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

In the Matter of	)	
	)	
Qwest Communications International, Inc.	)	
	)	
	)	WC Docket No. 02-148
Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska and North Dakota	)	
	)	

MOTION OF AT&T CORP.
<u>FOR LEAVE TO FILE COMMENTS IN EXCESS OF ONE HUNDRED PAGES</u>

Pursuant to the Commission's *Notice*,[1] AT&T Corp. ("AT&T") respectfully seeks leave to file comments on Qwest's joint application for Colorado, Idaho, Iowa, Nebraska and North Dakota of 150 pages in length. This length exceeds the Commission's one hundred (100) page limit for single-state applications by fifty (50) pages. In its *Notice*, the Commission recognized that parties may require additional pages to respond to Qwest's unprecedented *five*-state application and requested that parties notify the Commission if they expect to exceed the 100 page limit.[2] AT&T has done so, and is filing this motion at the Commission's request.

A grant of this motion is warranted. The additional pages are needed so that AT&T can address certain state-specific pricing, interconnection, network element, and public interest issues. AT&T also notes that the applicant's brief in support of the joint application, to

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[1] Public Notice, *Comments Requested on the Application by Qwest Communications International, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota,* WC Docket No. 02-148, DA 01-1390 (June 13, 2002) ("*Notice*").
[2] *See id.*, n.2.

which AT&T is responding, was 190 pages in length, significantly in excess of the Commission's 125-page limitation for single-state briefs.[3] In addition, the applicant's brief was supported by 63 CDs and nine (9) boxes of proprietary documents. For these reasons, AT&T respectfully submits that the modest extension of the page limits requested here is warranted.

Respectfully submitted,

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July 3, 2002

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[3] *See* Public Notice, *Updated Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, DA-99-1994, at 4 (September 28, 1999).

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COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these comments in opposition to the joint application of Qwest for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Nebraska, and North Dakota.

INTRODUCTION AND SUMMARY

Process, not substance, is the central theme of Qwest's unprecedented 5-state section 271 application. The message behind this application is unmistakably clear: accept at face value Qwest's claims of compliance with the federal law requirements of section 271, defer entirely to state commission recommendations, and, whatever you do, please don't look behind the curtain. Abdication, not independent review, is called for, Qwest contends, because the "new" Qwest is different from all prior section 271 applicants (and from its predecessor US West) and, unlike prior applicants, can be trusted to do the right thing for competition and consumers.

The new Qwest *is* different from prior applicants, but only in ways that demand more, not less, Commission scrutiny. No prior section 271 applicant can match Qwest's long and shameful record of blatant section 271 violations – violations that defy Qwest's express representations to the Commission, that began the minute Qwest swallowed US West, and that continue unabated today. No prior applicant has generated so many serious and well-publicized questions about (and ongoing investigations of) its candor to regulators and to the public. And, certainly, no prior applicant has been revealed to have been leading a double life, claiming full compliance with the statute while entering patently discriminatory secret deals to silence critics and evade informed state commission, Commission and third party review of its compliance with the core section 271 checklist requirements. Context is king, and this extraordinary backdrop demands that Qwest's Application receive the most searching Commission review.

Qwest's aversion to independent, principled Commission review of its Application is understandable, for Qwest has much to hide. That should be evident from a critical examination of Qwest's opening proclamation that its Application "stands on the foundation" of "two overriding corporate commitments" – to improve "service quality" and to "accelerate and complete the process of opening its local market to competition" – that Qwest made in support of its merger with US West. Application at 2. Qwest claims that it has met these commitments and that the "local exchange market in the Qwest region is entirely different than it was two years ago." *Id.* In fact, customer satisfaction with Qwest's service has *declined* dramatically since the merger closed (as the other Bells' ratings have improved), and Qwest now ranks *dead last*, by a considerable margin, among local telephone providers.[1] Far from working to accelerate the opening of its local markets to competition, Qwest has simply substituted different, but equally effective, schemes to prevent that from happening, as illustrated by one state commission's recent determination that Qwest unlawfully refused to allow AT&T even to *test* a network element-based competitive local offering (and then deliberately fabricated evidence in an attempt

[1] *See, e.g.*, "Qwest Receives Lowest Rating, Rocky Mountain News (May 21, 2002) (available at http://www.rockymountainnews.com/drmn/business/arti…/0,1299,DRMN_4_1158517,00.htm; http://www.theacsi.org/first_quarter.htm#tel1.

to defend its gross misconduct).[2] And Qwest's local markets are *not* materially different than they were two years ago. Contrary to the misleading figures in the Application, there is still almost no residential local competition in Colorado, Iowa, Idaho, Nebraska or North Dakota – as Qwest's recent *ex parte* submissions in response to Department of Justice inquiries starkly confirm.

Qwest's merger with US West has not created an altruistic "super Bell." Rather, Qwest's notable achievement has been to transform a financially strong monopolist into a desperate, financially strapped monopolist. The timing of this Application reflects no irreversible opening of Qwest's local markets to competition, but only Qwest's calculation that it could ill afford to break yet another of its reckless section 271 filing date promises. Because state and third party review of key issues is far from complete, the Application consists largely of stopgap measures (*e.g.*, last-minute rates and other terms that have never been reviewed), baseless pleas that key deficiencies be ignored (*e.g.*, third party testing deficiencies that remain unresolved because Qwest refused further testing), and legally doomed gambits to foist some of the most obvious and fatal section 271 problems into other proceedings (*e.g.*, Qwest's pervasive secret deals discrimination).

As a result, the Application does not remotely satisfy Qwest's burden to prove that it has satisfied each of the competitive checklist requirements and that granting its request for interLATA authority in five states where local markets remain closed to meaningful residential competition will serve the public interest. Indeed, as detailed below, the Application is deficient in virtually every relevant respect.

[2] *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. against Qwest Corporation*, Docket No. P-421/C-01-391, Order Granting Temporary Relief and Notice and Order for Hearing, issued April 30, 2001.

The Commission's review can begin and end with the fact that Qwest has not even attempted to demonstrate how it could satisfy its Checklist Item 2 burden to prove that it is providing "access" to its network facilities on terms and conditions that are "nondiscriminatory," 47 U.S.C. § 271(c)(2)(B)(ii) – or, indeed, how it could satisfy its burden with respect to *any* of the eight checklist items that expressly require nondiscrimination – in the face of its ongoing, deliberate, and region-wide scheme to violate those very nondiscrimination obligations by conspiring to confer secret, more favorable interconnnection agreement terms on selected CLECs. These secret agreements – more of which Qwest grudgingly discloses each day in response to subpoenas and other discovery requests in ongoing state commission investigations – blatantly favor some CLECs over others and therefore constitute dispositive evidence that Qwest is not today providing the required nondiscriminatory access.

It is hard to imagine misconduct that strikes more directly at the heart of section 271. In an effort to create the false appearance that it has opened its local markets to competition, Qwest has promised favorable terms to carriers that pose little threat to its core market dominance in return for those carriers' promises not only to hide this discrimination from regulators and other carriers, but also to keep silent about their own problems with Qwest. So long as it remained a secret, Qwest's scheme was an ingenious one. While carriers that posed a real threat to Qwest's local monopolies were kept at bay with unfavorable terms, Qwest could point to carriers buoyed by secret deals as evidence that its markets are open to competition (and that it has satisfied Track A). All looked well to the outside world, because, with special arrangements in place, Qwest's performance to those latter carriers would often be acceptable (and when it was not, those carriers would be bound by their "secret deals" not to complain to regulators or to challenge Qwest's compliance with section 271 requirements). The idyllic perceptions created by this complex web of deception and misinformation obviously created a much more favorable environment for Qwest in Section 271 and related proceedings.

But Qwest has been caught, and it must now bear the consequences of its intentional misconduct. One such consequence – and there should be many others – is that this Application must be denied. That is so for a number of reasons. The clear checklist item 2 violation is the most obvious. There is no way to characterize Qwest's secret price and non-price discrimination as providing access to network facilities on terms and conditions that are "nondiscriminatory." Given Qwest's complete failure to disclose to the Commission all (or, indeed, *any*) of the discriminatory terms that appear in its many secret deals, there is also no rational basis for the Commission to conclude that Qwest has satisfied the seven other checklist items that include nondiscrimination requirements. If Qwest contends that it offers nondiscriminatory interconnection (as required by checklist item 1), for example, it must prove that, and it cannot do so without submitting all of its secret deals to the Commission and demonstrating that it does not, through those agreements, discriminate in the provision of interconnection. And, as one important component of an unrivaled pattern of discriminatory, anticompetitive and unlawful conduct that goes directly to the core inquiry whether Qwest's local markets are open and likely to remain so, Qwest's secret deals misconduct also precludes any finding that granting the requested interLATA authority is in the public interest.

The Application, in its shocking failure even to address these serious deficiencies, reflects Qwest's own recognition that it cannot meet its checklist and other burdens if it is forced to confront its secret deals practices in this proceeding. That is why Qwest recently filed a frivolous petition seeking a Commission declaration that Qwest's failure to file its secret interconnection agreements with state commissions did not violate section 252. Qwest cannot seriously hope to prevail in that proceeding; by its plain terms, section 252 requires Qwest to file "[a]ny" interconnection agreement it adopts by negotiation, 47 U.S.C. §§ 252(a), (e), and not merely some, or selected passages of, such agreements.[3] Rather, the declaratory order proceeding is nothing but a stalling ploy – Qwest will urge the Commission to ignore the mounting secret deals evidence here and address it only in that declaratory order proceeding. The Commission cannot lawfully do so. There is no possible resolution of the section 252 interconnection agreement *filing* issues raised in the declaratory order proceeding that could erase Qwest's *discrimination* in offering special terms to its secret deals partners that are not available to other requesting carriers. And nothing that the Commission could do in the declaratory order proceeding could eliminate the Commission's clear duty to consider Qwest's pervasive discrimination in determining whether Qwest has met its burden to demonstrate that it meets the checklist nondiscrimination requirements.[4]

Qwest's approach of "buying off" CLECs that would otherwise have brought evidence of its failure to adhere to the Act's market opening requirements to the attention of regulators has subverted the entire section 271 process. That has obvious and far-reaching implications for the states. Indeed, the only way in these circumstances to ensure that Qwest satisfies the statutory preconditions to interLATA authority is for state commissions to conduct comprehensive investigations, to force Qwest to come clean about all of its secret deals and to reform its discriminatory practices, and then to restart the section 271 process with full participation by all interested parties. As the secret deals evidence continues to mount, state commissions are beginning to recognize this. *See*, *e.g.*, Letter of Arizona Corporation Commissioner Jim Irvin to

[3] *See Petition For Declaratory Ruling Of Qwest Communications International, Inc.*, WC Docket No. 02-89 (filed Apr. 23, 2002); *Opposition of AT&T Corp. To Petition For Declaratory Ruling Of Qwest Communications International Inc.*, WC Docket No. 02-89, at 6-10 (filed May 29, 2002).

[4] *See, e.g., Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 27, 2002) ("any further movement by the Commission on Qwest's Section 271 application must be suspended until the issues related to the compromised agreements are resolved") (Attachment 1 hereto).[5] But whatever course the states ultimately decide to take, Qwest, through its secret deals misconduct and its failure to join issue on the many section 271 implications of that conduct, has left this Commission with only one course: a finding that Qwest has not met its burden of demonstrating compliance with the checklist nondiscrimination requirements.

Qwest has failed to meet its checklist burden in many other respects as well. Qwest's claim that it has met its checklist item 2 burden to prove that network element rates in all five states are appropriately forward-looking and comply with the Commission's TELRIC rules, for example, is nonsensical. In three of the five states, Iowa, Idaho and North Dakota, rates were set many years ago using backward-looking methodologies that did not even purport to comply with the Commission's TELRIC rules. Iowa, for example, expressly *rejected* TELRIC, and has for years failed to comply with a district court remand vacating its patently unlawful pricing decision and directing it to "comply with the requirements of the FCC's rules."[6] A fourth state, Nebraska, conducted proceedings more recently, but based rates on a loop cost model that the Commission has found does not "adhere to sound engineering and forward-looking, cost-minimizing principles,"[7] and a switching cost model that Qwest openly acknowledged is designed not to estimate forward-looking costs, but "the actual, 'real world' costs that [Qwest] incurs."[8]

[5] *See also id.* ("What makes this situation unique is the subversive nature of these actions and their potential to taint the public deliberative Section 271 review process. Who knows what the outcome of the proceedings would have been if ALL parties of interest had fully participated?").

[6] *See U S West Communications, Inc.* v. *Thoms*, Civil No. 97-CV-70082 (S.D. Iowa).

[7] *See Platform Order*, 13 FCC Rcd. 21323 at ¶ 54 (1998).

[8] *See* AT&T Post Hearing Br. at 27-28 (Apr. 26, 1999) (*quoting* testimony of U S West witness Alan Bergman.

Recognizing that the approved rates in these four states cannot seriously be defended, Qwest makes only a token effort to do so.

Qwest claims that the Commission can nonetheless place the TELRIC stamp of approval on its Iowa, Idaho, Nebraska and North Dakota rates based upon arbitrary, last-minute reductions that Qwest claims have reduced the rates in all four states to Colorado levels. Claiming rights to such a "benchmarking" shortcut is remarkably presumptuous, given that the Commission has never approved Qwest's rates in *any* state. But even if the Commission could, consistent with the requirement of reasoned decisionmaking, benchmark against rates that it is simultaneously reviewing for the first time, Qwest's ploy would fail. As detailed below, even *after* the arbitrary reductions, Qwest's Iowa, Idaho, Nebraska, and North Dakota rates are not remotely comparable to its Colorado rates. Qwest's contrary claim is based upon wildly flawed cost comparisons that imply considerable disdain for the Commission's review process. Qwest's comparisons improperly include very high cost rural Iowa, Idaho and North Dakota exchanges that Qwest *does not even own* and that skew the cost comparisons; they exclude significant new recurring charges that Qwest sneaked in to all four state SGATs at the same time it reduced other charges; and, in direct contravention of the Commission's *New Jersey 271 Order*, they reflect national average minutes of use assumptions that mask important cost and rate differences, rather than the state-specific figures that Qwest could, and therefore should, have used. When the benchmarking comparisons are done properly, it is clear that Qwest's rates in the other states are, in fact, as much as *45 percent higher*, on a cost-adjusted basis, than its Colorado rates.

But Qwest's benchmarking claim would fail even if the other four states' rates did compare favorably to Colorado rates, because the Colorado rates quite plainly are *not* TELRIC-compliant. To the contrary, Qwest's loop, non-loop and non-recurring UNE rates are all substantially inflated by clear TELRIC errors. Qwest's Colorado loop rates, for example, improperly rely upon Qwest's embedded network, rather than the efficient, forward-looking analysis that the Commission's rules require in estimating outside plant costs. Qwest's recurring switching rates are based upon Qwest input assumptions that were never even reviewed by the Colorado commission and that both double count costs and reflect backward-looking network assumptions. And Qwest's Colorado non-recurring charge methodology was so bloated with improper manual processing and other phantom cost assumptions that it has produced, among other anomalies, hot cut rates that are a facially absurd $170. For these and other reasons detailed below, Qwest has not satisfied its checklist item 2 burden with respect to rates in Colorado, much less with respect to the four states it attempts to justify by comparison to Colorado.

Nor has Qwest met its burden of demonstrating that it is providing nondiscriminatory access to operations support systems ("OSS"). Qwest relies almost entirely on the "ROC" test conducted by KPMG Consulting – even describing KPMG's test as "determinative" of OSS-related issues. To the contrary, the Commission has repeatedly held that actual commercial usage data is far more probative in assessing whether a BOC is providing critically important parity of access to OSS. And although the availability of actual commercial usage data is necessarily limited here by the anemic levels of competitive entry, there is, as detailed below, ample proof that Qwest is not, in fact, providing parity of access in the real world. For example, Qwest's systems reject nearly one-half of all CLEC orders, and as many as two-thirds of orders that are not rejected fall out for manual processing.

Even if Qwest could ignore its actual performance, the KPMG test could not carry Qwest's checklist burden. KPMG concedes that in conducting tests that covered *every* OSS function, from pre-ordering to maintenance and repair, it relied upon representations and data obtained from CLECs who were receiving preferential "secret deals" treatment from Qwest. Although Qwest's preferential treatment of these CLECs unquestionably skewed the test results and caused Qwest's performance to be overstated, KPMG and the ROC Executive Committee refused even to *consider* the scope and magnitude of the impacts. In these circumstances, the KPMG test results obviously cannot be deemed reliable indicia of Qwest's actual real world performance.

In any event, the results of the KPMG testing, which Qwest cut short in its zeal to file the Application, undermine, rather than support, Qwest's claim of checklist compliance. KPMG's Final Report finds numerous deficiencies in Qwest's OSS in critically important areas. Qwest's current "redesigned" change management process, for example, is still a work in progress. As KPMG found, not only is there far too little evidence to support a finding that Qwest has complied with the change management process, but both of Qwest's test environments are seriously defective. As KPMG recognized in its Final Report, Qwest has an unusually high error rate in manually processing orders. Together, with Qwest's wholly unacceptable order reject rate, these deficiencies substantially impair CLECs' ability to compete by delaying the return of order status notices and the provisioning of service to CLEC customers, while increasing the likelihood of errors in the provisioning of CLEC orders. Qwest's own reported data likewise demonstrate that repeat trouble report rates are higher for CLEC customers than for Qwest's own retail customers. And, as KPMG found, Qwest has also failed to show that it performs repairs for CLECs in a satisfactory manner. In short, Qwest's OSS are plainly discriminatory.

Qwest has not met its burden of demonstrating checklist compliance in a number of other respects as well. With regard to interconnection, Qwest's terms and conditions are blatantly unreasonable and discriminatory. Qwest levies a non-cost-based, wholly unjustified "entrance facility" charge on interconnection that grossly inflates the cost of interconnection and effectively denies CLECs interconnection at their selected point. Qwest imposes large financial penalties on CLECs that fail to meet Qwest's arbitrary 50-percent trunk utilization requirement – a requirement that Qwest itself need not and does not meet. And Qwest restricts efficient interconnection by requiring CLECs to place interconnection traffic on separate trunk groups, and by arbitrarily limiting the length of interconnection trunks. These anticompetitive restrictions severely deter facilities-based entry by driving up the cost of the facilities that CLECs must have to interconnect with Qwest's network.

Qwest further obstructs competitive entry by denying CLECs nondiscriminatory access to unbundled network elements. Qwest retains discretion to refuse to build new facilities to provision CLEC UNE orders, and to delay fulfillment of those orders, when Qwest itself would build the needed facilities if the end-user ordered service directly from Qwest. Qwest also denies CLECs any access to the unbundled network elements, including transport and dark fiber, of Qwest's affiliates, places discriminatory restrictions on a CLECs' ability to combine UNEs with telecommunications services, and unlawfully converts the mistaken calls of CLEC customers for maintenance and repair service into marketing events intended to winback those customers.

With regard to individual network elements, Qwest denies CLECs reasonable access to unbundled local transport by imposing non-distance-sensitive charges that plainly conflict with the Commission's rules. Qwest imposes unlawful restrictions on the availability of unbundled local switching for customers with three or fewer lines in a single location, and limits the availability of packet switching to one degraded form. Qwest also unfairly restricts access to dark fiber, and imposes limitations that effectively deny CLECs any access to the Network

Interface Device. These restrictions all serve to insulate Qwest from meaningful local competition and underscore how far Qwest remains from fully implementing its checklist obligations.

Qwest also falls far short of its burden to establish, based upon record evidence, and not merely paper promises, that Qwest and its separate long distance affiliates, if granted interLATA authority, would comply with the section 272 nondiscrimination requirements that the Commission has recognized are "of crucial importance" in ensuring "a level playing field."[9] Qwest's section 272 declarations consist almost entirely of promises. Indeed, the declarations are virtually identical to Qwest's submissions in Minnesota, where an administrative law judge ruled that Qwest has failed to meet its burden to establish *six* of the fundamental section 272 requirements, including the core requirements that the BOC and its long distance affiliates operate independently, have separate officers and directors, deal with each other only on an arms' length basis, disclose their transactions, treat each other and all other carriers on a nondiscriminatory basis, and comply with joint marketing restrictions.[10] The Application acknowledges past noncompliance with Section 272, and, as detailed below, that section 272 noncompliance is but a small part of a much broader pattern of section 271-related noncompliance. On this record, with both a long history of past noncompliance and the Minnesota findings of *current* noncompliance, Qwest's promises of future compliance, many of which are supported by no documentary evidence, are patently inadequate and provide an "independent ground[] for denying [this] Application." *New York Order* ¶ 402.

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[9] *See* 47 U.S.C. § 271(d)(3)(B); *Texas 271 Order* ¶ 395.

[10] *See Commission Investigation Into Qwest's Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272), Minnesota Pub. Util. Comm.*, Findings of Fact and Conclusions of Law and Recommendations, PUC Doc. No. P-421/C1-01-1372 (Mar. 14, 2002).

Finally, even if the Commission could rationally find that Qwest has fully implemented its obligations under the competitive checklist, the record here precludes any finding that granting Qwest's application is consistent with the "public interest, convenience and necessity." As the Commission has recognized, granting a BOC request for long distance authority can serve the public interest only if the Commission finds that the BOC's "local market is open and will remain so."[11] As the Commission has likewise recognized, no such finding may be possible if the "BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations," because the provisions of the 1996 Act that are directed at opening the local exchange market "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECS with their statutory obligations."[12] Although the Commission "will not withhold Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination," it has warned the BOCs that it will do so where "a pattern of discriminatory conduct" exists.

Qwest has engaged in just such a widespread and pervasive course of unlawful conduct designed to forestall competition in its local exchange markets at the same time that it provides service across LATA boundaries. The Commission has on at least three occasions *adjudicated* Qwest (or US West before it) responsible for violating Section 271 of the Act, and Qwest continues to violate Section 271. Qwest's current violations are perhaps the most troubling in this context, because they reflect a studied indifference to Qwest's express promises to the Commission in the Qwest/U S West merger proceedings, and thus remove any possible basis for finding that Qwest can be trusted to comply in good faith with its obligations on a going forward basis. As both the merger-related audit of Qwest and the complaint proceedings initiated by

[11] *See SBC Texas 271 Order* ¶ 431; *New York 271 Order* ¶ 444.

[12] *Michigan 271 Order* ¶ 397.

Touch America make clear, Qwest has broken its promise (and statutory obligation) to divest its interLATA customers and business in the U S West region. In particular, Qwest took a number of steps that it concealed from the Commission to ensure that Touch America, the entity it promised to establish as an independent successor to Qwest's in-region long distance customers and business, would remain dependent on Qwest in providing services to divested customers. And, immediately after the "divestiture," Qwest undertook a concerted campaign to reacquire the most valued divested customers and to provide them (and others) with prohibited in-region interLATA services through sham "leasing," "corporate communications" and other arrangements.

As bad as they are, these section 271 violations are just the tip of the anticompetitive iceberg. As detailed below, Qwest has also demonstrated complete disregard for its section 251 and 252 obligations, by, among other things, refusing to file its secret interconnection deals with state commissions as required by section 252 (thereby inhibiting the development of local competition, preventing state commission review, and impairing the state section 271 review process), "freezing" local service accounts to prevent customers from switching to competitive carriers, and refusing to allow CLECs even to test competitive offerings. In short, far more than any previous section 271 applicant, Qwest has exhibited a pattern of activity that removes any possible basis for a finding that Qwest's markets are open and likely to remain so. The record confirms, moreover, that Qwest's UNE rates would make it economically impossible for CLECs to enter in three of the five states even if Qwest could be trusted to reform its anticompetitive behavior, and this provides yet another reason why granting the Application would not serve the public interest.

In sum, careful review of Qwest's 5-state application will confirm that Qwest must do much more to open its local markets to competition – and to disclose and remedy its own ongoing misconduct – before it will qualify for section 271 authority. Qwest urges the Commission simply to ignore the many clear deficiencies and grant Qwest a five-state leap into the long distance business as a reward to Qwest for getting some things, such as aspects of the ROC process, right. The Commission should certainly laud what was done right, but it would be dereliction of the worst sort to ignore what was not.

I. QWEST'S PERVASIVE AND ONGOING SECRET DEALS DISCRIMINATION REQUIRES THAT THE COMMISSION REJECT THESE APPLICATIONS.

Non-discrimination is a bedrock principle of the Communications Act in general, *see MCI Telecommunications Corp v. American Tel. & Tel. Co*, 114 S. Ct. 2223 (1994), and section 271 in particular, *Michigan 271 Order* ¶ 334. In eight separate checklist items, Congress required that the BOC meet its substantive obligation in a nondiscriminatory manner. *See* 47 U.S.C. §§ 271(c)(2)(B)(i) (incorporating the non-discrimination obligations of sections 251(c)(2) and 252(d)(1)), 271(c)(2)(B)(ii), (iii), (vii), (ix), (x), (xii), (xiv) (incorporating the non-discrimination obligations of sections 251(c). Indeed, Congress felt so strongly about this principle with regard to access to network elements that it *doubly* required "nondiscrimination" in Checklist Item 2. *See id.* § 271(c)(2)(B)(ii) (requiring "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," which in turn require both "nondiscriminatory" access to UNEs and "nondiscriminatory" UNE rates).

Congress recognized that – absent broad nondiscrimination requirements – a BOC could effectively avoid its market opening obligations by discriminating in favor of a handful of carriers in return for section 271 support. Although those carriers might (temporarily) be better off, consumers and competition would certainly be worse off. That is because the BOC would predictably extend such favorable terms only to carriers that posed little threat to its core market dominance, and not those carriers that could truly threaten its local monopolies.

There is now overwhelming evidence that Qwest has attempted precisely this gambit. In an effort to create the false appearance that it has opened its local markets to competition, Qwest has promised favorable terms to selected carriers in return for those carriers' promises not only to hide this discrimination from regulators and other carriers, but also to keep silent about their own problems with Qwest. These agreements, which blatantly favor some CLECs over others, are a patent violation of Qwest's obligation to provide "access" to its network facilities on terms and conditions that are "nondiscriminatory." 47 U.S.C. § 271(c)(2)(B)(ii).[13] Indeed, it is hard to imagine conduct that goes more directly to the heart of the Act's nondiscrimination requirement.

Moreover, Qwest's secret agreements have a critically important impact on the remaining checklist requirements. Given Qwest's complete failure to disclose to the Commission *any* of the discriminatory terms that appear in its many secret deals, there is no rational basis for the Commission to conclude that Qwest has satisfied the seven other checklist items that, like Checklist Item 2, prohibit discrimination. And because there is substantial evidence demonstrating that Qwest effectively bought the silence of CLECs with respect to proceedings on its section 271 application, the Commission cannot rely on the *absence* of evidence of discrimination or other checklist violations to conclude that *any* of the checklist requirements are satisfied. Indeed, it is now clear that but for the existence of these secret deals, CLECs would have filed additional evidence in state section 271 proceedings demonstrating that Qwest was not satisfying its obligations under the Act. In these circumstances, the only way that the Commission can be sure that Qwest has fully opened its markets to competition and has met its checklist burden is to allow state commissions to conduct comprehensive investigations regarding Qwest's secret deals, to force Qwest to come clean about all of its secret deals and to reform its discriminatory practices, and then to restart the section 271 process with full participation by all interested parties.

The Commission cannot ignore these fundamental violations of the Act's core market opening provisions on the grounds that Qwest has filed a petition seeking a Commission declaration that Qwest's failure to file its secret interconnection agreements with state commissions did not violate section 252. Assuming Qwest had a colorable claim that section 252 could be read, as Qwest argues, to allow Qwest to file only selected passages of negotiated interconnection agreements – and the plain language of section 252 makes plain that this contention is frivolous[14] – the declaratory order proceeding provides no lawful basis for ignoring the mounting secret deals evidence here. Even if the Act could be read as not requiring Qwest to *file* its secret, discriminatory agreements, that would not make Qwest's practice of favoring some CLECs with rate and non-rate terms that are not available to (or even known by) other CLECs any less discriminatory. The secret deals provide dispositive evidence that Qwest does not provide access to network elements (and other checklist items) on nondiscriminatory terms, and there is no possible basis for the Commission to ignore that evidence in this proceeding.

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[13] The fact that Qwest provided certain carriers sweetheart deals is also highly probative of whether the rates, terms and conditions it has imposed on the disfavored carriers comply with the Act's *substantive* standards of Checklist Item 2.

[14] Section 252(a)(1) allows Qwest and other incumbent LECs to negotiate agreements for "interconnection, services, or network elements pursuant to section 251," but provides that "[t]he agreement . . . shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C. § 252(a)(1). Section 252(e) provides that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. § 252(e)(1). *See* Opposition of AT&T Corp. To Petition For Declaratory Ruling Of Qwest Communications International Inc., WC Docket No. 02-89, at 6-10 (filed May 29, 2002).

A. The Secret Deals Discrimination Is Undisputed.

It is now beyond dispute that Qwest has entered into blatantly discriminatory agreements with favored CLECs and has kept those agreements secret from state regulators and competitors by failing to file them with state commissions, as required by law. Further, it is beyond dispute that in some cases, the favored CLECs agreed in return to acquiesce in major Qwest regulatory initiatives, including Qwest's instant section 271 application.

As a result of a six-month investigation into potential anticompetitive conduct, the State of Minnesota Department of Commerce filed a complaint against Qwest with the Minnesota Public Utilities Commission on February 14, 2002.[15] That complaint alleges that Qwest entered into a series of secret, discriminatory agreements with various competitive LECs to provide preferential treatment for those competitive LECs with respect to access to rights of way, reciprocal compensation, and collocation.[16] The Department of Commerce Complaint included as exhibit 11 written agreements between Qwest and various CLECs that Qwest had never filed with the Minnesota Public Utilities Commission pursuant to Section 252(a)(1). The Minnesota Department of Commerce is seeking civil penalties in excess of $50 million against Qwest.[17] The Minnesota PUC has already held one hearing before an ALJ and will conduct further proceedings, scheduled for August 6-8, on additional, newly discovered agreements between Qwest and McLeod before issuing a decision.[18]

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[15] *See, e.g., Second Amended Verified Complaint, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Minnesota Public Utilities Commission,* Docket No. P-421/C-02-197 (Attachment 2 hereto).

[16] *See* Second Amended Verified Complaint ¶ 24 ("By entering into the Secret Agreements, Qwest is providing discriminatory treatment in favor of the CLECs that are party to these agreements and to the detriment of CLECs that are not"); *id.* at ¶ 26 ("[T]he ongoing and repeated behavior of Qwest in entering into these secret agreements was, and is, anticompetitive and in violation of federal and state law").

[17] *See* Second Amended Verified Complaint ¶¶ 275-77, 282.

[18] Favoring selected CLECs held little risk for Qwest, because if any carrier began to grow beyond "acceptable" boundaries, Qwest could neutralize that carrier's opposition by a pretense of cooperation, holding the carrier to its

Significantly, the Minnesota Department of Commerce has uncovered evidence demonstrating that five of the agreements identified in its Complaint "were the direct result of efforts by Qwest to prevent Eschelon and McLeodUSA – two of Qwest's largest wholesale customers – from participating in consideration of Qwest's application to provide in-region, interLATA long-distance services by the state commissions and the FCC."[19] As a result of these secret agreements to silence Eschelon and McLeodUSA, the Minnesota Department of Commerce noted that "14 states, including Minnesota, have been reviewing Qwest's Section 271 application without the participation of two of Qwest's largest wholesale customers in most of their workshops or adjudicative proceedings."[20] While "[t]he extent of the damage that these agreements have caused with respect to 271 proceedings across Qwest's territory is still unknown," the Minnesota Department of Commerce recently "uncovered information that Qwest has not provided accurate billing or access information for the UNE platform products ordered by Eschelon from Qwest at any time from 2000 through the present."[21] The Department's investigation is continuing.[22]

Upon learning of the Minnesota complaint, several other state commissions in the Qwest region commenced similar investigations of their own. The New Mexico Public Regulatory Commission, for example, has issued over 80 subpoenas to competitive LECs

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promise not to oppose Qwest's section 271 proceedings, but paying only lip service to its own promises of "favorable" treatment.

[19] *See* Comments Of The Minnesota Department of Commerce In Opposition To Qwest's Petition For Declaratory Ruling, WC Docket No. 02-89, at p. 18 (filed May 29, 2002). *See also id.* ("Qwest granted Eschelon various preferences "in exchange for Eschelon agreeing not to participate in consideration of Qwest's Section 271 application before any state commission or the FCC"); *id.* at 20 ("Qwest entered into a similar arrangement with McLeodUSA in exchange for an oral agreement to stay out of the Section 271 proceedings"; noting that McLeodUSA confirmed this in response to a discovery request).

[20] *Id.* at 22.

[21] *Id.* at 22-23.

[22] AT&T is aware, for example, that – prior to their defections from the workshops – Eschelon raised serious problems with Qwest's UNE-P offering and McLeod raised issues with respect to access to poles/duct/conduits and rights of way.

operating in the state, requiring them to produce any and all agreements relating to interconnection that were not previously filed with that commission. Several additional secret agreements were recently produced in response to the subpoenas. The State of Washington has also begun an investigation.[23]

Two states have now issued decisions concluding that Qwest entered into interconnection agreements with individual CLECs that granted them preferential rates, terms and conditions (thereby discriminating against other CLECs) and also violated section 252(a)(1) and applicable state rules by failing to file these agreements with the state commissions. On May 29, 2002, the Iowa Utilities Board (the "IUB") issued a decision concluding that Qwest violated section 252(a)(1) and Section 38.7(4) of the Iowa Code by failing to file three agreements with the Board.[24] The three agreements that the Board examined had been identified by the Minnesota Department of Commerce as involving CLEC operations in Iowa.[25] The Iowa Board concluded that the secret deals presented to it "include interconnection agreement provisions that should have been filed with the Board pursuant to § 252."[26]

The Board further concluded that each of the agreements was discriminatory because it granted preferential rates, terms or conditions to the CLEC. The first agreement was between Qwest and Covad and provided that U S West would commit to meeting several specific interconnection performance standards (including timing, service and quality standards

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[23] *See, e.g.*, Deborah Solomon, *States Probe Qwest's Secret Deals to Expand Long-Distance Service*, Wall Street Journal, Apr. 29, 2002, Section A:1 (col. 5) (2002 WL-WSJ 3393212) (noting investigations in Colorado, Arizona, Oregon, New Mexico, and Utah).

[24] *See AT&T Corp. v. Qwest Corporation, Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing*, Docket No. FCU-02-2 (May 29, 2002) ("Iowa Order") (Attachment 3 hereto).

[25] Iowa Order at 2.

[26] *Id.* at 9. The Board made clear that this was not a close question with respect to any of the three agreements. *See id.* at 11 ("there can be no serious argument" that the terms of the first agreement "are not properly considered a part of an interconnection agreement"); *id.* at 12 ("there can be no real argument" that the terms of the second agreement

for its firm order commitment ("FOC") process, service intervals, new service failure rate, and facilities problems) not applicable to other carriers, in return for Covad committing to withdraw its opposition to the U S West/Qwest merger.[27] The Board found that "[e]ach of these service quality standards relates to interconnection, would have been of interest to other CLECs negotiating with U S WEST in the relevant time frame, and may still be of interest to other CLECs negotiating with Qwest today."[28]

The second agreement was between Qwest and McLeod and set going-forward rates that McLeod would pay for subscriber list information, amended the existing interconnection agreement to incorporate bill-and-keep in place of reciprocal compensation, and provided that certain interim rates would be treated as final.[29] The Board concluded that this nominal "settlement agreement" plainly "discriminated against other CLECs in favor of McLeod, at least in Minnesota."[30] The Board explained:

> Other CLECs that purchased services for resale apparently began paying higher rates on February 8, 2000, but McLeod was permitted to continue to purchase those same services at the lower interim rates for several more weeks. *It was a form of discrimination to extend this favored treatment to McLeod and not to other CLECs. This discrimination would not have been possible if the agreement had been filed with the various state commissions where it was intended to have effect (all 14 Qwest states).* Because the agreement was not filed in any state, Qwest was able to extend uniquely favorable treatment to McLeod, in return for which McLeod dropped its opposition to the Qwest-U S West merger. Thus, Qwest's failure to file McLeod Agreement No. 1 violated both the letter and the purpose of the statute and the Board's rule.

Id. at 13 (emphasis added).

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are "anything other than an interconnection agreement"); *id.* at 15 ("Qwest's own arguments establish" that the third agreement "is an interconnection agreement that must be filed with the Board").

[27] *Id.* at 9-10. For example, "U S West (and, as a result of the subsequent merger, Qwest) agree[d] to provide 90 percent of Covad's FOC dates within 48 hours of receipt of a service request for regular unbundled loop services and within 72 hours of a service request for DSL-capable, ISDN-capable, and DS-1-capable unbundled loop services." *Id.* at 10.

[28] *Id.* at 10.

[29] *Id.* at 11-12.

[30] *Id.* at 13.

The third agreement – also between Qwest and McLeod – established escalation procedures to facilitate dispute resolution and quarterly executive meetings to resolve issues relating to implementation of the interconnection agreements.[31] The Board concluded that these provisions "are logical and necessary parts of a comprehensive interconnection agreement" and that exempting these "important" provisions from the filing requirement "would undermine the pick-and-choose and nondiscrimination features of the Act."[32]

The Iowa Board further recognized that the three unfiled agreements it examined may be just the tip of the iceberg. It therefore ordered Qwest to "file any other non-filed interconnection agreements with the Board" within 60 days.[33] Last week, Qwest declined its opportunity to request a hearing with respect to the Iowa Board's conclusions. As a result, the tentative decision is now final.

The staff of the Arizona Corporation Commission ("ACC") recently confirmed the obviousness and seriousness of Qwest's unlawful and anticompetitive conduct, concluding that Qwest violated its filing obligations under section 252 by failing to file at least *25* agreements with the ACC.[34] The ACC staff made specific findings that the unfiled agreements are discriminatory:

> It is clear, for instance, through Qwest's own description of what it includes within the terms and conditions of business-to-business arrangements, *i.e.*, dispute resolution, escalation procedures, account team support, and the mechanics of provisioning and billing for ordered interconnection services, that giving favored treatment to one carrier while denying it to another, is the very type of discrimination that the Act attempts to prevent. Without the level of transparency achieved through public filing of these agreements, it would be impossible to ensure that the provisions of the Act were being carried out in a

[31] *Id.* at 14-15.

[32] *Id.* at 15.

[33] *Id.* at 21.

[34] *See Staff Report And Recommendation In The Matter Of Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 1 (June 7, 2002) ("Arizona Report") (Attachment 4 hereto).

> nondiscriminatory manner, an important prerequisite to the development of competition in Arizona . . . The Commission cannot determine the nature of, and CLECs cannot pick and choose terms, that are kept secret . . . . Staff believes that this is exactly the type of discrimination that the Act seeks to prevent.

Id. at 15-16.

The Arizona Staff particularly noted the "egregious nature of [Qwest's] infraction" with respect to seven agreements which had provisions "in which CLECs agreed that they would not participate in regulatory proceedings before the FCC," including Section 271 proceedings.[35] The Staff recognized that these agreements attempt to suppress participation by all parties for full development of the record in regulatory proceedings before the Commission are not in the public interest."[36] Arizona "Commission Chairman William Mundell said he was 'shocked and disgusted' when he read the clauses in question. 'It's very troubling that Qwest would have competitors sign interconnection agreements to not participate in the 271 process,' he said. 'Whether it's one (competitor) or 50, the fact that a competitor has to sign an agreement not to participate goes to the heart of the process,' Mundell said."[37]

ACC Staff also recognized that it may not have identified all of Qwest's secret agreements.[38] An ALJ recently heard arguments on whether the ACC should proceed to a full hearing on this matter. And two of the three Arizona commissioners have now properly recognized that the only possible course in light of Qwest's secret deals misconduct is to suspend further consideration of Qwest's section 271 proceeding, pending further investigation: "It is clear to me that continuing with our Section 271 review must be suspended until the Commission

[35] *Id.* at 1-2, 19.

[36] *Id.* at 1; *see also id.* at 16 ("[P]rovisions in agreements which gave favored treatment in exchange for a party's agreement not to participate in proceedings before this Commission . . . are of extreme concern to the Commission and detrimental to the public interest").

[37] Oscar Abeyta, *Probe Will Slow Qwest's Arizona Call Application*, Tucson Citizen, June 20, 2002, at 1B.

can determine to what extent the agreements in question may have compromised the entire Section 271 review."[39]

In a blatant effort to preempt these ongoing state investigations, and to dodge the Section 271 implications of its pervasive discrimination, Qwest filed a request for a declaratory ruling with the Commission with respect to the scope of its filing obligations under section 252(a)(1).[40] Specifically, Qwest requested "guidance" as to "which types of negotiated contractual arrangements between ILECs and CLECs are subject to the mandatory filing and 90-day state commission pre-approval requirements of Section 252(a)(1) – and which are not." *Id.* at 3. This petition is a frivolous attempt by Qwest to seek cover for its unlawful failure to file secret, discriminatory agreements and to avoid the fatal section 271 consequences of that misconduct. All commenters uniformly opposed Qwest's Petition, and AT&T and other commenters demonstrated that Qwest's proposed narrow construction of section 252(a)(1) flies in the face of the statute's plain language.[41] In addition, several commenters provided additional evidence of Qwest's discriminatory and anticompetitive practices.[42] In short Qwest's Petition for Declaratory Ruling is nothing more than a transparent attempt to derail or distract the enforcement efforts that its own misconduct has spawned.

[38] *See id.* at 20 n.4 ("These recommendations should also apply to agreements subsequently submitted by CLECs (in response to Staff data requests) which Qwest may not have filed and which Staff determines should have been filed by Qwest under Section 252(e).")

[39] *See* Letter of Commissioner Jim Irvin to All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 27, 2002) (Attachment 1 hereto); *see also* Letter of Commissioner Marc Spitzer to All Parties, Docket Nos. RT-00000F-02-0271 & T-00000A-97-0238 (June 26, 2002) ("[T]he question I posed in my initial letter must first be answered before the Commission moves forward on the remaining issues regarding Qwest's entry into the long distance market.") (Attachment 5 hereto).

[40] *See Petition For Declaratory Ruling Of Qwest Communications International, Inc.*, WC Docket No. 02-89 (filed Apr. 23, 2002).

[41] *See Opposition of AT&T Corp. To Petition For Declaratory Ruling Of Qwest Communications International Inc., WC Docket No. 02-89*, at 6-10 (filed May 29, 2002).

[42] *See* Comments of Touch America, Inc. at 2 n.2, 4-6 & n.4, 9; Comments of PageData.

Regardless of the Commission's ruling on the Section 252 filing requirement issues raised in the declaratory ruling proceeding, Qwest has engaged in blatant discrimination against CLECs, in direct violation of its nondiscrimination obligations under the Act. The Commission cannot lawfully disregard that discrimination in this proceeding.

B. The Secret Deals Foreclose Any Finding That Qwest Has Met Its Checklist Or Public Interest Burdens.

The mounting evidence of Qwest's secret, discriminatory agreements with selected CLECs precludes any finding that Qwest has satisfied its obligation to provide nondiscriminatory access to UNEs as required by Checklist Item 2. Indeed, it is hard to imagine a more blatant example of providing discriminatory access to UNEs. As the Iowa Utilities Board and Arizona Commission Staff concluded, Qwest has given a few CLECs preferential UNE rates and superior access to UNEs to the competitive detriment of all others. Qwest further engaged in a deliberate campaign to keep these deals secret from regulators by requiring the favored CLECs to promise not only to hide this discrimination from regulators and other carriers, but also to keep silent about their own problems with Qwest.

This discrimination impedes competitive entry by the disfavored CLECs. Not only do they face an entrenched monopolist that is unwilling to provide them with commercially reasonable access to its bottleneck facilities, but the favored secret deal competitors do not face these overwhelming disadvantages. Whereas the favored CLECs have a Qwest representative to assist them in navigating Qwest's inadequate OSS, other competitive carriers do not. Even where the disfavored competitive carriers can succeed in placing orders, they must pay excessive rates for UNEs and interconnection. This not only puts them at an enormous competitive disadvantage against Qwest, but also against other CLECs that are able to purchase access to

Qwest's network at lower rates.[43] And when the inevitable problems arise in dealing with a supplier that has no interest in the emergence of local competition, most CLECs must resort to costly and time consuming litigation to vindicate their rights under the Act. Those CLECs that are parties to the secret deals, in contrast, were entitled to expedited dispute resolution with Qwest.[44]

The magnitude of this discrimination precludes any finding that Qwest's applications satisfy the public interest. By favoring a few at the expense of the many, Qwest has assured that it will not face ubiquitous, effective competition in any of the applicant states. Granting the applications under these conditions would, by definition, eliminate Qwest's incentives fully to open its local markets and free Qwest to leverage its monopolies to impede long distance competition on the merits.

Even without the direct evidence of Qwest's discriminatory conduct uncovered so far, the Commission could not make a reasoned determination that Qwest has satisfied its nondiscrimination obligations, for two independent reasons. First, the state investigations are ongoing and the full scope and extent of Qwest's discriminatory conduct are not yet known. Indeed, the state commissions are still trying to identify and obtain copies of interconnection agreements that Qwest improperly failed to file (and has not been forthcoming in producing voluntarily, necessitating the use of subpoenas and data requests, as in Iowa, New Mexico, and Arizona). Without the benefit of complete investigative findings from the state commissions, and without any independent analysis of the unfiled agreements (which Qwest has not submitted for Commission review), there can be no finding that Qwest has met any of the eight checklist items that expressly forbid discrimination.

[43] *See Fassett/Mercer Decl.* (discussing Qwest's inflated UNE loop rates); *Chandler/Mercer Decl.* (discussing Qwest's inflated non-loop UNE rates); *Weiss Decl.* (discussing Qwest's inflated non-recurring rates).

Second, wholly apart from the issue of the scope and extent of Qwest's discriminatory conduct and violation of filing requirements, Qwest's secret agreements taint its ability to demonstrate compliance with the other checklist requirements. This is because the evidence demonstrates that Qwest bought the silence of CLECs that may be aware of additional discriminatory conduct by Qwest and have additional information bearing on Qwest's checklist compliance. Indeed, Eschelon has now stated on the record that it was prevented by its secret agreement with Qwest from providing critical evidence regarding Qwest's failure to comply with the Act in state section 271 proceedings.[45] As a consequence, the Commission cannot rely on the *absence* of evidence of discrimination or other checklist violations in the state commission proceedings to conclude that the checklist requirements are satisfied because the record in those proceedings is suspect and incomplete. Nor, because of Qwest's anticompetitive actions, can the Commission rely on the *absence* of evidence of discrimination or other checklist violations in *this* proceeding. Accordingly, unless the Commission conducts an independent investigation of Qwest's compliance with all checklist items, the Commission cannot make a reasoned determination that Qwest has satisfied its nondiscrimination and other checklist obligations. Absent such an independent investigation, any finding by the Commission that Qwest has satisfied the competitive checklist would be reversible error.[46]

The terms of the secret deals uncovered to date also provide conclusive evidence that Qwest has not provided just, reasonable and cost-based UNEs and interconnection to CLECs. In each of the applicant states, Qwest has offered under the table UNE rates well below the rates it

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[44] *See Iowa Order* at 14-15.

[45] Letter from J. Jeffrey Oxley, Eschelon, to Bruce Smith, Colorado PUC, Docket No. 02M-260T (filed May 16, 2002) (Attachment 6 hereto).

[46] *See Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency decision is arbitrary and capricious if agency "entirely failed to consider an important aspect of the problem"); *Sprint*

relies upon to support its applications. For example, in a secret agreement with Eschelon, Qwest provided a flat 10 percent discount on all purchases made by Eschelon from Qwest.[47] Eschelon also received a significant per line per month rebate based on Qwest's inability to provide accurate daily usage information.[48] It, of course, would defy common sense to believe that Qwest has voluntarily agreed to UNE rates that are below Qwest's own forward-looking, economic costs of providing the UNEs.[49] Thus, by charging favored CLECs much less for UNEs and interconnection than the rates set by the state regulatory commissions, Qwest has through its own actions demonstrated that those rates are well in excess of TELRIC.

II. QWEST DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

Because "access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements (UNEs) under terms and conditions that are nondiscriminatory and just and reasonable, and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable," a BOC seeking Section 271 authority must demonstrate that it provides nondiscriminatory access to its OSS.[50] The Commission has repeatedly found that "nondiscriminatory access to OSS is a prerequisite to the development of meaningful local

Communications Co. v. *FCC*, 274 F.3d 549, 553-56 (D.C. Cir. 2001) (remanding 271 order to Commission for failure to consider clearly relevant factor in granting application).

[47] *See* Second Amended Verified Complaint ¶ 99 (quoting paragraph 3 of *Confidential Amendment to Confidential/Trade Secret Stipulation*, Nov. 15, 2000).

[48] *Id.* at ¶ 110.

[49] *Local Competition Order* ¶ 679 (TELRIC seeks to "replicate[], to the extent possible" the "costs . . . incurred by the incumbents" in providing "interconnection and unbundled elements.") If Qwest were to price UNEs below TELRIC, it would place itself at a significant competitive disadvantage vis-a-vie the competitive carriers obtaining below-cost access to its network.

[50] *New Jersey 271 Order*, App.C ¶ 26.

competition," and that absent such access, CLECs "will be severely disadvantaged, if not precluded altogether, from fairly competing" in the local exchange market.[51]

Qwest falls well short of meeting its obligation to provide nondiscriminatory access. For example, Qwest's current change management process – which has been "redesigned" in recognition of the patent inadequacies of its predecessor – still is not complete, and the "redesigned" CMP is so recent in nature that Qwest cannot establish the "pattern of compliance" with the CMP that the Commission requires of every Section 271 applicant. Moreover, Qwest fails to provide CLECs with a suitable test environment that gives them a meaningful opportunity to compete.

Nor does Qwest provide CLECs with nondiscriminatory access to OSS functions. Qwest's OSS, for example, are plagued by high rates of order rejections and excessive reliance on manual processing of electronically submitted orders. These problems are exacerbated by the manual errors made by Qwest personnel on CLEC orders, which increase the likelihood of errors and delays in provisioning. CLECs cannot even verify whether they are being charged accurately for the (inferior) service that they are receiving from Qwest, since Qwest has not provided them with wholesale bills that can be readily audited and verified.

As described below, Qwest's own performance data – which is the most probative evidence of whether Qwest is meeting its OSS obligations – show that Qwest is not providing parity of OSS to its OSS.[52] Even if such data were unavailable, however, the third-party testing

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[51] *See, e.g.*, *New Jersey 271 Order*, App. C ¶ 25; *Georgia/Louisiana 271 Order*, App. D ¶ 25; *New York 271 Order* ¶ 83.

[52] The Commission has consistently held that the most probative evidence that a BOC is providing nondiscriminatory access to its OSS is "actual commercial usage." *New Jersey 271 Order*, App. C ¶ 31; *Georgia/Louisiana 271 Order*, App. D ¶ 31; *Texas 271 Order* ¶ 98; *New York 271 Order* ¶ 89; *Michigan 271 Order* ¶ 138.

of Qwest's OSS by KPMG Consulting ("KPMG") does not support Qwest's claim that it is providing nondiscriminatory access.

The KPMG test is of no real world value because the results were based on input from CLECs that received preferential secret deals treatment from Qwest that is not available to other carriers.[53] KPMG has recognized that reliance on information and representations from "secret deal" CLECs may have skewed its results, but has flatly refused analyze the impact of these agreements on the test results. In these circumstances, the Commission can give no weight to KPMG's finding that Qwest "satisfied" certain evaluation criteria that KPMG used in the test.[54]

Even leaving aside the fact that the results of the KPMG test overstate Qwest's actual performance, those results, in fact, undermine Qwest's claims of compliance with its OSS obligations. KPMG's conclusions make clear that Qwest cannot show that it has adhered to its change management process over time, and or that it has established a suitable test environment. The KPMG report also reveals a number of flaws in Qwest's performance – including errors in manual processing, inadequate provision of status notices, and untimely installations – that deny parity of access to CLECs. Thus, if (as Qwest asserts) the Commission should accord "substantial deference" to KPMG's conclusions (Application at 112), Qwest cannot reasonably be found to be providing nondiscriminatory access.

A. Qwest Has Neither Established, Nor Adhered To, an Adequate Change Management Process.

Adequate change management processes are essential to viable local competition. "Without a change management process in place, a BOC can impose substantial costs on competing carriers simply by making changes to its systems and interfaces without providing adequate testing opportunities and accurate and timely notice and documentation of the

[53] Finnegan/Connolly/Menezes Decl. ¶¶ 16-17.

changes."[55] Thus, in determining whether a BOC has given CLECs a meaningful opportunity to compete, the Commission "will give substantial consideration to the existence of an adequate change management process and evidence *that the BOC has adhered to this process over time*."[56]

Qwest has neither established, nor complied with, an effective change management process. Because its "redesigned" CMP is in its infancy, Qwest cannot establish that it has "adhered to this process over time." Moreover, as KPMG found in its testing, Qwest has not provided CLECs with a stable testing environment that mirrors, but is separate from, the production environment.

1. Qwest Has Not Shown That It Has Adhered To an Adequate Change Management Process Over Time.

In determining whether a change management plan offers a meaningful opportunity to compete, the Commission evaluates, *inter alia*, "whether the BOC has demonstrated a pattern of compliance with the plan."[57] As the Staff of the Arizona Corporation Commission recently stated, the compliance issue "is critical because it is one thing to have a process that looks good on paper versus a process that works in practice."[58]

Qwest cannot show that it has adhered to its current CMP "over time," or otherwise establish a "pattern of compliance" with that process, because the process is too recent – and not even complete. The current CMP is the result of a "redesign" process that began in July 2001, and continues today.[59] Although most of the provisions of the redesigned CMP have now been

[54] *Id.* ¶¶ 17-19.

[55] *Georgia/Louisiana 271 Order*, App. D ¶ 41.

[56] *Id.*, App. D ¶ 40; *Texas 271 Order* ¶ 106; *New York 271 Order* ¶ 102 (emphasis added).

[57] *Georgia/Louisiana 271 Order*, App. D ¶ 42.

[58] Filip Decl., Exh. DFL-CMP-10, at 28 (¶ 86) (ACC Staff supplemental report dated May 7, 2002).

[59] In June 2001, Qwest requested that CLECs participate in a process for "redesigning" its change management process (then known as the Co-Provider Industry Change Management Process, or "CICMP") after two separate

agreed to, at least one major issue – voting procedures under the CMP – has still not been resolved.[60] Other provisions were agreed to only within the last few weeks, and some of them have not yet been implemented.[61] The provisions governing the advance notice required for releases, and other critical provisions of the "redesigned" CMP, were implemented only on or after April 1, 2002.[62]

Because the "redesigned" CMP is still in its infancy, Qwest cannot establish that it has adhered to that process "over time." None of Qwest's major releases has been fully implemented under the current provisions of the "redesigned" CMP on an end-to-end basis. Qwest precluded KPMG from conducting such end-to-end testing even on the CMP's newly implemented prioritization and "packaging" processes, by requesting that KPMG conduct no further testing.[63]

Qwest boasts that it "has implemented every aspect of the redesigned [CMP] as soon as it has been agreed upon."[64] Merely implementing a provision of the CMP, however, does not establish compliance with that provision "over time." Moreover, Qwest's description of the percentage of "milestones" that it allegedly has met provides no indication of its compliance with the CMP. In the first place, Qwest has not even fully described the "milestones" that it cites, or

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third-party testers found, and the CLECs demonstrated in Section 271 proceedings, that the CICMP was seriously defective. Finnegan/Connolly/Menezes Decl. ¶ 33-34. Obviously recognizing the flawed nature of the CICMP, Qwest disavows any reliance on the CICMP for any purpose in this proceeding, including the issue of whether it has established a "pattern of compliance." Application at 133-134 n.63, 143 n.69.

[60] Finnegan/Connolly/Menezes Decl. ¶ 36-39.

[61] *Id.* For example, the parties agreed to a manual workaround procedure for the redesigned CMP only on June 17-18, 2002 – after Qwest filed its Application. Other provisions of the CMP, such as the "exception" process for requesting a deviation from the CMP's requirements and a process for posting product or process changes, had been agreed to, but not implemented, at the time of the filing. Finnegan/Connolly/Menezes Decl. ¶ 38.

[62] *Id.* ¶¶ 39.

[63] *See* Finnegan/Connolly/Menezes Decl. ¶ 44. In denying KPMG an opportunity to conduct further testing on an end-to-end basis, Qwest ignored the admonition of the Common Carrier Bureau to Qwest's predecessor, US WEST, that prior to filing a Section 271 application it should allow an independent evaluator to conduct "a review of the BOC's ability to implement at least one significant software release." Letter from Lawrence E. Strickling (Chief, Common Carrier Bureau) to Nancy E. Lubamersky (US WEST) dated September 27, 1999, at 2.

[64] *See* Application at 143-146.

provided the basis for its percentages of "milestones" met. And Qwest has refused to provide back-up data for its "milestones," notwithstanding AT&T's request that it do so.[65]

Furthermore, even based on its limited description, Qwest's "milestones" are plainly an artificial, manipulative attempt by Qwest to establish a pattern of compliance. The "milestones" appear to represent every step that Qwest takes (or is required to take) under the "redesigned" CMP, including tasks that are purely administrative or ministerial in nature.[66] Most of them reveal little, if anything, about the extent of Qwest's compliance with the CMP. For example, one of Qwest's "milestones" – whether Qwest has held regular meetings under the CMP – provides no indication of the actual effectiveness of the meeting itself, or of Qwest's actual conduct at the meetings (including its failure to produce subject matter experts at the meeting who are sufficiently knowledgeable to address particular change requests).[67]

The inability of Qwest to establish compliance with the "redesigned" CMP is confirmed by KPMG's Final Report. KPMG concluded in its report that it was not able to verify whether Qwest adhered to the redesigned CMP, because many of whose provisions were "either too new, or not yet mature enough to evaluate."[68] KPMG based its conclusion on three exceptions that it opened during its test, which found that Qwest was *not* adhering to the provisions of the CMP. KPMG closed each of these exceptions as "unresolved" or "inconclusive" because, as indicated in its report, the various provisions of the CMP that it would have been required to observe for compliance had not yet been adopted, or had been adopted only recently – thereby precluding

[65] Finnegan/Connolly/Menezes Decl. ¶¶ 50-51.

[66] The "milestones," for example, include whether Qwest holds regular CMP meetings, sends an acknowledgment to an originator of a change request, and posts a change request to its web site. Finnegan/Connolly/Menezes Decl. ¶ 47. Since it appears that Qwest has included every step or action that it takes (or is required to take) under the "redesigned" CMP as a "milestone," it is hardly surprising that Qwest describes "a possible 812 milestones" alone for 127 OSS interface change requests, and "a possible 301 milestones" for 36 product/process change requests. *Id.* ¶ 48.

[67] *Id.*

KPMG from making any assessment.[69] In the case of one exception, which involved the newly adopted prioritization and packaging processes of the CMP, Qwest expressly requested that KPMG conduct no further testing.[70]

Because KPMG issued its report – including its conclusion that it was unable to evaluate Qwest's compliance with the CMP because of its recent nature – only two weeks before Qwest filed its Application, that conclusion should be dispositive here. Apparently recognizing this fact, Qwest argues that the various components of the "redesigned" CMP that KPMG was unable to evaluate "are outside what the [Commission] has required for Section 271 purposes" and "do not have implications for section 271 approval." Application at 146-147. Qwest's argument, however, is flatly contrary to the Commission's precedents.[71]

Like KPMG, Cap Gemini Ernst & Young – which conducted third-party testing of Qwest's OSS in Arizona – concluded in May that "insufficient time has passed since the inauguration of the redesign process to determine whether Qwest has established a pattern of compliance with its redesigned CMP over time."[72] The inability to evaluate Qwest's compliance

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[68] *Id.* ¶ 52 (quoting KPMG Final Report).

[69] *Id.* ¶¶ 52-67.

[70] *Id.* ¶¶ 66-67. Qwest's claim that it "complied with the CMP prioritization procedures" for the IMA 10.0 and 11.0 releases is incorrect. Application at 146. As KPMG found, Qwest improperly bypassed those procedures for both releases by misclassifying certain of its own change requests as regulatory change requests (which resulted in preferential treatment of the requests), over the objections of the CLECs.

[71] For example, although Qwest asserts that the Commission has never required an RBOC to have a change management process for product/process changes, it admits that the "product/process CMP" includes manual processes – which the Commission has included within its definition of "OSS systems" subject to the change management process. *Georgia/Louisiana 271 Order*, App. D ¶ 41; *Ameritech Michigan Order* ¶ 134 (including, within definition of OSS, all "manual functions a BOC has undertaken to provide access to OSS"). Similarly, despite Qwest's assertion that prioritization of regulatory changes is not within the scope of the Commission's review of a CMP, the Commission has not only included changes mandated by regulators within its concept of change management, but has also reviewed prioritization processes as part of its analysis of the adequacy of a change management plan. *See, e.g., Georgia/Louisiana 271 Order*, App. D ¶ 41 (stating that changes subject to change management process include "changes that may be mandated by regulatory authorities"); *id.*, ¶¶ 183-184, 193 and *New York Order* ¶¶ 106, 115, 124-125 (evaluating prioritization process of CMP of Section 271 applicant).

[72] Finnegan/Connolly/Menezes Decl. ¶ 68; Filip Decl., Exh. DLF-CMP-9 at 31.

was cited by the Staff of the Arizona Corporation Commission as a "critical" and "important" exception to its finding that the CMP otherwise met the requirements of Section 271.[73]

2. Qwest Has Not Provided an Adequate Test Environment To CLECs

An important factor in the Commission's analysis of the adequacy of a BOC's change management process is whether the BOC has provided a "stable testing environment that mirrors the production environment and is physically separate from it."[74] Neither of the testing environments offered by Qwest meets this requirement.

Qwest's "Interoperability Environment" is inadequate because, as Qwest admits, it is not separate from the production environment. *See* Application at 136 (Interoperability Environment "uses real production legacy systems"). Furthermore, as Qwest acknowledged last year in its "White Paper" on its Stand-Alone Test Environment ("SATE"), the Interoperability Environment does not mirror the production environment, because responses to CLEC transactions are returned manually even if they would be returned in automated form in the production environment.[75] It was precisely because of these and other deficiencies in the Interoperability Environment that Qwest agreed to develop SATE as an alternative test environment.[76]

SATE, Qwest's alternative test environment, is equally inadequate. First, SATE is not a stable testing environment – which the Commission has defined as an environment where "no changes by the BOC are permitted after the testing period commences." *Texas 271 Order* ¶ 132 n.350; *New York 271 Order* ¶ 109 n.301. Qwest does not "freeze" both the version of a release

[73] Finnegan/Connolly/Menezes Decl. ¶ 68; Filip Decl., Exh. DLF-CMP-10 at 28 (¶ 86).

[74] *Georgia/Louisiana 271 Order* ¶ 187 (quoting *Texas 271 Order* ¶ 132); *see also Georgia/Louisiana 271 Order* ¶ 179.

[75] Finnegan/Connolly/Menezes Decl. ¶¶ 85-90.

in SATE and the implemented version of the release so that changes cannot be made to one without making the same changes to the other. Thus, the test release may differ from the release that is actually implemented.[77]

Second, SATE fails to mirror the production environment. SATE supports only a subset of all of the products and transactions that are available in the production environment. As a result, CLECs cannot test every product that they desire to offer before offering the products in actual commercial production.[78] SATE also fails to mirror the production environment because the responses that it returns to CLECs may be different from those that would be returned in actual production, due primarily to the fact that the databases in SATE contain only some of the data that is in Qwest's actual production systems.[79] Finally, SATE does not support "real world scenario testing" because – unlike the production environment – CLECs using SATE are required to choose a "path" for the response that will determine the time within which it is returned.[80]

Because of these deficiencies, KPMG issued two exceptions, both of which it closed as "unresolved" after Qwest requested that no further testing be conducted. As a result, KPMG found that Qwest did *not* satisfy its evaluation criterion of whether "[a] functional test environment is made available to customers for all supported interfaces."[81]

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[76] When KPMG issued an exception noting these deficiencies in the Interoperability Environment, Qwest responded that it had "no plans to enhance the Interop[erability] environment," but instead would "continue to enhance SATE." Finnegan/Connolly/Menezes Decl. ¶ 88.

[77] Finnegan/Connolly/Menezes Decl. ¶ 92.

[78] *Id.* ¶ 93. SATE has also previously lacked flow-through capability, thus precluding CLECs from determining whether their test orders would flow through in actual production. Although Qwest asserts in its Application that it has now implemented flow-through capability in SATE in all three of its regions, that implementation was completed only on May 20, 2002, and was not tested by KPMG, due to the implementation schedule and Qwest's request that no further testing be conducted. *Id.* ¶ 98.

[79] *Id.* ¶¶ 103,106.

[80] *Id.* ¶ 103.

[81] *Id.* ¶ 100.

Qwest does not dispute that SATE contains these deficiencies, but argues (at 139-41) that they are not "relevant" or "significant."[82] The Commission's precedents, however, do not support Qwest's position. For example, although the Commission held in the *Texas 271 Order* that the lack of flow-through capability in SWBT's test environment did not preclude a finding that the test environment satisfied the requirements of section 271, the Commission based its decision on the "totality of the circumstances." Thus, contrary to Qwest's assertions, the Commission did not unequivocally hold that BOCs are not required to implement flow-through capability in their test environments.[83] Moreover, SWBT's test environment did not suffer from the deficiencies (aside from lack of flow-through capability) in SATE.[84]

Qwest's other attempts to defend the deficiencies in SATE are equally baseless. Contrary to Qwest's assertions, its recent implementation of flow-through capability in SATE will not cure the failure of SATE's responses to mirror responses in the production environment, since the two are entirely different problems. Nor will the implementation of flow-through capability affect the requirement that CLECs choose "paths" for their responses.[85] Finally, Qwest's

[82] Qwest attempts to rely on the data that it has reported under PID PO-19 as evidence that SATE reflects the production environment. Application at 138. However, the data reported by Qwest under this PID provides no basis for Qwest's position, because Qwest has improperly calculated the data by comparing the responses received in SATE with the responses that a CLEC *should* receive in the production environment – not with the responses that a CLEC *did* receive.

[83] *See Texas 271 Order* ¶ 138.

[84] Finnegan/Connolly/Menezes Decl. ¶ 105.

[85] *Id.* ¶ 104. In addition to failing to offer an adequate test environment for pre-ordering, ordering, and provisioning functions (for which the Interoperability Environment and SATE are used), Qwest fails to offer a suitable test environment for maintenance and repair functions. As KPMG found, the testing environment that Qwest offers for its "EB-TA" maintenance and repair interface is deficient because it is not separate from the actual production environment. As a result of this lack of separation, test transactions could invade the production processes and result in erroneous dispatches of technicians. Finnegan/Connolly/Menezes Decl. ¶¶ 115. Qwest's rationalization that it is not required to meet the Commission's criteria for a suitable test environment in the context of maintenance and repair functions is unsupported by Commission precedent. CLECs need a stable test environment that mirrors, but is separate from, production in the context of maintenance and repair interfaces for the same reason that such an environment is needed in the context of pre-ordering and ordering: to ensure that they "are capable of interacting smoothly and effectively with a BOC's OSS," and that their transactions will not "succeed[] in the testing environment but fail[] in production." *See Georgia/Louisiana 271 Order* ¶ 187; *Texas 271 Order* ¶ 132; Finnegan/Connolly/Menezes Decl. ¶¶ 107.

assertion that any differences in responses between SATE and the commercial environment are "intended," but do not "affect a CLEC's ability to test its code" (Application at 139) simply misses the point. Because of the differences in responses as between SATE and the production environment, SATE provides no assurance that the same results will be achieved in the production environment.

Qwest further suggests (at 139-40) that the failure of SATE to reflect the production environment does not adversely affect CLECs, because Qwest's documentation describes any differences between SATE and production, and CLECs may seek elimination of those differences through such procedures as the submission of a change request. Qwest is incorrect. As KPMG has stated, documentation of differences between SATE and actual production "does not substitute for a test environment that mirrors the transactional behavior of the production environment."[86] In addition, requiring CLECs to submit change requests to add products to SATE is not only unreasonable (given the cumbersome and time-consuming procedure involved) but wholly unwarranted, since there is no reason why SATE should differ from actual production.[87]

[86] Finnegan/Connolly/Menezes Decl. ¶ 99.

[87] *Id.* ¶ 101. Qwest cites the recent evaluation of SATE by Hewlett-Packard ("HP") in Arizona as proof that "SATE is adequate to meet the Section 271 requirements." Application at 140-141. The HP evaluation, however, was insufficient to demonstrate that SATE is adequate. HP did not conduct "production mirror testing" of Qwest's IMA Release 9.0, even though HP concluded in a previous evaluation that there were "noteworthy discrepancies related to business rules consistency between the SATE and production systems." Finnegan/Connolly/Menezes Decl. ¶ 109. HP also did not conduct comprehensive testing of the "VICKI" system that Qwest implemented to provide automated responses in SATE, or of the limited flow-through capability that Qwest had implemented in SATE. *Id.* ¶¶ 110-111. If anything, the HP evaluation showed that SATE is *not* adequate, since HP found that it could not conclude that SATE returns consistent messages, in view of the numerous errors that it had observed in the responses. *Id.*

B. Qwest's Interfaces Fail To Provide Nondiscriminatory Access.

In addition to the inadequacy of its change management process, including the absence of a suitable test environment, Qwest does not provide interfaces that provide CLECs with access to OSS functions equivalent to that which Qwest enjoys in its own retail operations.

Pre-Ordering. Qwest does not provide nondiscriminatory access to pre-ordering functions, even though the Commission has stated that "it is critical that a competing carrier be able to accomplish pre-ordering activities in a manner no less efficient and responsive than the incumbent."[88] First, Qwest has not shown that it provides CLECs with the ability to integrate EDI pre-ordering and ordering functions successfully – as it must, in order to meet the requirements of section 271.[89] In contrast to previous (and successful) section 271 applicants, Qwest presents no evidence that real-world CLECs using EDI have attained successful integration. Instead, Qwest simply relies on third-party testing by Hewlett-Packard and letters presented from two companies that design EDI interfaces for CLECs.[90] Such evidence is plainly insufficient. Moreover, HP's test report confirms that a CLEC would find it unreasonably difficult, if not impossible, to integrate EDI pre-ordering and ordering functions successfully.[91]

Second, Qwest fails to provide nondiscriminatory access to loop qualification information, because it fails to provide CLECs with access to its LFACS system and all other databases that contain such information.[92] The "loop qualification tools" that Qwest provides (Application at 115-116) do not provide CLECs with all of the information to which Qwest has

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[88] *New Jersey 271 Order* ¶ 33; *Georgia/Louisiana 271 Order*, App. D ¶ 34.

[89] *See, e.g., Georgia/Louisiana 271 Order* ¶ 119.

[90] Application at 116; Finnegan/Connolly/Menezes Decl. ¶¶ 122.

[91] *Id.* ¶¶ 123-124.

[92] When a BOC has compiled loop qualification information for itself, "it is required to provide requesting competitors with nondiscriminatory access to loop information within the same time frame whether it is accessed manually or electronically." *Georgia/Louisiana 271 Order* ¶ 114. That obligation applies whenever "such information exists anywhere in [the BOC's] back office and can be accessed by any of [the BOC's] personnel," regardless of whether the BOC's retail arm has access to that data. *Kansas/Oklahoma Order* ¶ 121.

access, such as information on loop conditioning and spare facilities.[93] Third, Qwest does not provide CLECs with the same ability to perform (or have performed) mechanized loop testing before actual provisioning that Qwest itself has.[94]

Fourth, Qwest has designed its systems to validate addresses using a database (PREMIS) that is different from the database (CRIS) which serves as the source of the service address information on the customer service record ("CSR"). Because CLECs use the service address information on the CSR to populate migration orders, and the address information in PREMIS and CRIS does not always match, CLECs experience order rejections not experienced by Qwest's retail operations.[95]

Finally, Qwest denies parity of access to due dates by changing due dates for CLEC orders far more frequently than for its own retail orders.[96] The higher rate of postponed installations, and the resulting customer dissatisfaction, denies CLECs a meaningful opportunity to compete.[97]

Ordering and Provisioning. Qwest also fails to provide nondiscriminatory access to ordering and provisioning functions. First, Qwest's systems are plagued by high rates of order rejections, manual processing of electronically submitted CLEC orders, and manual errors.[98] Tellingly, Qwest's Application fails to discuss rejection rates, or the percentage of all electronically submitted orders that actually flow through to its service order processor

[93] Finnegan/Connolly/Menezes Decl. ¶¶ 127-128.

[94] *Id.* ¶¶ 130-135. CLECs need the ability to perform MLTs before a loop is provisioned in order to ensure the accuracy of the loop qualification information to which they have access. Qwest has performed "pre-order" MLTs in its retail operations in the areas where it would operate its "Megabit" service. *See id.*

[95] Finnegan/Connolly/Menezes Decl. ¶¶ 136-138.

[96] *Id.* ¶¶ 139-141.

[97] *Id.* ¶ 141.

[98] Finnegan/Connolly/Menezes Decl. ¶¶ 145-174.

("SOP").[99] Qwest has good reason for its silence. Qwest's systems reject nearly one-third of orders submitted by CLECs using the electronic Qwest interfaces, and those rejections result in delays in the provisioning of service to CLECs' customers, and increase the CLECs' costs.[100]

Qwest's total flow-through rates (*i.e.*, the rate of *all* non-rejected, electronically-submitted LSRs that flow through to the SOP without manual intervention) are equally abysmal. Depending on the type of order and the particular interface used, between 25 and 65 percent of all electronically submitted LSRs in Qwest's region fall out for manual processing.[101] As shown below, the overall rates of manual processing in the five States that are the subject of Qwest's Application ranged from 39.6 percent to 73.1 percent in April 2002.

State	Percentage of Total LSRs Manually Processed (April 2002)
Colorado	45.7%
Idaho	39.6%
Iowa	63.0%
Nebraska	53.1
North Dakota	73.1%

Finnegan/Connolly/Menezes Decl. ¶ 151.[102]

Manual processing, by nature, increases the likelihood of delays and errors in provisioning.[103] And KPMG's third-party testing established that Qwest *does* commit numerous errors in manually processing orders. Qwest, for example, cited human errors and/or inadequate training as a source of various problems noted in 75 exceptions and observations that KPMG

[99] *See id.* ¶¶ 147, 151; Application at 122-123.

[100] *Id.* ¶ 149.

[101] Finnegan/Connolly/Menezes Decl. ¶ 152. Qwest's Application discusses only one of its two measures of flow-through – PO-2B, which measures the percentage of all LSRs that Qwest has designed to flow through that actually flow through to the SOP without manual intervention. Qwest fails to mention the second flow-through measure (PO-2A), which is the rate of *all* electronically-submitted LSRs that flow through to the SOP without manual intervention, regardless of whether they are designed to flow through. *See* Application at 122-123; Finnegan Decl. ¶¶ 150-151.

[102] Qwest cannot validly attribute the high rates of rejection and manual fall-out to "CLEC errors." For example, even if a CLEC follows Qwest's business rules, its orders may be rejected if the rules are inaccurate, unclear, or incomplete. Finnegan/Connolly/Menezes Decl. ¶ 150 n.104. Moreover, beginning with March 2002 data, the flow-through rates reported by Qwest exclude all orders that fall out for manual processing due to CLEC errors. *Id.*

[103] *Id.* ¶ 145.

issued during the ROC test.[104] Despite Qwest's assurance that it had implemented "training and quality assurance measures" to correct the human errors and inadequate training, KPMG continued to find manual errors on approximately 15 percent of the orders that it reviewed, resulting in KPMG's issuance of another observation at the end of May (Observation 3110). Although KPMG found that further retesting was needed, Qwest requested that the observation be closed, rather than allow a retest.[105] KPMG's Final Report thus expressed concerns about the "numerous problems with manually handled orders" during the test, and urged regulators to closely scrutinize Qwest's flow-through performance in light of those problems.[106]

The manual error problems found by KPMG are compounded by the current inability of regulators to monitor the accuracy of Qwest's manual processing on a regular basis. To date, Qwest has not been required to report data on service order accuracy, or on the accuracy of the rejection notices that it sends manually to CLECs, in its performance reports.[107] Although KPMG recommended the adoption of both metrics, Qwest agreed only to develop a PID for service order accuracy – which, as proposed, is patently inadequate because it does not even cover codes that CLECs use on virtually every LSR.[108] Given KPMG's findings regarding the manual error problem, and the lack of established metrics to evaluate the adequacy of Qwest's manual processing performance, Qwest cannot show that it gives CLECs a meaningful opportunity to compete.[109]

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[104] *Id.* ¶ 163.

[105] *Id.* ¶¶ 166-169.

[106] *Id.* ¶ 161.

[107] *Id.* ¶ 171.

[108] *Id.* ¶¶ 172-173.

[109] The self-serving "service order accuracy data" that Qwest includes in its Application provide no reliable basis for concluding that its manual processing of CLEC orders is adequate. *See* Notarianni/Doherty Decl. ¶ 356. Such data were developed unilaterally by Qwest, not under an established PID. Moreover, Qwest has provided no description of the methodology that it used to calculate the data, the volume of LSRs that it used in its calculations, or the field codes that it reviewed. Finnegan/Connolly/Menezes Decl. ¶ 174.

Second, Qwest does not provide the accurate, complete, and timely order status notices that CLECs need in order to have a meaningful opportunity to compete.[110] Both KPMG's test and Qwest's reported performance data show that Qwest is not providing timely jeopardy notices to CLECs on a nondiscriminatory basis.[111] Indeed, Qwest's systems for returning status notices are so flawed that, for some of its orders, AT&T has received a firm order confirmation ("FOC"), followed by a rejection notice – a sequence that should never occur.[112] In other instances, Qwest's systems have returned rejection notices that never should have been issued, because there was no deficiency in the order.[113] These problems put CLECs at a distinct disadvantage with the efficient, fully automated systems that Qwest uses in its retail operations.[114]

Third, Qwest does not provision CLEC orders on a nondiscriminatory basis. KPMG's Final Report, and Qwest's own reported data, show that the provisioning intervals for UNE-P and resale orders are longer than those for Qwest's own retail orders.[115] Qwest has also shown itself unable to provision orders for dark fiber and EELs adequately.[116]

Fourth, Qwest's unreasonably long process for updating customer service codes ("CUS Codes") in customer service records denies CLECs a meaningful opportunity to compete.[117] The

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[110] *See, e.g., New Jersey 271 Order* ¶ 93 (describing timely receipt of status notices as "an important aspect of a competing carrier's ability to serve its customers at the same level of quality as a BOC").

[111] Finnegan/Connolly/Menezes Decl. ¶¶ 179-182.

[112] *See* Finnegan/Connolly/Menezes Decl. ¶¶ 183-187. When AT&T brought this problem to Qwest's attention, Qwest stated that it had sent a rejection notice because it had found an error in the order after it transmitted the FOC. In response to AT&T's complaints, Qwest instituted a "workaround" under which it now manually returns a *jeopardy* notice, rather than a rejection notice, after sending a FOC. This "workaround," however, requires AT&T to expend time and resources to resolve the issues raised by the jeopardy notice, and (like Qwest's previous practice of sending a jeopardy notice) raises the risk of order cancellations. *Id.* ¶¶ 185-187.

[113] *Id.* ¶¶ 188-189.

[114] *Id.* ¶ 189.

[115] *Id.* ¶¶ 190-193.

[116] *Id.* ¶¶ 194-200.

[117] *Id.* ¶ 201-206.

delays in updating CUS codes effectively preclude CLECs from submitting any further orders on a customer's account for days, thereby preventing CLECs from promptly honoring requests for additional services from newly-acquired customers.[118]

Maintenance and Repair. As part of its OSS obligations, Qwest is required to provide access to maintenance and repair functions.[119] Qwest, however, has not done so. For example, repeat trouble report rates for CLEC customers using the UNE-P where no dispatch is required have been higher than those for Qwest's own retail customers.[120] Moreover, as KPMG found, Qwest does not process CLECs' transactions to modify trouble reports in a timely manner; Qwest's rate of successful repairs is inadequate; and Qwest does not maintain accurate repair records for CLECs.[121] Each of these problems denies CLECs a meaningful opportunity to compete.[122]

Billing. Qwest has not provided the nondiscriminatory access to billing functions that CLECs need in order to enable them to provide accurate and timely bills to their customers.[123] Specifically, Qwest has not met its obligation to provide "complete, accurate, and timely" daily usage files ("DUFs") or wholesale bills to CLECs.[124]

[118] *Id.* ¶¶ 202-204. The delays that are caused by the lengthy CSR updating process appear to have been reduced to some extent by a "workaround" that Qwest implemented (without advising AT&T, which learned of the "workaround" only through happenstance in January 2002). *Id.* The workaround, however, requires AT&T to expend additional time and resources, without any assurance from Qwest that (like other RBOCs) it will implement an automated process that updates CUS Codes in real time. *Id.*.

[119] *Georgia/Louisiana 271 Order*, App. D ¶ 38; *New York 271 Order* ¶ 212.

[120] Finnegan/Connolly/Menezes Decl. ¶ 208

[121] *Id.* ¶¶ 209-211, 214.

[122] *Id.* ¶¶ 208-214.

[123] *See New Jersey 271 Order* ¶ 121; *Georgia/Louisiana Order*, App. D ¶ 39.

[124] *New Jersey 271 Order* ¶ 121.

Qwest's Application makes no attempt to show that its DUFs are accurate and complete. *See* Application at 128 (describing only data on timeliness of DUFs).[125] However, KPMG's test shows that Qwest's systems do not, and cannot, return complete and accurate DUFs. Qwest failed KPMG's test for DUF accuracy and completeness *five separate times* before it finally (and barely) passed on the sixth try.[126] This constant series of failures calls the reliability of Qwest's systems into serious question, particularly since it appears that Qwest has no effective mechanisms to verify DUFs for accuracy and completeness before sending them to CLECs.[127]

AT&T's carrier-to-carrier testing with Qwest in Minnesota showed similarly deficient performance by Qwest. For example, in the second (and final) phase of the test, Qwest failed to return more than 40 percent of the DUFs that it was required to send, and committed errors on more than 30 percent of the access DUFs that AT&T actually received.[128]

Similarly, the wholesale bills that Qwest provides are inadequate to meet the requirements of Section 271. Qwest "must demonstrate that it can produce a readable, auditable and accurate wholesale bill in order to satisfy its nondiscrimination requirements under checklist item 2."[129] Qwest's wholesale bills, however, are not auditable, because they are not provided using the industry standard "CABS BOS/BDT" format – which would "permit[] a wholesale carrier to use computer software to readily audit the data."[130] Instead, Qwest generates wholesale bills in its own proprietary format, using the Customer Record Information System

[125] Qwest's reported monthly performance data do not include data regarding the accuracy and completeness of DUFs. Finnegan/Connolly/Menezes Decl. ¶ 221.

[126] Finnegan/Connolly/Menezes Decl. ¶ 219.

[127] Finnegan/Connolly/Menezes Decl. ¶¶ 219-220. For example, it appears that in each of the tests that it failed, Qwest was totally unaware of the inaccurate and incomplete nature of the DUFs that it was sending to KPMG's pseudo-CLEC until it was advised of the problem by KPMG – including KPMG's first such test, when Qwest was failing to return more than 30 percent of the expected DUFs. *Id.* ¶ 220.

[128] *Id.* ¶¶ 223-224.

[129] *New Jersey 271 Order* ¶ 124; *Pennsylvania 271 Order* ¶ 22.

[130] *New Jersey 271 Order* ¶ 122 n.148.

("CRIS"). Because Qwest uses a non-industry-standard format, CLECs cannot use currently available software to audit the electronic bill.[131] As a practical matter, this renders CLECs unable to audit Qwest's wholesale bills, because attempting to use paper bills to verify the accuracy of Qwest's charges would be prohibitively expensive and time-consuming.[132]

Qwest's wholesale bills are also not accurate. In its Final Report, KPMG noted its "repeated receipt of erroneous bills" from Qwest and concluded that it was unable to determine whether Qwest was adhering to its wholesale billing processes.[133] Qwest's wholesale bills to AT&T have persistently contained errors, most of which have continued to appear in AT&T's bills even after months of discussions between Qwest and AT&T.[134] Finally, Qwest's own reported data on billing accuracy and bill completeness confirm that it falls well short of meeting its obligation to provide nondiscriminatory access.[135]

C. The Performance Data Upon Which Qwest Relies Are Inaccurate.

As this Commission has stated, "the reliability of reported data is critical" and "the credibility of the performance data must be above suspicion."[136] Qwest simply cannot satisfy this requirement.

Contrary to Qwest's claims, the Liberty PMA did not validate the accuracy of Qwest's performance data. During that audit, Liberty assumed that Qwest's raw data inputs were accurate. Based upon that assumption, Liberty then assessed whether Qwest properly applied the

[131] *Id.* ¶¶ 227-230.

[132] *Id.* ¶ 230. Although Qwest has promised to implement CABS billing for UNE-P ordering on July 1, 2002, it is premature to conclude that Qwest will do so, given its longstanding refusal to do so (even in the face of a regulatory mandate). Finnegan/Connolly/Menezes Decl. ¶¶ 232-234. Even if Qwest implements CABS on July 1, only experience will tell whether the system works properly and enables CLECs to audit Qwest's electronic wholesale bills. *Id.* ¶ 234.

[133] *Id.* ¶ 236.

[134] *Id.* ¶¶ 237-238.

[135] *Id.* ¶ 239.

[136] *Texas 271 Order* ¶¶ 428-429.

business rules governing the metrics when calculating performance results.[137] As a consequence, that audit was never intended to serve as a robust analysis of the integrity of Qwest's data.

Nor can Qwest seek refuge in the Liberty data reconciliation process as proof of the accuracy and reliability of its performance data. The Liberty data reconciliation process was extremely limited in scope and was riddled with so many deficiencies that it could not possibly be characterized as a reliable indicator of the accuracy of Qwest's data.[138] The Liberty data reconciliation involved an examination of data generated more than a year ago by three CLECs for seven measures covering three products. *No* data were examined from three of the states included in Qwest's Application.[139]

The Liberty data reconciliation process was also procedurally and substantively flawed. The study objective inappropriately placed the burden on the CLECs to prove that Qwest's data were inaccurate. Worse yet, Liberty failed to engage in military style testing and prematurely closed observations without determining whether Qwest had eliminated the numerous errors in its performance monitoring and reporting processes that Liberty had identified.[140] However, even Liberty's flawed study reveals that Qwest's performance results are not trustworthy.[141]

Similarly, the KPMG data reconciliation process conducted during the ROC OSS test lends no support to Qwest's claim that its data are accurate and reliable. For a variety of reasons, KPMG was unable to render findings on numerous test criteria. Many of these test criteria were governed by diagnostic measures as to which no parity or benchmark standard has been

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[137] Finnegan Performance Data Decl. ¶ 21.
[138] *Id.* ¶ 25-77.
[139] *Id.*
[140] *Id.* ¶¶ 15-31.
[141] *Id.*

developed.[142] As a result, KPMG simply calculated performance results without reaching a determination as to whether Qwest satisfied test criteria or whether any apparent deficiencies in its performance had any competitive impact. With respect to other test criteria, KPMG was unable to render findings because Qwest refused to be subjected to the rigors of additional testing.[143] However, even the KPMG data reconciliation process revealed that Qwest's performance monitoring and reporting processes are plagued with problems due to human error during the manual processing of orders.[144] Thus, if anything, the KPMG data reconciliation undercuts Qwest's claims of data integrity.

Qwest's reliance on the CGE&Y PMA as proof of the reliability of its data is also misplaced. The CGE&Y PMA did not test the accuracy of Qwest's raw data inputs. The test plan for that audit contemplated that the accuracy of Qwest's input data would be evaluated in the Functionality and Capacity test during which Qwest's data would be compared against that collected from the Pseudo-CLEC. However, this aspect of the test was fatally compromised because of the failure of the testers to obtain data from the Pseudo-CLEC. As a result, Qwest's input data were never validated during this audit.[145]

Moreover, even Qwest's inadequate commercial data show that CLECs are subjected to high rejection rates and low flow-through rates which increase the risk of error and provisioning delay. Qwest's own recorded data show that it fails to issue timely status notices and discriminates against CLECs during the provisioning, maintenance and repair and billing processes.[146]

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[142] *Id.* ¶¶ 78-98.

[143] *Id.*

[144] *Id.*

[145] *Id.* ¶¶ 99-108.

[146] *Id.* ¶ 108.

III. QWEST'S RECURRING AND NON-RECURRING RATES DO NOT SATISFY CHECKLIST ITEM TWO.

Qwest does not come close to satisfying its burden of proving that its UNE rates in each of the five states comply with Checklist Item Two. In four of those states, it is quite obvious that the state commissions failed to apply TELRIC principles. The UNE rates adopted by the Iowa commission, for example, were found to violate the 1996 Act by a federal court because the Iowa state commission openly refused to apply TELRIC principles. The Idaho state commission conceded that the UNE rates relied upon by Qwest in its 271 Application – which were initially adopted in 1997 using 1996 data – are so stale that there could be no finding that they are TELRIC-compliant. The Nebraska state commission simply split the baby and set UNE rates using the discredited Benchmark Cost Proxy Model and severely flawed inputs that reflected Qwest's "actual" costs. And the North Dakota state commission, which last adjudicated the UNE prices in 1997, established only "interim" rates subject to true up upon the completion of a subsequent proceeding, which has not yet taken place. Understandably, Qwest makes only a token effort to defend those rates on the merits.

Instead, Qwest points to eleventh hour unilateral rate reductions in Idaho, Iowa, Nebraska, and North Dakota, and claims that the rates, as reduced, satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state. Setting aside the fact that Qwest's strategy would require this Commission to adopt a new policy of benchmarking, not against rates in states that have already obtained section 271 approval, but against rates in states that are concurrently before the Commission, Qwest's strategy fails.

Qwest's benchmarking analysis fails to account for the numerous additional loop and switching rates that Qwest inserted (or increased) at the same time that it implemented unilateral rate reductions in other states. Qwest's benchmarking analysis continues to reflect high cost exchanges in Idaho, Nebraska and North Dakota that Qwest has sold. And Qwest's benchmarking analysis fails to reflect state-specific usage assumptions. After correcting these clear errors, there is no question that Qwest's rates in at least three of the four states (Iowa, North Dakota and Nebraska) flunk the Commission's benchmarking test, using the Colorado rates as the benchmark – and are indeed as much as 45% higher than Colorado rates, on a fully cost-adjusted basis.

In any event, Qwest's UNE rates could not be found to be TELRIC-compliant in any of the five states, because Qwest's Colorado UNE rates are themselves inflated by myriad clear TELRIC errors. Qwest's NRC cost model contains TELRIC errors that inflate NRCs that are critical for CLEC entry – *e.g.*, hot cut NRCs and basic loop install NRCs – by as much as 1000%. As one example, Qwest's hot cut rate of over $170 is almost five times higher than that recently approved by this Commission in New Jersey (and about $10 higher than obviously inflated hot cut rate that Verizon relied upon its first withdrawn New Jersey application).

Qwest's recurring UNE loop rates also are inflated by clear TELRIC errors. Although the Colorado PUC correctly relied primarily on the HAI Model to compute UNE loop rates, it adopted numerous non-TELRIC-compliant inputs that vastly inflated Qwest's UNE loop rates. The result is a classic case of garbage in, garbage out. These clear TELRIC-errors inflate Qwest's UNE loop costs by more than $2.00.

Likewise, Qwest's Colorado recurring switching rates are substantially overstated. The Colorado PUC initially decided to ignore the evidence submitted in the most recent cost proceeding and to simply maintain Qwest's old patently unlawful switching rates. Recognizing that those massively inflated switching rates would not satisfy Checklist Item Two, Qwest proposed lower switching rates. However, the reduced rates Qwest submitted were based on non-TELRIC-compliant inputs that the Colorado PUC never found to be TELRIC compliant. Rather, the Colorado PUC approved Qwest's proposals solely on the ground that they reduced rates from existing levels.

Finally, even aside from the problems discussed above, there is separate and independent evidence that the UNE rates in Idaho, Iowa and North Dakota violate Checklist Item Two. Accounting for all possible potential revenues that may be available to new entrants – including interLATA toll contributions, IntraLATA toll contributions, and state and federal universal service revenues – revenues are not sufficient to cover an efficient new entrant's costs in those states. Moreover, even accounting for possible entry strategies that include a mix of UNE-based services and resale service, the margins available to new entrants are insufficient to support competitive local telephone entry. Thus, Qwest's UNE rates in Idaho, Iowa, and North Dakota are discriminatory in violation of Checklist Item 2.[147]

A. Qwest's Iowa, Nebraska and North Dakota UNE Rates Do Not Satisfy The Commission's Benchmarking Analysis, Using Colorado As The Benchmark State.

The Idaho, Iowa, North Dakota and Nebraska rates are not remotely TELRIC-compliant. Unable to defend the rates in those states on the merits, Qwest claims that it "adjusted its core UNE rates in Idaho, Iowa, Nebraska and North Dakota in a manner designed to comply with the Commission's benchmarking analysis, using Colorado as the benchmark state." Application at 163. However, as demonstrated in the attached declaration of Michael Lieberman (¶¶ 7-14), Qwest's unilateral rate reductions are not, in fact, sufficient to support a finding of TELRIC-compliance. Rather, even after accounting for Qwest's unilateral rate reductions, Qwest' UNE

[147] As demonstrated below, the fact that Qwest's UNE rates in these states preclude competitive local entry also shows that a grant of Qwest's applications would contravene the public interest.

rates in Iowa, North Dakota and Nebraska are substantially higher than those in Colorado, on a cost adjusted basis.

In large part, Qwest's purported rate reductions are illusory. At the same time that Qwest implemented reductions to some of its UNE rates in these states, Qwest also added numerous new rates to its SGATs.[148] For example, in Nebraska, Qwest unilaterally added a recurring UNE loop rate called "OSS," which increases Qwest's UNE loop rate by $2.52. Similarly, Qwest added new grooming and cost-connect charges in some states at the same time that Qwest purported to reduce its UNE-L loop rates.[149] Qwest's benchmarking analysis does not reflect any of the new recurring loop rates. This omission artificially diminishes the difference in Qwest's UNE rates in Iowa, North Dakota and Nebraska, relative to Colorado, thereby creating the false impression that those rates satisfy the Commission's benchmarking analysis.

There are other serious deficiencies in Qwest's benchmarking analysis. For example, Qwest's benchmarking analysis fails to account for Qwest's recent sales of high cost exchanges in Iowa and North Dakota, which have substantially decreased Qwest's costs in those states relative to Colorado. The USF cost model used by Qwest to compare loop and non-loop costs between states reflects the cost of Qwest's network in 1996. Since then, Qwest has sold several high cost exchanges.[150] Those sales reduced Qwest's costs in Iowa, Nebraska and North Dakota relative to Colorado, and hence those sales have reduced the UNE rate difference that could be justified between those states and Colorado using the Commission's benchmarking analysis.

Qwest's non-loop benchmark analysis also is flawed because it is based on national average "minutes of use." In the *New Jersey 271 Order*, the Commission rejected arguments

[148] *See* Lieberman Decl. ¶ 10.

[149] *See id.*

[150] *See* Lieberman Decl. ¶ 51.

that a benchmarking analysis should be based on national averages, stating that "[w]e . . . disagree . . . that . . . we should use standardized MOU [minutes of use] and traffic assumptions (*i.e.*, demand assumptions) as opposed to state-specific demand assumptions to develop per-line per-month prices as part of the benchmark analysis."[151]

Where, as here, Qwest bears the burden of proving that its rates are TELRIC-compliant, and has access to its own state-specific minutes-of-use statistics, Qwest must use those state-specific numbers in its benchmarking analysis.[152] Otherwise, Qwest would have the unilateral power to determine which minutes of use would be used in the benchmarking analysis. And Qwest obviously would choose (and has chosen) the minutes-of-use statistics that produced the most beneficial results from Qwest's perspective. The Commission already has determined that state-specific data more accurately reflect relative cost and rate differences among states.[153] Having made that finding, the Commission must reject any analysis that fails to implement that approach.

AT&T has conducted a benchmarking analysis that corrects all of the errors in Qwest's flawed approach.[154] That analysis confirms that Iowa, North Dakota and Nebraska all fail the Commission's benchmarking test. Qwest's UNE-platform loop rates in those states are higher than those in Colorado on a cost-adjusted basis, by 12%, 31% and 13%, respectively.[155] Qwest's UNE-L loop rates in those states exceed Colorado's UNE-L loop rates on a cost-adjusted basis by 9%, 35%, and 17%, respectively.[156] And Qwest's non-loop rates in those states exceed those

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[151] *New Jersey 271 Order* ¶ 53.

[152] *See id.* (noting that national averages could be appropriate if state-specific figures were unavailable).

[153] See *New Jersey 271 Order* ¶ 53.

[154] *See* Lieberman Decl. ¶ 13-14.

[155] *See* Lieberman ¶ 13.

[156] *See id.*

in Colorado by 4%, 48%, and 12%, respectively.[157] Thus, contrary to Qwest's claims, its UNE rates in Iowa, Nebraska and South Dakota do not satisfy the Commission's benchmarking analysis, using Colorado as the benchmark state.

B. Qwest's Idaho, Iowa, North Dakota And Nebraska UNE Rates Can Not Be Found TELRIC-Compliant On Their Own Merits.

Qwest barely attempts to defend the rates adopted by the Iowa, Idaho, North Dakota and Nebraska state commissions on the merits. That is because the state commission orders confirm that the states did not apply TELRIC principles. Moreover, even if those state commissions had endeavored to apply TELRIC principles (and had succeeded in that endeavor), the cost proceedings in those states generally took place in 1997 and 1998, and relied on even earlier cost data. Since then, Qwest's switching and loop costs have fallen dramatically. Qwest's switching costs have fallen by 15%, 25%, 21% in Idaho, Iowa, and North Dakota, respectively.[158] And Qwest's loop costs have fallen by 22%, 22%, and 8% in each of those states respectively.[159] Thus, even if Qwest's UNE rates in those states were TELRIC-compliant when they were set – which they were not – those rates would not be TELRIC-compliant today.[160]

[157] *See id.*

[158] *See* Lieberman Decl., Table 6.

[159] *See id.*, Table 4.

[160] Section 271 is framed in the present tense and requires a showing that the UNE rates proposed in the application are cost-based at the time of the application. For example, § 271(c)(2)(A) provides that the relevant inquiry is whether the applicant "*is* providing access and interconnection . . . [that] meets the" checklist requirements. (emphasis added). In addition, checklist item 2 requires that a BOC must provide "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" of the Act. § 271(B)(ii). Section 251(c)(3) requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that *are* just, reasonable, and nondiscriminatory." (emphasis added). Section 252(d)(1) further provides that state commission rate determinations "for network elements . . . *shall be* . . . based on the cost . . . of providing the . . . network element." (emphasis added). *See also* 47 C.F.R. § 51.503(a) ("An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that *are* just, reasonable, and nondiscriminatory") (emphasis added); *id.* at § 51.507(a) ("Element rates shall be structured consistently with the manner in which the costs of providing the elements *are* incurred") (emphasis added). Thus, the fact that Qwest's UNE rates cannot possibly be TELRIC-compliant today confirms Qwest has failed to satisfy Checklist Item Two.

Iowa. The Iowa Utilities Board ("IUB") did not even attempt to set TELRIC-compliant rates.[161] In its Final Decision and Order, the IUB declared that TELRIC violated both state law and section 252(d)(2) of the Act because it required UNE rates based on efficient network design rather than the "actual costs U S West will incur in providing unbundled network elements in the near future."[162] This refusal to apply TELRIC principles is precisely why the inputs adopted by the IUB seek to replicate Qwest's existing costs of UNEs rather than the forward-looking, long run incremental costs.[163]

Any doubt that the rates set by the IUB are not TELRIC-compliant is dispelled by *U S West Communications, Inc. v. Thoms*, Civil No. 97-CV-70082 (S.D. Iowa), Memorandum Opinion, Ruling Granting AT&T's and MCI's Motion for Reconsideration and Order Amending Judgment (Apr. 19, 1999). There, the District Court *vacated* the very findings on which Qwest now relies. The court held that the Board's costing approach in fact violated the TELRIC standard, and thus was "inconsistent with current federal law":

> The Board adopted neither the TELRIC option nor the proxy option in establishing rates for interconnection and access to unbundled elements. *Indeed, the Board specifically rejected the TELRIC methodology because the Board was unwilling to accept two of its underlying assumptions. See* Board's Final Decision and Order, at 13-14 (April 23, 1998), as modified by order on June 12, 1998. In its stead, the court [sic] adopted an incremental cost approach. *See id.* at 14-15. *By adopting a pricing methodology other than those specified in the FCC's pricing rules, the Board's pricing approach is inconsistent with current federal law.*

Id. at 4-5 (emphasis added). Accordingly, the court remanded the pricing issues to the IUB, directing it to "comply with the requirements of the FCC's rules." *Id.* at 5. But, as explained in

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[161] Baker/Starr/Denney Decl. ¶¶ 22-24.

[162] Final Decision and Order, *US WEST Communications, Inc.*, Docket No. RPU-96-9, at 14-15 (Io. Utils. Bd. issued April 23, 1998) ("*Iowa Pricing Order*"); *see also id.* at 13-14 ("[T]he Board finds it is inappropriate to determine UNE prices using TELRIC methodology because it incorporates two assumptions that are difficult to reconcile with the cost-based pricing requirements of 47 U.S.C. § 252(d)(1) and IOWA CODE § 476.101(4)(a)(1).").

[163] *See id.*

the Baker/Starr/Denny Declaration (¶¶ 35-40), the IUB has yet to comply with the court's remand order.[164]

Idaho. Contrary to Qwest's misleading characterizations, the Idaho Public Utilities Commission ("IPUC") has expressly disclaimed finding the UNE rates that were set in 1997 are TELRIC-compliant. The IPUC explained that it is "unable to determine whether Qwest's UNE prices are consistent with the public interest because Qwest has not established UNE prices for its Idaho services."[165] "There is no evidence showing that Qwest's UNE prices reached through an arbitration that occurred four years ago satisfy current FCC TELRIC pricing requirements, that the arbitrated rates are currently effective because AT&T continues to purchase UNEs from the arbitrated prices, or that the UNEs identified in the interconnection agreement meet the complete list of UNEs now required for pricing."[166] Thus, the IPUC concluded that "[t]he lack of UNE prices for Qwest remains a gap in Qwest's record for compliance with the Section 271 requirements,"[167] and "the Commission cannot conclude that Qwest has satisfied all the FCC requirements for approval of Section 271 interLATA service authority."[168]

Nebraska. Although the Nebraska Public Service Commission ("NPSC") at least has set UNE rates within the last few years, the rates it set do not comply with the Commission's pricing rules. With regard to loops, the NPSC simply avoided the hard issues, and decided to set loop rates on the basis of the three different cost models utilizing the default inputs in those cost

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[164] *See id.*

[165] *Idaho Public Utilities Commission, Commission Decision On Qwest Corporation's Compliance With Section 271 Public Interest And Track A Requirements And Section 272 Standards,* US West Communications, Inc.'s Motion For An Alternative Procedure To Manage Its Section 271 Application, Case No. USW-T-00-3, at 11 (Idaho PUC April 19, 2002) ("*IPUC 271 Order*").

[166] *Id.*

[167] *Id.*

[168] *Id.* at 12.

models.[169] The NPSC reached this conclusion on the basis of its reluctance to make specific findings related to individual inputs, and its belief that any possible bias contained in each model and its associated inputs, would be minimized by averaging the results of the three models.[170]

This explanation is nonsense. To the extent that any of the models used by the NPSC to calculate UNE rates was flawed, averaging those results with TELRIC-compliant models could only result in *excessive*, non-TERIC-compliant rates.[171] And that is precisely what happened. Although the NPSC relied on the results of two forward-looking models (the Commission's Hybrid Cost Proxy Model ("HCPM") and AT&T's HAI model), it averaged those with the excessive rates generated by the now fully discredited Benchmark Cost Proxy Model ("BCPM").[172] Thus, it is only because outlier results from the BCPM were included that the resulting average loop rate of $21.83 set by the NPSC was well in excess of the approximately $15.60 loop rate calculated by both the HCMP and the HAI model.[173]

The other recurring UNE rates set by the NPSC also are flawed. Despite the fact that the Commission had substantially endorsed HAI's switching cost algorithims and interoffice facilities module, *Platform Order* ¶ 75, the NPSC rejected the use of AT&T's HAI model to set switching and interoffice transmission UNE rates, instead relying on Qwest's proprietary model.

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[169] *See id.*

[170] *See id.*

[171] *See id.*

[172] *See id.*

[173] *See id.* Use of the BCPM to set TELRIC rates is foreclosed by the Commission's findings that the BCPM uses an improper standard to calculate outside plant and improper default input values. In its *Platform Order*, 13 FCC Rcd. 21323 (1998), the Commission found that the BCPM's used a "simplist[ic]" approach to "group and serve . . . customers" that "generat[e]d artificial costs." *Id.* ¶ 46. In particular, the Commission found BCPM's methodology flawed because it would "require separate facilities to serve customers that are [in fact] in close proximity." *Id.* Similarly, in determining what approach should be used to "design" the outside plant, the Commission found that the BCPM did not "adhere to sound engineering and forward-looking, cost-minimizing principles." *Id.*¶ 54. Thus, the Commission found that BCPM did not use proper "optimization routines through use of sound network engineering design to use the most cost-effective forward-looking technology." *Id.* ¶ 61. Moreover, the Commission in its *Platform Order* and subsequent *Inputs Order*, 14 FCC Rcd. 20156 (1999) also rejected many of the key default inputs used in the BCPM. *See* Baker/Denny Decl. ¶¶ 39-40.

That model, however, is not appropriately forward-looking.[174] As Qwest openly acknowledged to the NPSC, its model is intended to allow Qwest "recover, in the prices charged to new entrants, the actual real world costs that it incurs to provide interconnection and unbundled network elements."[175]

Moreover, even if the model in fact attempted to calculate the efficient, economic costs of providing switching and interoffice transmission UNEs, the specific inputs used to calculate rates for these UNEs were patently excessive and could not have not produced TELRIC-compliant rates. As one example, the NPSC adopted an inflation factor that was based on hopelessly outdated 1985-1995 data, and that was demonstrably far above those forward-looking inflation factors.[176]

North Dakota. The North Dakota Public Service Commission last adjudicated Qwest's UNE rates in an arbitration in 1997.[177] The PSC established those rates as "interim" only, and "subject to true up upon the completion of the Commission's cost study for U S West" in a subsequent case.[178] Since 1997, however, the PSC has neither completed such a cost study nor established permanent rates to replace the interim rates.[179] Nor has the PSC ever adjusted Qwest's interim rates for UNEs and interconnection to reflect changes in Qwest's costs since 1997.[180]

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[174] Baker/Starr/Denney Decl. Dec. ¶¶ 39-40.

[175] AT&T Post Hearing Br. at 27-28 (Apr. 26, 1999) (quoting testimony of Alan Bergman). *See also id.* ("The cost recovery methodology the Commission adopts in this proceeding must allow [Qwest] to recover its actual costs."). There is no way for Qwest to reconcile these statements with its current claim that the ICM used a properly forward-looking approach.

[176] *See* Baker/Starr/Denny Decl. ¶ 35-54 (describing the inflation factor and describing other non-TELRIC inputs).

[177] *See* Baker/Starr/Denny Decl. ¶ 55.

[178] See i*d.* at 6.

[179] *See id.*

[180] *See* Baker/Starr/Denney Decl. ¶ 56.