July 26, 2002. *See* Letter from Yaron Dori, Counsel to Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-148 at 23 (filed July 19, 2002) (Qwest July 19 *Ex Parte* Letter); *see also* Qwest I Stewart Reply Decl. at paras. 44-50. According to Qwest, this agreement under the change management process became effective July 29, 2002. *See* Qwest Nov. 7c *Ex Parte* Letter at 3-4. We note that no misses were reported in September under this measure for line sharing requiring dispatch. *See* MR-6 (Mean Time to Restore) for line sharing requiring dispatch in the applicant states.

[1305] *See* Qwest II Stewart Line Sharing/Line Splitting Decl. at para. 47. As noted above, Qwest also argues that requests for future appointments adversely affect its performance under the restoration interval and mean time to restore measures. *See supra* at para. 358. For example, Qwest states that 27.7% of the trouble reports in September (continued....)

given Qwest's nondiscriminatory performance under other line sharing maintenance and repair metrics,[1306] we find that Qwest's performance under these metrics does not warrant a finding of noncompliance with checklist item 4. We will monitor Qwest's performance after approval. If this situation deteriorates, we will not hesitate to take appropriate enforcement action pursuant to section 271(d)(6).

360. Covad also argues that maintenance and repair performance for line shared loops would improve if Qwest provided competitive LECs with the same "router test" for end-to-end data continuity that Qwest provides for its own customers as part of the provisioning process.[1307] Specifically, Covad states that many of the line shared loop orders for which it receives a service order completion notice suffer from missing or incomplete cross-connects in the central office that would be detected by use of the router test, and could be corrected prior to delivery of the line shared loop.[1308] Covad explains that its request in this proceeding for access to router testing is designed to ensure that the loop has been properly provisioned and is a good loop upon delivery, whereas its request for a pre-order MLT is designed and limited to addressing deficiencies and inaccuracies in loop makeup information.[1309] Qwest states that it has recently agreed to develop a router testing option as part of its line shared loop provisioning process, and that it has not proposed a charge for this testing, though it reserves the right to propose alternate rate structures for line sharing in future rate proceedings.[1310] Qwest plans to implement this testing option by the first quarter of 2003.[1311] Covad states that it is encouraged by Qwest's commitment to provide router testing, and that it is continuing to work with Qwest to make sure that router testing will be provided in all central offices where Qwest provides router testing for itself, and at no additional charge as part of Qwest's obligation to provide non-discriminatory access to a working loop.[1312] As noted above, we find that Qwest's overall performance with respect to maintenance and repair of line shared loops is nondiscriminatory. While the Commission has no requirement for router testing, we are encouraged that Qwest's decision to

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were requests for future appointments with hold times of more than 24 hours, and that when the time attributed to these future requests is removed, Qwest's average mean time to repair for those tickets would be reduced from 33 hours and 15 minutes, to 1 hour and 40 minutes. *See* Qwest Nov. 7c *Ex Parte* Letter at 4-5.

1306 *See generally* MR-7 (Repair Repeat Report Rate); MR-8 (Trouble Rate) for line shared loops in the applicant states. We note that Qwest missed parity for two months in Colorado under MR-7, but improved to parity performance in August and September. *See* MR-7 (Repair Repeat Report Rate) for nondispatch line shared loops.

1307 *See* Covad Qwest II Comments at 18-23, 43. *See also* Touch America Qwest III Comments at 25-26.

1308 *See* Covad Qwest II Comments at 19, 22.

1309 *See* Covad Qwest II Comments at 35 n.53.

1310 Qwest III Application Addendum, Tab 9 at 1-2; Qwest III Stewart Reply Decl. at para.5.

1311 Qwest III Application Addendum, Tab 9 at 1-2; Qwest III Stewart Reply Decl. at para.6. Touch America argues that the Commission should not accept Qwest's promise of future action regarding implementation of the router test. Touch America Qwest III Comments at 25-26.

1312 Covad Qwest III Comments at 2, n.2.

implement a router testing option may help to ensure continued improvement in Qwest's provisioning performance for line shared loops.[1313]

361. *Network Interface Devices.* We find that Qwest demonstrates that it provides nondiscriminatory access to network interface devices (NIDs).[1314] We disagree with AT&T's allegation of discriminatory access to NIDs. AT&T contends that Qwest denies competitive LECs nondiscriminatory access to NIDs because Qwest does not permit the removal of its unused loops from the network protector side of the NID in order to make room for a competitive LEC to attach its own loops.[1315] According to AT&T, this issue arises in the context of AT&T's cable telephony offerings, where AT&T provides its own loops to a multi-tenant building.[1316] In such cases, the multi-tenant building often has covenants that prohibit competitors from installing additional NIDs.[1317] Thus, AT&T argues that it is unable to serve its customer because Qwest's unused loops remain attached to the only available terminals.[1318] According to Qwest, this issue was previously challenged in the Colorado, Idaho, Iowa, Nebraska, and North Dakota state proceedings, and the state commissions all found that the safety concerns with wire removal are valid, and thus approved Qwest's policy.[1319] We find Qwest's practice here to be reasonable given these state commissions' exhaustive review and their unanimous conclusions regarding the impact of Qwest's policy in the application states.

1313 The Department of Justice agrees that Qwest's accommodation of Covad's requests would be responsive to the Department's concern that competitive LECs have nondiscriminatory access to router testing. *See* Department of Justice Qwest III Evaluation at 8.

1314 Qwest allows requesting competitive LECs to connect their own loop facilities to on-premises wiring through Qwest's NID or at any other technically feasible point. *See* Qwest I Stewart NIDs/Subloops Decl. at para. 3; Qwest II Application App. A, Tab 15, Declaration of Karen A. Stewart (Qwest II Stewart NIDs/Subloops Decl.) at para. 3. Qwest states that, to date, it has not received any orders for stand-alone unbundled NIDs in its region, but it stands ready to provision stand-alone NIDs upon request. *See* Qwest I Stewart NIDs/Subloops Decl. at para. 4; Qwest II Stewart NIDs/Subloops Decl. at para. 4 (where Qwest states that it has provisioned NIDs to competitive LECs in conjunction with loops and subloops).

1315 *See* AT&T Qwest I Comments at 103; AT&T Qwest II Comments at 118-119. Under Qwest's SGAT, neither the competitive LEC nor Qwest is allowed to remove the other party's loop facilities from the other party's NID. *See* SGAT § 9.5.2.1.

1316 *See* AT&T Qwest I Comments at 103; AT&T Qwest II Comments at 118-119.

1317 *See* AT&T Qwest I Comments at 103; AT&T Qwest II Comments at 118-119.

1318 *See* AT&T Qwest I Comments at 103; AT&T Qwest II Comments at 118-119.

1319 *See* Qwest I Stewart NIDs/Subloops Decl. at para 12. During the proceeding in Colorado, the Staff recommended, and the Hearing Commissioner determined, that "Qwest's determination that the capping off of its drop wire is an unsafe practice that Qwest is not willing to accept is a reasonable decision within the bounds of utility management discretion." *See* Colorado Staff's Final Report on the Fifth Workshop, Checklist Items 2, 4 and 11 (Volume V-A, Impasse Issues) February 8, 2002.

362. *Other Issues.* AT&T contends that Qwest discriminates against competitive LECs that order UNEs requiring construction of new facilities before installation.[1320] Specifically, AT&T claims that if a competitive LEC orders an unbundled loop and the facilities are not currently available, Qwest will build the loop only "if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort obligation to provide basic Local Exchange Service or its Eligible Telecommunications Carrier obligations to provide primary basic Local Exchange Service."[1321] AT&T, however, does not provide any specific instances in which Qwest's policy has prevented competitive LECs from obtaining or serving customers. Qwest states that it provides UNEs, including loops, for competitive LECs where facilities are available, and that it meets its obligations under the Act and Commission orders by implementing its procedures from the SGAT when the facilities are not currently available.[1322] According to Qwest, it follows procedures intended to provide facilities to the requesting competitive LEC.[1323] Absent additional information, we are not convinced that Qwest's policy has denied competitive LECs a meaningful opportunity to compete to date. Accordingly, we decline to find that this allegation warrants a finding of checklist noncompliance.

C. Checklist Item 5 – Unbundled Local Transport

363. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from

1320 *See* AT&T Qwest I Comments at 82.

1321 *See* AT&T Qwest I Comments at 82; *see also* SGAT § 9.1.2.1. The SGAT in Colorado, however, requires Qwest to build facilities whenever it would build for itself. *See* Colorado SGAT § 9.19. AT&T argues that Qwest's policy is discriminatory and violates the requirements of section 251(c). *See* AT&T Qwest I Comments at 84.

1322 *See Qwest I Campbell* Loops Decl. at para. 62; *see also* SGAT §§ 9.1.2.1.3, 9.1.2.1.3.1., 9.1.2.1.3.2., and 9.2.2.16. for Qwest's procedure for unbundled loops when no compatible facilities are available. The Eighth Circuit has previously concluded that "subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LECs's existing network—not to a yet unbuilt superior one." *See Iowa Util. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997). We also note that we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC demand requirements for facilities that the incumbent LEC has not deployed for its own use. *See UNE Remand Order*, 15 FCC Rcd at 3843, para. 324.

1323 Qwest says that if a competitive LEC requests an unbundled loop and no compatible facilities exist, a 5-step procedure takes place in an effort to provide the facilities to the requesting competitive LEC. *See* Qwest I Campbell Loops Decl. at para. 60-61. Qwest explains that if compatible facilities are still not available, it holds the order for 30 business days and continues to attempt to assign compatible facilities. *See* Qwest I Campbell Loops Decl. at para. 60; *see also* SGAT § 9.2.2.16. If, after the 30 business days, compatible facilities are still unavailable, Qwest will then reject the order and inform the competitive LEC that no compatible facilities exist. *See* Qwest I Campbell Loops Decl. at para. 60. After 30 days, the competitive LEC may submit a second order and Qwest will continue to attempt to assign compatible facilities for another 30-day period. *See id.*

switching or other services."[1324] Based on our review of the record, we conclude, as did each state commission, that Qwest complies with the requirements of this checklist item.[1325]

364. We reject AT&T's concern with the way Qwest charges for unbundled local transport in Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, and Wyoming.[1326] In particular, AT&T alleges that Qwest's different classification of unbundled dedicated interoffice transport (UDIT) and extended unbundled dedicated interoffice transport (EUDIT)[1327] facilities is baseless and serves only to raise the cost of transport to competitive LECs.[1328] UDIT is a flat-rated charge that is based on distance and applies to dedicated transport between Qwest's wire centers, end offices, or tandem switches in the same LATA and state.[1329] EUDIT is a flat-rated, *non-distance sensitive* charge that is defined as "the portion of transport between a competitive LEC wire center and a Qwest wire center."[1330] AT&T alleges that Qwest's EUDIT charges are unlawful because they fail to reflect the way costs are incurred.[1331]

365. As discussed in the UNE pricing section above, we generally defer to the states with respect to UNE pricing, unless we conclude that the state has made a clear error in applying our TELRIC rules. We find no such error with respect to the decision in these seven states to permit Qwest to impose flat-rated non-distance sensitive charges for connections between a Qwest switch and a competitive LEC switch. While AT&T is correct that the Commission "requires dedicated transport to be recovered through a flat-rated charge,"[1332] the Commission's TELRIC rules do not specify that such charges must be based on distance.[1333] Qwest also notes

[1324] 47 U.S.C. § 271(c)(2)(B)(v); *see also* Appendix K at para. 53.

[1325] *See* Qwest II Application App. A, Tab 16, Declaration of Karen A. Stewart (*Qwest II Stewart Transport* Decl.) at para. 7; Qwest I Application App. A, Tab 17, Declaration of Karen A. Stewart (Qwest I Stewart Transport Decl.) at paras. 6-51; Colorado Commission Comments at 21-22; Idaho Commission Comments at 13-14; Iowa Commission Comments at 46; Montana Commission Comments at 30; Nebraska Commission Comments at 8; North Dakota Commission Comments at 137-144; Utah Commission Comments at 5-6; Washington Commission Comments at 21; Wyoming Commission Comments at 8, para 17.

[1326] AT&T Qwest III Comments at 81; AT&T Qwest II Comments at 114; AT&T Qwest II Wilson Decl. at paras. 57-63; AT&T Qwest I Wilson Decl. at paras. 56-62.

[1327] AT&T advances a similar argument with respect to the pricing of entrance facilities. Qwest clarified that EUDIT and entrance facilities are the same thing and these are not two separate pricing issues. *See, e.g.*, Qwest I Thompson Reply Decl. at para. 106.

[1328] AT&T Qwest II Comments at 114-116; AT&T Qwest II Wilson Decl. at para. 57; AT&T Qwest I Wilson Decl. at para. 56.

[1329] Qwest II Stewart Transport Decl. at para. 9 n.16; Qwest I Stewart Transport Decl. at para. 9 n.15.

[1330] Qwest II Stewart Transport Decl. at para. 9 n.16; Qwest I Stewart Transport Decl. at para. 9 n.15.

[1331] AT&T Qwest II Wilson Decl. at para. 10; AT&T Qwest I Wilson Decl. at para. 10.

[1332] AT&T Qwest II Wilson Decl. at para. 58; AT&T Qwest I Wilson Decl. at para. 57.

[1333] 47 C.F.R. § 51.509(c) (2001).

that the Commission has approved a number of section 271 applications in states that have used a similar rate structure.[1334]

366. We also dismiss AT&T's argument that the charge for the link between a competitive LEC switch and a Qwest switch should be recovered in the same manner as links between Qwest switches, because there is "no economic or engineering difference whatsoever" between these two types of facilities.[1335] In response, Qwest argues that there are both economic differences and engineering differences that warrant a different rate structure and different rates. Specifically, Qwest argues that there are economies of scale and scope that reduce the per-trunk cost for trunks between Qwest offices.[1336] Qwest also argues that it is more likely that additional electronics will be needed for links to competitive LEC offices.[1337] AT&T has not refuted these arguments, and therefore provides no reason for the Commission not to defer to the decisions made by the state commissions on this issue.

367. We further reject AT&T's claims that "QC and QCC are now part of a merged firm that is integrating its operations," and that at least to some extent, QCC is a "successor or assign" of QC under section 251(h).[1338] On the basis of the record before us, we do not find QCC or any other Qwest affiliate to be a successor or assign of QC, and therefore Qwest is not discriminating in denying unbundled access to affiliate-owned facilities. Qwest affirms that QC has not transferred any assets to any affiliate, that no affiliate of QC has continued QC's business without interruption or substantial change, and that no affiliate of QC has stepped into the shoes of QC.[1339] AT&T notes that the Colorado Commission has directed Qwest to amend its SGAT to offer unbundled access to any QCC dark fiber to which QC has access rights, out of concern about the parent's access to the affiliate's dark fiber.[1340] Nonetheless, AT&T does not suggest that the Colorado Commission found QCC to be a successor or assign of QC, or that Qwest had failed to meet its unbundling obligations under section 251(c)(3). Based on the foregoing, then, we find no evidence in the record that warrants a finding of checklist noncompliance in this area.

1334 *See, e.g., SWBT Texas Order*, 15 FCC Rcd at 18392, para. 82; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17476, para. 104.

1335 AT&T Qwest II Wilson Decl. at para. 60; AT&T Qwest I Wilson Decl. at para. 59.

1336 Qwest I Thompson Reply Decl. at paras. 110-111.

1337 Qwest I Thompson Reply Decl. at para. 111 n.139.

1338 AT&T Qwest I Comments at 85-86.

1339 Qwest I Reply Comments at 81.

1340 AT&T points to the Colorado Staff's conclusion that "[a]s it is occurring today, and as it continues into the future, the merged entities' facilities are becoming operationally integrated, and it is becoming virtually impossible to distinguish between fiber routes used exclusively for long distance or data services, and fiber routes that contain fibers used for transport of local exchange services." AT&T Qwest I Comments at 87-88 (quoting Colorado Staff Report on Emerging Services at 9 (Jan. 10, 2002)). Colorado directed Qwest to amend its Colorado SGAT to offer unbundled access to any QCC dark fiber to which QC has access rights. Qwest I Reply Comments at 82 (citing Colorado SGAT § 9.7.1).

If, in the future, we receive evidence that Qwest is merging its incumbent LEC operations with QCC or that any affiliate is becoming a successor to QC, we will expect Qwest to extend the unbundling obligations accordingly.

368. We also find AT&T's argument that Qwest offers discriminatory and inferior access to dark fiber without merit.[1341] AT&T claims that when Qwest provides dark fiber to its own customers, it guarantees that it will maintain transmission performance at the designed transmission parameters and will restore the fibers if they fall below the design standard.[1342] AT&T further claims that for competitive LECs, Qwest considers a fiber as good when there is "optical continuity" regardless of performance.[1343] We note that Qwest withdrew the retail dark fiber offering cited by AT&T for new customers several years ago.[1344] Consequently, Qwest no longer provides any new dark fiber arrangements under its federal tariff and its retail dark fiber product is grandfathered.[1345] Qwest further notes that continuity is the standard required for both unbundled dark fiber and the grandfathered retail dark fiber product and that neither the grandfathered retail nor the unbundled dark fiber technical publications states that the fiber has a certain level requirement for attenuation.[1346]

369. Finally, we reject AT&T's argument that Qwest unlawfully denies access to dark fiber by applying the local use restrictions test that the Commission has adopted for loop-transport combinations ("enhanced extended links," or "EELs") already combined in the incumbent LECs' network.[1347] AT&T argues that the local use restrictions have no possible application to dark fiber, because competitive LECs always light and generally combine unbundled dark fiber themselves.[1348] As a result, AT&T believes that Qwest's application of the

[1341] AT&T Qwest II Comments at 118.

[1342] *Id.*

[1343] *Id.*

[1344] Qwest II Stewart Transport Reply Decl. at 15, para. 28 (stating that Qwest withdrew the offering cited by AT&T on June 10, 1994).

[1345] *Id.*

[1346] *Id.* at 16, para. 31.

[1347] AT&T Qwest I Comments at 102 (citing SGATs § 9.7.2.9 ("CLEC shall not use UDF [unbundled dark fiber] that is part of a loop-transport combination, as a substitute for special or switched Access Services, except to the extent CLEC provides a 'significant amount of local exchange traffic' to its End Users over the UDF as set forth by the FCC")); AT&T Qwest II Wilson Decl. at 30, para. 64. The Commission's local use restriction prevents an interexchange carrier (IXC) from converting special access services to combinations of unbundled loop and transport network elements, unless such combinations are used to provide a significant amount of local exchange service. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 99-370, *Supplemental Order*, 15 FCC Rcd 1760, para. 2 (1999).

[1348] AT&T Qwest I Comments at 102.

local use restriction to dark fiber loop-transport combinations is unlawful.[1349] However, where a competitive LEC procures a dark fiber loop UNE and a dark fiber transport UNE and combines these elements itself, Qwest is in agreement with AT&T that no local usage restriction applies.[1350] Rather, Qwest only applies the local usage restriction to dark fiber where Qwest itself has combined a dark fiber loop with dark fiber transport to create a "dark fiber EEL."[1351] We find that all existing combinations of loops and transport combined by an incumbent LEC, whether lit or not, are within the scope of the local usage restrictions.[1352] We are thus satisfied that Qwest complies with this checklist item.

D. Checklist Item 6 –Unbundled Local Switching

370. Section 271(c)(2)(B)(vi) of the 1996 Act requires a BOC to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services."[1353] To satisfy its obligations under this subsection, an applicant must demonstrate compliance with Commission rules relating to unbundled local switching.[1354] Specifically, Qwest demonstrates that it provides: (1) line-side and trunk-side facilities;[1355] (2) basic switching functions;[1356] (3) vertical features;[1357]

[1349] AT&T Qwest I Comments at 103.

[1350] Qwest August 15 *Ex Parte* Letter at 1.

[1351] Upon request, Qwest will combine a dark fiber loop with dark fiber transport in the serving wire center of the loop. Qwest can combine these UNEs via a Fiber Distribution Panel or other facility without lighting the dark fiber. To light the dark fiber EEL, the competitive LEC would then have to place electronics at the end-user's premises and at a distant central office. Qwest August 15 *Ex Parte* Letter at 1-2.

[1352] We note that the Multistate Facilitator reached the same conclusion. *See* Multistate Facilitator's Report on Emerging Services at 57 (finding "no doubt that a loop-transport combination that includes dark fiber remains a loop-transport combination").

[1353] 47 U.S.C. § 271(c)(2)(B)(vi); *see also* Appendix K at paras. 54-56.

[1354] *See* 47 C.F.R. § 51.319(c); *see also SWBT Texas Order*, 15 FCC Rcd at 18520-22, paras. 336-38.

[1355] Line-side facilities include, but are not limited to, the connection between a loop termination at a main distribution frame, and a switch line card. Trunk-side facilities include, but are not limited to, the connection between trunk termination at a trunk-side cross-connect panel and a switch trunk card. *Second BellSouth Louisiana Order,* 13 FCC Rcd at 20724 nn.679-80. *See also* Qwest II Application App. A, Tab 17, Declaration of Lori A. Simpson and Karen A. Stewart (Qwest II Simpson/Stewart Decl.) at para. 17; Qwest I Simpson/Stewart Decl. at para. 17.

[1356] The basic switching function includes, but is not limited to: connecting lines to lines; lines to trunks; trunks to lines; trunks to trunks; as well as the same basic capabilities that are available to the BOC's customers, such as a telephone number, directory listing, dial tone, signaling, and access to 911, operator services, and directory assistance. *Second BellSouth Louisiana Order,* 13 FCC Rcd at 20726 n.690. *See also* Qwest II Simpson/Stewart Decl. at para. 18; Qwest I Simpson/Stewart Decl. at para. 18.

[1357] Vertical features provide end users with various services such as custom calling, call waiting, call forwarding, caller ID, and Centrex. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20726, para. 216. *See also* Qwest II Simpson/Stewart Decl. at para. 26; Qwest I Simpson/Stewart Decl. at para. 26.

(4) customized routing;[1358] (5) shared trunk ports;[1359] (6) unbundled tandem switching;[1360] (7) usage information for billing exchange access;[1361] and (8) usage information for billing for reciprocal compensation.[1362] Based on our review of the record, we conclude, as did each of the state commissions,[1363] that Qwest complies with this checklist item.[1364]

371. Qwest's compliance is challenged by AT&T, WorldCom, and Eschelon, but we reject these challenges.[1365] AT&T alleges that Qwest fails to provide unbundled local switching in two respects.[1366] First, AT&T claims that Qwest fails to provide unbundled packet switching

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1358 Customized routing permits requesting carriers to designate the particular outgoing trunks associated with unbundled switching provided by the incumbent that will carry certain classes of traffic originating from requesting carriers' customers. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20728-29, para. 221. Customized routing is also referred to as selective routing. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20728 n.704. *See also* Qwest II Simpson/Stewart Decl. at para. 38; Qwest I Simpson/Stewart Decl. at para. 38.

1359 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange carriers and Commercial Mobile Radio Service* Providers, CC Docket Nos. 96-98 and 95-185, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12475-80, paras. 25-30 (1997) (*Local Competition Third Reconsideration Order*); *Ameritech Michigan Order*, 12 FCC Rcd at 20716-17, paras. 327-29; *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20732, para. 228. *See also* Qwest II Simpson/Stewart Decl. at para. 37; Qwest I Simpson/Stewart Decl. at para. 37.

1360 The requirement to provide unbundled tandem switching includes: (i) trunk-connect facilities, including but not limited to the connection between trunk termination at a cross-connect panel and a switch trunk card; (ii) the base switching function of connecting trunks to trunks; and (iii) the functions that are centralized in tandem switches (as distinguished from separate end-office switches), including, but not limited to, call recording, the routing of calls to operator services, and signaling conversion features. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20733 n.732. *See also* Qwest II Simpson/Stewart Decl. at para. 41; Qwest I Simpson/Stewart Decl. at para. 41.

1361 *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20733-35, paras. 230-31; *see also* Qwest II Simpson/Stewart Decl. at paras. 44-46; Qwest I Simpson/Stewart Decl. at paras. 44-46.

1362 *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20735-37, paras. 232-34; *see also* Qwest II Simpson/Stewart Decl. at para. 47; Qwest I Simpson/Stewart Decl. at para. 47.

1363 *See* Colorado Commission Qwest I Comments at 22; Idaho Commission Qwest I Comments at 4; Iowa Board Qwest I Comments at 48; Nebraska Qwest I Commission Comments 8; North Dakota Qwest I Commission Comments at 5; Washington Commission Qwest II Comments at 22; Montana Public Service Commission Qwest II Comments at 30-31; Wyoming Commission Qwest II Comments at 8; Utah Commission Qwest II Comments at 5. *See also* Qwest III Application at 2; Qwest II Application at 84-86; Qwest I Application at 3; Colorado Commission Qwest I Reply at 24.

1364 Qwest II Application at 84-86; Qwest I Application at 77-79; Qwest II Simpson/Stewart Decl. at 3-71; Qwest I Simpson/Stewart Decl. at paras. 3-72.

1365 Although related to unbundled local switching, we discuss WorldCom's challenge to Qwest's compliance with the custom routing of OS/DA calls under Directory Assistance/Operator Services because the issue was raised as a violation of section 271(c)(2)(B)(vii). *See supra* Part IV.E.2.

1366 AT&T Qwest II Comments at 112-114; AT&T Qwest I Comments at 94-99.

on a nondiscriminatory basis because it provides competitive LECs with only the lowest quality packet switching, Unspecified Bit Rate ("UBR"), while providing its retail customers five grades of packet switching.[1367] AT&T argues that Qwest must offer competitive LECs the same grades of packet switching that Qwest offers to its retail customers.[1368] Qwest explains that its retail DSL service offering (which, it argues, is its only context in which it offers unbundled packet switching when the Commission's four-prong UNE packet-switching rules are not met[1369]) provides only for UBR transmission.[1370] Qwest states that it offers other grades of packet switching to customers ordering other types of services, such as its Cell Relay Service, but not to its retail DSL customers.[1371] Accordingly, based on Qwest's description of its service offerings, we find that Qwest provides its DSL retail service in a nondiscriminatory manner. We, therefore, reject AT&T's argument. Moreover, we find that Qwest offers competitive LECs unbundled packet switching in a nondiscriminatory manner when the conditions established by the Commission in the *UNE Remand Order* are met.[1372] We also note that Qwest makes available to competitive LECs the option of requesting other types of bit rates using Qwest's bona fide request process.[1373]

372. We also conclude that Qwest has properly implemented the Commission's rule 51.319(c)(2), under which an incumbent LEC may be excused from providing unbundled local circuit switching in certain high-density areas to end users with "four or more lines."[1374] In the initial Qwest section 271 applications, AT&T challenged Qwest's policy on this issue as inconsistent with the Commission's rules.[1375] On September 25, 2002, before it filed the instant application, Qwest modified its prior policy implementing the switching carveout exception to

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[1367] AT&T Qwest II Comments at 113-114; AT&T Qwest I Comments at 98-99; AT&T Qwest I Wilson Decl. at paras. 71-74.

[1368] AT&T Qwest II Comments at 113-114; AT&T Qwest I Comments at 98-99; AT&T Qwest I Wilson Decl. at paras. 71-74.

[1369] 47 C.F.R. § 51.319(c)(5).

[1370] *See* Qwest II Reply Declaration of Karen A. Stewart (Qwest II Stewart Reply Decl.) at paras. 62-63; Qwest I Stewart Reply Decl. at para. 54-55.

[1371] *See* Qwest II Stewart Reply Decl. at paras. 62-69; Qwest I Stewart Reply Decl. at paras. 54-57. We also note that, based on Qwest's representation in its declarations, competing LECs may obtain these services offering transmission at other bit rates for resale at a wholesale discount.

[1372] *See* Qwest II Stewart Reply Decl. at paras. 64-66; Qwest I Stewart Reply Decl. at paras. 56-57. *See also UNE Remand Order*, 15 FCC Rcd at 3838-3839, para. 313; 47 C.F.R. § 51.319(c)(5).

[1373] *See* Qwest II Stewart Reply Decl. at 64-65; Qwest I Stewart Reply Decl. at paras. 56-57; *see also* 47 C.F.R. § 51.319(c)(2).

[1374] 47 C.F. R. § 51.319. This rule is known as the "switching carveout exception".

[1375] *See* AT&T Qwest II Comments at 112-113; AT&T Qwest I Comments at 95-98; AT&T Qwest I Wilson Decl. at para. 69 (maintaining that Qwest did not correctly interpret the Commission's "switching carveout exception" because it counted customers' lines on a "per wire center" basis).

conform to the *Virginia Arbitration Order*.[1376] Qwest subsequently memorialized its modified policy through the filing of a revised SGAT in two of the three states in Qwest's region where the switching carveout exception applies: in Colorado on October 28, 2002; in Utah on October 31, 2002. For the third state, Washington, pursuant to a decision by the Washington Commission, Qwest has had in place since June 25, 2002 an SGAT that complies with federal rules.[1377]

373. Under Qwest's revised policy, Qwest has committed to applying the switching carveout exception only in cases where there are four or more lines per customer location.[1378] We conclude that this policy is consistent with the Commission's rules, because the Commission distinguished high-volume customers from those residential and small business customers for whom unbundled local switching would continue to be available in the *UNE Remand Order*.[1379] High-volume customers are more likely to have four or more lines per location, as opposed to residential and small business customers, who are less likely to have four or more lines at a single location. In addition, the Commission in the *UNE Remand Order* focused on the various costs avoided through the purchase of local switching, such as the costs associated with collocation and hot cuts, which are largely a function of customer location.

374. In assessing Qwest's compliance with checklist item 6, we waive our "complete when filed" rule to consider the revised legal commitment established by Qwest to implement the "switching carveout exception." We find that the interests our standard procedural requirements are designed to protect are not affected by our consideration of Qwest's recent SGAT filings addressing the legal commitment. There are a number of special circumstances that support the granting of this waiver. Qwest modified its policy, effective September 25, 2002, and clarified its modification on the record early in the 90-day statutory period for the Commission's consideration of the instant application.[1380] As such, parties were afforded a sufficient opportunity to comment on Qwest's modified policy during the specified comment cycle and could avail themselves of the terms retroactive to September 25, 2002, prior to the filing of the instant section 271 application. Moreover, Qwest modified its policy immediately after the issuance of the Bureau order and demonstrated good faith in its efforts to comply with the Commission's rules. We find that to not consider Qwest's SGAT filing would elevate form

1376 *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration, et al.*, CC Docket No. 00-218, *Memorandum Opinion and Order*, DA 02-1731 at 173-178, paras. 355-363 (July 17, 2002) (*Virginia Arbitration Order*) (emphasis added). *See also* Qwest III Application, Tab 11 (confirming that its policy was revised effective September 25, 2002).

1377 *See* Letter from Hance Haney, Executive Director-Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed November 14d, 2002) (*Qwest Nov. 14d Ex Parte*).

1378 Qwest III Application, Tab 11.

1379 *See UNE Remand* Order, 15 FCC Rcd at 3830-31, para. 297.

1380 *See* Qwest Application, Tab 11.

over substance. As a practical matter, no parties have been denied unbundled local circuit-switching, as Qwest maintains that it has never enforced the switching carveout in the three states where the exception applies. Finally, we find that Qwest's filing of revised SGATs is a straightforward step that has already been taken and does not constitute a promise of future action. For these reasons, we find that the circumstances present in this instance warrant a waiver of our procedural requirements, and allow consideration of Qwest's revised legal commitment to implement the "switching carveout exception."

375. We also conclude that Eschelon's assertions regarding tandem switch failures are insufficient to rebut Qwest's evidence showing compliance with the requirements of this checklist item.[1381] While we are concerned that such outages can have an adverse affect on competitive LECs, the present record does not reflect a systemic problem. Rather it appears that the tandem switch failures represented a series of isolated outages.[1382]

E. Checklist Item 7 – 911/E911 Access & Directory Assistance/Operator Services

1. 911 and E911 Access

376. Section 271(c)(2)(B)(vii) of the Act requires a BOC to provide "[n]on discriminatory access to 911 and E911 services."[1383] Qwest must provide competitors with access to its 911 and E911 services in the same manner that it provides such access to itself, *i.e.*, at parity.[1384] Specifically, the BOC "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers."[1385] We find, as did the commissions of the nine application states,[1386] that Qwest provides nondiscriminatory access to 911 and E911 services. We note that no commenter challenges Qwest's compliance with this aspect of checklist item 7.

2. Directory Assistance / Operator Services

1381 *See* Eschelon Qwest II Comments at 44-46; Eschelon Qwest I Comments at 28.

1382 We note that only seven outages occurring over a nine month period were reported by Eschelon and there have been no recent allegation of outages. No other commenter reported a similar problem.

1383 47 U.S.C. § 271(c)(2)(B)(vii); *see also* Appendix K at paras. 57-58.

1384 *Bell Atlantic New York Order*, 15 FCC Rcd at 4130-31, para. 349 (citing *Ameritech Michigan Order*, 12 FCC Rcd at 20679, para. 256).

1385 *Ameritech Michigan Order*, 12 FCC Rcd at 20679, para. 256.

1386 *See* Colorado Commission Qwest I Comments at 12; Idaho Commission Qwest I Comments at 4; Iowa Board Qwest I Comments at 50; Montana Commission Qwest II Comments at 32; Nebraska Commission Qwest I Comments at 8; North Dakota Commission Qwest I Comments at 5; Utah Commission Qwest II Comments at 5; Wyoming Commission Qwest II Comments at 8.

377. Section 271(c)(2)(B)(vii)(II) and section 271(c)(2)(B)(vii)(III) require a BOC to provide nondiscriminatory access to "directory assistance services to allow the other carrier's customers to obtain telephone numbers" and "operator call completion services," respectively.[1387] Additionally, section 251(b)(3) of the 1996 Act imposes on each LEC "the duty to permit all [competing providers of telephone exchange service and telephone toll service] to have nondiscriminatory access to . . . operator services, directory assistance, and directory listing, with no unreasonable dialing delays."[1388] Qwest provides competitive LECs access to the same directory assistance services and operator services that it provides to Qwest's retail customers.[1389] Qwest's processes for providing directory assistance services and operator services are designed to ensure competitive LECs that all calls are handled in the same manner regardless of whether they are originated by a competitive LEC's customers or by Qwest's customers.[1390] Qwest also provides branding for competitive LECs that purchase operator services and directory assistance from Qwest.[1391] Based on our review of the record, we conclude, as did each of the state commissions,[1392] that Qwest offers nondiscriminatory access to its directory assistance services and operator services (OS/DA).[1393]

378. We reject WorldCom's allegations that Qwest refuses to provide customized routing as required by Commission precedent.[1394] Specifically, WorldCom seeks to carry OS/DA

[1387] 47 U.S.C. § 271(c)(2)(B)(vii)(II)-(III). *See also Bell Atlantic New York Order*, 15 FCC Rcd at 4131, para. 351.

[1388] 47 U.S.C. § 251(b)(3). We have previously held that a BOC must be in compliance with section 251(b)(3) in order to satisfy sections 271(c)(2)(B)(vii)(II) and (III). *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20740, n.763. *See also Bell Atlantic New York Order*, 15 FCC Rcd at 4132-33, para 352.

[1389] Qwest II Application at 89-91; Qwest I Application at 82-83. *See also* Qwest II Applications App. A, Tab 19, Declaration of Lori A. Simpson (Qwest II Simpson-OS/DA Decl.) at para. 4; Qwest I Application App. A, Tab 20, Declaration of Lori A. Simpson (Qwest I Simpson-DA/OS Decl.) at para. 4.

[1390] Qwest II Application at 89-91; Qwest I Application at 82-83. *See also* Qwest II Simpson-OS/DA Decl. at para. 4; Qwest I Simpson-DA/OS Decl. at para. 4.

[1391] Qwest II Application at 89-91; Qwest I Application at 82-83. *See also* Qwest II Simpson-OS/DA Decl. at para. 4; Qwest I Simpson-DA/OS Decl. at para. 4.

[1392] *See* Colorado Commission Comments at 12; Idaho Commission Comments at 4; Iowa Board Comments at 74; Montana Commission Comments at 32; Nebraska Commission Comments at 8; North Dakota Commission Comments at 8; Utah Commission Comments at 5; Wyoming Commission Comments at 8.

[1393] *See* Qwest II Application at 89-91; Qwest I Application at 82-83. *See also* Qwest II Simpson-OS/DA Decl. at paras. 3-72; Qwest I Simpson-OS/DA Decl. at paras. 3-79.

[1394] *See* WorldCom Qwest III Comments at 26; WorldCom Qwest II Comments at 36-40; WorldCom Qwest I Comments at 34-37; WorldCom Qwest II Reply at 21-23; WorldCom Qwest I Reply at 19-20; Letter from Lori E. Wright, Associate Counsel-Federal Advocacy, WorldCom, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 (dated August 19, 2002) (WorldCom August 19, *Ex Parte*). Customized Routing is a function provided by the switch and is included in the requirements addressed under checklist item 6. *See also* 47 C.F.R. § 51.319(c)(1)(iii)(B). This issue is discussed in this section because WorldCom raises it as a violation of checklist item 7 rather than as a violation of checklist item 6.

traffic over its existing Feature Group D trunks.[1395] WorldCom maintains that Qwest requires that it purchase "unique" Feature Group D trunks dedicated to OS/DA traffic.[1396] Qwest states that this requirement is supported by the terms and conditions of the interconnection agreements.[1397] The Commission has previously addressed customized routing in the *Second BellSouth Louisiana Order*, finding that if it is technically feasible for the incumbent LEC to offer a particular customized routing arrangement, failure to do so would be a violation of section 251(c)(3) of the Act.[1398] We find that Qwest's general customized routing offering in its SGAT complies with our rules because it allows competitive LECs to have customers' calls routed as Qwest's customers' calls are, or to choose customized routing to the extent it is technically feasible.[1399] This offering is available to all competing LECs, including WorldCom. The fact that WorldCom is dissatisfied with its current contract,[1400] which contains the language regarding "unique" trunks, does not rise to the level of a checklist violation, particularly in light of Qwest's SGAT offering. Therefore, consistent with Commission precedent,[1401] we decline to resolve this matter within the context of this section 271 proceeding.[1402]

[1395] WorldCom Qwest II Comments at 36-37; WorldCom Qwest I Comments at 35. *See also* WorldCom Qwest II Reply at 21-23; WorldCom Qwest I Reply at 19.

[1396] WorldCom Qwest II Comments at 36-37; WorldCom Qwest I Comments at 35. *See also* WorldCom Qwest II Reply at 21-23; WorldCom Qwest I Reply at 19.

[1397] Qwest II Reply Declarations Tab 3, Reply Declaration of Lori A. Simpson (Qwest II Simpson-OS/DA Reply Decl.) at paras. 47-48; Qwest I Reply Declarations Tab 3, Reply Declaration of Lori A. Simpson (Qwest Simpson-OS/DA Reply Decl.) at paras. 29-30.

[1398] *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20731-20732, paras. 226-227. The Commission also recognized that all incumbent LECs must make network modifications as necessary to accommodate interconnection or access to network elements.

[1399] Qwest II Simpson OS/DA Decl. at paras. 3-22; Qwest I Simpson OS/DA Decl. at paras. 3-22. *See, e.g.*, Qwest Application App. B, Vol. 1, Tab 2, Colorado Statement of Generally Available Terms (Colorado SGAT) at § 9.12.

[1400] *See* WorldCom Qwest II Comments at 36-40; WorldCom Qwest I Comments at 34-37. *See also* WorldCom Qwest II Reply at 21-23; WorldCom Qwest II Reply at 19-20.

[1401] *See SWBT Texas Order*, 15 FCC Rcd at 18389-18390, paras. 77-78 (rejecting AT&T's claim that its rights under section 251 were not fully reflected in its contract, relying instead on SWBT's contract with WorldCom to find checklist compliance).

[1402] We reject Qwest's assertion, raised in its reply comments, that WorldCom's customized routing request is actually a 411 presubscription since the record is inconclusive on this issue and it would best be resolved in state proceedings. *See* Qwest II Simpson-OS/DA Reply Decl. at paras. 41-50; Qwest I Simpson-OS/DA Reply Decl. at paras. 23-32. We also note that Qwest states its willingness to work with WorldCom to pursue a workable solution for both parties. *See* Qwest II Simpson-OS/DA Reply Decl. paras. 40-41; Qwest I Simpson-OS/DA Reply Decl. at paras. 31-32.

F. Checklist Item 10 – Databases and Signaling

379. Section 271(c)(2)(B)(x) of the 1996 Act requires a BOC to provide "nondiscriminatory access to databases and associated signaling necessary for call routing and completion."[1403] Qwest states that it provides competitive LECs in each of the application states with unbundled, nondiscriminatory access to its signaling network, including signaling links and transfer points, and to Qwest's call-related databases and service management systems.[1404] Based on the evidence in the record, we find, as did each of the commissions in the nine application states, that Qwest complies with the requirements of checklist item 10.[1405]

380. We reject Touch America's contentions that, because Qwest allegedly discriminated against Touch America in the context of the U S WEST-Qwest merger divestiture with respect to access to databases, Qwest will similarly "discriminate" against other competing carriers.[1406] Touch America's dispute is particular to the U S WEST-Qwest merger and is being addressed by the Commission in a separate proceeding.[1407] We conclude that Touch America's speculative claims about Qwest's future conduct does not warrant a finding that Qwest fails to comply with this checklist item. No other commenter challenges Qwest's compliance with this checklist item.

G. Checklist Item 11 – Number Portability

381. Section 271(c)(2)(B) of the Act requires a BOC to comply with the number portability regulations adopted by the Commission pursuant to section 251.[1408] Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[1409] Qwest states that it satisfies

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[1403] 47 U.S.C. § 271(c)(2)(B)(x); *see also* Appendix K at para. 62.

[1404] *See* Qwest II Application App. A, Tab 22, Declaration of Margaret S. Bumgarner (Qwest II Bumgarner-Signal Decl.) at para. 4; Qwest I Application App. A., Tab 23, Declaration of Margaret S. Bumgarner (Qwest I Bumgarner-Signal Decl.) at para. 4.

[1405] *See* Montana Commission Qwest II Comments at 6; Utah Commission Qwest II Comments at 6; Washington Commission Qwest II Comments at 22-23; Wyoming Commission Qwest II Comments at 9; Colorado Commission Qwest I Comments at 23-24; Idaho Commission Qwest I Comments at 11; Iowa Board Qwest I Comments at 53-54; North Dakota Commission Qwest I Comments at 4-5; and Nebraska Commission Qwest I Comments at 1.

[1406] *See* Touch America Qwest II Comments at 11-13; Touch America Qwest I Comments at 10; Touch America Qwest II Reply at 12-13; Touch America Qwest I Reply at 14.

[1407] *Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-004 (February 11, 2002) (revised and refiled March 1, 2002); *Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-003 (February 8, 2002).

[1408] 47 U.S.C. § 271(c)(2)(B)(xi); *see also* Appendix K at para. 63.

[1409] 47 U.S.C. § 251(b)(2).

the requirements of checklist item 11 as it complies with the Commission's (a) long term number portability ("LNP") implementation schedule; (b) performance criteria; (c) technical, operational, architectural and administrative requirements and (d) cost recovery rules for number portability.[1410] Based on the evidence in the record, we conclude, as did each of the nine state commissions, that Qwest has satisfied the requirements of checklist item 11.[1411]

382. Only one commenter, OneEighty, offers comments on this checklist item, which we reject for the following reasons. OneEighty alleges that Qwest lacks an adequate system of internal controls to manage number portability, which led to over 6,000 of OneEighty's Montana business customers losing service for three and a half hours in June 2002, and another outage the following month.[1412] Both OneEighty and Qwest agree the July outage is directly related to the June outage.[1413] Accordingly, the outages are addressed jointly.

383. A review of the events leading up to the June and July outages do not demonstrate that Qwest's actions or inaction directly caused or exacerbated the outages. The events in question involve a North American Numbering Plan Administration ("NANPA") administrator and a mistake made with respect to an area code/exchange ("NPA/NXX"). A prospective subsidiary of OneEighty sent an order to the NANPA administrator to change the name and revenue accounting office for the NPA/NXX from the subsidiary to OneEighty.[1414] The NANPA administrator mistakenly processed the transfer order as an order to cancel the subsidiary's use of this NPA/NXX, causing the OneEighty outages.[1415] In accordance with the industry's guidelines, NANPA put the subsidiary/OneEighty and Qwest on notice that the NPA/NXX would be cancelled, a month prior to the outage.[1416] Thus, despite the initial error by the NANPA

1410 Qwest II Application App. A., Tab 23, Declaration of Margaret S. Bumgarner at para. 3; Qwest I Application App. A., Tab 24, Declaration of Margaret S. Bumgarner at para. 3.

1411 Colorado Commission Qwest III Comments; Idaho Commission Qwest III Comments; Iowa Commission Qwest III Comments; Montana Commission Qwest III Comments; Nebraska Commission Qwest III Comments; North Dakota Commission Qwest III Comments; Utah Commission Qwest III Comments; Washington Commission Qwest III Comments; and Wyoming Commission Qwest III Comments.

1412 OneEighty Qwest III Comments at 9-14; OneEighty Qwest II Comments at 9-12.

1413 *See* OneEighty Qwest II Comments at 9-12; Letter from Hance Haney, Attorney, Qwest II to Marlene H. Dortch, Secretary, Federal Communications Commission at 3, WCB Docket No. 02-189 (dated August 20b, 2002) (*Qwest II August 20b* Ex *Parte*).

1414 OneEighty Qwest III Comments at 10; OneEighty Qwest II Comments at 10.

1415 Avista Communications, in anticipation of becoming an operating subsidiary of OneEighty, sent an order to the NANPA administrator, NeuStar, to change the name and revenue accounting office for the NPA/NXX 406/294 from Avista to OneEighty. NeuStar mistakenly processed the order as an order to cancel Avista's use of this NPA/NXX and notified Qwest, as the service provider that had ported 406/294 numbers, that it must either assume the 406/294 NPA/NXX or number changes would have to be done for the customers. OneEighty Qwest II Comments at 10; OneEighty Qwest III Comments at 10.

1416 On May 22, 2002 NANPA issued a "Central Office Code (NXX) Assignment Request – Part 3" form that was sent to both the original code holder, Avista, and to the new code assignee, Qwest, with an effective date of (continued....)

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