AT&T nonetheless continues to insist that an efficient carrier "would not invest in more switching and line port investment than is required to have sufficient capacity to meet small unexpected increases in demand and any necessary administrative functions," because "it is straightforward to add line cards to switches that already have sufficient common equipment, [and because] . . . today's switches are easily expandable." AT&T Comments, Chandler/Mercer Decl. at 11-13. That is false. Adding capacity to a switch is a costly and complex engineering and installation activity that requires "lumpy" equipment investments and significant lead times to prevent held customer orders. *See* Thompson Reply Decl. ¶ 32. Moreover, AT&T's analysis fails to account for, among other things, the necessary spare switching capacity needed to provide the "soft dial tone" that AT&T elsewhere emphasizes as essential to an efficient network. *Id.* ¶ 34.

AT&T thus falls back on the argument that, despite appearances, the HAI *actually* employs an "implicit fill factor" of less than 80%. That is so, AT&T argues, because the HAI Model "includes the fixed investment for a switch that could serve at least 100,000 lines," but limits the size of a switch to 80,000 lines. AT&T obscurely suggests that, for this reason, it would be inappropriate to make any reductions to the Model's explicit default fill factor of 94%.

This argument is deeply misleading in two independent respects. First, the "implicit fill factor" that AT&T invokes could be applicable, if at all, only to a small subset of the costs of a switch: the fixed costs, which are typically dwarfed by the variable costs, as to which the HAI model indisputably imposes a 94% fill factor. 85/ Second, AT&T's purported

85/ The HAI Model analyzes two broad categories of switch investment costs: fixed (*i.e.*, the costs incurred per switch, regardless of that switch's capacity) and variable (*i.e.*, the incremental cost per line of adding capacity to serve additional lines). The HAI Model recognizes that, for most switches, the variable costs account for a much larger proportion of total switch investment than fixed costs. *See* Thompson Reply Decl. ¶ 36 n.36.

"implicit fill factor" is further limited to circumstances in which a single switch could be used to serve 80,000 lines or more. Only in such circumstances would the HAI model add a new switch (with new fixed costs) rather than fill up the supposed 100,000 line capacity of the initial switch. Such circumstances, however, are an extreme rarity. With respect to the 96% of switches in Colorado for which the HAI Model determines a cost, the vast majority have fixed costs unaffected by the 80,000 line limitation. Thompson Reply Decl. ¶ 36. In sum, AT&T's "implicit fill factor" analysis is untenable. 86/

Vertical features. Because of the HAI Model's confusing and inadequate documentation, Qwest is unable to refute AT&T's claim that Qwest's newly reduced switch port rate in Colorado reflects excessive recovery of certain vertical features costs. In formulating that rate, Qwest believed the HAI Model uses Qwest-specific accounting data in its determination of such costs. And, because Qwest accounted for those costs as an amortization expense rather than a maintenance expense, it believed that the HAI Model had omitted them. Upon reexamination, Qwest has discovered that this Model – sponsored by AT&T – overrides the Qwest-specific accounting data with non-Qwest-specific cost data (specifically, data drawn from a study of New England Telephone). Qwest can neither verify nor refute AT&T's claim that those data include the relevant features-related costs. Accordingly, to avoid further controversy on this point,

86/ Although AT&T criticizes the 70%-30% allocation of switching charges between usage-sensitive minutes-of-use charges and flat-rated port charges, it does not even acknowledge, let alone refute, Qwest's explanation for that approach in its application. *See* Thompson Colo. Decl. ¶ 58; Thompson Reply Decl. ¶ 37. In any event, this Commission's recent *Maine 271 Order*, which specifically upholds the same 70%-30% allocation, forecloses AT&T's argument on this exact point. *Maine 271 Order* ¶ 29.

Qwest is lowering the switch port rate in Colorado by a further $0.38, to $1.15. 87/ *See* Thompson Reply Decl. ¶¶ 38-41

Loop rate. AT&T's claim that Colorado's statewide average loop rate is "vastly overstated," AT&T Comments at 63, is unsupported and wrong. AT&T does not challenge Qwest's observation that the rate is essentially equivalent to the SM-adjusted loop rate recently adopted by the New York commission, Thompson Colo. Pricing Decl. at 8 n.18, whose pricing decisions this Commission has often cited for their faithful adherence to TELRIC. *See, e.g., Rhode Island 271 Order* ¶ 52. Nor does AT&T address Qwest's observation that the CPUC adopted dubious cost-reducing inputs, Application at 153-54 & n.85; Thompson Colo. Pricing Decl. ¶¶ 29-39 – which the CPUC characterized as "aggressive" – concerning placement costs and structure sharing. *Colorado Pricing Further Reconsideration Order* at 31. Those input decisions had the effect (all else held constant) of lowering the statewide average loop rate by about $1.00 to $1.50 below what a strict application of TELRIC principles would have produced. Thompson Colo. Pricing Decl. ¶ 39; Application at 154 n.85. As a result, even if AT&T could somehow demonstrate that the CPUC committed clear error on most or all of the loop inputs that it challenges in its comments, the net result would be a virtual wash. Thompson Reply Decl. ¶¶ 42-43.

In all events, AT&T cannot demonstrate that the CPUC committed *any* rate-raising input errors for the loop, much less carry its heavy burden here of showing that the CPUC committed "clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."

87/ As discussed below, the "complete when filed" rule poses no obstacle to the Commission's consideration of this reduction.

Georgia/Louisiana 271 Order, ¶ 23. As discussed in greater detail in the Thompson Reply Declaration (at ¶¶ 44-68):

- AT&T cites no basis for challenging the CPUC's determination that a forward-looking network would contain 20% aerial plant, a figure substantially higher than the 13% aerial plant in Qwest's existing network. For aesthetic reasons, many municipalities have restricted the amount of aerial plant that carriers are even allowed to deploy. Also, it is more efficient over the long run to install buried or underground plant in many cases, because aerial plant requires more maintenance and presents a greater risk of service outages. This Commission does not generally, and should not here, second-guess a state commission's resolution of such quintessentially factual issues based on the record compiled in its proceeding.

- The CPUC also acted reasonably in allocating the "extra" plant reassigned from the HAI model's default percentage of aerial cable evenly between "underground" plant (*i.e.*, in conduit) and "buried" plant (*i.e.*, not in conduit), instead of allocating it *all* to the less expensive buried plant. That decision was a reasonable means of compensating for the HAI model's systematic and much-criticized under-inclusion of underground cable.

- AT&T's challenge to the $1.44 plowing cost per foot in the lowest density zones is puzzling, because AT&T's own declarant conducted the survey underlying the $1.44 figure the CPUC adopted. That figure is now (if anything) understated, because the 1997 survey data have not been adjusted to account for inflation.

- After accepting AT&T's own preferred cost model (HAI), the CPUC properly declined to activate that model's optional "minimum spanning tree" function. That function ignores real-world obstacles such as buildings and right-of-way restrictions, and produces estimates for distribution distances (particularly in urban areas) that are systematically lower than the distances required to connect flesh-and-blood customers even in the most forward-looking network.

- AT&T's criticisms of the CPUC's 87.2 foot drop length assumption are particularly misplaced, because AT&T largely prevailed on that input before the CPUC, and this Commission has accepted dramatically higher drop length assumptions in other section 271 decisions.

- AT&T is wrong in contending that the network operations factor adopted by the CPUC "assumes that Qwest will achieve no reduction in network operations expense on a forward-looking basis."

Fassett/Mercer Decl. ¶ 24. After hearing the evidence, the CPUC ordered a 4% adjustment to that and other factors to reflect forward-looking productivity improvements. AT&T does not acknowledge that adjustment, let alone show that it is insufficient.

Line sharing (HFPL). Although Covad has no valid basis for advocating a charge of zero for the high-frequency portion of the loop ("HFPL"), Qwest sought to avoid controversy by proposing zero as an interim rate, subject to true-up. In a series of orders, however, the CPUC rejected that proposal, and ordered a $4.89 rate instead, on the ground that a charge of zero for this rate element is "absolutely wrong." *Colorado Pricing Further Reconsideration Order* at 17. That determination is correct on the merits and, in all events, provides no basis for rejecting this application.

This Commission has provided no definitive guidance on the appropriate methodology for pricing the HFPL. Although Covad claims otherwise, the *Line Sharing Order* hardly provides a "prescription for establishing a price for the line shared loop UNE." Covad Comments at 5. Rather, the *Line Sharing Order*, while setting forth one methodology that states "may" use, did not *require* the use of that methodology. 88/ In negotiating this uncertain legal framework, at least four state commissions – California, Connecticut, and Washington, as well as Colorado itself – have concluded that a non-zero rate is not only permissible, but legally required. *See generally* Thompson Reply Decl. ¶¶ 69-73. 89/

88/ *Line Sharing Order*, 14 FCC Rcd at 20975 ¶ 139. Covad is also wrong in claiming that the *CALLS Order* somehow resolved this issue. *See* Covad Comments at 7 (citing *Access Charge Reform*, 15 FCC Rcd 12962 ¶ 98). That *Order* has nothing to do with HFPL pricing, and the offhand remark that Covad quotes was obviously never intended to settle the issue or bind the states.

89/ *Rulemaking on the Commission's Own Motion to Govern Access to Bottleneck Services And Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, Rulemaking 93-04-003, Investigation 93-04-002, Permanent Line Sharing Phase, Draft Interim Opinion Establishing Permanent Rate for the High Frequency Portion of the Loop (draft opinion of ALJ Jones, Calif. PUC mailed May 7, 2002); *Application of the Southern New*

Covad is particularly mistaken in contending that TELRIC somehow compels an HFPL rate of zero. This Commission itself has recognized that the standard TELRIC analysis as discussed in the *Local Competition First Report and Order* "does not apply to line sharing, because [TELRIC] is intended to develop rates for discrete network elements, while line sharing involves two carriers sharing the use of a single facility." *Id.* ¶ 138. The line-shared loop presents basic questions of "joint cost" allocation. *See Local Competition First Report and Order* 11 FCC Rcd at 15845 ¶ 676 (defining "joint costs"). Even if an ILEC were to incur no direct costs in providing the HFPL element other than the joint cost of the shared loop, this Commission has definitively rejected "setting the price of each discrete network element based solely on the forward-looking incremental costs directly attributable to the production of individual elements [because such an approach] will not recover the total forward-looking costs of operating the wholesale network." *Id.* at 15852 ¶ 694. In the CPUC's words:

> A positive price is required to mirror the allocation of resources that a competitive market would produce. It provides the proper signals to producers who seek to deploy capital and labor to the delivery of broadband services. It also provides the proper information to consumers as they choose among alternative broadband technologies. Further, . . . a non-zero price is required to reflect a reasonable allocation of joint and common costs.

Colorado Pricing Order at 114-15. The CPUC thus set a positive price for the HFPL because a positive cost is associated with that element – not, as Covad wrongly asserts, on the basis of a "value-based pricing methodology." Covad Comments at 12.

England Telephone Co. for a Tariff to Introduce Unbundled Network Elements, Docket 00-05-06, Decision, pp.19-21 (Conn. Dept. Pub. Util. Control June 13, 2001); *Continued Costing and Pricing of Unbundled Network Elements, Transport, and Termination*, Docket No. UT-003013, Thirteenth Supplemental Order; Part A Order Determining Prices for Lines Sharing, Operations Support Systems, and Collocation (Wash. Utils. and Transp. Comm'n, Jan. 31, 2001).

Moreover, the general policy rationale underlying the *Line Sharing Order* supports a positive rate for the HFPL. The *Order*'s basic object is to ensure that "CLECs and ILECs incur the same cost for access to the bandwidth required to provide xDSL services" and to "alleviate any potential price squeeze." *Line Sharing Order*, 14 FCC Rcd 20912, ¶ 141. Here, as noted by the CPUC, the wide gap between the wholesale line sharing rate established by the CPUC ($4.89) and Qwest's retail DSL rates ($21.95 to $31.95 per month) forecloses any realistic possibility of a price squeeze. 90/

In any event, as a procedural matter, a section 271 proceeding is an "inappropriate forum[] for the considered resolution of industry-wide local competition questions of general applicability" like this one, because such questions are "more appropriately the subjects of industry-wide notice-and-comment rulemaking." *Texas 271 Order*, ¶¶ 23, 25; *accord AT&T Corp. v. FCC*, 220 F.3d 607, 630-31 (D.C. Cir. 2000); *Missouri/Arkansas 271 Order*, ¶ 82 & n.257. It would be especially inappropriate to choose this proceeding as the vehicle for resolving generalized questions about HFPL pricing, because the D.C. Circuit has now cast doubt on whether ILECs will have any continuing legal obligation to provide the HFPL as a stand-alone UNE in the first place. *See United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (petition for rehearing pending).

90/ *Colorado Pricing Order* at 118. Although a footnote in DOJ's Evaluation questions the CPUC's failure to adjust retail local exchange rates in light of its treatment of the HFPL, DOJ recognizes that Qwest unsuccessfully sought to implement an interim HFPL rate of zero, and it thus acknowledges that this Commission should address any remaining questions about the HFPL rate not by rejecting this application, but by "pursu[ing] this matter directly with the state commission." DOJ Evaluation at 32 n.156. Moreover, the CPUC specifically noted that some adjustment to retail rates might well be appropriate in a future proceeding addressing Qwest's retail rates. *Colorado Pricing Order* at 116-177. The CPUC could not implement any such adjustment in the 577T pricing docket, however, because retail rates were outside the scope of that UNE pricing proceeding. *See also* Thompson Reply Decl. ¶ 73 .

Nonetheless, to alleviate any residual concerns, Qwest is establishing (subject to further review by the relevant state commissions) a geographically deaveraged HFPL rate in Colorado and Nebraska, the two states subject to this application in which the PUC has authorized Qwest to impose a positive charge. Qwest is taking this step, even though it does not believe that it is methodologically necessary, to give CLECs additional flexibility in their business plans and reduce any disproportionality between an averaged HFPL rate and a geographically deaveraged loop rate. Finally, to preclude any claim by CLECs of Qwest unilaterally imposing a price increase, Qwest will not increase the HFPL rate in high cost zones beyond the level of the current, averaged rate. The details of this deaveraging approach, and of its implementation, are set forth in the Thompson Reply Declaration at ¶ 74.

B. Taking Into Account Rate Reductions Qwest is Making in Response to the Opening Comments, the Benchmark-Adjusted Rates for Iowa, Idaho, Nebraska, and North Dakota Accurately Reflect This Commission's Benchmarking Methodology

Qwest lowered certain key rates that CLECs would pay for stand-alone loops or the UNE-P in Iowa, Idaho, Nebraska, and North Dakota to make them comparable to the corresponding Colorado rates, adjusted (where appropriate) through the use of the SM. Qwest is making two additional benchmarking-related reductions in response to issues identified in the opening comments. First, because Qwest relied on the version of the SM publicly available on the FCC's web site, it inadvertently included within its analysis certain exchanges in Idaho, Iowa, and North Dakota that it has sold to other carriers. *See* DOJ Evaluation 31-32; AT&T Comments 50, 52; WorldCom Comments 29-31. The net effect of removing those exchanges from the benchmarking analysis is a slight reduction in certain UNE rates in those three states.

Second, as discussed above, Qwest has further agreed to remove $0.38 from the Colorado switch port rate in response to AT&T's argument that Qwest would otherwise over-recover vertical features costs. The result of that adjustment is a further reduction in the minute-of-use switching rates in the four states benchmarked here against Colorado. Qwest will soon be filing amended SGATs in all four states reflecting the results of these recalculations (subject to a state-specific offset in the Idaho switching and transport rates). *See* Thompson Reply Decl. ¶ 79. 91/

Commission precedent makes clear that the "complete when filed" rule poses no obstacle to consideration of these rate reductions (or the associated reductions in the Colorado port rate) in evaluating this application. The reductions respond to other parties' identification of two esoteric and technical errors of which Qwest was previously unaware, and these reductions are plainly not part of some scheme to "game" the section 271 process. *See Rhode Island 271 Order*, ¶ 15. Rather, as in other cases in which this Commission has permitted BOCs to make rate changes during the 90-day period, these corrections are Qwest's attempt to "take[] positive action that will foster the development of competition" in response to valid criticism. *Id.*, ¶ 12. Moreover, because the changes are straightforward, neither the Commission nor any party should have any difficulty analyzing the resulting rates and commenting on their validity. *See id.*, ¶ 11. Indeed, Qwest has agreed to these changes much earlier in the statutory period – on or before day 45 – than the corresponding point – day 80 – at which Verizon made very substantial reductions to its port and switching usage rates in the Rhode Island proceeding. *Id.*, ¶ 8.

The remaining challenges to Qwest's benchmarking analysis are without merit:

Standard vs. state-specific minutes-of-use figures. Qwest's benchmarking analysis makes use of the same standard minutes-of-use assumptions that this Commission itself has used in approving section 271 applications on benchmarking grounds. *See Pennsylvania 271*

91/ As discussed below, Qwest is also lowering its "grooming charges" in Idaho and

Order at ¶ 67, n.252; *Maine* 271 *Order* at ¶ 33. AT&T and WorldCom contend, however, that the recent *New Jersey 271 Order* (issued after Qwest filed this application) compels the use instead of *state-specific* minutes-of-use data when they are available. That argument is wrong on several different levels.

As a threshold matter, AT&T and WorldCom mischaracterize the *New Jersey 271 Order*. There, the Commission rejected WorldCom's own contention that Verizon *should* have used standardized data for benchmarking purposes, and it approved the use of state-specific minutes-of-use data instead. The Commission made it clear, however, that the approach used for New Jersey was not the only permissible benchmarking analysis. To the contrary, the Commission explained that "use of the standardized demand assumptions in the *Pennsylvania Order* may also be reasonable depending on the particular section 271 application under review." *New Jersey 271 Order* at ¶ 53. The Commission continued: "The absence of valid state-specific demand data, *for example*, might be a reason to use the Commission's standardized demand assumptions." *Id.*

In any event, Qwest has compelling reasons for the use of standardized assumptions rather than state-specific demand data. First, Qwest *does* lack the "valid state-specific demand data" that would permit it to avoid the use of standardized assumptions. Although Qwest has data on total minutes of use, it does not have studies supporting state-specific data for three traffic-pattern variables critical to a valid benchmarking analysis: percentage of interoffice vs. intraoffice calls, percentage of originating vs. terminating calls, and percentage of calls to an access tandem vs. directly to a POP. *See* Thompson Reply Decl. ¶ 81. Qwest had no alternative to using standardized data for these variables. Indeed, AT&T tacitly

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Nebraska, even though such charges are not properly included within the benchmarking analysis.

acknowledges as much. Its analysis does not rest – as might appear – on truly state-specific data, but on a jerry-rigged analysis using state-specific data only for local minutes of use and an assortment of other assumptions for these three variables. But that apples-and-oranges approach is less reliable than either consistent use of standardized assumptions (Qwest's approach here) or consistent use of actual state-specific data when the complete set of such information is available (as it is not here). Moreover, Qwest's use of consistent standardized assumptions is the most transparent and straightforward way to apply a consistent benchmarking methodology for all 13 of the states for which Qwest has filed or intends to file section 271 applications within a compressed time period. *See* Thompson Reply Decl. ¶¶ 82-84.

Finally, there is no merit to AT&T's insinuation that Qwest has chosen standardized minutes-of-use data because Qwest has somehow determined that such data would produce higher relative costs, and thus higher UNE rates, for the 13 in-region states that will be benchmarked against Colorado for section 271 purposes. In fact, an analysis of state-specific data for total minutes of use over the most recent three years (1999, 2000, and 2001) reveals that Qwest could derive no systematic advantage using either standardized data or the alternative of combining state-specific minutes of use and standardized traffic assumptions. *See* Thompson Reply Decl. ¶¶ 85-89. AT&T might have grounds for complaint if Qwest alternated between these two different approaches on a state-by-state basis to produce the higher set of rates in each state. But that is not Qwest's approach: it is using standardized data for every state subject to benchmarking. 92/

92/ As discussed in the Thompson Reply Declaration ¶ 88, AT&T's calculation that these two alternative approaches produce a 48% difference in the North Dakota non-loop aggregate rates appears seriously overstated. Qwest's own calculations show that the difference is significantly lower, and AT&T's failure to submit its accompanying data or assumptions make it impossible to explain this discrepancy.

OSS charges, cross-connect, and grooming charges. AT&T further argues that Qwest's benchmarking analysis is flawed because it does not take account of certain charges for OSS, cross-connects, or grooming. That argument is flawed in two independent respects. First, in Qwest's view, it is inappropriate to include any such miscellaneous rate elements in a benchmarking analysis. For example, it is unclear why these charges should be treated any differently from the DUF charge that the Commission has specifically excluded from "benchmark comparisons of non-loop rates among states" on the ground that such miscellaneous charges "are separated from switching charges" and should be analyzed "independently," even though "carriers only purchase DUF when they purchase unbundled switching." *Georgia/Louisiana 271 Order*, ¶ 86 & n.296.

Moreover, even apart from that consideration, none of these three charges could have any material effect on a proper benchmarking analysis. First, the OSS charge about which AT&T complains is not (as AT&T suggests) a recurring charge at all, but a very small *non-recurring* charge assessed on each order (no matter how many lines are at issue). *See* Thompson Reply Decl. ¶ 91. For that reason alone, it is irrelevant to any benchmark analysis of Qwest's recurring rates. Second, the "cross-connect" charge is a collocation-related rate element, and it is thus also irrelevant to any benchmark analysis of loop rates. And, in any event, the cross-connect charges are essentially equivalent for the states in AT&T's analysis (Colorado, Iowa, Nebraska, and North Dakota), so they would not materially affect the benchmarking analysis even if it were proper to include them in that analysis, which it is not. *See id.* ¶ 92.

Third, even on the doubtful premise that "grooming charges" (unlike DUF charges) could be appropriately included in a benchmarking analysis, there is no straightforward respect in which the Nebraska and North Dakota grooming charges exceed those in

Colorado. 93/ *Id.* ¶ 93. In Colorado, the $2.06 grooming charge (kept low on the premise that IDLC would pervade a *forward-looking* network, such that the charge would be spread out over many lines) applies only to those unbundled loops in the *current* network that are actually carried on IDLC facilities and therefore require demultiplexing. In Nebraska and North Dakota, recurring grooming charges of (respectively) $1.17 and $1.35 apply to *all* loops (whether carried on IDLC facilities or not) that are provided on an unbundled, stand-alone basis (*i.e.*, not as part of UNE-P). Nonetheless, to remove any residual concern on this issue, Qwest is lowering the grooming charge in those two states to the level – $0.19 – adjusted to reflect that in Nebraska and North Dakota, unlike Colorado, the charge is applied to all stand-alone loops. *Id.* ¶¶ 95-97.

C. There Is No Merit To CLEC Challenges To Various Other Rate Elements In Iowa, Nebraska, Idaho, and North Dakota

Collocation. New Edge's challenges to Qwest's "quote preparation fee" ("QPF") are without merit for the reasons discussed in the Thompson Reply Declaration. Nonetheless, to clarify application of the QPF, Qwest will revise the SGAT Exhibit A in Idaho and North Dakota to make clear that it will accept the "All Collocation" QPF rate for Caged and Cageless collocation applications until a final ruling by the state commissions in the cost dockets in those states. Qwest will also clarify that this fee is subject to a credit provided that the CLEC pays the Space Construction charge for caged or cageless collocation. Finally, within the next week, Qwest will also file proposed rates for a QPF augment charge in Iowa, Idaho, Nebraska, and North Dakota to bring those states in line with Colorado, which offers a lower QPF for collocation augments. *See* Thompson Reply Decl. ¶ 98-99.

93/ "Grooming" charges cover the costs of demultiplexing a DS0 loop from an IDLC feeder facility such that the loop can be connected on a stand-alone basis to the CLEC's collocation facilities.

AT&T's argument that the Nebraska collocation rates are non-TELRIC-compliant is simply incorrect. In fact, Nebraska's collocation rates compare favorably with the rates in Colorado, which AT&T does not even challenge. *Id.* ¶¶ 102-05. In any event, AT&T has defaulted on this argument by failing to raise it before the Nebraska commission.

Transport. The Iowa DS3 rates challenged by New Edge have been superseded by the restructured and reduced rates that appear in Qwest's current SGAT. The Iowa DS1 rates that New Edge challenges are the product of the cost model (Hatfield) that the CLECs themselves have championed, and there is no basis for challenging them here. As for the Idaho DS1 rate, Qwest's SGAT contained a typographical error that listed the DS3 rates in place of the DS1 rates. This is being corrected, and thus New Edge's complaint is moot. Thompson Reply Decl. at ¶ 118.

Finally, AT&T's arguments concerning the rate structure for entrance facilities (E-UDIT) are unpersuasive. Because there are important cost differences between such facilities and interoffice transport facilities (UDIT), the rates for entrance facilities in most states for which this Commission has granted section 271 approval are non-distance-sensitive. Indeed, a representative composite of the rates for E-UDIT and UDIT in the states at issue here is well within the zone of reasonableness established by the corresponding composite rates in those section 271-approved states. *See* Thompson Reply Decl. ¶¶ 106-12. 94/

94/ In Section IX.B *infra,* we demonstrate that there is no merit to AT&T's and WorldCom's assertions that the relationships between Qwest's retail rates and its UNE rates establishes an impermissible "price squeeze."

VIII. QWEST SATISFIES THE SEPARATE AFFILIATE REQUIREMENTS OF SECTION 272

Section 271(d)(3)(B) provides that the Commission shall not approve a Section 271 application unless it finds that "the requested authorization *will be* carried out in accordance with the requirements of section 272." 47 U.S.C. § 272(d)(3)(B) (emphasis added). This calls for the Commission to make a "predictive judgment" 95/ about whether Qwest and its designated Section 272 affiliate, Qwest Communications Corporation, will comply with the provisions of Section 272; the nondiscrimination provisions of Section 272 do not apply until Section 271 authority has been granted and the affiliate has begun to provide in-region interLATA service. AT&T makes several arguments that, in addition to their other faults, are simply irrelevant to the question of whether, *following* QCC's entry into the interLATA market, interLATA services will be provided in compliance with Section 272.

All five State Authorities examined Qwest's showing exhaustively, together with AT&T's opposition thereto, and concluded that such services would be provided in compliance with Section 272. Six other state authorities have reached the same conclusion. AT&T's comments rely instead almost entirely on the findings of a single administrative law judge in Minnesota — findings that have not even been adopted by the Minnesota Public Utilities Commission and are inconsistent with this Commission's precedents. In case this Commission is interested in the Minnesota proceeding, the Reply Declaration of Marie E. Schwartz includes, as exhibits, Qwest's brief in the Minnesota Section 272 proceeding, Qwest's exceptions to the

95/ *Michigan 271 Order*, 12 FCC Rcd at 20715 ¶ 347 ("Section 271(d)(3)(B) requires the Commission to make a finding that the BOC applicant will comply with section 272, in essence a predictive judgment regarding the future behavior of the BOC."); *see also Second Louisiana 271 Order*, 3 FCC Rcd at 20785 ¶ 321.

ALJ's recommendations, and Qwest's "compliance filing" describing additional measures QC and QCC have implemented in an attempt to respond to the ALJ's concerns.

A. QCC Will "Operate Independently" as Required by Section 272(b)(1)

The Application establishes that QCC will operate independently from QC by showing that the two companies will not jointly own any transmission or switching facilities and will not perform operation, installation, or maintenance services ("OI&M") on each other's networks. The Declaration of Judith L. Brunsting states that QCC "will perform OI&M on its own network facilities." Brunsting Decl. ¶ 27(d). The Reply Declaration of Judith L. Brunsting makes clear that QC and QCC are not currently providing, and have never provided, OI&M services on each other's networks. Brunsting Reply Decl. ¶ 3. Neither the statute nor Commission rules prohibit joint use of facilities, provided there is no joint ownership. There is no precedent for requiring an applicant to provide an asset-deployment plan. 96/

B. QC and QCC Will Have Separate Officers, Directors, and Employees as Required by Section 272(b)(3)

The Application establishes that QC and QCC will have separate officers, directors, and employees by citing a payroll comparison, lists of officers and directors, and controls to govern sharing of services and protection of confidential information. The Biennial Audit Procedures provide that the auditor will "[i]dentify and document the types of internal controls that are in place that would prevent one from being an officer, or director, or employee of both the BOC and Section 272 affiliate at the same time" and will perform a payroll comparison. *See* Exhibit MES-272-15 at 23-24. The Reply Declaration of Marie E. Schwartz

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96/ *See, e.g.*, Affidavit of Linda G. Yohe for Arkansas, Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194, ¶¶ 10-15.

states that the payroll system used by both QC and QCC ensures that no employee may appear on both payrolls simultaneously. Schwartz Reply Decl. ¶ 5. This is more than sufficient for Section 272 purposes. *See New York 271 Order* ¶ 409 & n.1261; *Texas 271 Order* ¶ 401 & n.1164. Whether an officer or director of QC or QCC holds a position with its common *parent* corporation is not relevant under Section 272(b)(3), which bars overlaps only between QC and QCC. This Commission has specifically rejected contentions that a BOC must provide detailed information regarding the reporting structure of such affiliates. *See Second Louisiana 271 Order*, 13 FCC Rcd at 20789-90 ¶ 330. Nevertheless, the Reply Declaration of Marie E. Schwartz states that there are no instances of a QC employee reporting to a QCC supervisor, or vice-versa. Schwartz Reply Decl. ¶ 6. Indeed, the provision of shared services permitted under the *Non-Accounting Safeguards Order* is subject to the requirement that "any persons provided by [QC or QCC] shall be solely the employees or agents of [the providing party] under its sole and exclusive direction and control." Schwartz Decl. Ex. MES-272-8; Brunsting Decl. Ex. JLB-272-13. Even though there is no requirement that employees of a BOC and its affiliate be physically separated, the Schwartz Declaration states that Qwest and QCC have taken reasonable steps to accomplish such a physical separation. Schwartz Decl. ¶ 55. AT&T's objection to the transfer of fewer than 200 employees between January and March 2001 is irrelevant because until the end of the transition period QCC had not yet even been designated a Section 272 affiliate. In any event, the Biennial Audit Procedures refute rather than support AT&T's claim: they demonstrate that transfers are not impermissible, but will be monitored during the course of the later audit. 97/

97/ Even the Minnesota ALJ has rejected AT&T's argument that such employee transfers impermissibly add "'built-in' value" to the new employer. *Compare* AT&T Comments at 112 with Minnesota ALJ 272 Recommendation ¶¶ 51-53.

C. Transactions Between QC and QCC Will Comply with Section 272(b)(5)

The Application presents overwhelming evidence that QC and QCC will comply with the requirements of Section 272(b)(5). *See, e.g.*, Exhibit MES-272-9 (Master Services Agreement); Exhibit MES-272-11 (sample of transactions); Brunsting Decl. ¶ 43 (citing http://www.qwest.com/about/policy/docs/qcc/overview.html, which lists all posted transactions). From January through June 2002, there have been no discrepancies between the billing from QC to QCC and the work orders posted on the Internet. *See* Exhibit MES-272-12; Reply Exhibit MES-4. The results of an examination conducted by KPMG LLP show that QC and QCC have developed sufficient controls to ensure compliance with the posting requirements. *See* Exhibit MES-272-3 (report of KPMG LLP); Exhibit MES-272-4 (Jacobsen KPMG Declaration).

The Commission can easily reject AT&T's contention that the use of a services company for legal, public policy, and financial services prevents a finding that transactions are not at arm's length. The Commission has explicitly permitted the sharing of services, whether provided by a BOC to its affiliate or provided by a common parent such as QSC, provided such services comply with the affiliate-transaction rules. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990-93 ¶¶ 178-183; *Third Order on Reconsideration* ¶¶ 18-19. Indeed in doing so, it rejected its original proposal to preclude the sharing of "in-house" administrative services such as "accounting, auditing, legal services, personnel recruitment and management, finance, tax, insurance, and pension services." 98/

98/ Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 11 FCC Rcd 18887 ¶ 62 (1996).

D. QC Will Comply with Section 272(c)'s Nondiscrimination Requirements

The Schwartz Declaration establishes that QC will comply with the nondiscrimination safeguards of Section 272(c). Schwartz describes mechanisms that ensure that QC will not favor QCC in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards. Any IXC, including QCC, must contact its sales representative at QC in order to obtain services. If QCC desires to obtain from QC a service that has not previously been offered, that request is subject to the *additional step* of a thorough review by QC's Compliance Oversight Team. This review ensures that QC satisfies the nondiscrimination obligations of Section 272(c)(1). AT&T incorrectly characterizes this additional step as "a mechanism for [QCC] to request a new product, service, or information from [QC]" that is not available to competing carriers, despite the fact that Qwest has corrected AT&T on this point in state proceedings and even the Minnesota ALJ found that "[t]he process, as described, does not discriminate against competing IXCs." Minnesota ALJ Findings ¶ 107 (Attachment 7 to AT&T's Comments); *see also* Schwartz Reply Decl. ¶ 9.

AT&T argues that confidential QC information will be shared with QCC *via* employees of other Qwest affiliates. The training materials attached to the Schwartz and Brunsting Declarations show that all employees of Qwest companies are trained that QC's confidential information is not to be shared with QCC's employees. *See* Exhibits MES-272-17, MES-272-18, MES-272-19, MES-272-21. The Schwartz Reply Declaration includes an e-mail, dated May 14, 2002, sent to all employees of all Qwest companies emphasizing that QC confidential information may not be shared with QCC, referring to the Code of Conduct and to the Corporate Compliance Advice Line. *See* Schwartz Reply Decl. ¶ 8; Reply Exhibit MES-5. In light of these extensive controls, AT&T's unsubstantiated arguments that there are "improper conduits of confidential information" between the BOC and the 272 affiliate are no less "unpersuasive" than those previously rejected by the Commission. *See Second Louisiana 271 Order* ¶ 345.

AT&T points to the fact that QC did not charge late-payment fees to QCC for certain past transactions that occurred during and shortly after the Section 272 transition period over a year ago. As discussed in the Schwartz Declaration, these were one-time omissions, they have been corrected, and the Master Services Agreement and Services Agreement will require such payments in the future. *See* Schwartz Decl. ¶¶ 19, 49.

E. QC and QCC Will Comply with Section 272(g)'s Restrictions on Joint Marketing

The Application establishes that QC and QCC will comply with Section 272(g) and, contrary to AT&T's insinuations, the Commission has specifically acknowledged that such good faith commitments are sufficient for this purpose. *See Second Louisiana 271 Order* ¶¶ 357-60. QCC does not currently market or sell QC's telephone exchange services and will not do so unless and until QC allows other entities offering the same or similar services to do so. Brunsting Decl. ¶ 49; Brunsting Reply Decl. ¶ 2. The Brunsting Declaration acknowledged that services such as product design, planning, and development of 272 Affiliate services are not part of joint marketing and must be offered by the BOC on a nondiscriminatory basis per Section 272(c). Brunsting Decl. ¶ 52. The Schwartz Reply Declaration includes current work orders describing the joint-marketing-planning services that QC is providing to QCC, versions of which have been available on the Internet since September 25, 2001. *See* Schwartz Reply Decl. ¶ 11; Reply Exhibit MES-6. It also confirms that QC will comply with the equal access requirements of Section 272(g). *Id.* ¶ 10.

IX. GRANT OF QWEST'S APPLICATION WILL PROMOTE THE OBJECTIVES OF THE ACT AND SERVE THE PUBLIC INTEREST

Consumers can expect to begin seeing significant benefits immediately upon grant of this Application. Qwest has shown that its return to the long distance market will serve the public interest by further enhancing both local and long distance competition. See Brief at 176-180; Teitzel Declaration at 29-42. Each of the five State Authorities has reached the same conclusion on behalf of its own consumers.

Faced with the extensive record here, competitors retreat to lower ground in attempting to fashion a countervailing public interest argument. AT&T pokes at the sufficiency of Qwest's performance assurance plans, notwithstanding that those plans are far more rigorous than those that the Commission has found satisfactory in other cases. AT&T and WorldCom re-run "price squeeze" arguments that the Commission already has rejected. Beyond that, competitors simply (albeit loudly) throw up a potpourri of miscellaneous other arguments that they allege provide public interest reasons for denying this application.

In a backhanded way, Qwest is pleased that its competitors' arguments come down to this. Their often-heated rhetoric is itself evidence of the strength of Qwest's showing under Section 271, and of the comprehensive work that has been done to open local markets in these states. With little of merit to say regarding legitimate Section 271 matters, competitors seek refuge outside its bounds.

Chairman Gifford of the Colorado PUC had a different take on the same issue three months ago when he denied an AT&T motion to modify his decision (as hearing examiner) regarding public interest issues in the Colorado 271 proceeding:

> AT&T is apparently prone to get a case of the vapors at the beginning of § 271-related dockets, *see* Decision No. R01-222-I, Docket No. 01I-041T. It now appears that this affliction has returned near the end of the § 271 dockets. *See* AT&T Motion to

> Modify Decision No. R02-318-I. This affliction manifests itself with ill-advised aggressiveness and overwrought pleading. *See Id.*

CPUC Hearing Commissioner Order Denying Motion To Modify Order On Staff Volume VII Report at 2. Chairman Gifford went on to observe that "the stridency of the motion principally serves to devalue the credibility of AT&T's position here, particularly, as I have noted before, because of the hypocrisy it betrays as to the "public interest" standard. *Id.* (referencing AT&T's advocacy of a narrow "public interest" review in the context of its own merger proceedings).

Similarly, nothing in the comments here should obscure the fundamental facts. Having fully met the Section 271 checklist and opened its local markets, Qwest's entry into the interexchange market is clearly in the public interest. These matters are discussed further below.

A. Criticisms of Qwest's Comprehensive Performance Assurance Plans Are Meritless

No party can challenge the fundamental fact that Qwest's performance assurance plans in the five states are more rigorous than those that the Commission has deemed satisfactory in other Section 271 proceedings. Indeed, the comments are notably silent with regard to PAP matters.

AT&T is a minor exception, but its criticisms of the Qwest PAPs are completely unfounded. 99/ AT&T claims, first, that Qwest's performance data are inaccurate and, therefore,

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99/ One-Eighty's comments do not implicate the sufficiency of the Qwest PAPs. As discussed above at Section VI(D) and in the Bumgarner Reply Declaration (at 11-14), OneEighty's comments involve alleged activity in Montana, a state that is not included in this Application. Any remedies available to OneEighty, therefore, would be pursuant to the Montana, rather the Colorado PAP. More importantly, the facts demonstrate that the June outages alleged by OneEighty were the result of Neustar's (the North American Numbering Plan Administrator) erroneous cancellation and reassignment of NPA/NXX code and was not Qwest's error. *Id.*

Qwest's PAPs (in Colorado as well as Montana) include performance measurements that measure and produce Tier 1 payments to CLECs for out-of-service incidents. (Qwest notes that the facts alleged by OneEighty related to the June outages may not warrant liability under the cannot be relied upon to determine the sufficiency of the plans. AT&T Comments at 144. However, the accuracy of Qwest's data has been verified through the Liberty audit and resulting reports and the data reconciliation efforts conducted through the ROC OSS collaborative. 100/ Each PAP also provides the opportunity for ongoing audits of performance measurements. Moreover, the sufficiency of the plans has been demonstrated through months of workshops and hearings in which the structure of the plans was fully scrutinized quite apart from the data that would pass through them. Finally, AT&T never asserted during the extensive state proceedings that any alleged inaccuracies in the data inputs prevented the plans from being properly evaluated.

AT&T also claims that the PAPs are flawed because they lack measures regarding service order accuracy. AT&T Comments, Finnegan Decl. ¶ 224. However, PO-20, Manual Service Order Accuracy, has recently been developed - subsequent to the PAP review proceedings - and currently is being reported as a diagnostic measurement. Williams Reply Decl. ¶¶ 81-82. Further review is expected in the course of a "long-term PID administration

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PAP, even under these measurements.) MR-3, Out of Service Cleared within 24 Hours, applies to non-design services and MR-5, Out of Service Cleared within 4 Hours, applies to design services. The PAPs include a measurement that evaluates the timeliness of Qwest's NXX code activation prior to the LERG effective date or by a "revised" effective date. *See* "NP-1, NXX Code Activation" and CPAP at 27. However, this measurement would not apply to OneEighty's claims as they are related to cancellation and reassignment of existing codes, rather than the activation of new NPA/NXX codes assigned to a CLEC's customers. And the PAPs are structured to provide significant payments to CLECs under these measurements. Under a per-occurrence payment structure, the PAPs pay on the percentage of trouble reports that did not meet the standard, relative to the total number of trouble reports in the same reporting period. The number of non-conforming trouble reports is then multiplied by the applicable payment amount identified in the PAP. *See* CPAP § 7.1. The amount may be the base amount or a higher amount depending upon whether other facets of the plan, such as payment escalation, also apply.

100/ *See* Liberty Audit Report, Appendix, D, Tab 4-16; The Liberty Consulting Group Report on Data Reconciliation of Qwest's Performance Measures, April, 2002, Appendix D, Tab 18-24. The data reconciliation process was discussed in detail in the Application, and additional information is provided in the Reply Declaration of Michael Williams.

forum." *Id.* ¶ 78. Each PAP provides the opportunity to consider inclusion of this PID at the six-month review.

There also is no validity to AT&T's claims that the Idaho and Iowa PAPs are contrary to FCC precedent. AT&T's sole complaint related to the Idaho PAP is that it allegedly "precludes CLECs from obtaining alternative forms of relief." AT&T Comments at 145. In fact, the Idaho PAP does not contain such a prohibition. Section 13.5 treats Tier 1 payments as liquidated damages, but expressly provides that the plan "is not intended to foreclose other noncontractual legal and noncontractual regulatory claims and remedies that may be available to a CLEC." Nor does the language in section 13.6 to which AT&T purports to object bar a CLEC from pursuing noncontractual claims, such as antitrust claims; rather, it prevents a CLEC from seeking the same or additional contractual relief through a noncontractual claim. This reflects the Multistate Facilitator's recognition that noncontractual remedies may well contain an element of compensatory recovery that would also be available under a contractual theory and, therefore, subject to the liquidated damages provision in the PAP. The Multistate Facilitator reasonably concluded that CLECs should not receive multiple opportunities to recover the same or additional contractual damages. Accordingly, a CLEC should not be permitted to fashion its contract claims as noncontractual ones (*e.g.*, tortious interference with contract) in an effort to recover damages it would be prevented from recovering under section 13.5. Facilitator's QPAP Report at 32.

Contrary to AT&T's unsupported contention, the PAPs' prohibition on recovery of contractual damages through noncontractual claims is not inconsistent with any FCC decision. The FCC has approved PAPs that treat Tier 1 payments as liquidated damages, as does section 13.5 of the QPAP. *See* Texas Plan at § 5.0; Kansas/Oklahoma Plan at § 5.0; Missouri at § 5.3-

5.5. Section 13.6 simply provides that a CLEC should not be able to circumvent this prohibition by the way it fashions its pleading. There is nothing unreasonable about the IPUC's agreement with the Facilitator that CLECs should not be afforded opportunities for multiple recovery.

Similarly, nothing in the Iowa PAP is inconsistent with FCC expectations or other plans that previously have been approved by the FCC. Contrary to AT&T's claim, nothing in the Iowa PAP precludes or impedes the Board's ability to enforce and supervise the PAP. Disputes arising under the PAP are addressed through the dispute resolution provision of the SGAT, which includes the Board as a forum for resolving disputes. Moreover, section 16.1 of the Iowa PAP states that "[a]ny disputes regarding adding, deleting, or modifying performance measurements shall be resolved pursuant to a proceeding before the Board and subject to judicial review." Indeed, AT&T's complaints appear to center around its unfounded belief that an RBOC must go so far as to grant substantive authority to a state commission or waive its rights to due process or to contest future commission orders. There is nothing in any FCC approved PAP or any FCC order that requires such a concession from an RBOC.

B. The "Price Squeeze" Arguments of AT&T and WorldCom are Both Legally Untenable and Factually Unsupportable

AT&T's and WorldCom's price squeeze claims are indistinguishable from those that the Commission, in a number of recent orders, has concluded pose no barrier to approval of a carrier's section 271 application. In particular, the Commission has recognized that in rural areas, a tight margin between UNE rates and available revenues might be "the result of subsidized local residential rates in one or more zones and not the fact that UNE rates are not at an appropriate point in the TELRIC range." It thus would not "be in the public interest to deny a section 271 application simply because the local telephone rates are low." *Vermont 271 Order* ¶ 68; *see also Georgia/Louisiana 271 Order* ¶¶ 286-87. In such circumstances, CLECs need not