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Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

AUG 27 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: **Application of Qwest Communications International Inc. for
Authorization Under Section 271 of the Communications Act
WC Dockets No. 02-148**

Dear Ms. Dortch:

On August 16, 2002, AT&T submitted an ex parte letter in the above-captioned docket. See Letter from Mark D. Schneider to Marlene H. Dortch, August 16, 2002 ("AT&T August 16 *Ex Parte*"). Qwest Communications International Inc. ("Qwest"), by its attorneys, hereby submits its response to that filing. 1/

**I. For all of AT&T's Rhetoric, the Actual Record Shows No Broad Pattern of
Discrimination in Favor of Certain CLECs.**

AT&T argues in its *ex parte* letter that the so-called "unfiled" or "secret" agreements issue provides a basis for the Commission to ignore the overwhelming evidence in this record of Qwest's efforts to open its local markets. AT&T contends that the Commission should deny Qwest the right to provide competing interLATA services for an indefinite period.

1/ AT&T filed its ex parte letter in Docket No. 02-189 as well. Qwest has responded to the letter in that docket in its reply comments. See Reply Comments of Qwest Communications International Inc. In Support Of Consolidated Application for Authority to Provide In-Region, InterLATA Services in Montana, Utah, Washington and Wyoming, at 126-53 (filed Aug. 26, 2002).

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Unfortunately, AT&T's pleadings to the Commission on this issue are misleading and unhelpful to a fair review. AT&T tries to paint a picture of broad scale "secret deals" and "unreasonable discrimination." Yet AT&T is misstating the record in state proceedings dealing with this issue, including both state commission reviews of Qwest-CLEC contracts, and KPMG's findings in connection with the OSS test. Put simply, AT&T is trying to distort a small compliance question involving an undeveloped legal area, and exaggerating its significance beyond recognition. However, AT&T cannot show that this issue outweighs the voluminous evidence here that Qwest's local markets are open. And this is all the more true given Qwest's actions to file the contested contracts without reference to whether such filings are mandatory under the Act.

Significantly, AT&T already has tried to shop this same argument to state commissions throughout the Qwest region - the parties that are closest to the Section 252 filing process. To date all ten of the state commissions that have considered AT&T's position have rejected it, including the commissions in all of the application states in Docket Nos. 02-148 and 02-189. The Department of Justice also has twice recommended that this issue not be considered grounds for denying Qwest's applications. The FCC should reach the same conclusion here.

A. The Forest and the Trees: Restoring the Larger Context AT&T Carefully Omits

In order for the Commission to evaluate AT&T's argument, the so-called "unfiled agreements" issue must be put in context, both as a stand-alone matter, and as a potential factor in a Section 271 analysis. At a most basic level, AT&T is asking the Commission to ignore the forest and instead stare myopically at a few trees.

First, AT&T disregards the undisputed fact that Qwest has filed hundreds of interconnection agreements. The record here establishes that Qwest is offering interconnection broadly, and that it is willing to negotiate and reach agreement with CLECs to meet their specific needs. The record also demonstrates that Qwest routinely meets its filing obligations under Section 252(a). 2/

Second, AT&T disregards the undisputed fact that many ILEC-CLEC contracts need not be filed and approved under Section 252(a). For example, AT&T cites as if it were authority conclusory allegations of the Minnesota Department of Commerce ("MDOC"), a strong opponent of Section 271 authority for Qwest. 3/ Yet even the MDOC, which reviewed

2/ Copies of Qwest's interconnection agreements are provided in this record at Appendix L.

3/ Typical of AT&T's distortion of the facts, it quotes from the MDOC, *see* AT&T August 16 *Ex Parte* Letter at 6-7, without reference to the fact that Qwest has rebutted the MDOC's misreading of the agreements with actual testimony in hearings before the Minnesota Commission. For that matter, AT&T does not advise the FCC that the MDOC is strongly opposing Qwest across the entire panoply of Section 271 issues in the proceedings in progress before the Minnesota Commission. The MDOC is hardly an impartial party there, and it is

over 75 “unfiled” agreements between Qwest and CLECs, ended up alleging that only 11 of them should have been filed in its complaint to the Minnesota Commission. ^{4/} Qwest is vigorously contesting these allegations with testimony from witnesses who know the actual circumstances surrounding these contracts. But meanwhile a larger - and undisputed - point is most relevant here: This issue involves only a limited number of contracts between Qwest and CLECs. No party disagrees that in the vast majority of cases Qwest either (1) filed a contract with a CLEC as an interconnection agreement, or (2) had no obligation to do so.

Third, AT&T disregards the fact that, as a simple legal matter, the scope of the mandatory filing obligation under Section 252(a) has never been defined. A serious legal question arises as to how much of the CLEC-ILEC business relationship falls within the regulatory purview of state utility commissions through the filing and 90-day approval process. Does Section 252 apply to contracts establishing the specifics of how an ILEC and CLEC meet together, manage their relationship, and resolve disputes? Does Section 252 apply to contracts containing specific implementation details for arrangements whose general parameters already are contained in filed interconnection agreements? Does Section 252 apply to contracts that settle past disputes? For that matter, does Section 252 require filing of contracts that do not relate to Section 251 matters at all, based on the circumstance that the parties have other contracts that do? These are generally the kind of “unfiled” contracts at issue here, not standard interconnection agreements.

Because of the lack of clarity on the legal standard, Qwest has filed a Petition for Declaratory Ruling asking this Commission to define once and for all the scope of ILEC-CLEC agreements subject to Section 252(a)(1)’s filing requirements. ^{5/} The FCC Petition sets forth Qwest’s understanding of the statute and its legislative history and purpose. The Commission has received and reviewed a great many comments on the issue and will issue a ruling that provides ILECs and CLECs guidance on this important question. But meanwhile, legal uncertainty remains.

Fourth, AT&T disregards the fact that when this issue arose in the context of the MDOC complaint, Qwest immediately took action to facilitate regulatory review. In Minnesota it arranged to have the affected CLECs waive confidentiality provisions of the alleged “unfiled

therefore disingenuous for AT&T to rely on the MDOC’s allegations as “authority” in this proceeding.

^{4/} The MDOC subsequently has alleged the existence of an unfiled oral agreement that should have been filed. AT&T repeats that allegation. AT&T August 16 *Ex Parte* at 9. Qwest does not concede that it entered into such a binding legal agreement, and has presented evidence to that effect before the Minnesota Commission.

^{5/} See Petition for Declaratory Ruling of Qwest Communications International Inc., *In the Matter of Qwest Communications International, Inc., Petition for Declaratory Ruling on the Scope of the Duty To File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, WC Docket 02-89, filed Apr. 23, 2002 (the “FCC Petition”).

agreements” so that they could be made public. Qwest requested expedited review and asked the Minnesota Commission to accept any of the contracts under Section 252 insofar as it agreed with the MDOC that they were subject to filing requirements. Qwest also sent letters to other states in its region, notified them of the issue, and provided a copy of its answer to the MDOC complaint, as well as copies of contracts cited by the MDOC that also were relevant to the state. Since then, Qwest has fully cooperated with states that have requested more information on this subject. 6/

Fifth, AT&T disregards that “unfiled agreements” allegations involve questions of fact as well as law, fact questions that the Commission cannot simply presume eventually would be resolved against Qwest in an enforcement proceeding. Even assuming the existence of an agreed upon legal standard, Section 252(a) still requires fact-based review of each CLEC contract, both with respect to the meaning of its terms, and with respect to its context and relevance for other CLECs. AT&T is flatly misreading provisions of certain alleged “unfiled agreements” in order to fit them into its own interpretation of Section 252(a), misreadings that Qwest has rebutted with testimony in Minnesota from persons who actually know what the contracts are about. Qwest has not introduced the record of that proceeding here, both because Minnesota matters are not directly at issue, and because the fact questions involved are precisely the kind of enforcement matters that should not be taken up in a Section 271 proceeding. Nevertheless, Qwest must make reference to that proceeding in order to respond to AT&T’s bare allegations here. 7/ They provide examples of why factual context is relevant to a determination of whether an ILEC-CLEC contract actually must be filed under Section 252(a) - whatever the applicable legal standard.

- The MDOC has complained about an agreement related to intraLATA access charges imposed by a CLEC on Qwest, which is not a matter relevant to Qwest’s own Section 251 obligations. Qwest Post-Hearing Memorandum at 49.
- Qwest has shown that reciprocal compensation arrangements in so-called unfiled agreements did not have to be filed at the time because the FCC had deemed them interstate, and/or the same arrangements

6/ Examples of these letters have been provided to the Commission in Docket No. 02-148 and are incorporated herein by reference. *See Ex Parte* Letter of Melissa Newman, WC Docket No. 02-148 (filed Aug. 26, 2002).

7/ Qwest will be referencing its Post-Hearing Memorandum in proceedings before the Office of Administrative Hearings of the Minnesota Public Utility Commission in MPUC Docket No. P-421/C-02-197 (filed Aug. 23, 2002) (“Qwest Post-Hearing Memorandum”). Qwest will make a copy of the filing, which in turns references the evidentiary record developed in the hearing, available to the Commission on request.

were on file in approved interconnection agreements.
Id. at 33-35.

- AT&T cites an agreement with Covad containing various targets for FOCs and other line sharing implementation matters. AT&T August 16 *Ex Parte* Letter at 11 n.38. However, Qwest provided un rebutted testimony in Minnesota that the contract was an articulation of service goals, and not a binding commitment. Qwest Post-Hearing Memorandum at 60.
- AT&T cites an agreement providing details regarding an on-site service manager for Eschelon. AT&T August 16 *Ex Parte* Letter at 11 n.37. But AT&T does not tell the Commission that Eschelon's on-site service management rights are contained Section 2.10 of an Eschelon Interconnection Agreement Amendment that was filed with and approved by the Minnesota Commission. Qwest Post-Hearing Memorandum at 38.
- AT&T references an MDOC allegation that Qwest provided discounts to a CLEC. AT&T August 16 *Ex Parte* Letter at 7. In fact, however, the contract is an agreement for Qwest to purchase services from that CLEC, and Qwest provided evidence at the Minnesota hearing of the services it had received from the CLEC. Qwest Post-Hearing Memorandum at 43-47.
- AT&T complains that Qwest provided credits in connection with daily usage feed issues. AT&T August 16 *Ex Parte* Letter at 8. However, the record in Minnesota establishes that these credits were settlement payments related to a dispute. Qwest Post-Hearing Memorandum at 47-49.
- AT&T cites an MDOC allegation that Qwest and a CLEC had modified a Qwest purchase agreement to convert it into an oral agreement to provide a discount. AT&T August 16 *Ex Parte* Letter at 9. 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 as a discount, and other information

refuting the MDOC's claims. Qwest Post-Hearing Memorandum at 55-60.

- The MDOC has challenged Qwest's 1999 failure to file an agreement with two CLECs regarding the use of local tandem functionality in certain U S WEST end offices. AT&T August 16 *Ex Parte* Letter at 8. Yet the record demonstrates that this functionality was made available to all CLECs because Qwest submitted the change to the industry-standard Local Exchange Routing Guide ("LERG"), and in practice interconnection agreements are not amended whenever a change to the LERG is made. Qwest Post-Hearing Memorandum at 67-70.

Qwest is not asking the Commission to evaluate these fact questions for itself. Our point only is that, in order to determine whether a particular contract must be filed under Section 252, such facts and context are important issues. AT&T is presenting its allegations regarding these matters. But the record here does not permit the Commission to reach any conclusions - nor should it. These compliance matters are not questions appropriate to a Section 271 analysis.

Sixth, and related, AT&T simply assumes that if an agreement should have been filed but was not, the result is serious, market-impacting discrimination. But that too is a gross exaggeration, involving fact questions that are not susceptible to an automatic assumption. For example, the MDOC has challenged contracts that were in place only for a short time and then terminated or superseded. Qwest also has presented unrefuted evidence demonstrating that contracts singled out by the MDOC did not give preferential treatment even if filing was required. For example,

- Leaving aside the fact that the Eschelon on-site assistance cited by AT&T (AT&T August 16 *Ex Parte* Letter at 11 n.37) was disclosed in a filed interconnection agreement, Qwest provided un rebutted evidence in Minnesota that its off-site wholesale service managers provide identical customer assistance functions to all CLECs. Qwest Post-Hearing Memorandum at 39; *see also id.* at 50-52.
- AT&T complains of a contract spelling out dispute resolution processes, including escalation processes. AT&T August 16 *Ex Parte* Letter at 11 n.37. But Qwest provided evidence in Minnesota that this contract merely memorialized substantially the same

procedures used by all CLECs. Qwest Post-Hearing Memorandum at 40-42.

- AT&T complains that Qwest agreed to regular meetings with a CLEC. AT&T August 16 *Ex Parte* Letter at 11 n.37. But Qwest demonstrated in Minnesota that it meets regularly with its CLEC customers, and no evidence was presented that Qwest had refused to meet. Qwest Post-Hearing Memorandum at 42-43.
- To the extent that AT&T complains about credits paid to a CLEC to settle a DUF dispute, it ignores the fact that the dispute related to a specific service that AT&T was not even taking, leaving aside the issue of whether a settlement agreement is a proper subject of Section 252. Qwest Post-Hearing Memorandum at 47-49.
- As noted above, AT&T (like the MDOC) incorrectly characterizes a Covad contract as establishing binding obligations rather than non-binding service goals. AT&T August 16 *Ex Parte* Letter at 11 n.38. But beyond that, Qwest also provided unrebutted testimony in Minnesota that in practice Covad was treated no differently from other CLECs, and the contract memorialized Qwest's internal practices and procedures. Qwest Post-Hearing Memorandum at 60-64.
- AT&T points to the so-called "small CLEC" agreement giving certain CLECs in Minnesota the right to request terms of interconnection agreements in other states. AT&T August 16 *Ex Parte* Letter at 8. But AT&T ignores the fact that this provision did not even take effect until March 17, 2002, (by which time Qwest had asked the Minnesota Commission to approve it as an interconnection agreement if appropriate). And in any event, (i) any new Qwest-CLEC agreement arising from this provision would be filed in Minnesota and available to others, and (ii) no party has alleged that Qwest has denied it a term that the "small CLECs" are free to request themselves. Qwest Post-Hearing Memorandum at 65-67.

Qwest could go on. The point is that the Commission should read AT&T's untested allegations of "serious, market-impacting discrimination" with several pounds of salt.

Even where it may be found that a particular Qwest-CLEC agreement should have been filed and approved under Section 252, that is not the same thing as finding that any material discrimination has occurred. And, in any event, AT&T has not established such discrimination in the record here, and a Section 271 proceeding is not the appropriate place to litigate the question.

Putting all of these facts together, the Commission can see the forest AT&T tries to obscure: Qwest has regularly been filing interconnection agreements. It has operated in good faith. Questions have arisen only with respect to a relative handful of contracts, and even there the compliance question is muddled because the law with respect to Section 252 is unclear. Furthermore, when evaluating alleged non-compliance, facts are important. For any given contract, it is necessary to understand the actual meaning and application of the contract terms to be sure that it falls within the scope of Section 252(a), let alone to evaluate the material consequences of any filing lapse. Yet AT&T is asking the Commission to leap from the "A" of a few potential Section 252(a) lapses to the "Z" of a broad scale discrimination problem worthy of denying an otherwise sound Section 271 application. The record here simply does not support such a conclusion.

Indeed, the ability of AT&T to weave rhetoric out of a handful of data points is almost breathtaking. Reading AT&T's pleading, one would hardly appreciate that only one state utility authority, the Iowa Utilities Board, actually has ruled on "unfiled agreements." In doing so, the IUB established its own standard defining the scope of the Section 252 filing requirement, clarifying the law in that state. The IUB then found that the three Qwest agreements before it should have been filed, but imposed no penalties. The IUB also provided that no penalties would apply if Qwest made a compliance filing submitting any other agreements with CLECs that fell within the Board's announced standard. ^{8/} Significantly, the Board reached this decision without hearing evidence that Qwest would have provided regarding the factual context of these agreements. (For example, the three agreements the Board found should have been filed included the Covad contracts that, in the Minnesota hearing, Qwest has shown contained targets but not binding commitments, and that in any event did not give Covad any different treatment than Qwest provided other CLECs.) Nevertheless, rather than request such a hearing, Qwest has been content to accept the Board's process for putting this matter behind it. Qwest has made the compliance filing and moved on.

Qwest notes this background in part to make a few points clear. First, no Commission has found wholesale violation of Section 252(a) by Qwest. Second, and so it is clear, Qwest's decision not to contest the Iowa Board's order should be read in context. Qwest will comply with the Board's newly announced standard, and in the absence of serious penalties for past lapses, has no interest in arguing the legal issue of the scope of Section 252(a) in that context. Qwest is perfectly willing to file any contract a state commission deems appropriate. *But the FCC should not allow AT&T to turn that willingness to resolve matters in Iowa (or any*

^{8/} 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).

future state), done with express reservation of its position, 9/ into an admission of bad faith misconduct, let alone a basis for denial of Section 271 authority. Rather, it is a sign of Qwest's willingness to comply with any legal authority clarifying the law in this area, just as Qwest has attempted to comply with the Act in the past.

B. State Authorities and the Justice Department Have Unanimously Rejected AT&T's Position

Consistent with AT&T's attempt to obscure the forest, it also ignores all of the decisions of regulatory authorities rejecting its "unfiled agreements" argumentation. Indeed, AT&T ignores the decision of the Iowa Utilities Board rejecting AT&T's petition to delay action on Qwest's 271 application for that state, 10/ even as AT&T tries to emphasize the Board's ruling that Qwest should have filed certain agreements under Section 252. AT&T does not even attempt to argue that the Iowa Board's conclusion was in error. Similarly, AT&T ignores decisions of the eight other commissions whose states are represented in Docket Nos. 02-148 and 02-189. Each of these commissions either expressly rejected motions by AT&T for Section 271 delay based on "unfiled agreements" questions, or otherwise concluded that the unfiled agreements issue was not a basis for denying Qwest Section 271 relief. 11/ Since AT&T filed its

9/ Qwest so qualified its compliance filing in Iowa. *See* Qwest Corporation's Compliance Filing, Iowa Utilities Board Docket No. FCU-02-2, n.2 (filed July 29, 2002).

10/ 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) ("Iowa Order to Consider Unfiled Agreements").

11/ *See, e.g.,* 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); 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); *accord*, 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*, Wyoming Public Service Comm'n, Docket No. 70000-TA-00-599 (June 18, 2002); Washington Utilities and Transportation Commission ("WUTC"): (1) *39th Supplemental Order; Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS Testing, Change Management, and Public Interest* ("39th Supplemental

ex parte letter on August 16, the Oregon Public Service Commission has released its own order reaching the same conclusion. ^{12/} In short, AT&T is zero for ten in its attempt to convince State Authorities that “unfiled agreements” questions are material here.

This unanimous state view underscores that regulatory authorities understand what the unfiled agreements dispute is, and what it is not. They recognize that Qwest has undertaken the enormous efforts required to open its local markets to competition. They recognize that the scope of Section 252’s mandatory filing requirements has not been clear. And most important, they recognize that any particular lapses in compliance with Section 252 in specific cases are not grounds for discounting the fundamental changes that have occurred in the Qwest markets.

The Justice Department has reached the same conclusion twice. In its evaluation in Docket No. 02-148 the Department stated that “it is not apparent that the remedy for . . . prior violations [of Section 251 or 252], if any, lies in these proceedings rather than in effective enforcement through dockets in which such matters are directly under investigation.” DOJ Evaluation, Docket No. 02-148, at 3. Similarly, the Department defers in Docket No. 02-189 to the Commission but does not propose that the “unfiled agreements” matter is a basis for withholding Section 271 authority. DOJ Evaluation, Docket No. 02-189, at 3 n.6.

These decisions of the State Authorities and DOJ are fully consistent with the Telecommunications Act. Section 271 proceedings are not the place to resolve legal questions such as which ILEC-CLEC agreements must be filed under Section 252(a), and which do not have to be filed. Similarly, the Commission does not use Section 271 proceedings as a vehicle for enforcement actions, or delay consideration of Section 271 applications while such proceedings are pending. As the Commission has written, “[t]he section 271 process simply could not function as Congress intended if we were generally required to resolve all such 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.” ^{13/}

Order”); and (2) *40th Supplemental Order Denying Petition for Reconsideration* (“*40th Supplemental Order*”).

^{12/} *In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region, InterLATA Services under Section 271 of the Telecommunications Act of 1996, Final Recommendation Report of the Commission, Public Utility Comm’n of Oregon, Docket No. UM 823 (Aug. 19, 2002), at 18-19 (declining to deny Section 271 relief or delay conclusion of Section 271 proceeding on basis of AT&T allegations).*

^{13/} *See SBC Kansas/Oklahoma Order* ¶ 19 (footnotes omitted); *see also SBC Texas Order* ¶¶ 23-27.

Indeed, the United States Court of Appeals for the District of Columbia Circuit expressly rejected AT&T's attempt to convert Bell Atlantic's Section 271 proceeding in New York into the same sort of referendum that AT&T seeks to create here. In agreeing with the FCC that CLECs should not be permitted to raise collateral issues, the court held that the sweeping inquiry AT&T sought would cast the Section 271 process adrift from its statutory moorings:

The Commission's concerns about encumbering the ninety-day administrative process and prolonging litigation, thus delaying BOC entry into long distance markets, seem well-founded.*** We thus agree with the FCC that allowing collateral challenges could change the nature of section 271 proceedings from an expedited process focused on an individual applicant's performance into a wide-ranging, industry-wide examination of telecommunications law and policy.

AT&T Corp. v. FCC, 220 F.3d 607, 631 (D.C. Cir. 2000). The Commission should take the same approach here. This docket is not the place for the Commission to rule on the scope of the filing requirement under Section 252(a). That legal issue should be left to careful consideration in the context of Qwest's pending rulemaking petition.

Similarly, this is not the proceeding for the Commission to prejudge the outcome of pending proceedings regarding specific Qwest-CLEC contracts being litigated at the state level. To date only one decision has been rendered on this topic - the Iowa Board's conclusion that three specific Qwest agreements should have been filed. As noted, Qwest did not seek a hearing or further review of that decision given the Board's conclusion that, if Qwest complied with the new standard it announced, no penalties would apply. This is hardly the kind of decision that provides a basis for the Commission to deny a Section 271 application.

While this Commission has said (in the *only* paragraph of FCC authority that the other parties or their witnesses have ever cited on this subject) that it is "interested in evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations," *Ameritech Michigan Order* ¶ 397, it has made just as clear (indeed, in the very next sentence) that it is not interested in such misconduct for its own sake. Rather, such evidence is relevant only insofar as it "would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority." ^{14/} The unfiled agreements dispute - which

^{14/} *Id.* See also Facilitator's Public Interest Report at 9 (finding that "the public-interest standard" is not "a punitive one, but rather a forward looking, or predictive one"); Workshop 4, Part 2, Findings and Recommendation Report of the Commission and Procedural Ruling, *In the Matter of the Investigation into the Entry of QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC., into In-Region, InterLATA Services under Section 271 of the Telecommunications Act of 1996*, Oregon Public Utility Comm'n, Docket No. UM 823 (Jun. 3, 2002) at 46 (finding that "[t]he public interest test is prospective in nature").

involves a good-faith question of the proper interpretation of Section 252's filing obligations – does not in any way overshadow the voluminous record evidence here that Qwest's local markets are open to competition now and would remain so after a grant of Qwest's application. The unanimous state commission decisions rejecting AT&T's delaying tactics, and the corresponding views of the Justice Department, are fully consistent with this precedent.

II. In Any Event, Qwest's Voluntary Filing Actions Eliminate Any Going-Forward Section 271 Issue

Qwest trusts that the Commission will recognize the forest before it, notwithstanding AT&T's distortion of the facts. Qwest strongly submits that the "unfiled agreements" issue is a red herring that AT&T presents with such vehemence only because it has so little to say in the face of Qwest's extensive market-opening activities, and the extraordinary work of the ROC and state utility commissions to test and review Qwest's efforts in that regard. The record contains no evidence actually to support AT&T's claims of broad scale discrimination.

In any event, this matter is now moot even as a theoretical matter. The Commission can look to recent actions Qwest has taken to eliminate dispute regarding this matter pending a ruling on its pending Declaratory Ruling Petition. These actions ensure that, to the extent debate continues regarding the unfiled agreements issue (both as to the generic legal standard applicable to all ILECs and CLECs, and as to application of the standard in particular cases), that debate - in the case of Qwest - will relate only to past events. Thus, even assuming that final regulatory orders conclude that Qwest made past errors in its filing decisions, the Commission can find that such past errors do not make the local markets in the states here any less open now or in the future.

Indeed, these actions by Qwest entirely moot AT&T's discrimination complaints. AT&T argues 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. AT&T August 16 *Ex Parte* Letter at 3. This is no longer the case. As a result, it is all the less relevant whether any of the CLEC contracts should have been filed in the past, or whether the impact of such non-filing could in any way be deemed to have a discriminatory effect.

First, Qwest has implemented new policies and procedures that are applicable to all new contracts with CLECs. Specifically, 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). ^{15/} Qwest believes that this "all obligations" standard is overbroad, and that Section 252(a) does not require filing and prior state commission 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

^{15/} These matters are described in the declaration of Mr. Larry Brotherson provided in Qwest's Reply Comments in Docket No. 02-148, and incorporated herein by reference.

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 (at the Executive Director level and above) 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. Brotherson Declaration ¶ 8.

Third, Qwest has taken steps to make available terms of older contracts in all of the states at issue here. As Qwest explained in a recent *ex parte* submission, ^{16/} the company naturally has been concerned about its potential penalty liability with regard to second-guessing of its past filing decisions in an area where the standards have not been clearly defined. Qwest has no objection to offering all CLECs in a state the same going forward terms it gives under contract to one local carrier. However, Qwest does not concede that all contracts with CLECs require prior approval, and has been concerned that extending such offers might be read as an admission regarding the scope of Section 252's mandatory filing requirements.

That said, Qwest stated in its Reply Comments in Docket No. 02-148 that it would post on its website 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). Qwest also stated that it would make available such going forward terms to other CLECs under the same policies that apply under Section 252(i). *See* Qwest Reply Comments, Docket No. 02-148, at 131-32.

After additional consideration, Qwest is now taking a 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 on-going obligations that relate to Section 251(b) or (c) which have not been terminated or superseded by agreement, commission order, or otherwise. Qwest is 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-

^{16/} *See Ex Parte* Letter of Melissa Newman, CC Docket Nos. 02-148 and 02-189, filed Aug. 20, 2002.

in opportunities will be provided on a state-specific basis under Section 252(i) rather than on a region-wide basis. 17/

We are not asking the state commissions to decide whether any of these contracts, or specific provisions therein, in fact are 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 251(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. As discussed above, Qwest has indicated that it does not agree with the determination, but is complying with it.) 18/

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

17/ 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.

18/ 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.)

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. 19/

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, we will follow the course outlined above.

In these circumstances, AT&T's red herring is a dead herring. For the reasons discussed above, Qwest submits that the record in this proceeding overwhelmingly demonstrates that its local markets are open to competition, and that the State Authorities and Justice Department were correct in concluding that residual disputes over the scope of Section 252(a) and particular Qwest contracts do not provide a basis for denying grant of Qwest's pending

19/ 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.

Section 271 applications. But this is all the more true when such disputes relate only to whether past contractual obligations should have been filed.

Qwest continues to believe that, after Section 252(a) filing standards are defined and its specific contracts reviewed, its past filing decisions will be found reasonable, and at the least in good faith. But for present purposes, this case is no different from the one addressed by the Commission in its *BellSouth Georgia/Louisiana Order*. In that proceeding two CLECs claimed that a BellSouth interconnection policy violated the CLECs' "rights to interconnect 'at any technically feasible point' within BellSouth's network," and that, as a result, the BOC had not satisfied its obligations under checklist items 1 and 9. *BellSouth Georgia/Louisiana Order* ¶ 207. The Commission rejected the CLECs' argument because (a) the BellSouth policy at issue had been rescinded, *id.* ¶ 208, (b) a Section 271 docket was not the place "to settle new and unresolved disputes about the precise content of an incumbent LEC's obligations to its competitors," *id.* (citing *SBC Kansas/Oklahoma Order* ¶ 19), and (c) the issue concerned matters "open . . . before [the] Commission" in another docket. *Id.* All of these considerations counsel in favor of resolving the "unfiled agreements" litigation in the dockets devoted to those issues, rather than delaying Qwest's 271 approval to consider those issues here.

In short, the state commissions and the Justice Department have got the so-called "unfiled agreements" issue right. Whatever its significance proves to be as pending proceedings go forward, the record in no way supports delaying action under Section 271 here.

III. Qwest's Performance Results Are Not Impacted by the "So-Called "Unfiled Agreements," Notwithstanding AT&T's Suggestions to That Effect

A. AT&T Distorts the Conclusions of KPMG and Ignores Actual Commercial Performance

AT&T also claims that the so-called "unfiled agreements" somehow taint the results of the ROC OSS Test. *See* AT&T August 16 *Ex Parte* at 10. But this argument completely ignores the record evidence in this proceeding and KPMG's testimony in recent state Section 271 proceedings.

AT&T first tries to set up a straw man by claiming that Qwest relies "almost entirely" on the results of the ROC OSS Test to demonstrate that its OSS complies with Section 271. *Id.* But this completely ignores thousands of pages of evidence submitted in this proceeding demonstrating that Qwest provides CLECs with nondiscriminatory access to its OSS on a commercial basis. Nearly half the PIDs that were developed to assess Qwest's commercial performance pertain to OSS. As Qwest has demonstrated repeatedly, its performance in the Application states under those PIDs has been extremely strong. *See* OSS Reply Decl., Docket No. 02-189, at ¶ 5 n.1-2. The premise of AT&T's argument – that Qwest must rely almost exclusively on results of the ROC OSS Test – therefore is completely false.

AT&T next tries to disparage KPMG and the ROC OSS Test by claiming that the so-called "unfiled agreements" diminish the credibility of the Test's results. *See* AT&T

August 16 *Ex Parte* at 10-11. This too ignores the evidence in this proceeding and in state Section 271 proceedings.

It is now well-understood that KPMG, on its own initiative, performed an analysis to determine whether any unfiled contracts between Qwest and CLECs affected its findings in the ROC OSS Test. This analysis – which is referred to as the “CLEC Participation Study” – was first issued by KPMG on May 7, 2002. In that initial release, KPMG stated that it had examined the impact that agreements with Eschelon, McLeod and Covad (“the three CLECs”) may have had on Qwest’s performance during the ROC OSS Test. In response to the May 7 CLEC Participation Study, WorldCom asked KPMG to expand the scope of its analysis to include eight additional CLECs that had agreements with Qwest. KPMG complied, and on June 11, 2002, it issued a revised CLEC Participation Study.

AT&T tries to make much of the fact that KPMG stated in the May 7 Study (and affirmed in the June 11 Study) that it “makes no assertion as to whether or not the information received from the three CLECs is representative of the ‘typical’ CLEC experience.” AT&T August 16 *Ex Parte* at 10, citing May 7 CLEC Participation Study at 1. But this has nothing to do with whether KPMG found that the agreements with these CLECs affected its findings in the ROC OSS Test. KPMG’s most salient statement on point appears in the June 11 Study, in which KPMG states 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 upon by KPMG Consulting” during the Test. June 7 CLEC Participation Study at 1.

AT&T wrongly – and inappropriately – characterizes this statement as an attempt by KPMG “to mitigate” the impact of its assertion regarding the representative nature of the information it examined in the CLEC Participation Study. As an initial matter, KPMG acted as an independent evaluator of Qwest’s OSS. To suggest that KPMG had to “mitigate” its statement therefore is misleading, as KPMG’s role required that it present clear and supported conclusions with regard to Qwest’s OSS. Moreover, there is nothing for KPMG to “mitigate.” The first statement cited by AT&T – regarding the representative nature of the information KPMG examined – merely states a fact. But KPMG’s finding that there was no evidence that any unfiled agreement affected the validity of the ROC OSS Test represents KPMG’s *conclusion*.

A close reading of 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. As explained more fully below, AT&T’s central premise – that unfiled agreements resulted in favorable treatment for certain CLECs – is false. But, even if that premise were true, such favorable treatment could not have had a measurable effect on KPMG’s conclusions because 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 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.” See June 11 CLEC Participation Study at 8 (“Substantial Reliance” Chart). 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 filed I WC Docket No. 02-189, ¶¶ 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.” See, e.g., *Maine Section 271 Order* at App. D-15. 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.

Having failed in its attempt to discredit KPMG with respect to the evaluation criteria in the “substantial reliance” category, AT&T next tries to obscure KPMG’s findings in connection with the criteria in the “partial reliance” category. But, as KPMG itself 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.

See Qwest 271 Application, WC Docket No. 02-189, Attachment 5, Appendix K, Wyoming Transcript, July 13, 2002, at 181. Thus, for the evaluation criteria on which KPMG “partially relied” with respect to CLEC-specific information, that information is irrelevant to KPMG’s overall finding of compliance in the ROC OSS Test.

Ultimately, having failed in its attempt to mischaracterize the CLEC Participation Study, AT&T tries to supplant KPMG’s judgment with its own by comparing KPMG’s reliance on CLEC-specific results generated by McLeod, Eschelon and Covad with the terms of their unfiled agreements with Qwest. See AT&T August 16 *Ex Parte* at 11. AT&T’s implicit suggestion that the Commission should defer to AT&T’s back-of-the-envelope analysis rather than KPMG’s three-year, comprehensive study of Qwest’s OSS is absurd.

B. CLEC-Specific Data Demonstrate That AT&T's Speculation Regarding Discrimination is Not Occurring in Reality

AT&T's discrimination argumentation also can be dismissed by examination of actual CLEC-specific performance data. AT&T focused on unfiled agreements with three CLECs – Covad, Eschelon and McLeod – as especially relevant due to the CLECs' size. AT&T Comments, Docket No. 02-189, at 19 ("AT&T Comments"). AT&T then makes two performance allegations: (1) that Covad obtained preferential firm order confirmations (FOCs) that allowed it to obtain "superior access to UNEs to the competitive detriment of all others;" and (2) that Qwest made it easier for certain CLECs to submit orders such that certain "CLECs may have skewed [the OSS Test] results." These allegations are based on speculation, not actual data.

In the same pleading, however, AT&T acknowledges that "Qwest's own performance data...is the most probative evidence of whether Qwest is meeting its OSS obligations" AT&T Comments at 29. However, Qwest's performance data, the very data AT&T acknowledges is the "most probative," show that the CLECs who entered into unfiled agreements with Qwest do not receive preferential treatment in ordering, provisioning and repair of UNEs.

This matter is discussed in the Williams Reply Declaration in WC Docket No. 02-189 and the confidential CLEC-specific data that accompany it. Specifically, Qwest has gathered data from the four products ordered most prevalently by these 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 measures that, if AT&T's allegations had 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 already a part of the confidential record in this docket. 20/ Focusing on the six most recent months (January - June 2002) for the states of Colorado, Iowa, Idaho, 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.

20/ Relevant excerpts from the reply declaration of Mr. Williams in Docket No. 02-189, and the associated Confidential Exhibit MGE-1, are provided here as Attachment A.

- 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, aggregating the three CLECs together, they 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.

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.

IV. The Record Here is More than Adequate

Finally, the Commission should reject AT&T's attempt to argue that the voluminous record here is somehow incomplete. Qwest has demonstrated that, based on an exhaustive checklist workshop process, where AT&T 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 "silencing" CLECs. Qwest has done nothing of the kind. First of all, 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.

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. 21/

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 commission staffs, Qwest's satisfaction of the requirements of Section 271 is fully and completely documented in this record.

Respectfully submitted,



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cc: Michele Carey
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21/ 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).