

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

To: The Commission

**SUPPLEMENTAL REPLY COMMENTS OF  
QWEST COMMUNICATIONS INTERNATIONAL INC.  
IN SUPPORT OF CONSOLIDATED APPLICATION  
FOR AUTHORITY TO PROVIDE IN-REGION, INTERLATA SERVICES  
IN COLORADO, IDAHO, IOWA, NEBRASKA, AND NORTH DAKOTA**

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## INTRODUCTION AND SUMMARY

Responses to the Commission's August 21 Public Notice are enlightening: Opponents of Qwest's pending applications have submitted no new information. They instead have simply ratcheted up the volume of their rhetoric in response to Qwest's additional good-faith actions to respond to concerns arising from the unclear scope of the Section 252(a) filing requirement.

In stark contrast, State Utility Authorities in Colorado, Idaho, Iowa, Nebraska and North Dakota, the relevant states here, unanimously contend that the so-called "unfiled agreements" issue does not provide a basis for delaying action granting this application. They are joined in this conclusion by three other commissions, those of Montana, Oregon and Washington. These State Authorities recognize that Qwest has fully opened the local markets in their states. They recognize that this matter only involves limited compliance questions arising in an area where the law is unclear. Indeed, the Colorado Commission refers to the issue as a "trifle." Qwest would never minimize any compliance matter, but that does not make this a Section 271 issue. The fundamental fact is that Qwest has filed hundreds of interconnection agreements, and questions have been raised only about a relative handful. Even there, unsettled legal line-drawing questions as to the scope of Section 252(a) are implicated, as no party disagrees that many ILEC-CLEC contracts (including many Qwest contracts) need not be filed for state regulatory approval.

And even assuming that Section 252(a) were clear — and the record shows multiple positions on this subject — the State Authorities recognize that this is a matter best resolved in an enforcement or other proceeding where the law can be clarified and actual facts determined. Qwest strongly disputes the allegations that have been made against it, and has presented un rebutted testimony in the states on two fronts: (i) the actual meaning of the contracts

at issue, and (ii) what it was routinely doing for other CLECs. The latter is crucial because in many cases the business practices that are memorialized in contracts at issue are essentially the same, or have been superseded by a higher quality of service, as those that Qwest gives to all CLECs in the ordinary course and/or were contained in other filed contracts. Thus, it is simply wrong to assume that, even if a filing lapse occurred in a particular case, the result is discrimination — let alone the kind of broad-scale discrimination that would compromise the massive record here of the steps that Qwest has taken to open its local markets — and the competition that has resulted. The State Authorities who have lived this record have no difficulty seeing the forest for the trees, and they make that clear in their comments.

It is worth reiterating here the true course of Qwest’s conduct: First, Qwest worked to improve its wholesale service by working directly with CLECs to address their specific concerns. In some cases, it reached contractual agreements with CLECs. For many of those agreements, Qwest determined them to be interconnection agreements within the meaning of Section 252 and filed them with State Authorities pursuant to Section 252(e)(2). There were other contractual arrangements with CLECs that Qwest did not, and does not, believe fall within the prior filing and approval requirements of Section 252. After questions were raised concerning some of those unfiled agreements, Qwest promptly brought the matter to the attention of the FCC and State Authorities throughout Qwest’s region.<sup>1</sup> This action included providing each Authority with copies of any contracts or amendments cited by the Minnesota Department of Commerce for CLECs that also operated in their state and requesting that, if the Authority

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<sup>1</sup> Qwest did not, as AT&T alleges, “stonewall[]” or “resist[] disclosure of the agreements placed into issue by the MDOC, the IUB, and the ACC.” Without any legal process, Qwest provided to all thirteen other states any of the eleven agreements identified by the Minnesota Department of Commerce that related to that state. Qwest also provided every document requested in discovery.

viewed any contract as an interconnection agreement subject to a Section 252 filing obligation, that contract be approved as such. Qwest also filed a petition for declaratory ruling with the FCC seeking clarification of the scope of the Section 252(a) filing requirement in the context of various ILEC-CLEC contractual arrangements. Comments on the petition proposed several varying standards.

In May 2002, Qwest adopted a new policy, pending action on its Declaratory Ruling Petition, that resolved this issue going forward by implementing a broad standard that draws no lines between minor implementation matters that Qwest views as outside the scope of Section 252(a)'s mandatory filing requirement, and other 251-related provisions. Under that policy, Qwest is filing all contracts, agreements, or letters of understanding between Qwest Corporation and CLECs that create obligations to meet the requirements of Section 251(b) or (c) on a going-forward basis. Qwest will follow that policy until the FCC issues a decision on the scope of the filing requirements. Contrary to AT&T's unsupported accusations, Qwest instituted these and other remedial measures before any state commission had issued any findings on whether the unfiled agreements should have been filed under Section 252(a).

With regard to older agreements, Qwest then stated in its Reply Comments in Docket No. 02-148 that it would post on its web site all contracts with CLECs in states where it had Section 271 applications pending insofar as those contracts contained effective going-forward obligations related to Section 251(b) and (c), and that it would make available such going-forward terms to other CLECs under the same policies that apply under Section 252(i). On August 20, Qwest took an additional step of committing to file all such contracts under

Section 252(e), and it made those filings in the ensuing days. Qwest also has posted these contracts on its web site and made them available immediately for request.<sup>2</sup>

Thus, Qwest has gone beyond what Section 252 requires in order to respond to concerns raised in this docket. Qwest is gratified that the Colorado PUC finds Qwest's actions "commendable." COPUC August 28 Comments at 3. AT&T's and other commenters' rhetoric that Qwest should be penalized underscore that this matter can and should be handled through enforcement proceedings. This is especially so because *these issues have clearly been resolved going forward*.<sup>3</sup> The combination of the commitments that Qwest has now made will more than comply with any reasonable Section 252 standard announced by this Commission and ensure that, in addition to the steps that Qwest has undertaken to open irreversibly its local markets to competition, any conceivable standard of nondiscrimination in Section 271's fourteen-point checklist will be satisfied.

Opponents nevertheless argue that Qwest's actions implicate the "complete when filed" policy of the Commission. This is wrong. Qwest's original application fully demonstrates that it has satisfied Section 271. Opponents of the application raised a peripheral issue of whether Qwest is complying with Section 252's filing standard, and Qwest has responded by taking positive remedial action that resolves any possible legitimate concern while the Commission is considering how to clarify the standard in a separate proceeding. The states are addressing the factual and legal questions of the specific contracts at issue in due course. This is how such an enforcement/compliance matter should be addressed, not in a 271 proceeding.

Indeed, the Opponents are effectively trying to manufacture a "complete when

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<sup>2</sup> Qwest took limited actions to protect the confidential information of CLECs, and to give CLECs the opportunity to address confidentiality provisions in the agreements.

<sup>3</sup> See Qwest Reply Comments in Docket No. 02-189 at 139-146.

filed” argument out of their own unproven allegations. As of today only one State Authority has issued a decision on this matter: the Iowa Utilities Board. The IUB established a new standard under Section 252, and provided Qwest an opportunity to file in accordance with that standard without imposing penalties. To resolve the issue, Qwest accepted that outcome, and the IUB has now reaffirmed that this issue should not delay 271 approval here.

Otherwise, the record here has nothing but AT&T’s rhetoric, based on bare allegations or preliminary state review without the benefit of the evidence that Qwest has provided in relevant proceedings on the subject. What is not “complete” is the development of a record on the past, historical contracts at issue, the vast majority of which no longer represent ongoing contractual obligations. Qwest believes that the record on the terminated and expired agreements is irrelevant, particularly in view of its recent filings of all of its currently effective obligations. But it should go without saying that Qwest faced no requirement to litigate in its initial application (or now) the allegations against it made by AT&T and other Opponents before and since the application was filed. A Section 271 proceeding is not the place to resolve such disputes.

Opponents also rehash their prior arguments that the “unfiled agreements” issue somehow implicates the KPMG OSS test. This is also false, as discussed most recently in Qwest’s ex parte letter of August 27 and reviewed here.

In short, the record in this proceeding overwhelmingly demonstrates that today Qwest’s local exchange markets are open, that Qwest is satisfying the requirements of Section 271, and that this application should be granted. This was true on June 13 and remains true today. Opponents should not be allowed to turn a compliance dispute that no State Authority views as material to Qwest’s Section 271 applications, and where the facts are much in dispute,

into a basis for ignoring all the work Qwest, the states, and other parties have done that have resulted in Qwest's meeting the Act's requirements.

**I. THE STATE AUTHORITIES HAVE REAFFIRMED THAT THIS MATTER DOES NOT OUTWEIGH THE MASSIVE RECORD THAT QWEST'S LOCAL MARKETS ARE OPEN TO COMPETITION**

As Qwest has discussed previously,<sup>4</sup> AT&T already has tried to shop these same arguments to State Authorities throughout the Qwest region. To date, all ten of the State Authorities that have considered AT&T's position have rejected it, including the Authorities in all of the states at issue in both pending applications. The Department of Justice has recommended in both proceedings that this issue not be considered grounds for denying Qwest's applications.

The relevant State Authorities have largely reiterated their positions here, providing this Commission with additional reason to reject AT&T's attempts to force these issues into the Section 271 proceedings.

The Colorado PUC "strenuously objects" to opponents' advocacy of "inaction and delay by this Commission." COPUC August 28 Comments at 2. The COPUC correctly characterizes opponents' allegations as "amorphous assertions of 'harm' that permeate this proceeding." *Id.* It reiterates that "the interests of the consumers of Colorado are best served by the prompt approval of Qwest's application and by Qwest's entry into the in-region, interLATA market." *Id.* at 3. AT&T's ratcheted-up rhetoric and "amorphous assertions of 'harm'" are entitled to no weight, and certainly cannot outweigh the public-interest considerations in increased long distance competition.

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<sup>4</sup> See, e.g., Ex Parte Letter of Peter Rohrbach, filed Aug. 27, 2002 ("Qwest August 27 Ex Parte"); Qwest Reply Comments in Docket No. 02-189 (filed Aug. 26, 2002).

Similarly, the Iowa Utilities Board urges this Commission to approve the pending application, stating that the issue of unfiled agreements “has been reviewed and resolved in Iowa through a separate docket.” IUB August 28 Comments at 5. The Idaho PUC states that it “does not believe Qwest’s filing of the agreements with the IPUC should affect the FCC’s consideration of Qwest’s Section 271 application.” IPUC August 28 Comments at 1. The North Dakota PSC “reaffirm[s] its conclusion” that this issue “has remedies that are better implemented outside of the § 271 process.” NDPSC August 28 Comments at 2. It “asks the FCC to reject current suggestions that the Qwest 271 application be derailed over this dispute,” arguing that the public interest will be protected regardless of approval but would be damaged by delay. *Id.* at 3.

Finally, the COPUC thoughtfully puts this dispute into the proper perspective:

[T]he ROC performed the most rigorous OSS test yet performed on an ILEC in the country. Qwest substantially passed this test. The COPUC developed the most rigorous performance assurance plan yet implemented by an ILEC. The COPUC, with the ROC, Qwest and CLECs, developed the most comprehensive SGAT yet filed by an ILEC. The COPUC reset TELRIC rates for Colorado, which rates have benchmarked the entire Qwest region.

At the end of the day, in light of all these notable market-opening accomplishments, it would be a grave error to deny or delay granting § 271 authority because of a trifle such as the unfiled agreements – and a trifle, no less, that is being dealt with through § 252 transparency and an enforcement investigation.

The Commission should grant the Qwest § 271 application without further delay.

COPUC August 28 Comments at 12-13.

AT&T engages in another flagrant misrepresentation through its contention that “several state commissions have now found” that Qwest has engaged in “a concerted region wide campaign that has already been demonstrated to involve dozens of secret interconnection agreements.” AT&T Supplemental Comments at 9. Not surprisingly, AT&T does not cite a

single state order or even name a single State Authority in this context. That is because, in truth, no State Authority has entered any such finding and not one has found that Qwest engaged in a “concerted region wide campaign.”<sup>5</sup>

Throughout its filing, AT&T repeatedly cites orders of the Iowa Utilities Board for the proposition that Qwest clearly violated Section 252’s filing standard. In fact, though the Iowa Board made findings that three agreements were interconnection agreements that should have been filed, this same Board supports Qwest’s Section 271 application and rejected AT&T’s motion to reopen its Section 271 docket, thereby rejecting the very same arguments that AT&T makes in these comments.<sup>6</sup>

AT&T also mischaracterizes the reasoning of the Nebraska PSC in declining to reopen its Section 271 proceeding. AT&T August 28 Comments at 13. The truth is that the Nebraska PSC declined to address the scope of Section 252 in its 271 docket because it recognized that the issue is properly before the FCC in the separate declaratory-ruling proceeding, not that it would be considered in a Section 271 proceeding.

The State Authorities for the five application states here have been joined by their colleagues. For example, the Washington commission encourages the FCC to provide guidance

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<sup>5</sup> This could be a symptom of AT&T’s tendency, as expressed by the chairman of the Colorado commission, “to get a case of the vapors” at the beginning and near the end of Section 271 proceedings. *See* CPUC Hearing Commissioner Order Denying Motion to Modify Order on Staff Volume VII Report at 2.

<sup>6</sup> As Qwest has discussed, it expressly chose not to request a hearing on the facts surrounding these three contracts, or others filed under the IUB’s announced standard. Qwest took this course because the IUB did not find that the issue warranted penalties, and Qwest was fully willing to make the contract terms public and available. But Qwest made clear that it was foregoing its right to present a defense based on the facts, such as the fact that a Covad contract term at issue was not a binding commitment, and in any event did not give Covad more than Qwest did for other CLECs. Thus, even the IUB decision does not resolve the question of whether the specific contracts created Section 252(a) compliance issues, let alone whether discrimination resulted. *See* Qwest August 27 Ex Parte at 8.

on the legal question of the scope of Section 252, and makes clear that it views this matter as an open enforcement question that does not implicate Section 271. The Montana commission similarly suggests that the FCC address the open legal question, at which point it can decide whether Qwest has met that standard in the past. But again, the Montana commission makes very clear that this matter should not delay Section 271 approval based on the voluminous record that Qwest has opened its local markets. The FCC should reach the same conclusion here.

## **II. QWEST HAS REPEATEDLY AND THOROUGHLY REBUTTED AT&T'S ALLEGATIONS IN THE STATE PROCEEDINGS**

AT&T would have the Commission believe, through misleading and disingenuous citations<sup>7</sup> to the litigation positions of the Minnesota Department of Commerce and recommendation of the Commission Staff in Arizona, that three state commissions have found that Qwest failed to file “interconnection agreements” with state commissions as required by § 252 of the Telecommunications Act of 1996. These are not *findings* by state commissions, but rather *allegations or recommendations* to state commissions. In fact, the scope of Qwest’s filing obligations and its failure, or not, to comply with those obligations remain very much in question. One state commission, the Iowa Utilities Board, found that Qwest should have filed three CLEC agreements, ordered Qwest to file any agreements falling within the Board’s newly articulated

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<sup>7</sup> AT&T Supplemental Comments at 6-7, 10. By referring repeatedly to the “findings” of the Minnesota Department of Commerce, AT&T seriously misrepresents the function of that agency. Make no mistake: the Minnesota Department of Commerce is not an adjudicative administrative body in Minnesota, but rather the state agency that initiated and has prosecuted the Minnesota “unfiled agreements” docket – primarily by hiring an outside attorney to conduct its investigation and make the Department’s case through his “expert” testimony. The Department’s views of its claims against Qwest are those of an advocate, not the findings of a disinterested arbiter, and AT&T should know better than to represent otherwise.

filing standard, and declined to impose penalties<sup>8</sup> — hardly the blanket indictment of Qwest’s conduct that AT&T’s most recent filing suggests. In connection with the filings Qwest has made with the Iowa Board in response to its order, the Board has agreed with Qwest’s categorization of agreements as interconnection agreements and, as Qwest argued there, excluded settlements of historical disputes. The Iowa Board also rejected AT&T’s motion to re-open its Section 271 proceeding to consider unfiled agreements allegations, and has supported Qwest’s Section 271 application in that state.<sup>9</sup>

The commissions in the other three states with active “unfiled agreements” dockets (Minnesota, New Mexico and Arizona) have yet to make findings or enter any rulings at this point because those proceedings are still under way. Moreover, the Iowa Utilities Board itself has reaffirmed its recommendation that this Commission grant the pending Section 271 application notwithstanding its decision on unfiled agreements. *See* IUB Supplemental Comments at 5.

In each of these states, and before this Commission, Qwest has disputed vigorously that it failed to file agreements it should have filed, acted in an anticompetitive fashion, or discriminated among its wholesale CLEC customers. Qwest will not further burden the Commission in this filing with a detailed discussion of the legal and factual issues presented in those cases. *See, e.g.*, Qwest August 27 Ex Parte at 4-7. The proper place to litigate them is in the hearings established for that purpose, and not in an open Section 271 docket. For present purposes, it will suffice to say that Qwest has developed a fulsome record in all of the “unfiled

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<sup>8</sup> *See* Order Making Tentative Findings, Giving Notice For Purpose of Civil Penalties, and Granting Opportunity to Request Hearing, *In re AT&T Corporation v. Qwest Corporation*, Iowa Utilities Board, Docket No. FCU-02-2 (May 29, 2002).

<sup>9</sup> *See* Order to Consider Unfiled Agreements, *In re US WEST Communications, Inc., n/k/a Qwest Corporation*, Iowa Utilities Board, Docket Nos. INU-00-2, SPU-00-11 (June 7, 2002).

agreements” cases demonstrating that its filing decisions were reasonable and did not favor any CLEC over another.

At the same time, Qwest responded to concerns about these issues expressed by the Commission and the state commissions by adopting new internal procedures and broader interim filing standards (which Qwest has followed, and will follow, pending the Commission’s ruling on Qwest’s Petition for Declaratory Ruling). Accordingly, and despite the stridency of AT&T’s rhetoric, there is no reason to delay or deny Qwest’s application for Section 271 approval.

Contrary to AT&T’s misleading suggestion, Qwest disputes, and always has disputed, the allegation that it failed to file business-to-business agreements with CLECs that are subject to § 252’s filing requirement. Qwest’s filing decisions in the first place, and its position now, are rooted in a good faith dispute about the contours of the filing requirement, specifically the application of the term “interconnection agreement” to the vast array of agreements that Qwest and other ILECs enter with CLECs. Nobody doubts that full-blown, so-labeled Interconnection Agreements must be filed, nor does anybody claim that every single ILEC/CLEC agreement, however minor or ministerial, must also be filed. As always, the rub lies in determining where to draw the line in between those two extremes. And in the course of the Minnesota “unfiled agreements” docket, for example, the various participating parties offered no fewer than five distinct articulations of the governing standard, ranging from Qwest’s approach, which ties the filing requirement to § 252(a)’s language regarding a schedule of all rates and descriptions of services, to Minnesota expert Thomas Burns’s, which would require

Qwest to file any contract containing a provision that a CLEC might find it helpful to know about.<sup>10</sup>

In Minnesota and New Mexico, where old Qwest contracts are being reviewed, Qwest has developed a detailed record, from written and live testimony of witnesses with first-hand knowledge of the transactions and its internal policies, demonstrating its bases for not filing the agreements at issue.<sup>11</sup> (Significantly, many of the agreements at issue no longer are in effect; some were in effect only for a short period before being superseded or terminated.) The evidence Qwest has introduced in these cases demonstrates that Qwest had a good-faith basis for not filing these contracts. Qwest has proven that administrative details, such as whether a dispute resolution term has a six-level escalation process before litigation or a five-level process, are matters properly worked out informally by the parties and are not within the scope of review under Section 252.<sup>12</sup> And Qwest has shown that its decisions were backed by sound policy. The record in these cases now reflects that public and other carriers are better served by permitting Qwest and CLECs to agree on processes for the implementation of specific terms rather than requiring state commissions to review, consider, and approve each implementation detail that Qwest undertakes or to which the parties agree that Qwest shall undertake.<sup>13</sup>

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<sup>10</sup> See Qwest Corporation's Post-Hearing Memorandum, *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, Office of Administrative Hearings Docket No. 6-2500-14782-2, filed August 23, 2002 ("Minnesota Post-Hearing Mem."), at 8-18.

<sup>11</sup> See *id.*; see also Qwest Corporation's Post-Hearing Brief, *In the Matter of the Investigation Into Unfiled Agreements Between Qwest Corporation and Competitive Local Exchange Carriers*, New Mexico Public Regulation Commission Utility Case No. 3750, filed August 30, 2002 ("New Mexico Post Hearing Br.").

<sup>12</sup> See Minnesota Post-Hearing Mem. at 31-72; New Mexico Post Hearing Br. at 2-13.

<sup>13</sup> *Id.*

It is wrong, therefore, to say or even to suggest that Qwest's "guilt" has been decided. Save the ruling by the Iowa Utilities Board, the jury is still very much out. And the record the New Mexico, Arizona and Minnesota commissions will consider strongly supports Qwest's interpretation of the Act and its application of the law to its agreements with CLECs.

Qwest by no means concedes that these proceedings are themselves relevant to Section 271. Even assuming for purposes of argument that those bodies eventually rule that Qwest misread Section 252(a), such a ruling still will leave the question of whether Qwest should be penalized. As noted above, the IUB chose not to impose penalties. Furthermore, as we have discussed, a filing lapse does not answer the question of whether any CLEC actually suffered any material discrimination. These issues, related to the past, will be addressed in due course. For present purposes, Qwest is simply observing that the record is still developing in the states. The Opponents here grossly exaggerate the maturity of that record, leaving aside its materiality to Section 271.

### **III. THE RECORD DEVELOPED IN THE MINNESOTA AND NEW MEXICO STATE PROCEEDINGS SHOWS THAT THERE HAS BEEN NO DISCRIMINATION RESULTING FROM THE UNFILED AGREEMENTS**

Leaving aside the question of whether, as a legal and factual matter, Qwest was required to file the agreements at issue, the Opponents' reheated allegations of discrimination have repeatedly been rebutted in numerous state proceedings. AT&T and WorldCom make no mention of the extensive record of nondiscrimination developed in the state proceedings. Again, this is no surprise given that they both participated in those proceedings and failed to offer any challenge to Qwest's evidence that no discrimination resulted from the unfiled agreements. But their disregard for Qwest's evidence on this point shows how desperate they are to erect any

roadblock to Qwest's 271 application, no matter how flimsy its construction. Rhetoric and lengthy filings cannot substitute for facts and analysis.

**A. The Evidence Developed in the State Proceedings Shows that No Material Discrimination Resulted from the Unfiled Agreements**

AT&T claims that Qwest treated, and continues to treat, some CLECs better than others by giving them “better prices, better provisioning, and special treatment when problems or disputes arose.”<sup>14</sup> AT&T's claims are remarkable given that it intervened as a party in the state proceedings, heard Qwest's testimony regarding the lack of any discrimination, and failed to challenge any of Qwest's evidence. During the state proceedings in Minnesota and New Mexico, Qwest introduced unchallenged evidence that there was no discrimination resulting from the unfiled agreements, including:

***Provisioning Terms:***

- An on-site provisioning team was disclosed in a filed interconnection agreement, and Qwest provided un rebutted evidence in Minnesota that its off-site wholesale service managers provide identical customer assistance functions to all CLECs.<sup>15</sup>
- One of the unfiled agreements raised by WorldCom established non-binding service goals for Covad.<sup>16</sup> Qwest provided un rebutted testimony in Minnesota that in practice the contracting CLEC was treated no differently from other CLECs, and the contract memorialized Qwest's internal practices and procedures – which were subsequently revised to provide an even higher level of service to all CLECs.<sup>17</sup>

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<sup>14</sup> AT&T Supplemental Comments at 7, 25.

<sup>15</sup> *Id.* at 39; *see also id.* at 50-52.

<sup>16</sup> WorldCom Supplemental Comments at 6.

<sup>17</sup> Qwest Minnesota Post-Hearing Memorandum at 60-64.

***Dispute Resolution Terms:***

- One of the unfiled agreements spelled out dispute resolution processes, including escalation processes. Qwest provided evidence in Minnesota that this contract merely memorialized substantially the same procedures used by all CLECs.<sup>18</sup>
- In two of the unfiled agreements, Qwest agreed to regular meetings with the contracting CLEC.<sup>19</sup> Qwest demonstrated in Minnesota that it meets regularly with its CLEC customers, and no evidence was presented that Qwest had refused to meet.<sup>20</sup>

***Pricing Terms:***

- One of the allegations in the state proceedings, raised again by WorldCom here, was that Qwest provided discounts to Eschelon.<sup>21</sup> In fact, however, the contract is an agreement for Qwest to purchase consulting and network related services from that CLEC, and Qwest provided unrefuted evidence at the Minnesota hearing of the valuable services that it had received from the CLEC and that Qwest's service quality improved as a result of those consulting services.<sup>22</sup>
- Another of the unfiled agreements involved Qwest providing credits in connection with daily usage feed issues. However, the record in Minnesota establishes that these credits were settlement payments related to a dispute.<sup>23</sup>
- A more recent allegation, raised again here by WorldCom, is that Qwest and a CLEC had modified a Qwest purchase agreement with McLeod to convert it into an oral agreement to provide a discount.<sup>24</sup> However, Qwest provided evidence in Minnesota that no such oral agreement exists, that such an oral agreement would have been barred by the written agreements of the parties, that the parties did not account for the transaction at issue in their books and records as a discount, and other information refuting the MDOC's claims.<sup>25</sup> Further, the MDOC's only accuser with

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<sup>18</sup> *Id.* at 40-42

<sup>19</sup> WorldCom Supplemental Comments at 7.

<sup>20</sup> Qwest Minnesota Post-Hearing Memorandum at 42-43.

<sup>21</sup> *See* WorldCom Supplemental Comments at 8.

<sup>22</sup> Minnesota Post-Hearing Mem. at 43-47.

<sup>23</sup> *Id.* at 47-49.

<sup>24</sup> *See* WorldCom Supplemental Comments at 12-13.

<sup>25</sup> Minnesota Post-Hearing Mem. at 55-60

any purported knowledge of the transaction failed to abide by a subpoena to appear at the hearing.

Among the charges Qwest has refuted is the claim, which AT&T treats as proven based on the Minnesota Department of Commerce's mere allegation, that Qwest entered into an oral "discount" agreement with McLeodUSA, Inc. ("McLeod"). Qwest has demonstrated that no such oral agreement exists, and that the relevant contract is a written "take or pay" agreement under which Qwest has agreed to purchase services from McLeod — as it may, and raising no Section 251 or 252 issue. See Minnesota Post-Hearing Mem. at 55-60. Such "take or pay" agreements are common in the wholesale carrier market, and carriers commonly buy and sell services to each other under them. Again, the details of these allegations and the underlying facts would require more discussion than is appropriate for this filing — this alleged agreement alone has been the subject of hundreds of information requests, three depositions, countless motions and a day-long evidentiary hearing in Minnesota alone. But it will suffice for present purposes to note the record resulting from these proceedings in Minnesota once again supports Qwest's consistent contention that the alleged oral discount does not exist.

Although the Minnesota Department of Commerce obtained an affidavit from a former McLeod executive regarding an "alleged" oral agreement, his testimony evolved considerably at deposition, especially when he was confronted with the undeniable fact that McLeod had booked the payments it received from Qwest under this alleged agreement as revenue. When this affiant was subpoenaed subsequent to his deposition to appear at the hearing, he refused to show up. As Qwest demonstrated in Minnesota, McLeod's accounting treatment is consistent with the terms of the parties' written take or pay agreement — an agreement Qwest acknowledges and that nobody suggests would need to be filed — but totally inconsistent with a discount. Neither the Department of Commerce nor anyone else can explain this discrepancy or,

more to the point, why the Minnesota Commission should credit the Department's description over the actual conduct of the parties to the agreement itself.

To be sure, the record is far from pristine. Some mistakes were made in the implementation of the written purchase agreements, and the parties exchanged documents that contain the word "discount" both before and after the written agreements were signed. But it makes no sense to claim that two sophisticated publicly traded corporations would enter into an oral agreement worth tens of millions of dollars, particularly in the face of a written agreement that expressly disclaimed the existence of any oral agreements, and that both of them would book the ensuing streams of money incorrectly. For the Department's theory to hold up, the Minnesota Commission will have to conclude that McLeod violated its standard business practices and disregarded Generally Accepted Accounting Principles. Contrary to AT&T's claims, the record of the McLeod "discount" agreement fails to support the arguments of Qwest's detractors.

In view of this record, and AT&T and WorldCom's failure to challenge it, their claims of discrimination are reminiscent of Gertrude Stein's famous adage about Oakland: There is no "there" there.

**B. Qwest's Remedial Actions Have Addressed Any Possible Discrimination**

What is even more remarkable about AT&T and WorldCom's comments is that they refuse to acknowledge that the remedial actions taken by Qwest – especially the subject matter on which they are now commenting – render the discrimination claims moot even as a theoretical matter. Instead, AT&T and WorldCom misconstrue and misrepresent these remedial actions. Because of the deliberate confusion sown by their comments, these remedial steps bear repeating:

*First*, while Qwest’s Declaratory Ruling Petition is pending, the company has voluntarily committed to file with the states all future contracts, agreements, and letters of understanding negotiated with CLECs that create obligations in connection with Sections 251(b) or (c).<sup>26</sup> Qwest believes that this “all obligations” standard is overbroad, and that Section 252(a) does not require filing and prior State Authority review and approval of any and all obligations agreed to between an ILEC and a CLEC. For example, regulatory approval should not be required for carrier-specific implementation details related to provisioning, Qwest-CLEC relationship management issues (such as meeting schedules and dispute resolution processes) and the like. Nevertheless, pending FCC action, Qwest will not draw lines in this area.

*Second*, Qwest has established a committee of senior managers to enforce compliance with this policy and any order the Commission issues on the subject. This committee meets on a regular basis (recently weekly) to review and determine whether Qwest must file particular agreements with state regulators.<sup>27</sup>

*Third*, Qwest took the further step as a sign of its good faith by filing all such agreements under Section 252(e) in addition to posting them on its website. Specifically, Qwest has reviewed all of its currently effective agreements with CLECs in the Docket No. 02-148 and 02-189 states that were entered into prior to adoption of the new review policy described above. Qwest already had filed appropriate agreements with the Iowa Utilities Board in accordance with the Board’s recent order. Qwest has now filed in the remaining eight states all such agreements that include provisions creating ongoing obligations that relate to Section 251(b) or (c) that have not been terminated or superseded by agreement, commission order, or otherwise. Qwest is

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<sup>26</sup> These matters are described in the declaration of Mr. Larry Brotherson provided in Qwest’s Reply Comments in this docket, and are incorporated herein by reference.

<sup>27</sup> Brotherson Declaration ¶ 8.

asking the respective commissions in these states to approve the agreements such that, to the extent any active provisions of such agreements relate to Section 251(b) or (c), they are formally available to other CLECs under Section 252(i). In conformance with the structure of Section 252, including the state-specific approval process, opt-in opportunities will be provided on a state-specific basis under Section 252(i) rather than on a region-wide basis.<sup>28</sup>

Qwest is not asking the state commissions to decide whether any of these contracts, or specific provisions therein, in fact is required to be filed under Section 252 as a matter of law. The state commissions need simply approve those provisions relating to Section 251(b) or (c) under their Section 252(e) procedures, and Qwest will make the going forward provisions related to Section 251(b) or (c) available under Section 252(i). Thus, the state commissions may but need not at this time reach a legal interpretation of Section 252(a), or decide when the 1996 Act makes a filing mandatory, and when it does not. (The Iowa Board has previously made its own ruling on this question.)<sup>29</sup>

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<sup>28</sup> For the state commissions' benefit, Qwest is marking, highlighting or bracketing those terms and provisions in the agreements which Qwest believes relate to Section 251(b) or (c) services, and have not been terminated or superseded by agreement, commission order, or otherwise. This should reduce the confusion that could otherwise arise given that these contracts were not prepared as interconnection agreements, sometimes cover multiple subjects, and are of various ages.

<sup>29</sup> Qwest is not filing for state commission approval its contracts with CLECs that do not contain provisions that relate to Section 251(b) or (c), or contain provisions relating to Section 251 that have been terminated or superseded by agreement, commission order, or otherwise. Qwest also is not filing routine day-to-day paperwork, settlements of past disputes, stipulations or agreements executed in connection with federal bankruptcy proceedings, or orders for specific services. Included in this last category are contract forms for services already provided for in approved interconnection agreements, such as signaling and call-related databases. (Parties may execute a form contract memorializing the provision of such services offered as described in the interconnection agreement.)

Qwest has not excluded agreements with CLECs entered into prior to their filing for bankruptcy. Agreements with CLECs already in bankruptcy generally address pre- and post-petition claims, adequate assurances, avoiding interruptions of services, etc. Such agreements do not change the terms or conditions of the underlying interconnection agreement. There is one

Qwest is requesting that the state commissions approve the agreements as soon as reasonably practicable. Qwest has reserved its rights to demonstrate that one or more of these agreements need not have been filed in the event of an enforcement action in this area. Meanwhile, however, Qwest will offer other CLECs any terms in effect for the benefit of the contracting CLEC pursuant to the policies and rules related to Section 251(i). (Provisions that do not relate to Section 251, that settle past carrier-specific disputes, or that are no longer in effect are not subject to Section 251(i) and this offering.) Should a state commission later conclude that a particular agreement did not have to be filed as a matter of law under Section 252, Qwest nevertheless will honor “opt-in” contracts made with CLECs prior to that decision. However, Qwest necessarily will reserve the right to terminate an “opt-in” arrangement (as well as the interconnection-related provision in the contract with the initial customer) in the unlikely event that a state commission finds both that the originally filed contract is of the type that must be filed under Section 252, and that the particular term is not in the public interest.<sup>30</sup>

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exception, an agreement with Arch Wireless, which does contemplate an amendment to the interconnection agreement. The Arch agreement was recently executed by the parties, on July 26, 2002, but it has not been approved yet by the bankruptcy court. When approved by the court, the amendment to the Arch interconnection agreement will be filed under Section 252(e).

<sup>30</sup> Qwest is filing the relevant CLEC agreements in full, subject to the following actions intended to protect CLEC interests given the confidentiality provisions contained in some of these agreements and the fact that the CLECs involved may deem the information contained therein confidential. First, Qwest is redacting those contract terms that relate solely to the specific CLEC and do not create ongoing obligations, such as confidential settlement amounts relating to resolution of historical disputes between Qwest and the particular CLEC, confidential billing and bank account numbers, particular facility locations, and CLEC end user customer information. Second, Qwest is asking state commissions to hold the submitted agreements under seal for a short period of time to allow the affected CLECs sufficient time to object to their public disclosure (except those that have been made public to date). Qwest is concurrently notifying the CLEC parties to the non-public agreements of this filing and advising them of their opportunity to submit any objections regarding public disclosure to the state commission. Absent other state rules, Qwest is requesting that this confidentiality period be limited to seven days.

*Fourth*, consistent with the discussion in its Docket No. 02-148 Reply Comments, Qwest also is posting the filed agreements on the website it uses to provide notice to CLECs and announcing the immediate availability of the effective interconnection-related terms and conditions in the respective states. This will facilitate the ability of CLECs to request terms and conditions prior to the state commission's decision approving the filed agreements. Qwest also will be sending CLECs operating in the states a general advisory notice that they can look to the website for this information (through regular procedures for such notices). Qwest will remove an agreement from its website when it has expired, when none of the terms remaining in effect create ongoing obligations as to matters related to Section 251 (b) and (c) of the Telecommunications Act, or in the event that a state commission concludes that the agreement is not subject to Section 252(a).

Qwest has taken these actions as a good faith gesture pending further clarification by this Commission of the scope of Section 252(a). Qwest does not concede that any of the affected agreements are of the kind that require prior filing and state commission approval. Qwest continues to believe that Congress did not intend all ILEC-CLEC contractual arrangements with a nexus to Section 251 to be formally filed for review, let alone those contracts that do not relate to Section 251 obligations. However, until the FCC rules on the matter, Qwest will follow the course outlined above.

**C. AT&T's Claims Regarding the Shortcomings in the Remedial Actions Are Distorted**

Now that AT&T can no longer argue that Qwest has not met its burden to prove that it is providing non-discriminatory access to checklist items because some of its agreements

with CLECs have not been filed, the centerpiece of its prior advocacy,<sup>31</sup> AT&T has trained its sights on Qwest's filing of these agreements.<sup>32</sup> Once again, AT&T's shots are wide of the mark.

### **1. Qwest Has Cooperated Completely with the State Investigations**

AT&T casts aspersions on Qwest's compliance with the numerous information requests that it has received from state regulators for information relating to the unfiled agreements, and implies that Qwest cannot be trusted to implement its remedial actions.<sup>33</sup> AT&T's examples of supposed resistance to these document requests distort the record. Typical of its overblown verbiage,<sup>34</sup> AT&T does not cite one instance in which Qwest did not fully cooperate with the state commission to provide it with the information that it wanted.

First, AT&T claims that Qwest attempted to hide the Minnesota agreements from the Iowa Utilities Board because it only provided three of the eleven agreements specified in the Minnesota Complaint.<sup>35</sup> AT&T fails to mention that the Minnesota Complaint was public when Qwest responded to the Iowa Utilities Board's request, and that it provided the three agreements to the Iowa Utilities Board that involved CLECs that operated in Iowa.<sup>36</sup> The other eight agreements were with CLECs who did not operate or have any interconnection relationship with Qwest in Iowa.

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<sup>31</sup> AT&T August 16 *Ex Parte* Letter at 3.

<sup>32</sup> See AT&T's Supplemental Comments at 26-37.

<sup>33</sup> AT&T's Supplemental Comments at 27.

<sup>34</sup> See *supra* note 5.

<sup>35</sup> AT&T's Supplemental Comments at 27.

<sup>36</sup> Qwest also provided a copy of its answer to the Minnesota Department of Commerce complaint, in which it specifically addressed each of the eleven contracts identified by the Department. See *Ex Parte* Letter of Melissa Newman, Aug. 26, 2002.

Moreover, Qwest did not resist the disclosure of the agreements that the Minnesota Complaint put at issue. It voluntarily provided the eleven Minnesota agreements to every state where the CLEC was certified. Qwest did not force the commission to compel production of those agreements for review. Even more tellingly, as to Iowa, instead of doing its own discovery, which AT&T had every opportunity to do, AT&T requested the Board to do AT&T's discovery through a Board-issued subpoena. Ultimately, the Iowa Board's decision setting a standard and Qwest's resulting compliance filing mooted AT&T's request that the Board issue a subpoena.

Second, AT&T implies that Qwest did not fully respond to the Arizona Corporation Commission's document requests fully and completely because that commission also issued information requests to CLECs and because its staff has recommended that the commission find that 25 agreements should have been filed.<sup>37</sup> AT&T's implication is flatly misleading. Qwest responded to Arizona's document requests with complete disclosure, and AT&T cannot provide a fact to the contrary.

In Arizona, as in all other states, Qwest provide the eleven agreements at issue in the Minnesota Complaint before the Arizona Staff issued any of its requests for documents. Qwest did not "grudgingly" provide documents; rather, Qwest responded fully to every discovery request and cooperated fully and openly with the Arizona staff.<sup>38</sup>

AT&T also implies – wrongly, again – that Qwest insisted on a confidentiality order in Arizona before providing responses to the Staff's discovery requests and that it "only"

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<sup>37</sup> AT&T Supplemental Comments at 27.

<sup>38</sup> In fact, Qwest is being sued by Time Warner in Arizona on the claim that Qwest was too liberal in providing Time Warner's agreement to the Staff.

consented today to permit AT&T to use Arizona documents before this Commission.<sup>39</sup> Qwest has taken the same position since this issue arose: It has no objection to public disclosure of all of the subject documents, and only the contracting CLECs, the other parties to the agreements, can raise objections that preclude public disclosure. Qwest's position has consistently been, since this issue arose, to make as many agreements public as possible.<sup>40</sup> Moreover, AT&T could have followed Iowa procedure for obtaining all of the agreements filed there, but it did nothing, and now complains that somehow Qwest has stood in its way.

In addition, all of the evidence on the substance of the unfiled agreements has been in AT&T's hands since the commencement of the Minnesota, Arizona, and New Mexico cases. AT&T could have – but chose not to – timely raised these matters before the Commission. Instead, lying in wait for maximum tactical advantage, AT&T has sought to spring its claims at the last moment in its attempts to derail Qwest's Section 271 application. It is ironic in the utmost that AT&T invokes the “complete when filed” doctrine in attempting to shout down Qwest's remedial actions, given that it has sought to raise these additional allegations regarding the unfiled agreements against Qwest at this, the eleventh hour.

Third, AT&T claims that Qwest limited its provision of agreements to the four states that did not mount proactive investigations – Colorado, Idaho, Nebraska, and North Dakota – to those agreements filed in Minnesota, Iowa, and Arizona.<sup>41</sup> Once again, AT&T goes

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<sup>39</sup> See AT&T Supplemental Comments at 27 & fn.58.

<sup>40</sup> AT&T has never made a single move to make the agreements public to other CLECs. Indeed, when Qwest a process before the New Mexico Public Regulation Commission by which the commission would request the contracting CLEC's positions on the public disclosure of the documents, AT&T did not support Qwest's proposal, despite its participation in the hearing. Qwest's proposal stands today.

<sup>41</sup> See AT&T Supplemental Comments at 28.

to great lengths to imply some wrongful conduct by Qwest, with no factual support to back its allegations up. In these states, Qwest voluntarily provided the agreements at issue in Minnesota, where applicable to the particular state, with a cover letter explaining its response to the allegations in the Minnesota Complaint. Where state commissions determined to open investigations, Qwest provided full and complete discovery in response to the discovery requests made by the particular commission.

All of these facts explain why no state commission has questioned before the FCC or in its own proceeding Qwest's cooperation. AT&T, the party with the most to lose if Qwest's application here is granted, stands alone.

## **2. Qwest Has Consistently Applied This Broad Filing Standard in Connection With Its Recent Filings**

In its litany of blame, AT&T next accuses Qwest of failing to comply with its new filing commitment.<sup>42</sup> AT&T points to several specific agreements as "evidence" of this purported lack of compliance.<sup>43</sup> AT&T has apparently not spent a minute of honest inquiry into this issue because, if it had, it would quickly have discovered that none of its examples is legitimate.

For example, AT&T claims that the Eschelon agreement, dated July 31, 2001, has not been posted on the website. Despite the fact that AT&T acknowledges that perhaps some agreements have expired,<sup>44</sup> it says in the next sentence that this Eschelon agreement has not. The facts are otherwise: The March 1, 2002 Eschelon agreement, which is posted on the website today, says in paragraph 3(b)(8) that the July 31, 2001 agreement has been terminated.

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<sup>42</sup> AT&T Supplemental Comments at 30.

<sup>43</sup> *Id.*

<sup>44</sup> AT&T Supplemental Comments at 31,

AT&T claims that the ATI agreement, dated February 28, 2000, involves DMOQs for Eschelon that were not offered to other CLECs.<sup>45</sup> As stated in the first sentence of the agreement relating to DMOQs, however, the parties filed an agreement with the Minnesota Public Utilities Commission on DMOQs. (Indeed, the Minnesota DOC Complaint did not raise an allegation that this agreement should have been filed.) Second, AT&T claims that Qwest agreed to waive TLAs for Eschelon, but not for other CLECs. In fact, the TLA provision was Minnesota-specific, and the agreement simply put them in suspension until the Minnesota Commission ruled, which it did, thereby superseding any aspect of the agreement on TLAs in Minnesota.<sup>46</sup> This provision of the agreement did not affect TLAs for any of the other states, and thus, there was nothing to file in any of the states covered in Docket Nos. 02-148 or 02-189.<sup>47</sup> Third, AT&T complains about the agreement providing an on-site provisioning team. In fact, this provision was filed as an interconnection agreement, approved by the Minnesota Commission, and available to any requesting CLEC.<sup>48</sup> Ironically, the witness that AT&T sponsored in the Minnesota hearing, who is the interconnection manager for Qwest's fourteen state region, testified that he did not have time to review filed interconnection agreements.<sup>49</sup>

AT&T next contends that the April 25, 2000 letter agreement between McLeod and Qwest was never filed. In fact, the April 25 letter agreement was subsumed in a formalized agreement dated April 28, 2000 between the same two parties, which contains the *identical*

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<sup>45</sup> AT&T Supplemental Comments at 32.

<sup>46</sup> See Minnesota Post-Hearing Mem. at 35-38.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 38-39.

<sup>49</sup> *Id.* at 38 and n.105 (citing the testimony of Michael Hydock, Tr. Vol. II, at 163:23-25).

terms, and Qwest filed the formal agreement last week in the states. AT&T apparently never bothered to compare the two documents. In any event, the subscriber list information rate that AT&T points to is a section 222 service, not a section 251 service, and the rate is identical to what the FCC set in its Subscriber List Information order. The bill and keep provision is contained in an interconnection amendment that was filed with the Minnesota Commission for approval in June 2000. Finally, the interim pricing provision was filed and identified last week as a term related to 251 in the ROC 1 and ROC 2 filings as part of the April 28 formal agreement and is posted and bracketed (pages 4-5) on the Qwest website.

AT&T's citation of the SBC line sharing agreement is specious.<sup>50</sup> One simple glance at the SBC line sharing document reveals that it is a form agreement (unexecuted) to be filed with a state commission for approval if a CLEC requests line sharing. It is Qwest's "permanent line sharing agreement," and has in fact been filed for state commission approval and has been available to any CLEC to opt into, or simply request.<sup>51</sup> That is, Multiband Communications, Inc., amended its interconnection agreement with the same form as the contract to which AT&T refers. The Multiband amendment was filed and approved by the commissions in Colorado, Idaho, Montana, and Wyoming.

In its final salvo, AT&T raises the "Small CLEC" agreement. Given that the small CLEC agreement applies solely to Minnesota-only CLECs, it correctly has not been filed in any of the states that currently have Section 271 applications pending before this Commission.

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<sup>50</sup> AT&T Supplemental Comments at 33.

<sup>51</sup> The form attached to the SBC letter appears to have been a mistake in copying and stapling, because it has nothing to do with content of the SBC letter.

Moreover, for AT&T to claim that this agreement is secret is patently false. This agreement was raised in the Minnesota Complaint, and it has been public since March 2002.<sup>52</sup>

AT&T – which has been a party to the proceedings in Minnesota, New Mexico, and Arizona, and thus has had access to the thousands of pages of discovery that Qwest has produced in those proceedings over the past six months – has tried mightily to find examples where Qwest has not complied with its filing commitment. AT&T has utterly failed to do so – a result that dramatically demonstrates how completely Qwest is fulfilling the remedial actions that it has announced.

### **3. Qwest’s New Filing Standard Is Over-Inclusive**

Having failed to demonstrate that the application of Qwest’s standard is problematic, AT&T switches gears and argues that the standard itself is under-inclusive and replete with “equivocations and loopholes.”<sup>53</sup> AT&T’s rhetorical flourishes fail to conceal the lack of any substance supporting its arguments.

First, AT&T argues that the mutual McLeod purchase agreements could have been used to conceal a discount.<sup>54</sup> Even the Minnesota Department of Commerce’s expert witness testified that mutual take or pay agreements are a legitimate transactional structure in the telecommunications industry.<sup>55</sup> Moreover, AT&T fails to discuss the evidence adduced at the Minnesota hearing that demonstrating that the parties in fact entered mutual purchase

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<sup>52</sup> See Minnesota Post-Hearing Mem. at 65-67.

<sup>53</sup> AT&T’s Supplemental Comments at 34.

<sup>54</sup> *Id.* at 35.

<sup>55</sup> Testimony of W. Clay Deanhardt, *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, Office of Administrative Hearings Docket No. 6-2500-14782-2, Tr. Vol. V, at 11:13-19.

agreements rather than a discount agreement. As discussed in note 13 above, AT&T's claims of discrimination are unpersuasive.

Second, AT&T's objection to the exclusion of settlements of historical disputes is inconsistent with the positions of virtually every other party to the state proceedings, all of whom have agreed with the exclusion of settlement agreements that do not have forward-looking terms from the filing obligations under Section 252(e).<sup>56</sup>

Such a position, of course, is consistent with the Commission's rulings and with sound policy. Settlement agreements that resolve disagreements between ILECs and CLECs and do not change existing or future rates or terms of interconnection are not interconnection agreements subject to filing under Section 252(a).<sup>57</sup> This holds true even if the dispute related to prior conduct pertaining to elements or services that are subject to Section 251. For example, Section 252 should not apply to settlement agreements providing for payments to resolve disputes between parties over the measurement of traffic volumes, the accuracy of billing processes, billing or payments generally for such services, or any dispute that does not alter the terms of the underlying interconnection agreement. This would be consistent with the FCC's consistent treatment of settlement agreements relating to tariffed services under the 1934 Act: settlement payments need not be tariffed and do not violate the statutory prohibition of unreasonable discrimination or unlawful rebates.<sup>58</sup> Given that negotiated agreements under Section 252 were intended to be less inclusive than historically micro-managed tariffs, the case is

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<sup>56</sup> See Minnesota Post-Hearing Mem. at 7-8.

<sup>57</sup> See, e.g., *id.* at 7.

<sup>58</sup> *Allnet Communications Services, Inc. v. Illinois Bell Tel. Co.*, 8 FCC Rcd 3030, 3037, ¶¶ 32-33 & n.78 (1993) (rejecting contention that award of damages to a customer in a complaint case, or a carrier's payment to a customer in settlement of such a dispute, constitutes violation of non-discrimination duty).

even stronger that such settlement provisions should not be subject to the Section 252 filing or approval requirements.

Moreover, applying Section 252 to settlement agreements would dissuade the public interest, because requiring public disclosure and third-party access to the terms of settlement agreements would deter parties from settling their disputes. It is undisputed that the public interest favors amicable dispute resolution.<sup>59</sup> And deterring parties from entering settlements would force regulators and courts to resolve many more disputes that could be settled by the parties. Not only would this be administratively burdensome, but more importantly it could well lead to the imposition of solutions that may be inferior to those that the parties could have worked out on their own.

AT&T misconstrues Qwest's exclusion of settlement agreements: Where such agreements resolve historical disputes and do not contain going-forward terms, Qwest has not – consistent with the 1996 Act – filed such agreements. Where such agreements do contain forward-looking obligations, Qwest has filed and will file the agreements with the relevant state commissions.

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<sup>59</sup> See, e.g., *McDermott v. AmClyde and River Don Castings, Ltd.*, 511 U.S. 202 (1994) (“public policy wisely encourages settlements”, *id.* at 215, and a rule that “discourages settlement and leads to unnecessary ancillary litigation” is “clearly inferior” to one that promotes settlement of disputes, *id.* at 211); *accord, Bergh v. Dept. of Transportation*, 794 F.2d 1575, 1577 (Fed. Cir. 1986), *citing United States v. Contra Costa County Water District*, 678 F.2d 90, 92 (9<sup>th</sup> Cir. 1982); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 565 (6<sup>th</sup> Cir. 1982); *Airline Stewards & Stewardesses Ass’n v. American Airlines*, 573 F.2d 960, 963 (7<sup>th</sup> Cir. 1978); *Florida Trailer & Equipment Co. v. Deal*, 284 F. 2d. 567, 571 (5<sup>th</sup> Cir. 1960); *Emmons v. Superior Court*, 192 Ariz. 509, 512, 968 P.2d 582, 585 (Ariz. Ct. App. 1979) (“Arizona’s law has long favored compromise and settlement.”).

#### **IV. QWEST'S RECENT ANNOUNCEMENT THAT IT HAS FILED ADDITIONAL CONTRACTS DOES NOT RAISE A “COMPLETE WHEN FILED” PROBLEM**

The complete-when-filed principle is not implicated by Qwest’s recent commitment to file additional agreements with CLECs.<sup>60</sup> The pending applications, when filed, were sufficient to show that Qwest has met the fourteen-point competitive checklist and satisfies the other requirements for grant of Section 271 authority. The additional commitments that Qwest has made during these proceedings have been fair responses to a peripheral issue that has been raised by opponents of the applications.<sup>61</sup> Every State Authority to reach a conclusion on the issue has agreed that these compliance questions are matters outside the proper scope of a Section 271 proceeding, and some have reiterated those conclusions in these records.<sup>62</sup>

There are many mechanisms to ensure that Qwest will comply with Section 252’s filing requirements, only one of which is the commitment it has made here to go beyond any reasonable standard by filing and make available all forward-looking terms related to Section 251(b) or (c). The scope of Section 252’s filing requirement is properly the subject of a separate declaratory-ruling proceeding before this Commission; State Authorities are examining past agreements in separate dockets; currently effective agreements have now been filed with each State Authority for their review under their Section 252(e) procedures; and enforcement processes are available if there is any question about Qwest’s compliance with those requirements. There is no need to force this issue into Section 271 proceedings. As the Commission has emphasized, “[t]he section 271 process simply could not function as Congress

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<sup>60</sup> AT&T goes so far as to suggest that virtually every ex parte that Qwest has filed in these proceedings constitute an impermissible supplement of the record. *See* AT&T Comments at 20-21.

<sup>61</sup> *See* COPUC August 28 Comments at 12 (referring to the unfiled agreements as “a trifle ... that is being dealt with through § 252 transparency and an enforcement investigation”).

<sup>62</sup> *See supra* at 5-9.

intended if we were generally required to resolve all [new and unresolved interpretive] disputes as a precondition to granting a section 271 application.” Section 271 proceedings “are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability.”<sup>63</sup>

It is firmly established that new information may be filed in response to issues raised by commenters.<sup>64</sup> Qwest’s August 20 ex parte filing was just such a response. Qwest’s decision to file the agreements and post them on its web site was not necessary for Qwest’s *prima facie* showing under Section 271. The records in these proceedings overwhelmingly establish that Qwest has opened its local markets to competition; the matter of unfiled agreements, if it has any merit at all, is no more than a “trifle.”<sup>65</sup>

In any event, the Commission has previously exercised its discretion to consider evidence filed during the course of a Section 271 proceeding. Such use of discretion here, though unnecessary, would be justifiable as consistent with prior Section 271 orders.

In the *Kansas/Oklahoma 271 Order*, for example, the Commission considered evidence filed during a Section 271 proceeding in circumstances where (a) the changes were limited relative to the scope of the overall application; (b) interested parties had a reasonable opportunity to comment on the new information; (c) the applicant had “responded to criticism in the record by taking positive action that will clearly foster the development of competition”; and (d) the applications were “otherwise generally persuasive applications, which demonstrate a commitment to opening local markets to competition as required by the 1996

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<sup>63</sup> *Kansas/Oklahoma 271 Order* ¶ 19.

<sup>64</sup> *Michigan 271 Order* ¶ 50; Public Notice, Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, March 23, 2001, at 3.

<sup>65</sup> Colorado PUC August 28 Comments at 12.

Telecommunications Act.”<sup>66</sup> In this case, (a) the issue, although heavily discussed by AT&T, is very narrow in the scope of the overall application; (b) the FCC sought comment on Qwest’s most recent filing, and parties filed extensive comments in response; (c) Qwest has responded to concerns raised by some CLECs with action that will clearly foster the development of competition; and (d) Qwest’s showings on all of the checklist items are strong, forcing certain commenters to concentrate their greatest energy on this narrow issue.<sup>67</sup>

Commenters focus on one consideration stated by the Commission in the *Rhode Island 271 Order*. There, the Commission noted that circumstances beyond Verizon’s control had prompted the filing of new evidence. However, that was not the case in the Kansas/Oklahoma proceeding, in which SBC filed new UNE rates as a “‘compromise’ to mitigate commenters’ concerns about prices in Kansas and Oklahoma.” The presence of circumstances beyond the BOC’s control has been a significant factor in only one of the three previous Commission decisions that considered late-filed evidence; it is not, as WorldCom suggests, a determining factor.

Disregarding Qwest’s filing of previously unfiled agreements would be inconsistent with the public interest. The Commission is in a position to bring true long-distance competition to customers in nine states in the near future on the basis of very strong showings on Section 271’s checklist and other requirements.<sup>68</sup> Because the scope of Section 252’s filing requirements is presently before the Commission and Qwest has committed, in the meantime, to

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<sup>66</sup> *Kansas/Oklahoma 271 Order* ¶¶ 23-24.

<sup>67</sup> *See also Rhode Island 271 Order* ¶¶ 8-14; *Connecticut 271 Order* ¶¶ 34-38.

<sup>68</sup> *See Rhode Island 271 Order* ¶ 17 (“The vast amount of evidence that BOCs submit on the day of filing dwarfs the relatively small amount of subsequent evidence we have considered pursuant to waiver.”).

over-file, it would serve no purpose other than delay to reject or postpone consideration of Qwest's most recent commitments.

## **V. THE UNFILED AGREEMENTS DID NOT MATERIALLY IMPACT THE RESULTS OF THE OSS TEST**

AT&T and WorldCom allege that the results of the ROC OSS Test are not reliable because of the unfiled agreements. Qwest has addressed this issue in other filings, most recently in its ex parte filing of August 27.<sup>69</sup> The primary claim of AT&T and WorldCom is that, because several CLECs (the "Participating CLECs") that had agreements subject to the unfiled agreements issue participated in the testing, the results of the testing were adversely affected, because the Participating CLECs allegedly received favorable treatment from Qwest. As set forth in Qwest's earlier filings, there is absolutely no evidence that Qwest has provided discriminatory treatment to the Participating CLECs. In fact, KPMG has stated that it has no evidence that Qwest provided discriminatory treatment to the Participating CLECs:

KPMG Consulting 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 upon by KPMG Consulting.<sup>70</sup>

Furthermore, Qwest's performance measurement results demonstrate that Qwest has not discriminated in favor of the Participating CLECs. Qwest gathered data from the four products ordered most prevalently by those CLECs: (1) analog loops; (2) 2-wire non-loaded loops; (3) UNE-P POTS; and (4) UNE-P Centrex. For each of these products, Qwest tracked flow-through rate (PO-2b), the percentage of commitments met (OP-3), the average installation interval (OP-4), and the overall trouble rate (MR-8). Collectively, these data points are the key

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<sup>69</sup> See Qwest August 27 Ex Parte.

<sup>70</sup> June 7 CLEC Participation Study at 1.

measures that, if AT&T's allegations had any merit, would show better treatment for these CLECs. However, the data simply do not bear this out.

In Confidential Exhibit MGW-1 in WC Docket No. 02-189, Mr. Williams presents (1) a summary document showing how Qwest performed for each of these CLECs vis-a-vis all other CLECs; (2) the actual level of performance that Qwest provided to these individual CLECs as compared to all other CLECs collectively; and (3) the overall order volumes that the CLEC represents in each state for each product. The data on these charts come directly from the CLEC-specific performance reports, which are part of the confidential record in this docket.<sup>71</sup> Focusing on the six most recent months available (January–June 2002) for the states of Colorado, Idaho, Iowa, Nebraska and North Dakota, the data show that:

- Eschelon had 21 months with better data than other CLECs, 22 months with worse data, and 34 months with equivalent data.
- Covad had 19 months with better data than other CLECs, 6 months with worse data, and 32 months with equivalent data.
- McLeod had 126 months with better data than other CLECs, 120 months with worse data, and 346 months with equivalent data.

Thus, the three CLECs together had 166 months with better data, 148 months with worse data, and 412 months with equivalent data. This is exactly the kind of randomness one would expect to see for any group of CLECs. The data clearly show that CLECs with unfiled agreements did not receive preferential treatment in the ordering, provisioning and repair of UNEs.

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<sup>71</sup> Relevant excerpts from the reply declaration of Mr. Williams in Docket No. 02-189, and the Confidential Exhibit MGW-1, were attached to the August 27 ex parte letter.

In short, for all of AT&T's speculation and innuendo, the reality is that there is no evidence that the so-called "unfiled agreements" issue undercuts Qwest's strong showing that it provides non-discriminatory OSS to all CLECs. Again, the agreements are a red herring. They did not impact the reliability of the KPMG OSS test. And they do not result in preferential treatment.

Even accepting the claim that Qwest discriminated in favor of the Participating CLECs, the test results could not have been materially affected. The primary focus of AT&T and WorldCom is on UNE-P orders. They claim that the conclusions of the test are not reliable for UNE-P regarding pre-order, order, provisioning, maintenance and repair, and billing. This entire claim is based upon AT&T and WorldCom's false assertion that the participation of these CLECs was extensive. In fact, the vast majority of the test was based upon orders submitted by Hewlett-Packard, rather than these participating CLECs. Orders were submitted by the Participating CLECs in only very limited circumstances.

Only in ordering and provisioning were transactions issued by the Participating CLECs, but these transactions were limited. HP submitted the LSRs for all types of UNE-P orders, except for those requiring a dispatch of a technician for provisioning. When the test was designed, the parties agreed that it did not make sense to dispatch technicians to provision pseudo-CLEC (HP) test orders. Instead, the parties agreed that KPMG would monitor such orders submitted by Participating CLECs. Since the vast majority of transactions were submitted by HP, KPMG was able to assess all aspects of UNE-P (and other order types as well) for preorder, order, maintenance and repair, and billing based upon transactions submitted by HP, rather than the Participating CLECs. Only for a narrow aspect of provisioning did KPMG rely

substantially on orders submitted by the Participating CLECs – orders requiring a dispatch. For all other aspects of provisioning, KPMG was able to rely on transactions submitted by HP.

The limited nature of KPMG’s use of transactions submitted by Participating CLECs is reflected in KPMG’s “CLEC Participating Study.” The CLEC Participation Study demonstrates conclusively that unfiled agreements did not have – and could not have had – any impact on the ROC OSS Test that is relevant to this proceeding.

In the CLEC Participation Study, KPMG confirms that it reached its conclusions on the vast majority of test criteria without relying at all on information provided by the Participating CLECs. However, KPMG does identify some test criteria for which it “partially relied” on information provided by the Participating CLECs and other criteria for which it “substantially relied” on information provided by the Participating CLECs.

With regard to the “partial reliance” category, KPMG has acknowledged:

Partial reliance meant some of our record was based upon data or information interviews or something that we had with one of those three CLECs, but that the bulk of our conclusions were based upon other materials that we had gathered directly. And in point of fact, if you took out all of that information provided by those CLECs, it wouldn’t change our conclusions at all.<sup>72</sup>

Thus, for the evaluation criteria on which KPMG “partially relied” on CLEC-specific information, that information is irrelevant to KPMG’s overall finding of compliance in the ROC OSS Test.

KPMG “substantially relied” on data from CLECs that supposedly received such favorable treatment in only four (out of 685) evaluation criteria. For each of these four criteria, the record is replete with other evidence - actual commercial performance - demonstrating that Qwest is meeting its Sections 251 and 252 (and by extension, its Section 271) obligations. The

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<sup>72</sup> See Attachment 5, Appendix K, Wyoming Transcript, July 13, 2002, at 181.

four evaluation criteria that KPMG placed in the “substantial reliance” category were 14-1-9, 14-1-21, 14-1-25 and 14-1-27. In the first, 14-1-9, KPMG observed Qwest technicians as they provisioned line sharing LSRs submitted by Covad to verify that the Qwest technicians “adher[ed] to documented method[s] and procedure[s]” and that “the loop characteristics met the technical specifications for the intended service.”<sup>73</sup> It defies logic for AT&T to suggest that unfiled agreements could have affected KPMG’s observation and evaluation of Qwest’s technicians in this area, as their overall performance has nothing to do with any unfiled agreements that may have existed.

The remaining evaluation criteria KPMG placed in the “substantial reliance” category (14-1-21, 14-1-25 and 14-1-27) all pertain to whether test orders submitted met the benchmarks or parity standards under OP-3 (Installation Commitments Met) or OP-4 (Average Installation Interval). But, as demonstrated in the Williams Reply Declaration, at ¶¶ 52, 56, substantial evidence exists to demonstrate that Qwest is meeting OP-3 and OP-4 on a commercial basis. The FCC has repeatedly held that “[t]he most probative evidence that OSS functions are operationally ready is actual commercial usage.”<sup>74</sup> Thus, even if unfiled agreements affected KPMG’s analysis of OP-3 and OP-4 (which they did not), additional evidence exists to support the presumption that Qwest can – and is – meeting those metrics.

**VI. THE CLAIMS OF AT&T AND WORLDCOM REGARDING THE NON-PARTICIPATION OF CLECS IN TEST DESIGN AND IN WORKSHOPS ARE WITHOUT MERIT.**

AT&T and WorldCom not only complain that the CLECs with unfiled agreements participated in the OSS Test – but, incomprehensively, they also complain that the

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<sup>73</sup> See June 11 CLEC Participation Study at 8 (“Substantial Reliance” Chart).

<sup>74</sup> See, e.g., *Maine 271 Order* at App. D-15.

test was flawed because the same CLECs did not participate. Like the allegations that the test was affected by the participation of these CLECs, the allegations that the test was adversely affected by the alleged non-participation of the same CLECs has no merit.

In rejecting AT&T's motion to reopen Qwest's section 271 application in Iowa, the Iowa Utilities Board found that there was "no way of knowing, even without the agreement, that other CLECs would have had the inclination to participate" in the section 271 process, and hence no reason to think the process was distorted or incomplete.<sup>75</sup> As it turns out, the Board was right: when the Department of Justice and Colorado commission evaluated the impact of CLEC (non)participation on this particular Section 271 application, both concluded that the process was unimpaired. In the Department of Justice's view, "the fact that certain CLECs did not participate [in the three-year ROC OSS test process] does not appear to have had a significant impact on the result."<sup>76</sup> And after considering evidence presented at *en banc* workshops, the Colorado Public Utilities Commission reached the same conclusion:

In a "but for" world, the potential impact of CLEC nonparticipation in the collaborative process is, at worst, close to nil. Smaller CLECs have elected to avoid the § 271 process altogether for a variety of reasons. Several CLECs have consistently participated, and others have participated when and as it was in their best interests to do so. The vast majority of impasse issues in Colorado have similarly been presented to the multistate facilitator, the Washington Commission, and the Arizona [Commission] for resolution. At the end of the day, no SGAT provisions would be worded differently, prices would not be adjusted,

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<sup>75</sup> Order to Consider Unfiled Agreements, *In re U S WEST Communications, Inc., n/k/a Qwest Corporation*, Iowa Utilities Board, Docket Nos. INU-00-2, SPU-00-11 (June 7, 2002), at 10.

<sup>76</sup> Evaluation of the United States Department of Justice, *In 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*, WC Docket No. 02-148 (July 23, 2002), at 5.

and impasse issue resolutions would not be modified. Such certainty is the incremental benefit of holding open, exhaustive § 271 proceedings.<sup>77</sup>

Tellingly, AT&T cites nothing to the contrary.

In short, the claims of AT&T and WorldCom that the unfiled agreements had a significant impact on the ROC OSS Test or the workshops are completely without merit.

## VII. THE RECORD HERE IS COMPLETE AND UNIMPAIRED

AT&T has tried mightily,<sup>78</sup> without success,<sup>79</sup> to inject “unfiled agreements” issues into Qwest’s Section 271 proceedings across its territory, raising the same specter of taint

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<sup>77</sup> Evaluation of the Colorado Public Utilities Commission, *In 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*, WC Docket No. 02-148 (July 2, 2002) at 64-65.

<sup>78</sup> See, e.g., AT&T’s Motion to Reopen Proceedings, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming’s Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms*, Wyoming Public Service Comm’n, Docket No. 70000-TA-00-599 (Record No. 5924) (May 13, 2002).

<sup>79</sup> Six of the nine states in which AT&T filed these motions rejected them. See Order Denying Motion, *In the Matter of the Colorado Public Utilities Commission’s Recommendation to the Federal Communications Commission Regarding Qwest Corporation’s Provision of In-Region, InterLATA Services in Colorado*, Colorado Public Utilities Comm’n, Docket No. 02M-260T (June 11, 2002); Order to Consider Unfiled Agreements, *In re U S WEST Communications, Inc., n/k/a Qwest Corporation*, Iowa Utilities Board, Docket Nos. INU-00-2, SPU-00-11 (June 7, 2002); Notice of Commission Action, *In the Matter of the Investigation into Qwest Corporation’s Compliance with Section 271 of the Telecommunications Act of 1996*, Montana Public Service Comm’n, Docket No. D2000.5.70 (June 3, 2002); Motion to Reopen 271 Proceedings Denied, *In the Matter of Qwest Corporation, Denver, Colorado, filing its notice of intention to file Section 271(c) application with the FCC and request for Commission to verify Qwest Corporation’s compliance with Section 271(c)*, Nebraska Public Service Comm’n, Application No. C-1830 (June 12, 2002); Transcript of Special Meeting, *U S WEST Communications, Inc. Section 271 Compliance Investigation*, North Dakota Public Service Comm’n, Case No. PU-314-97-193 (June 13, 2002); Order on AT&T Motion to Reopen Proceedings, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming’s Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms*,

it raises here. But AT&T's contrived fears are misplaced. Qwest has undergone the most extensive OSS test ever conducted, which was supervised by 13 state regulatory commissions. In addition, Qwest has participated in the most extensive set of checklist workshops ever conducted. The state commissions in Qwest's region have conducted over 300 days of workshops, during which each checklist issue was fully explored. AT&T and WorldCom's unsubstantiated speculation about possible effects of the unfiled agreements do not hold weight in light of the extensive factual record developed by the state commissions.

The Commission should not, therefore, be detained long by arguments that the voluminous records in these two proceedings are somehow incomplete. Qwest has demonstrated that, based on an exhaustive checklist workshop process, where AT&T and WorldCom participated in full along with other CLECs, it beyond question is meeting its obligations under Section 251. No party can contest that local exchange competition is active in these states. No party can fairly argue that the KPMG test was not the most thorough review of OSS that has been conducted in the nation. And the record established in the performance data speaks for itself in demonstrating that Qwest's markets are open.

Qwest takes strong exception to AT&T's gross accusations of "procur[ing]" the "silence" of CLECs. The suggestion that Qwest somehow has gagged CLECs by settling disputes with them is unfair. Settlements are both legal and desirable; they *resolve* complaints rather than suppressing them. Nothing in Qwest's agreements with CLECs affected any of CLEC's responses to a government inquiry; certain CLECs simply agreed not to actively oppose Qwest's section 271 application. The number of CLECs and agreements is small.

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Wyoming Public Service Comm'n, Docket No. 70000-TA-00-599 (June 18, 2002). A seventh state, South Dakota, orally denied AT&T's motion to reopen the section 271 hearings in that state, but is permitting the parties to brief the issue; the other two states have not ruled.

Even Minnesota's Mr. Deanhardt recognizes that settlements like these are perfectly normal. Mr. Deanhardt conceded in the Minnesota public interest hearing that, leaving the Section 271 process aside, it is hardly unusual (a) for carriers to get into commercial and regulatory disputes with each other, (b) for those disputes to make their way into formal regulatory and court proceedings, and (c) for the carriers to resolve their disputes outside the formal proceedings in a way that makes participation in those proceedings unnecessary.<sup>80</sup> He also agreed that CLECs have no obligation to participate in the section 271 process or any other regulatory proceeding,<sup>81</sup> and that a CLEC's decision to join the process as an active participant or pursue its concerns some other way outside the regulatory process is a matter for the CLEC's own business judgment.<sup>82</sup> The fact that a CLEC decides not to participate in a Section 271 proceeding says nothing except that, in its business judgment, it has more to gain by putting its resources elsewhere, and an agreement not to oppose a section 271 application is no different than, for example, agreeing to eliminate or reduce the rate for line sharing in order to simplify a 271 proceeding. And AT&T's arguments to the contrary suffer from a number of factual and logical flaws.

First, the record in this proceeding demonstrates active CLEC participation across a broad range of issues. It goes without saying that the CLECs are independent companies that can make up their own minds as to when they want to participate in a proceeding and when they do not.

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<sup>80</sup> Hearing Transcript, Testimony of W. Clay Deanhardt, May 30, 2002, *In the Matter of Qwest Corporation's Compliance with Section 271(d)(3)(C) of the Telecom Act of 1996 Regarding Public Interest, Convenience and Necessity*, MPUC Docket No. P421/CI-01-1373, at 67:1-14.

<sup>81</sup> *Id.* at 60:23-61:3.

<sup>82</sup> *Id.* at 65:13-18.

Second, AT&T cannot make something sinister out of a decision by a particular CLEC that it would prefer to resolve disagreements with Qwest through informal dispute resolution processes, rather than through public proceedings. Indeed, such carrier-to-carrier discussions can be much more efficient. Nothing in any Qwest-CLEC contract prohibited any CLEC from responding to government inquiries.

Third, AT&T is being hypocritical. It too routinely makes decisions as to when to expend the resources to participate in a regulatory proceeding and when not to do so. Indeed, one of the so-called “secret deals” at issue in the Arizona proceeding is an agreement between AT&T and U S WEST to settle certain disputes, leading AT&T to withdraw from participating in that proceeding. As part of that settlement AT&T demanded that Qwest decline from participating in certain regulatory proceedings of importance to AT&T.<sup>83</sup>

In short, there is no requirement that CLECs participate in Section 271 proceedings. CLECs will do so when it serves their self-interest. What is relevant here is that, thanks to the comprehensive work of the State Authorities, Qwest’s satisfaction of the requirements of Section 271 is fully and completely documented in these records.

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<sup>83</sup> Staff of the Arizona Corporation Commission, *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 19 (June 7, 2002).

