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NEW YORK
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1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

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SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8058

WRITER'S E-MAIL ADDRESS
mschneider@sidley.com

August 16, 2002

By Hand Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TWB-204
Washington, DC 20554

Re: *Application by Qwest Communications International, Inc., for Authorization to Provide In-Region InterLATA Services in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota*, Docket No. 02-148.

Application by Qwest Communications International, Inc., for Authorization to Provide In-Region InterLATA Services in the States of Montana, Utah, Washington and Wyoming, Docket No. 02-189.

Dear Ms. Dortch:

On behalf of AT&T Corp. ("AT&T"), we are writing in reference to the impact on the above-referenced applications filed by Qwest Communications International, Inc. ("Qwest"), of Qwest's pattern of entering into secret, unfiled interconnection agreements.[1] As AT&T has maintained with respect to both phases of Qwest's unprecedented nine-state application, the Commission's review can begin and must end with Qwest's ongoing, deliberate, and region-wide pattern of providing secret, discriminatory and illegal interconnection agreement terms to selected CLECs. As AT&T has demonstrated, Qwest's pervasive pattern of entering into secret deals is a patent violation of Checklist Item 2, which requires Qwest to prove that it is providing "access" to its network facilities on terms and conditions that are

[1] Representatives of AT&T met with the FCC staff regarding these matters on August 5, 2002. *See* Letter from Amy L. Alvarez, AT&T, to Marlene H. Dortch, Secretary, dated August 6, 2002. AT&T is providing the following information in response to various questions that were asked at and following the meeting.

"nondiscriminatory," and deprives the Commission of any rational basis for concluding that Qwest has satisfied at least seven other checklist items that incorporate nondiscrimination requirements. Moreover, Qwest's tactic of providing secret benefits and buying off CLECs that otherwise might have alerted regulators to Qwest's failure to adhere to the Act's market opening requirements has precluded full development of the regulatory record, casting crucial aspects of the state commission review mechanism into doubt. It has also corrupted the performance and other test data on which Qwest's section 271 applications rely. Ultimately, Qwest's pattern of discriminatory, anticompetitive and unlawful conduct goes directly to the core issue of whether Qwest's local markets are open and are likely to remain so. Qwest's entrance into these secret deals - and its failure to make them public and have them approved by the states - currently precludes any finding that granting Qwest interLATA authority is in the public interest.

I. Introduction.

As AT&T demonstrated in its comments on both of Qwest's applications, Qwest's pervasive anticompetitive practice impacts CLECs in all of Qwest's states and is the subject of findings of violations by several independent state authorities, including Iowa and Arizona.[2] Qwest's discriminatory practices in violation of Sections 251 and 252 also are the subject of complaint and investigation by an independent regulatory body in Minnesota, where the Minnesota Department of Commerce is seeking to have millions of dollars of sanctions imposed against Qwest.[3] Qwest's unlawful conduct also is under investigation in other states, including Washington and New Mexico. As AT&T and others have shown in their comments, these adjudicated findings of violations of Sections 251 and 252 preclude the grant of interLATA authority to Qwest, notwithstanding the desire of Qwest and certain states to deflect and delay the evaluation of Qwest's discriminatory conduct to future post-section 271 proceedings. In fact, Qwest's entrance into these secret, undisclosed interconnection agreements provides three independent mandates for the denial of Qwest's nine-state application.[4]

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[2] *See* AT&T Comments on Qwest I at 20-24; AT&T Comments on Qwest II at 21-24; *A T&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, at 16 ("*Iowa Order*"); *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 17-18 ("*Arizona Report*"). The Iowa Utilities Board found that Qwest had violated section 252 of the Act and section 38.7(4) of the Iowa Code by failing to file three interconnection agreements in a timely manner. The staff of the Arizona Corporation Commission also found that Qwest had violated section 252 and engaged in anticompetitive conduct in a report released on June 7, 2002, which recommended that Qwest be required to file 25 secret agreements. The staff also recommended a significant assessment of fines for the failure to file these agreements, and explicitly recommended a higher forfeiture for agreements that contained clauses prohibiting the CLEC from participating in state regulatory proceedings.

[3] *See id.* at 18-20; AT&T Comments on Qwest II at 19-21; *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 ("*MDOC Complaint*").

[4] *See, e.g.,* Colorado Evaluation at 64; Idaho Comments at 13; Iowa Comments at 67.

First, Qwest's applications must be rejected because Qwest has not made the discriminatory secret deal terms available to other CLECs and it therefore cannot satisfy its checklist burden to demonstrate that it is presently providing nondiscriminatory interconnection and nondiscriminatory access to unbundled network elements. As discussed below, based only on the secret interconnection agreements that Qwest has been forced to disclose in the Iowa, Arizona and Minnesota proceedings, it is clear that Qwest has offered selected CLECs better prices and better terms for provisioning and resolving disputes over service. Because Qwest has not yet filed all of its secret interconnection agreements with the state commissions, had them approved pursuant to section 252, and made their terms available to all CLECs, Qwest cannot meet its burden to prove compliance with any checklist items that have a nondiscrimination component.

Second, Qwest's claim that it is presently providing nondiscriminatory access to OSS rests upon the results of KPMG tests that are not representative of Qwest's real world performance. These tests relied upon the performance of CLECs that received special treatment, not available to other CLECs, pursuant to the secret, unfiled agreements. As discussed in more detail below, with respect to tests concerning critical provisioning of dispatch services, even KPMG has refused to recognize that the test results were representative of the "typical" CLEC experience.[5] Because Qwest relies almost entirely on third-party testing data to carry its burden of proving nondiscriminatory access to OSS in opening its local markets to competition, the lack of reliability of critical portions of this data mandate the denial of Qwest's request for Section 271 authority.

Third, the record also does not reflect Qwest's real performance because key CLECs that had been most active in Qwest's region effectively were paid not to testify, having agreed not to participate in section 271 proceedings after entering secret deals. As discussed in more detail below, the record of Qwest's performance has been compromised in states like Colorado, and every other state where certain "secret deal" CLECs like Eschelon and McLeod operate, because these "secret deal" CLECs were obligated by their unfiled agreements to refrain from raising or addressing critical issues about Qwest's offerings and performance.

Ultimately, the only manner in which to ensure that Qwest satisfies the statutory preconditions for its receipt of interLATA authority is for state commissions to require public disclosure of all the unfiled agreements, to force Qwest to come clean about all of its secret deals, and to make certain that Qwest reforms its discriminatory practices by making the relevant terms and conditions of interconnection agreements available to all CLECs who wish to partake of them. At a minimum, those "secret deals" that constitute interconnection agreements must be filed and approved pursuant to section 252, with all of their terms available to the CLECs from

[5] *See* KPMG May Report, AT&T Comments on Qwest I, Finnegan Declaration, Attachment 2.

whom these deals were hidden, before section 271 authority can be granted to Qwest.[6] Absent the complete eradication of Qwest's discriminatory process of entering into secret interconnection agreements, oral or otherwise, this Commission must find that Qwest has not met its burden of demonstrating compliance with the checklist's nondiscrimination requirements.

II. The Secret Deals Constitute Discrimination.

As AT&T demonstrated in its initial comments, Qwest has entered into blatantly discriminatory agreements with CLECs and has kept those agreements secret from state regulators and competitors by failing to file them with state commissions. State commissions in both Iowa and Arizona have issued decisions concluding that these agreements granted preferential rates, terms and conditions to the favored carriers -- thereby discriminating against other CLECs and violating section 252 and applicable state rules. For example, the Iowa Utilities Board (the "IUB") issued the *Iowa Order* 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 IUB.[7] As demonstrated in AT&T's Comments, the IUB concluded that each of the agreements was discriminatory because it granted preferential rates, terms or conditions to the CLEC. Contrary to Qwest's claims that these agreements were simply settlements of outstanding commercial disputes, IUB held, among other things, that (1) each "of these service quality standards relates to interconnection, would have been of interest to other CLECs negotiating with U S WEST in the relevant time frame, and may still be of interest to other CLECs negotiating with Qwest today;" (2) even nominal settlement agreements plainly "discriminated against other CLECs;" and (3) 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."[8] The staff of the Arizona Corporation Commission ("ACC") similarly has concluded that Qwest violated its filing obligations under section 252 by failing to file at least *25* agreements with the ACC. The ACC staff recognized that the unfiled agreements are discriminatory, stating that "giving favored treatment to one carrier while denying it to another is the very type of discrimination that the Act attempts to prevent."[9]

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[6] Simply put, Qwest must comply with Section 252's obligation to file all "interconnection agreements" with the state commissions, including any agreement that affects the rates, terms and conditions of interconnection.

[7] The IUB concluded that the secret deals presented to it "include interconnection agreement provisions that should have been filed with the Board pursuant to § 252." *Iowa Order* at 9.

[8] *Iowa Order* at 10-15. The three agreements addressed in the *Iowa Order* included favorable and private terms on (1) specific interconnection performance standards, (2) going-forward and interim rates, and (3) regular executive meetings and escalation procedures for dispute resolution. *Id.* Qwest declined to request a hearing with respect to the IUB's conclusions and the *Iowa Order* is now final.

[9] *See Arizona Report* at 15-16. The ACC staff relied on Qwest's own description of what was included within the terms and conditions of the agreements, including dispute resolution, escalation procedures, account team support,

(continued . . .)

Finally, the Minnesota Department of Commerce ("MDOC") has observed that Qwest entered into a series of secret, discriminatory agreements with respect to access to rights of way, reciprocal compensation, and collocation. In the words of the MDOC:

> This is not, as Qwest portrays it, a case of business-as-usual, where Qwest honestly made mistakes and reasonable minds can disagree. To the contrary, the evidence discovered by the Department establishes that Qwest entered into these agreements, in part, to manipulate the regulatory process relating to Qwest's Section 271 application and the Qwest/USWEST merger. Qwest, for example, secretly agreed to provide two CLECs with significant discounts on all of their purchases from Qwest (including collocation, UNE and tariffed purchases), as part of a group of interdependent agreements that required the CLECs not to participate in the state or federal review of Qwest's Section 271 application. It kept these agreements and others secret both to prevent state commissions from discovering this manipulation and to avoid having to offer other CLECs the same, beneficial terms that it traded for favorable regulatory treatment.[10]

The MDOC noted in this respect that evidence, "including documents signed by senior executives at Qwest, shows that these agreements were part of a broader course of conduct by Qwest designed to prevent state and federal regulators from obtaining direct evidence that Qwest is not meeting its Section 271 obligations."[11] Specifically, according to the MDOC, Qwest's conduct and documents uncovered by the Department demonstrate that "Qwest was trying to avoid its non-discrimination obligations by preventing other CLECs from being able to opt into these agreements under 47 U.S.C. §252(i)."[12] In summary, the MDOC has characterized perfectly the ongoing pattern of discriminatory conduct by Qwest:

> What really happened here is that Qwest got caught with its hand in the cookie jar. Qwest engaged in a practice of trading discriminatory terms and conditions of interconnection in exchange for agreements by certain CLECs not to participate in consideration of Qwest's Section 271 application and/or the Qwest/USWEST merger. The most egregious of these agreements provided two CLECs—but no others—with substantial price reductions on UNEs, collocation, tariffed services and every other purchase made by the CLECs from Qwest. Qwest then concealed these agreements so

(. . . continued)
and the mechanics of provisioning and billing for ordered interconnection services. *Id.*

[10] MDOC Comments in Opposition To Qwest's Petition For Declaratory Ruling, WC Docket No. 02-89, filed May 29, 2002, at 2 (footnote omitted).

[11] *Id.* at 2 n.1.

[12] *Id.* at 13, 26.

> that the MPUC never had an opportunity to decide whether such agreements are in the public interest, and other CLECs never had an opportunity to opt into the terms that interested them under Section 252(i).[13]

Even based solely upon a review of the MDOC's investigation, three of the numerous secret interconnection agreements that were analyzed by the IUB, and the ACC staff's *Arizona Report*, the conclusion is inescapable that Qwest offered the favored CLECs better prices, better provisioning, and more desirable dispute resolution than other CLECs received. This patently discriminatory conduct is ongoing. As of this moment, Qwest still has not made those terms available to other CLECs. Qwest therefore cannot satisfy the checklist items that require a demonstration that it is presently providing nondiscriminatory interconnection and nondiscriminatory access to UNEs. Moreover, inasmuch as Qwest has refused to disclose all of its secret interconnection agreements, it cannot meet its burden of proving compliance with any of the checklist requirements that have a nondiscrimination component.[14]

Because the FCC, the state commissions and CLECs cannot know the full extent of the discrimination until Qwest discloses all of the required agreements - a process that has begun in some but not all of the state commissions and is far from complete - it would be patently arbitrary on this record for the Commission simply to close its eyes and assume that there are no other discriminatory agreements or terms. Qwest must submit these agreements for state commission approval, and the states must then make a determination whether these agreements discriminate against third parties.[15] Review of the recent developments in the Iowa, Arizona and Minnesota proceedings confirms that Qwest's pattern of providing secret interconnection agreement terms to selected CLECs is not only discriminatory and in violation of Section 252, but is ongoing, deliberate, and region-wide.

Evidence continues to mount in proceedings in Iowa, Minnesota and Arizona that Qwest's pattern of providing secret rates, terms and conditions for interconnection to selected carriers is not limited to the material that had become public at the time of Qwest's first multi-state filing at the FCC. In Iowa, for example, the IUB very recently determined that eleven new agreements that Qwest had failed to file, in addition to the three agreements that were the subject of the *Iowa Order*, should have been filed and must now be reviewed and made public. Additionally, nineteen additional agreements apparently will be made available for review, on a confidential basis subject to a protective order, for a determination of whether they contain rates, terms or conditions of interconnection that require that the agreements be filed pursuant to

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[13] *Id. at 41*

[14] *See* 47 U.S.C. § 271(c)(2)(B)(ii), (iii), (vii), (ix), (x), (xii) and (xiv) (incorporating the non-discrimination obligations of Section 251(c)).

[15] Pursuant to Section 252(e)(2)(A)(i) the states are required to complete this process within 90 days of the filing of the agreements.

Section 252. While AT&T has made efforts to obtain copies of these agreements, it was not until the evening of August 14, 2002, that AT&T was able to receive copies of some of the fourteen agreements that the IUB has determined must be made public. It remains undisputed, however, that the IUB's consideration of Qwest's pattern of entering into clandestine terms of interconnection, some of which already have been demonstrated to include discriminatory terms, is not nearly complete, even as the FCC's 90-day process nears its completion.

The ACC process in Arizona is similarly incomplete, but continues to provide significant evidence that Qwest persists in having interconnection agreements that must be, but have not been, filed, approved pursuant to Section 252, and made public for CLECs to pick and choose desirable terms and conditions of interconnection. On August 14, 2002, the ACC staff released a Supplemental Staff Report and Recommendation concerning the items addressed in the *Arizona Report*.[16] After receiving and reviewing information generated as a result of further data requests, the ACC staff amended its original list of 25 agreements, eliminating several agreements but adding several more, bringing to 28 the number of agreements that Qwest must now file in Arizona. The revised list includes agreements with ten carriers, including Eschelon, McLeod, Covad, ELI, Allegiance, GST and WorldCom. The ACC staff also revealed that Qwest had additional oral agreements with Eschelon and McLeod.[17] Pursuant to the ACC's procedures, parties have ten days to comment on the ACC staff's *Arizona Report* and *Arizona Supplemental Report* and on the revised list of 28 contracts subject to section 252 filing requirements. Only after those comments are filed will the ACC be prepared to make public these interconnection agreements and their terms. The ACC's procedures contemplate further analysis of these interconnection agreements as a part of the section 271 application process.

Similarly, in Minnesota, the PUC is conducting hearings and further analysis of the secret written and oral agreements that have come to light as a result of the MDOC Complaint. As part of that complaint proceeding, AT&T has analyzed the eleven public written agreements that are part of the MDOC Complaint.[18] In his testimony, AT&T's representative

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[16] Supplemental Staff Report and Recommendation, *Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, released August 14, 2002 ("*Arizona Supplemental Report*").

[17] According to the ACC staff, among other things, "there was also an oral agreement between Qwest and McLeod that McLeod would not oppose Qwest's 271 application as long as Qwest was in compliance with its agreements and all applicable statutes." Qwest's practice of purchasing CLEC silence during the section 271 process is discussed below in Section IV. It is worth noting here, however, that the ACC staff expressed its concern that its "significant additional discovery" had "escalated concerns regarding the business to business relationship between Qwest and Eschelon, and to a lesser degree Qwest and McLeod." *Arizona Supplemental Report* at 3. The ACC staff noted that "of particular concern is Qwest's handling of the 271 proceeding, and its reasons for not filing certain agreements entered into with these two carriers with the Commission for approval." *Id.*

[18] *See* Testimony of Michael Hydock, District Manager, AT&T, Local Services and Access Management Organization, MDOC Complaint, Exhibit 202 (April 22, 2002).

concluded that the confidential terms were "exceptionally favorable to each of these CLECs" and that "AT&T never had the opportunity to approach Qwest to opt-in to similar or identical arrangements."[19] For example, Eschelon received an "on-site dedicated provisioning team for up to one year [consisting of] a coach and service delivery coordinator . . . to resolve and work through provisioning issues," while AT&T received meetings that were "sporadic and occurred only over the telephone and not face-to-face as described in the Eschelon agreement."[20] Eschelon also received a ten percent reduction of "aggregate billed charges for all purchases made by Eschelon from Qwest," resulting in Eschelon "paying 10% less for wholesale services than AT&T – or any other CLEC – that could not enter this particular agreement."[21]

In another agreement, Qwest also committed "to credit Eschelon $13 per line per month as an interim resolution to compensate Eschelon for Qwest's failure to properly record usage on Eschelon's lines on its daily usage files ("DUF")," thus giving Eschelon a favorable "discount" per line per month; AT&T determined that "Qwest reported accurate switched access records on its DUF files only 48% of the time," but despite reporting this figure "to Qwest during numerous meetings," AT&T was offered no relief.[22] Qwest later increased this credit to Eschelon by an additional "$2 per line for intraLATA toll traffic terminating to Eschelon's switch" where Qwest provided inaccurate access records for this type of traffic, but while AT&T was involved in "several" billing disputes of this type, Qwest never "offered a credit such as this to AT&T."[23]

In the Minnesota proceeding, AT&T reviewed the agreements made public between Qwest and Covad and other "Small CLECs."[24] AT&T's representative has made clear that AT&T would have been interested in the service terms that required Qwest "to deliver 90% of Covad's FOCs within 48 hours of delivery of an accurate LSR," without loop conditioning activity "of any sort," as well as terms for line sharing service that "are more favorable than the published service interval guide."[25] AT&T would also have been interested in the favorable term afforded to the "Small CLECs," which allowed them to adopt any voluntary term agreed to by

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[19] *Id.* at 3.

[20] *Id.* at 4.

[21] *Id.* at 7.

[22] *Id.* at 9. Qwest therefore secretly granted Eschelon "credits for every line for every month" in a manner that was "discriminatory to AT&T *and* every other CLEC." *Id.* at 10 (*emphasis in original*).

[23] *Id.* at 10.

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

[25] *Id.*

Qwest anywhere in its operating territory, because traditionally "Qwest has limited AT&T to pursuing adoption of agreements on a state-by-state basis."[26]

In its complaint before the Minnesota PUC, the MDOC has relied on precisely these types of discriminatory agreements in support of its claim that Qwest has violated Sections 251 and 252 of the Act. In the current phase of the proceedings, moreover, the MDOC has provided evidence that Qwest has additional *oral* agreements that further discriminate between certain favored CLECs and other CLECs.[27] Specifically, Qwest and McLeod apparently entered into oral agreements whereby "Qwest would provide discounts to McLeod for all purchases made by McLeod from Qwest;" these discounts "ranged from 6.5% to 10% depending on the volume of purchases made" by McLeod.[28]

The MDOC's investigation revealed that Qwest did not want to put the discounts in writing, and was "concerned that other CLECs might feel entitled to the same discount if the agreement were written and made public."[29] These clandestine oral discount agreements accompanied the secret written agreements with McLeod that were part of the MDOC Complaint, and were joined with an oral agreement for McLeod "not to participate in proceedings considering Qwest's Section 271 application."[30] From both the current developments in Minnesota and Arizona, it is clear that Qwest has made, and is currently making, every attempt to discriminate among CLECs with respect to discounts; in fact, the purpose of keeping these agreements secret has been to prevent other CLECs from asking for similar rates, terms or conditions.

The evidence of Qwest's ongoing practice of keeping private its selective terms for interconnection in these state proceedings is unmistakably clear. Given the conclusions of the state commissions in Arizona, Iowa and Minnesota, and the corroborating facts that are coming to light as these proceedings continue, the FCC must refuse to grant Qwest section 271 relief until Qwest can demonstrate that the discriminatory practices in which it has engaged have been eliminated, and that no more "unfiled agreements" litter its local landscape. As demonstrated by the proceedings in Minnesota, Iowa and Arizona, states can adopt procedures that will result in the rapid filing, review and approval of Qwest's terms for interconnection, provided that Qwest ceases its dilatory tactics with respect to the disclosure of these agreements.

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[26] *Id.* at 12.

[27] *See, e.g.*, Supplemental Testimony of W. Clay Deanhardt, July 24, 2002. The current proceedings before the MPUC are being undertaken confidentially under seal. The report provided here is based on the redacted version of Mr. Deanhardt's testimony.

[28] *Id.* at 2, 9.

[29] *Id.* at 8-9.

[30] *Id.* at 5.

Absent such an undertaking, Qwest simply cannot meet its burden of demonstrating compliance with the various checklist requirements that are rooted in nondiscrimination.[31]

III. The Secret Deals Make KPMG Test Results Unreliable.

Qwest also cannot escape the impact of these ongoing discriminatory arrangements upon the efficacy of the test results on which Qwest relies to demonstrate that it provides effective and nondiscriminatory access to OSS. Because it has precluded the emergence of significant competition and as a result there is insufficient commercial experience in the applicant states, Qwest has relied almost entirely upon the results of third-party testing data to meet its burden of demonstrating that its provision of access to OSS meets the Commission's standards under Section 271. To test Qwest's performance with respect to activities that require dispatch of a Qwest technician, for example, KPMG was required to observe Qwest's performance with respect to specific CLECs. As indicated in AT&T's comments on Qwest's applications, KPMG's findings were based almost entirely on information and data that KPMG obtained from CLECs like McLeod, Eschelon and Covad. These favored "secret deal" CLECs were receiving preferential treatment from Qwest, and therefore may not be relied upon to demonstrate acceptable general performance by Qwest for all CLECs.[32]

KPMG has acknowledged that some of the findings and conclusions in its report were based, in whole or in part, on information and data obtained from "secret deal" CLECs. In its report issued May 7, 2002, KPMG identified a number of tests on which it had relied, either substantially or in part, on information from at least three "secret deal" CLECs.[33] In identifying these tests, which covered every OSS function, from pre-ordering to maintenance and repair, KPMG stated that it "makes no assertion as to whether or not the information received from the three CLECs is representative of the 'typical' CLEC experience, given the preferential treatment the three CLECs may have received from Qwest."[34]

One month later, after additional "secret deal" CLECs were discovered and disclosed, KPMG issued a supplemental report which reiterated that "in our original [KPMG

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[31] Qwest's most recent attempts to promise future compliance by the filing of some future interconnection agreements falls woefully short of carrying its burden or curing its discriminatory practices. Most simply, even with such a promise for future action, Qwest still will not have disclosed all of the terms in all existing secret interconnection deals, much less cured the discriminatory effect of these agreements by making those terms available to all CLECs. Moreover, Qwest has placed significant caveats in its promise for future compliance, by indicating that it will not file agreements that reflect payments for past disputes, because these payments often take the form of discounts on future service or effectively constitute such discounts.

[32] *See* Joint Declaration of John F. Finnegan, Timothy M. Connolly, and Mitchell H. Menezes at 9-11.

[33] *Id.* at 10 and Attachment 2 (KPMG May 2002 Report).

[34] *Id.* at Attachment 2.

May 2002 Report], KPMG Consulting made no assertion as to whether or not the information received from the three CLECs is representative of the 'typical' CLEC experience," and continued on to "affirm that statement."[35] KPMG took pains to mitigate the impact of that statement - which like the thirteenth chime of a clock called the efficacy of its prior testing immediately into question - by indicating that it "is not aware of any evidence that suggests that Qwest has given preferential treatment to any of the participating CLECs in a manner that would undermine the credibility of the information relied on by KPMG Consulting." Yet KPMG participants in the testing have since acknowledged that they never attempted "to investigate whether or not the information provided by one of the participating CLECs was consistent with information held by other CLECs."[36]

Because the burden is on Qwest to demonstrate the effectiveness and nondiscriminatory nature of its OSS performance, these statements by KPMG alone are sufficient to prove unreliable the tests that relied in whole or in significant part on performance observation or data that came from the favored CLECs. Nevertheless, as indicated below, AT&T can show, at a minimum, that KPMG relied extensively on McLeod for unbundled loop and UNE-P observations, Eschelon for UNE-P observations, and Covad for DSL observations. Where KPMG relied to a material extent on these "secret deal" CLECs, the concern that the performance that was measured was superior to the results that would have been observed for a less-favored CLEC is obvious for several reasons. First, installation or repair of service logically would be benefited by the attentiveness of specific Qwest personnel that were provided to certain CLECs as part of their private favorable arrangements.[37] Second, particularly favorable timing commitments that were privately provided to certain CLECs logically would produce an incentive to meet those commitments, unlike the incentive that exists with "typical" CLECs subject to more standard arrangements.[38] It is for this very reason that KPMG felt the need to qualify its reports on the representative nature of tests involving "secret deal" CLECs.

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[35] *Id.* at Attachment 3 (KPMG June 11, 2002 Report).

[36] *Compare* Attachment 3 *with* CPUC Transcript, June 10, at 178, 200 (Weeks testifies that basis for no claim of "no evidence" was that "no information has been brought to our attention to the contrary," and admits that KPMG actually has not reviewed any of the secret agreements or become "aware of what the content are of those deals").

[37] For example, the MDOC alleged that Qwest had agreed to locate a "Coach" and a "Service Delivery Coordinator" on Eschelon's premises; to dedicate a special provisioning team to handle Eschelon's orders; to hold weekly meetings with a service account team; and to provide the CLEC with special internal dispute resolution procedures, including escalation to Qwest's Vice Presidential level and above. *See* Eschelon Agreements Nos. I-IV. McLeod received a similar escalation provision. *See* McLeod Agreement, Sections 2 and 3.

[38] For example, Qwest agreed to provide Covad with "90% of Covad's FOC dates within 48 hours of receipt of properly completed service requests for POTS unbundled loop services;" to notify Covad of any facility shortages for DSL, ISDN and DS1 capable services within the same 48 hour period; and to provide 90% of Covad's FOC dates within 72 hours of receipt of properly completed service requests, among other accommodations. *See* Covad Agreement, at Sections 1-4.

In its reports, KPMG catalogues more than 40 different instances of tests and criteria that involved "partial reliance" on input from "secret deal" CLECs.[39] Additionally, KPMG catalogues 4 separate instances of tests and criteria that involved "substantial reliance" on input from "secret deal" CLECs.[40] The tests where KPMG placed "substantial reliance" on the "secret deal" CLECs were based on input primarily or wholly from these CLECs, and included testing for average time for installing unbundled loops, to testing for the percentage of UNE-P installation commitments that were met, to testing for the average installation interval for all products.

As for the tests in which KPMG placed "partial reliance" on "secret deal" CLECs, KPMG has not identified which CLECs were involved or the extent of the reliance. These tests included a broad range of performance indications, including comparisons of retail and wholesale service offerings, provisions of "Hot Cuts," number portability timeliness, timeliness of coordinated cuts for unbundled loop, clearance of out-of-service trouble reports, and other service issues and comparisons. The Commission cannot place any reliance on these various tests to support favorable findings concerning Qwest's OSS performance because, while KPMG is certainly capable of doing so, KPMG has not been given the time by Qwest to define with any degree of specificity the extent of the reliance of these tests on "secret deal" CLECs and whether the advantages they were afforded skewed the results of the tests.[41]

IV. The Secret Deals Prevented CLECs From Providing Essential Information.

Finally, in its comments on Qwest's applications, AT&T demonstrated that Qwest's practice of entering into secret interconnection agreements does substantial damage to its ability to show compliance with the checklist requirements of section 271 because the record reflects Qwest's purchase of the silence of CLECs that had critical information bearing on Qwest's checklist compliance.[42] Indeed, as AT&T noted, Eschelon has confirmed 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.[43] Simply put, Qwest's "secret deal" partners were among the most active in Qwest's region during the early stages of UNE

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[39] *See* CLEC Participation, KPMG Qwest 271 OSS Evaluation, May 7, 2002.

[40] *Id.*

[41] To compound the unreliable nature of these tests, neither Qwest nor KPMG sought to expand the study of the participation of "secret deal" CLECs beyond the original three (McLeod, Covad and Eschelon), despite AT&T's request that the report be amended to reflect the participation or study of subsequently-discovered additional "secret deal" CLECs in June of 2002.

[42] *See* AT&T Comments at 17.

[43] *See id.* at 16 & Attachment 6.

deployment, and were in this respect uniquely suited to comment with "real world" experience on particular problems with Qwest's service and offerings and the general openness of Qwest's local market. As a consequence, the Commission cannot rely on the absence of evidence of discrimination or other checklist violations in the state proceedings to conclude that the checklist requirements are satisfied because absent further independent investigation, any finding by the Commission that Qwest has satisfied the competitive checklist would be reversible error.

The recent developments in the ongoing proceedings in Minnesota and Arizona provide stark evidence of the validity of this concern, and drive home the significant reliance Qwest has placed on depriving the state commissions and the FCC of important comments on Qwest's performance. The ACC staff's *Arizona Supplemental Report*, issued on August 14, 2002, contains significant reflections on the severity of Qwest's conduct in procuring the silence of key CLECs. Consistent with its admonishments in the *Arizona Report*, the ACC staff recognized that the concealed agreements that prohibited CLEC participation in the state section 271 process raise "concerns from a public policy perspective with regard to the 271 investigation:"

> The 271 proceeding is conducted by State commissions in order to determine whether Qwest should be allowed into the interLATA interexchange market . . . . Qwest must meet a myriad of requirements and conditions in order to receive the FCC's approval to offer interLATA service. The State Commission conducts what is a lengthy in-depth proceeding . . . so that the Commission can adequately perform its consultative role with the FCC under Federal law. *For this reason, interference with the Commission's processes in the 271 case, in particular, raises serious public policy concerns.*[44]

Most importantly, the ACC staff continued on to hold that given "the responses to Staff's data requests and the comments filed in the 271 proceeding, Staff believes that an initial showing has been made that Qwest interfered with the 271 proceeding before the Commission and that the Commission's processes and the ability of two carriers to present their issues to the Commission were adversely impacted."[45] The ACC staff found that based upon the additional information received since its original report, "additional fines over and above the base amount" for entering into private agreements restricting CLEC participation in the section 271 process, "as well as non-monetary penalties are appropriate."[46] In this way, the ACC staff expressed its serious and "particular concern" with Qwest's attempts to silence the contributions of Eschelon and McLeod. For this reason, the ACC staff has recommended the establishment of a sub-docket in the Section

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[44] *Arizona Supplemental Report* at 9-10 (*emphasis added*).

[45] *Id.*

[46] *Id.*

271 docket in Arizona that will expressly assess the role that Qwest's procurement of CLEC witness silence played in Arizona's section 271 proceeding.[47]

Given the severity and very nature of Qwest's conduct in purchasing witness silence, there can be no suggestion that the burden is upon commenters to prove that which Qwest has concealed from them: the scope of the discrimination and the harm to the record caused by Qwest's entrance into secret deals. The silence of the favored CLECs, who were among the most active participants in Qwest's region and in Qwest's state proceedings at one time, could not be filled by AT&T, who had less experience with UNE-P offerings in states like Colorado and other Qwest states where its early offerings were contemplated using AT&T Broadband or other assets. Indeed, placing the burden on AT&T to demonstrate any harm to the record, much less substantial harm, impermissibly shifts the burden of proof in a section 271 proceeding and rewards the very behavior that states like Arizona and Minnesota are seeking to punish and remedy.

Nevertheless, AT&T has come forward with significant anecdotal evidence of both the likely intention and effect of Qwest's purchase of the silence of CLECs like Eschelon, McLeod and SunWest, specifically with respect to the function of the workshop process in state proceedings.[48] In AT&T's experience, the workshop process depends critically on the contributions and participation of all CLECs who have worked and are currently working with Qwest. During the time that the workshops were conducted, none of the CLECs in Qwest's territory had used all of Qwest's local products and different CLECs were using different business plans. Some CLECs were facilities-based, some CLECs were UNE-based and other CLECs provided service through resale. Because the voices that had principal or unique experiences with UNE-based market entry were missing, the UNE workshops and associated metrics missed vital input on issues and problems using Qwest offerings. Similar problems of omission occurred in the resale workshops where critical CLECs were silenced by Qwest.

For example, the first UNE workshop in the Qwest region was held in October of 2000 in Arizona. AT&T's representative recalls that Eschelon had several people at the meeting and was by far the most vocal CLEC. Specifically, Eschelon had been attempting to enter the market using various types of UNE-P and, from his recollection of their statements in the workshop, they were having tremendous problems with Qwest's UNE-P offerings, with Qwest's

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[47] In the Minnesota proceeding, Qwest similarly is facing the consequences of its concerted effort to silence McLeod and Eschelon. In that proceeding, the MDOC presently is pursuing aggressively sanctions for Qwest's efforts to bind McLeod to an oral agreement not to participate in Section 271 proceedings. *See* Supplemental Testimony of W. Clay Deanhardt, July 24, 2002, at 5.

[48] As indicated in the attached declaration, the ensuing description of the workshop process in Qwest's region is provided by Kenneth L. Wilson, the lead technical witness for AT&T in the section 271 workshops in Qwest's region. Mr. Wilson attended a total of 41 multi-day Qwest 271 workshop sessions.

provisioning processes and with other aspects of market entry using Qwest UNE-P. In the meeting, Eschelon apparently went so far as to say that Qwest had no real UNE-P product. While AT&T's representative recalls that Qwest tried to placate Eschelon in the meeting with various alternatives and options, Eschelon responded to each suggestion with knowledgeable replies as to how they had tried the suggested approach without success. Qwest could not at that point provide solutions to Eschelon's problems and most of these issues were set aside for Qwest to resolve in follow-up workshops.

Subsequent to this first workshop, after Qwest had apparently entered into its discriminatory arrangement with Eschelon, Eschelon did not appear again at any section 271 workshop in the Qwest region.[49] Eschelon did not participate in workshops for which they had been scheduled in other Qwest states such as Colorado, nor did they perform any follow-up in Arizona. AT&T's participant was able to learn only that Eschelon's upper management apparently had met with Qwest, and that Eschelon employees were forbidden to discuss any issues regarding Qwest, were forbidden to talk about any agreements with Qwest and were forbidden to participate in any manner in the section 271 workshops. In the view of AT&T's representative, Eschelon's departure crippled the UNE workshops and severely damaged work on testing and metrics.

Unlike Eschelon, AT&T was not using UNE-P in the Qwest region because of the slowness of Qwest's work on OSS and the lack of Qwest testing capability. No other CLEC in the workshops said that they were actively trying to use Qwest's UNE-P offerings at the time. While Eschelon brought up issues that could have changed the way that the SGAT was written, that tests were conducted, and that metrics were constructed, Qwest's "secret deal" and its concurrent commitment from Eschelon to keep silent prevented such a complete development of the record. While AT&T attempted to resurrect the issues, it had no actual experience in UNE-P in the Qwest territory and no other CLEC acknowledged involvement with UNE-P at that time. Qwest's contentions that it had remedied Eschelon's concerns and that there was no need for change in the SGAT, in testing and in the metrics, could not be effectively challenged.[50]

Similarly, McLeod was an important participant in some early section 271 workshops in other states in Qwest's region. Specifically, McLeod began in one of the first workshops by taking Qwest to task on the provisioning of poles, ducts, conduits and rights-of-way. In the middle of the workshop sequence, McLeod's representative stopped coming to meetings and stopped calling in on the conference calls. While a new McLeod representative appeared, they did not participate aggressively, if they participated at all. According to AT&T's

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[49] While one Eschelon employee briefly appeared in a multistate loop workshop nine months later, this employee indicated that they were present only to listen.

[50] Confirmation that Eschelon had these and other issues can be found in Eschelon's filings in Minnesota and before the FCC in this proceeding.

representative, McLeod's representative indicated that they were no longer allowed to talk about problems they were having with Qwest, but were only allowed to observe and to obtain clarification on issues. As the Arizona and Minnesota proceedings make crystal clear, the procurement of McLeod's silence damaged the section 271 process.

Finally, in Colorado's workshop process, Sun West had unique experiences with Qwest in provisioning UNE-Loop services, in collocation provisioning, in the availability of EEL, and with long-unresolved disconnected service. Specifically, in early workshops, Sun West demonstrated problems with the provisioning of loops in rural areas. Sun West ceased actively advocating the existence of problems, however, after it entered into an arrangement with Qwest that was not filed or made public. With Sun West's procured silence, the problems with Qwest's provisioning of loops in rural areas were not resolved, and in AT&T's view, have yet to be resolved. As with Eschelon and McLeod, Qwest simply purchased the silence of a material and necessary participant in the section 271 process, compromising the record in the attempt to ease its way into the interLATA market without regard for its obligations to develop OSS and other market-opening practices with respect to its own local exchange service.

V. Conclusion.

For the reasons discussed above, the Commission must reject Qwest's gambit at securing interLATA entry into multiple states before it deals with the consequences of its entrance into secret, discriminatory interconnection arrangements. Should the Commission staff have any further questions regarding the impact of these arrangements, please feel free to contact the undersigned.

Very truly yours,

/s/ Mark D. Schneider

Mark D. Schneider

cc: Michelle Carey
Michael Carowitz
Linda Kinney
Carol Mattey
Elizabeth Yockus

DECLARATION OF KENNETH L. WILSON

I, Kenneth L. Wilson, do hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information and belief:

I served as the lead technical witness for AT&T in the Section 271 workshops in Qwest's region. I attended approximately 41 multi-day Qwest 271 workshop sessions.

I have reviewed the foregoing ex parte letter drafted to address Qwest's practice of entering secret interconnection agreements, particularly Section IV entitled "The Secret Deals Prevented CLECs From Providing Essential Information." I provided the facts set forth on pages 13 through 15 concerning the workshops, and hereby verify that they are true and correct.

Kenneth L. Wilson

Kenneth L. Wilson
Dated: August 15, 2002