Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
Qwest Communications International Inc.'s Consolidated Application for Authority to Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming	)	WC Docket No. 02-314

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REPLY COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to Qwest's application for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming.

INTRODUCTION AND SUMMARY

Close your eyes, hold your nose, and take your chances on appeal. That, in a nutshell, is the approach that Qwest would have the Commission take in this proceeding. There is, to be sure, no other route to approval of this fatally deficient application. But there have been few proceedings where bending the rules in that fashion would do greater disservice to the Commission's reputation and to the public interest. And it is impossible to conceive of circumstances where an applicant could be less deserving of such regulatory largesse.

From one pleading cycle to the next, the pattern repeats. A checklist violation is alleged. Qwest flatly denies that it has done anything wrong. The evidence mounts until plausible deniability becomes impossible. At the last minute, Qwest admits that there have been "lapses," and then urges the Commission to disregard them and trust that Qwest will fix the problem. Even a single such transgression should give the Commission pause in a 90-day proceeding in which the Commission must ensure that local markets are, in fact, open to competition. Where, as here, the facts and findings that demonstrate the applicant's hostility to the "market-opening" provisions of the Act have accumulated, rather than abated, with the passage of time, however, it should be quite plain that the Commission must verify, rather than simply trust, assertions of checklist compliance.

Qwest's MLT-related checklist violation is just the latest in a string of similar revelations of secret deals discrimination, accounting deficiencies, OSS discrimination, pricing benchmarking errors and a host of other deficiencies that Qwest has tried, but failed, to hide. And Qwest's reaction to the crisis du jour is typical. Qwest does not – because, in the face of documentary proof, it cannot – dispute that it does in fact acquire and retain loop data that it does not today provide to competitors. As the Commission has recognized, that violates the checklist requirement of nondiscriminatory OSS. It also is a matter of great real world concern to CLECs, as Covad, the CLEC that is perhaps most experienced with Qwest's failure to comply with its loop unbundling obligations, has recently stressed. Qwest therefore attempts distractions with much arm-waving and complaining that it did not hide its MLT practices from regulators in all of the myriad ways that its own former employee and internal documents suggest. Qwest's explanations in this regard strain – and in the case of the internal e-mail, which contains clear statements that no amount of lawyering can explain away, break – credulity. But regardless whether Qwest's failure though years of section 271 proceedings to disclose the full nature of its MLT practices resulted from "lapses" or something more sinister, two things are clear: The checklist violation remains, and Qwest has, yet again, proven why the Commission cannot allow Qwest to fill the deficiencies in its section 271 showings with paper promises. Rather, as the Department of Justice recognizes, the Commission must "assure itself that it has full and accurate information *before* proceeding to address the remainder of the issues" in Qwest's application.[1]

As detailed below, granting this application on this record simply cannot be squared with the statute and would invite a very unflattering decision from the court of appeals. If, as Qwest now admits, Qwest runs MLTs that it never previously disclosed and retains loop data that is not available to CLECs, the Commission's own prior decisions compel a finding that Qwest has not satisfied its burden to prove that it provides nondiscriminatory access to OSS. If there are serious questions whether Qwest has entered secret oral interconnection agreements – and both a Minnesota fact finder *and* the reviewing commission, having heard Qwest's evidence, have held that Qwest does, in fact, have such secret oral deals – then the plain language of the Act precludes any finding that Qwest has satisfied its checklist nondiscrimination requirements. And, if, as Qwest's own submissions confirm, its new "section 272 affiliate" is an empty shell that is subject to the same concededly inadequate accounting policies and controls as the rest of the Qwest family, the Commission's prior decisions compel the conclusion that Qwest cannot demonstrate that it will comply with section 272. These are clear legal issues that petitioners would have no trouble explaining, and that the Commission would have much trouble defending, in the court of appeals. Indeed, it is difficult to imagine just what the Commission's advocates would say in response to a judge's predictable questioning of Commission disregard of actual evidence of *present* violations and checklist deficiencies – which, under any measure, make out at least prima facie showings – in favor of entirely unsupported assurances of future compliance from an applicant prone to frequent "lapses."

[1] DOJ Eval. at 4-5 (emphasis added).

Granting this application on this record would also send exactly the wrong message about the Commission's resolve to deal with serious issues of corporate accountability and faithfully to apply core provisions of the Communications Act. The application should be rejected.

Part I of these reply comments demonstrates that Qwest did not, in the few weeks following its withdrawal of its first two section 271 applications, solve the pervasive and acknowledged accounting problems that forced the withdrawal of it prior applications. It is as true today as it was in September that the entire Qwest family's accounting polices and controls are inadequate and under investigation, and that fact precludes any reasoned finding that the requested authorization will, as required by section 271(d)(3)(B), "be carried out in accordance with the requirements of section 272."

Qwest's proposed solution, a new paper shell labeled "272 affiliate," is a meaningless ruse designed only to divert attention from the real issue: can Qwest *today* demonstrate (rather than merely assert) that it will *provide* interLATA service through a qualified 272 affiliate. The answer is quite clearly no. As the Commission and the courts have stressed, it is substance, not form, that matters here. No one can seriously believe that QLDC, which, for all practical purposes, has neither assets nor employees, is in any position to launch and operate a massive 9-state long distance business. Whatever the corporate forms, the substance of the matter is that some other Qwest entity that has assets, employees and experience will be the true provider of Qwest's long distance service. Whether the real provider is QC, QCC or some combination of other Qwest entities, the fatal problem for this application is that Qwest neither has nor could show that those entities will comply with GAAP (or, for that matter, the other section 272 requirements). Indeed, despite temporizing in its application,[2] Qwest has publicly acknowledged

[2] Qwest III Application at 9 n.11.

elsewhere that QLDC is ephemeral and will soon be merged out of existence, leaving – surprise, surprise – QCC as the sole interLATA provider.

Failing (or refusing) to see this arrangement for the sham that it is would invite not only reversal, but serious public questioning of the Commission's resolve on issues of corporate accounting and responsibility to which the Administration and other branches of government have properly assigned the highest priorities. That is particularly true given that the DOJ and state commissions – at the Commission's request – have deferred to the Commission on 272 issues.[3]

And even if QLDC were a legitimate company and was the only entity through which Qwest would actually be "providing" in-region long distance services, Qwest has not demonstrated that QLDC will satisfy the section 272 requirements. Although Qwest tries to make a virtue out of the fact that QLDC was created out of whole cloth just a few weeks ago, that fact damns its application. Commission precedent makes clear that the most probative evidence of going-forward compliance with section 272 is a proven track record. This is particularly true with respect to section 272's accounting safeguards; basic accounting principles are clear that there is no substitute to a history of maintaining books in conformity with generally accepted accounting practices ("GAAP"). Here, QLDC has no demonstrated history of compliance with section 272. And to the extent that QLDC is judged by QCC's checkered past, the only reasoned conclusion can be that QLDC would not abide by section 272's "crucial[ly] important[]" safeguards.[4]

Further, the fact that QLDC is "new" does not mean that it is somehow immune from the accounting problems that have prevented Qwest from certifying the books of QC, QCC and the

[3] *See* DOJ Eval. at 9; Montana (Qwest III) at 1; Nebraska (Qwest III) at 1; Colorado (Qwest III) at 3; North Dakota (Qwest III), Wefald Concurring Opinion at 1.

[4] *Kansas/Oklahoma 271 Order* ¶ 147.

holding company, QCII. That is because Qwest's basic accounting policies themselves are under review and, while it is now clear that Qwest's problems are systemic and pervasive, the full extent of its accounting irregularities are not yet known and will not be known until the ongoing investigations conclude. It is also widely acknowledged that Qwest's internal controls are inadequate and need strengthening.

Part II confirms that Qwest's documented secret deals discrimination – through both written and oral unfiled interconnection agreements – precludes any rational finding that Qwest satisfies the competitive checklist. The Minnesota Public Utlities Commission ("PUC") has now adopted the findings of its administrative law judge ("ALJ") that Qwest committed 25 knowing and intentional violations of section 252 by failing to file discriminatory interconnection agreements with favored CLECs, including an oral discount agreement the existence of which Qwest denied throughout the Minnesota proceeding. The Minnesota decision precludes approval of this application. It is now clear that, despite Qwest's repeated denials, it has entered into *oral* interconnection agreements and that these agreements have not been filed with the state commissions. In addition, Qwest continues to violate sections 251 and 252 by not filing and making publicly available all of the *written* agreements it has with other CLECs, despite having committed to do so several months ago and despite the express holding of the Commission's *Interconnection Agreement Declaratory Order*.

Part III discusses the checklist significance of Qwest's belated admission that it performs MLTs on every loop that it cut over to a CLEC, but fails to provide that loop qualification data to CLECs. In a recent *ex parte* filing responding to a declaration from a former Qwest employee submitted with AT&T's initial comments, Qwest concedes the dispositive facts that compel a finding that Qwest does not today provide nondiscriminatory OSS.

As discussed in Part IV, the comments confirm that Qwest has failed to satisfy its burden of establishing that it is providing nondiscriminatory access to its OSS in other critical respects as well. Qwest's systems continue to be plagued by high-rates of order rejection, extensive manual processing of electronically submitted CLEC orders, and manual errors. In fact, Qwest's ordering and provisioning systems are so flawed that they commit errors on service orders even for local service requests ("LSRs") that flow through those systems without manual intervention. In addition, Qwest does not provide complete, accurate, and timely daily usage files ("DUFs") and wholesale bills to CLECs. AT&T's latest electronic wholesale bills from Qwest, like the bills received in prior months, contain numerous flaws that render the bills both inaccurate and inauditable. Eschelon demonstrates that *all* of its bills for UNE-Eschelon have been inaccurate, and that its DUF records do not include more than 20 percent of the calls for which Qwest was obligated to provide access records.

The comments also show that Qwest does not provide a stable test environment that mirrors the production environment. For example, the test scenarios available in Qwest's Stand-Alone Test Environment ("SATE") include only the simplest order types. The SATE also supports less than half of the products that Qwest offers in the commercial environment. As a result of these limitations, CLECs are precluded from using the SATE to test numerous order types that they commonly submit in commercial production. Even when Qwest recently agreed to include in the SATE some additional test scenarios requested by WorldCom, it refused to advise CLECs of their availability or to agree that the additional scenarios would be included in future versions of the SATE. Qwest's policy is discriminatory on its face, and provides further confirmation that Qwest's SATE falls woefully short of mirroring actual production.

Qwest's commercial performance results also do not satisfy the checklist. Qwest's performance data are incomplete, inaccurate, and unreliable. The performance measurements on which Qwest relies are either ill-defined or have been implemented in such a manner that they cannot and do not capture Qwest's actual performance. Even Qwest's inadequate performance results show that Qwest has failed to meet its statutory obligations in the ordering, provisioning maintenance and repair, and billing processes.

Part V shows that Qwest still has not met its burden of proving that its rates in *any* state in its application satisfy Checklist Item 2. Qwest has implemented a series of eleventh hour rate reductions in eight states for which it cannot even plausibly claim that the Commission's TELRIC rules were applied, and Qwest now claims the Commission can ignore the serious TELRIC errors in those states based on a "benchmarking" test, using Colorado as the benchmark state. This argument, however, has a fatal flaw – Qwest's Colorado rates are well in excess of TELRIC levels, and therefore cannot be used as benchmarks. In all events, even if Colorado were a valid benchmark state, the rates in many of the states covered by Qwest's application do not pass an appropriate benchmarking analysis.

Moreover, recent developments confirm that Qwest's bloated UNE rates foreclose competition. As explained by the Montana Public Service Commission ("PSC"), Qwest has refused to comply with a recent Montana PSC order to supply the Montana PSC critical information that would allow it to protect Montana customers against a price squeeze that "will disable competitors attempting to compete with Qwest in both toll and local markets in Montana."[5] Accordingly, the Montana PSC has *withdrawn* its initial conditional support for Qwest's section 271 application. And Montana is not the only state where Qwest's rates preclude local entry. As demonstrated by AT&T and WorldCom, a properly conducted margin analysis shows that even a residential entry strategy that employs a combination of UNE-based and resale entry also is not economically feasible in Idaho, Iowa, Montana, or Washington.

[5] Montana (Qwest II) Eval. at 5.

Finally, Part VI shows that Qwest's new application also must be denied because granting Qwest's request for interLATA authority would not otherwise be in the public interest. Qwest has engaged in a pattern of discriminatory and anticompetitive conduct that has grown and spawned new concerns as time has passed. Simply, Qwest has shown that it is not committed to accelerating and completing the process of opening its local markets to competition. For example, as the Minnesota PUC confirmed at a hearing this very week, Qwest's practice of entering secret deals was "knowing and intentional," structured specifically to prevent their disclosure, the subject of dissembling, and part of a pattern of other questionable business practices. If the Commission were to accept Qwest's invitation to sweep the warnings of the *Michigan 271 Order* under the carpet, it would stand alone among other governmental agencies that have resolved to establish corporate responsibility and effective government oversight. Qwest has attempted to thwart competition with the hope that any long-delayed sanction will be a trivial cost of doing illicit business, and the Commission must not reward this strategy by granting Qwest's premature application for interLATA authority.

I. THE COMMENTS CONFIRM THAT QWEST HAS AGAIN FAILED TO DEMONSTRATE COMPLIANCE WITH SECTION 272 OF THE ACT.

The comments confirm that QLDC is, by any measure, a sham corporation,[6] and that, by Qwest's own admission, will have only a fleeting existence.[7] The Commission must squarely reject Qwest's claim that the Commission can approve this application based solely on a review of QLDC's compliance with section 272. The courts – and the Commission[8] – have stressed that

[6] WorldCom at 18-21; Touch America at 6-7.

[7] AT&T at 22 (citing admissions by Qwest); WorldCom at 20-21 (same).

[8] *Fox Television Stations* ¶ 48 (no weight can be given to "formalistic and formulaic" changes to corporate form in assessing compliance with substantive rules); *NextWave Order* ¶ 44 (the Commission will look to "the economic reality and substance of . . . transactions"); *Michigan 271 Order* ¶ 361 (holding that section 272 cannot be nullified "through a legal fiction").

"form should be disregarded for substance and the emphasis should be on economic reality"[9] and have "consistently refused" to accept an interpretation of federal statutes that would "give effect to the corporate form where it is interposed to defeat legislative policies."[10] Indeed, the Commission has held precisely this in construing the operative language of section 272, which requires a BOC to "provide" in-region interLATA services through a separate affiliate that complies with all the substantive requirements of sections 272(b)-(e).[11] In the *Qwest Teaming Order*, the Commission rejected the notion that "provide" as used in the Communications Act should be equated with the mere physical transmission of communications, instead finding that the term must be construed in light of the core "statutory purpose" of the particular provision in which it is used.[12]

Here, Qwest's proposal would eviscerate section 272's "crucial[ly] important[]"[13] purpose of preventing BOCs from using their control of "bottleneck facilit[ies]" to advantage their long distance offerings.[14] Under Qwest's proposal, the section 272 safeguards would apply only to QLDC despite the fact that it is an empty vessel that is clearly unable to "provide" long distance service in the nine states for which Qwest is now seeking section 271 approval. If Qwest's construction of the statute were accepted, the Qwest companies actually "providing" long distance service in these states would not have to satisfy section 272's accounting and structural safeguards, and there would be no protections in place to prevent and detect discrimination in favor of the entities chiefly responsible for Qwest's in-region long distance offering.

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[9] *SEC* v. *Texas International Co.*, 498 F. Supp. 1231, 1240 (N.D. Ill. 1980) (quoting *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967); *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 99-100 (7th Cir. 1977).

[10] *First National City Bank* v. *Bano Para El Comercio Exteriror de Cuba*, 462 U.S. 611, 630-31 (1983) (citing precedents).

[11] *See* 47 U.S.C. § 272(a)(1).

[12] *Qwest Teaming Order* ¶¶ 28-37.

[13] *Kansas/Oklahoma 271 Order* ¶ 147.

At a minimum, by announcing that Qwest intends to eliminate QLDC in the future and make QCC its sole 272 affiliate, Qwest must demonstrate that QCC satisfies section 272.[15] As AT&T explained in its opening comments, read together, sections 271 and 272 mandate that Qwest prove, and the Commission find, that Qwest is in compliance with section 272 at the time it files its application, *and* that there is a reasonable assurance that Qwest will continue to operate in compliance with section 272 going-forward.[16] Qwest does not even attempt either showing with respect to QCC, notwithstanding that it is undisputed that Qwest will attempt to provide in-region long distance through QCC in the near future. Indeed, Qwest acknowledged in announcing the creation of QLDC that both QLDC *and QCC* "must remain compliant with section 272" in order for Qwest to obtain section 271 approval.[17] This showing must be based on hard evidence; a "paper promise" of "*future* performance" is insufficient to "satisfy [Qwest's] burden of proof."[18]

Qwest does not even purport to claim that QCC presently complies with any provision of section 272, let alone provide substantial evidence that QCC today complies with sections 272(b)(2) and 272(c)(2) or even that it will do so at some point in the future. Nor could it, as it is now established that QCC's "books, records, and accounts" do not comply with GAAP and do not satisfy section 272(b)(2). Indeed, if QCC could satisfy section 272(b)(2), there would be no reason for Qwest to have resorted to creating QLDC.[19]

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[14] *Accounting Safeguards Order* ¶ 14; *Non-Accounting Safeguards Order* ¶¶ 10-13.

[15] *See also* WorldCom at 20 ("It would be contrary to sound public policy to approve [Qwest's application], because the section 272 affiliate that Qwest would have the Commission is not the affiliate that Qwest ultimately will use to provide long distance service.").

[16] *Michigan 271 Order* ¶ 55 ("Evidence demonstrating that a BOC intends to come into compliance with the requirements of section 271 by day 90 is insufficient." (emphasis in original); *id.* ¶ 347 ("past and present behavior of the BOC applicant [is] the best indicator" as to whether the BOC will comply with section 272).

[17] Qwest III Application, Schwartz Decl., Exh. MES-QC-13 (Qwest Today Announcements, Qwest Creates New '272' Affiliate).

[18] *Michigan 271 Order* ¶ 55.

[19] Notably, many of the state commissions do not endorse Qwest's end run around section 272. Instead, they note that Qwest bypassed state review on this issue and urge the Commission to take a hard look at Qwest's compliance (continued)

But even if QLDC could somehow be considered the only relevant entity for section 272 purposes, the comments confirm that Qwest fails to satisfy that provision. With regard to section 272's accounting safeguards (47 U.S.C. §§ 272(b)(2), (c)(2)), Qwest argues that because QLDC is a "new" company, it is "not subject to *past* accounting irregularities" and therefore "the Commission can be assured that its books, records, and accounts will be maintained in accordance with GAAP."[20] This is doubly wrong.[21]

First, Commission precedent and basic accounting principles dictate that a *proven* history of compliance with GAAP is the best evidence of going-forward compliance. "The Commission has long-stated that the 'present and past present behavior of the BOC applicant provides the best indicator of whether [the applicant] will carry out the requested authorization in compliance with section 272.'"[22] Likewise, as Professor Holder explained, a track record of audited operating results is a pre-condition to access to public capital markets and the authoritative accounting literature provide that "nothing can substitute for an audited track record of proven performance in being capable of providing information presented in conformity with GAAP."[23] Thus, the fact that QLDC was created just a few weeks ago is a reason for *rejecting* Qwest's application, not approving it.

Second, there is no basis for Qwest's claims that QLDC's books are somehow immune from Qwest's flawed accounting policies and inadequate controls. As an initial matter, Qwest offers nothing more than the unsworn assertions of its lawyers to support its position. But as

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with section 272. *See* Montana at 1; Nebraska at 1; Colorado at 3; North Dakota, Wefald Concurring Opinion at 1. *See also* Idaho at 2 ("Given the short time between the withdrawal of Qwest's initial FCC application and its re-filing on September 30, the IPUC did not attempt to re-open its review of Qwest's ability to comply with Section 272 requirements.").

[20] Qwest III Application at 11.

[21] As Professor Holder explained, Qwest's accounting problems also preclude any finding that Qwest is in compliance with section 272(b)(5), which requires that the sale of services from QC to QLDC be consummated in accordance with "arm's length" terms. AT&T (Qwest III), Holder Decl. ¶¶ 29-35.

[22] WorldCom at 19 (citing *New York 271 Order* ¶ 402).

Professor Holder explains, even actual management representations are insufficient to establish GAAP-compliance in such circumstances.[24] Instead, the authoritative literature provides that a finding that information in accounting books is presented in compliance with GAAP can only be reached after an "application of . . . auditing procedures" by accounting professionals.[25]

Further, Qwest's accounting problems are not simply the isolated misapplication of otherwise sound accounting policies. To the contrary, as Professor Holder explains – and Qwest has largely conceded – Qwest's problems are the result of flawed accounting *policies* that seemingly apply equally to QC, QCC, QLDC and all other members of the Qwest corporate family.[26] And – as Qwest itself has acknowledged – the ongoing investigations into Qwest's policies reveals that Qwest's problems are not simply the result of the failure of a few former employees to follow proper procedures, but a complete breakdown in accounting controls that permitted numerous employees at all levels of the company to violate basic accounting principles.[27] Qwest also told the investment community that the full scope of Qwest's accounting problems is not yet known[28] and that "new issues may be raised by the company's internal analyses, or by KPMG."[29] And even once the existing problems are identified, and new policies are developed and put in place, Qwest's accounting controls must still be strengthened to prevent a repeat of prior problems.[30] Thus, given Qwest's acknowledgement that its accounting problems are systematic, pervasive and still under review, and given Qwest's failure to conduct

[23] AT&T (Qwest III) Holder Decl. ¶ 13.

[24] *Id.* ¶ 14.

[25] *Id.*

[26] AT&T (Qwest III) Holder Decl. ¶¶ 9, 17. *See also* WorldCom at 20

[27] *Id.* ¶¶ 17-19, 24-25 (discussing Qwest securities filings and published reports on Qwest's accounting scandal)

[28] August 16, 2002 Qwest 8-K at 5,6, 9-10; *see also* WorldCom at 19-20.

[29] August 16, 2002 Qwest 8-K at 6, 11; *see also id.* August 8, 2002 Qwest 8-K at 1 ("The company is consulting with its new external auditors, KPMG LLP, on the scope of a restatement and what adjustments would be required. Until such time as these efforts have been concluded, the company cannot indicate the extent to which the results for 2000-2002 will be impacted.").

any audit or comparable investigation of the particular accounts, policies and controls at issue here, there is simply no basis for crediting Qwest's *ipsi dixit* that its existing problems do not infect QLDC's books.

For these same reasons, the Commission should reject any claim by Qwest that, despite the fact that QC cannot certify its books because of pervasive accounting problems,[31] those problems do not extend to transactions between QC and QLDC. These additional paper promises cannot be credited. As detailed in AT&T's opening comments,[32] Qwest has a history of non-compliance with both GAAP in general and BOC-affiliate transactions in particular. Given that history, mere paper promises unaccompanied by hard accounting evidence must not be credited. Further, As Professor Holder explained, given the systemic nature of Qwest's problems, the fact that Qwest does not even yet know how deep those problems go, and the failure of Qwest to have in place adequate controls, there is no rational basis on this record to credit any assertion by Qwest that, while QC's books are generally flawed, the parts of those books dealing with QLDC transactions are correct.

It is undisputed that, with internal, civil, and criminal investigations ongoing, neither Qwest's officers nor its outside auditors are willing to opine that Qwest's accounting policies are GAAP compliant or that Qwest's internal controls are adequate to ensure compliance with the policies themselves (and other rules and laws).[33] It also is undisputed that although the irregularities disclosed to date show severe problems, the full scope is not yet known. There is,

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[30] AT&T (Qwest III) Holder Decl. ¶ 25. *Accord*, August 16, 2002 Qwest 8-K at 7, 12 ("[T]he company needs to enhance certain internal controls.").

[31] *See Ex Parte* Letter from Oren Shaffer to Marlene Dortch, WC Docket Nos. 02-148, 02-189 (August 20, 2002).

[32] *See* AT&T at 26-28.

[33] August 19, 2002 Qwest 8-K at 4 ("KPMG has informed us that due to the identification of the adjustments that we believe we are required to make in our financial statements, the ongoing analyses by us and KPMG of our accounting policies and practices, analyses of our internal controls and the inability of our chief executive officer and chief financial officer to [certify Qwest's financial statements], KPMG is not able to complete, as of the date of this Current Report on Form 8-K, all the procedures necessary to finalize its review of the financial statements to be (continued)

therefore, no possible basis to conclude that the weeks-old shell, QLDC, will, unlike the other members of the Qwest family, somehow maintain its books and records in accordance with GAAP, notwithstanding the absence of adequate accounting policies and controls. Nor is there any basis to conclude that transactions between QC and QLDC are immune from the pervasive accounting problems that are the symptoms of these inadequate policies and controls.[34]

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

There is now overwhelming evidence that Qwest is not providing nondiscriminatory access to its bottleneck local network facilities as required by multiple checklist items.[35] Despite Qwest's self-serving recent statements that "on a going-forward basis" Qwest will be in compliance because it has "made personnel changes and adopted formal internal controls that ensure that all necessary agreements are filed,"[36] the record establishes that Qwest continues to engage in blatant discrimination through secret interconnection agreements (both written and oral) that provide favored CLECs with preferential UNE rates and terms.

Indeed, the recent finding of the Administrative Law Judge in the Minnesota complaint proceeding[37] demonstrates that the extent of Qwest's secret deal discrimination is far broader

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included in the second quarter of 2002 report on Form 10-Q required by the regulations under the federal securities laws.").

[34] The comments also show that Qwest violates several of section 272's structural safeguards. As explained in detail in the declaration of Mr. Lee Selwyn attached to AT&T's comments, QLDC has already in its short history engaged in violations of virtually all of the "arms' length," "separate employees" and other core section 272 safeguards. Touch America shows that these problems are the continuation of improper practices at QCC. Touch America at 10 ("[I]n Touch America's experience, Qwest has routinely transferred employees between QC and QCC. Touch America has encountered the same Qwest personnel in QC and QCC.").

[35] *See* 47 U.S.C. §§ 271(c)(2)(B)(i-ii) (requiring "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," which in turn require both "nondiscriminatory" access to UNEs and "nondiscriminatory" UNE rates).

[36] Kris Hudson, *Qwest may face Minn. fines, split-up*, Denver Post, Oct. 22, 2002.

[37] *Findings of Fact, Conclusions, Recommendation and 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 (Sept. 20, 2002) ("Minnesota ALJ Decision") (Attachment 1 to AT&T Comments).

than Qwest has previously acknowledged.[38] The Minnesota ALJ found that Qwest's knowing and intentional violations of the law – failing to file "25 distinct provisions" in twelve separate interconnection agreements – precludes any finding by the Commission that Qwest has satisfied its nondiscrimination obligations. The ALJ also found that Qwest entered into an *oral* discount agreement with McLeod – despite Qwest's repeated denials to this Commission and state regulators that such oral agreements existed.[39]

The Minnesota PUC has now confirmed the ALJ's findings. On October 20, 2002, the Minnesota PUC held hearings to review the ALJ's findings. At the end of the meeting, the PUC "voted unanimously" to accept the ALJ's report and held "that Qwest's actions amounted to a 'knowing and intentional violation of state law.'"[40] The PUC will levy penalties against Qwest on November 19, in what PUC Chairman Gregory Scott described as a decision that "'has the possibility of being a very, very watershed decision for telecommunications competition in Minnesota.'"[41] A range of possible penalties against Qwest were discussed at Monday's hearing, including fines of "$50 million or more," "revocation of its right to sell local phone service in the state," and "forcing the company to break up its Minnesota operations."[42] Chairman Scott even "favored withdrawing Qwest's 'certificate of authority' to do business in Minnesota, which would force Qwest to sell its Minnesota phone operations to another company."[43] Chairman

[38] *See* WorldCom at 22-23; Touch America at 20-21.

[39] *See* WorldCom at 25 ("Moreover, given this oral agreement, as well as Qwest's more general tendency to make oral agreements as a means of hiding illegal activity, it is quite possible that there are other oral interconnection agreements that have not yet been uncovered"); *id.* at 24 (describing the oral agreement as "astounding" and noting that "Qwest attempted to conceal [it] through a separate written agreement"); Touch America at 18-19 ("Some agreements were oral and at least one agreement was a total sham, designed to hide a preferred discount provided under another agreement").

[40] Kris Hudson, *Qwest may face Minn. fines, split-up*, Denver Post, Oct. 22, 2002.

[41] *Id.*

[42] Steve Alexander, *Ruling Against Qwest Backed*, Minneapolis Star Tribune, Oct. 22, 2002. A break-up "would force Qwest to split its Minnesota operations into two independent units; one would sell phone service to consumers and corporations, and the other would sell services to other telephone companies that use its network to sell local telephone service to customers." *Id*.

[43] *Id*.

Scott said "he was tired of presiding over regulatory proceedings on questionable Qwest business practices" and he asked "How many times must we do this? Do we want this kind of phone company in our state?"[44] PUC Commissioner Marshall Johnson expressed similar sentiments: "'What bothers me is that for years we have been promoting competition, and then these people work behind our backs to make secret deals. It just isn't right.'"[45] Chairman Scott also "angrily lectured Qwest on its continued attempts to deny wrongdoing."[46] Given this continuing pattern of obfuscation and false denials, it would be patently arbitrary for the Commission simply to assume, as Qwest urges, that Qwest has come clean and that all previously unfiled interconnection agreements have now been filed and made available to all CLECs. The Mcleod and other unfiled agreements do exist; Qwest has not made the terms of those agreements available to other CLECs; and Qwest is therefore not in present compliance with the checklist nondiscrimination requirement.

Commenters also agree that the Commission's recent rejection of Qwest's cramped interpretation of the scope of the filing requirement under section 252(a)[47] further confirms that Qwest's agreement to make some terms of some previously unfiled agreements public and available to other CLECs falls well short of Qwest's checklist nondiscrimination obligations. For example, "[i]t is not clear from Qwest's prior filings whether the standard it set for filing agreements in August included all settlement agreements with ongoing obligations,"[48] as the Commission made clear must be filed.[49] The Commission also "disagreed with Qwest and concluded that dispute resolution and escalation provisions should be filed,"[50] and Qwest has

[44] *Id.*
[45] *Id.*
[46] Leslie Brooks Suzukamo, *Qwest violated law, PUC says*, St. Paul Pioneer Press, Oct. 22, 2002.
[47] *See Interconnection Agreement Declaratory Order*.
[48] WorldCom at 22.
[49] *Interconnection Agreement Declaratory Order* ¶ 8.
[50] WorldCom at 21.

offered no hard evidence that it has now filed all such provisions. These open questions, along with the evidence presented by AT&T that Qwest has *not*, in fact, filed and posted on its website all of the requisite interconnection agreements for the states that are the subject of the Qwest III Applications,[51] preclude any finding that Qwest is currently in compliance with the competitive checklist.

The comments also put to rest any claim by Qwest that it did not corrupt the section 271 process in buying the silence of CLECs (including Eschelon and McLeod, two of its biggest wholesale customers) in section 271 and other regulatory proceedings.[52] As the Nebraska state commission recognized, it "cannot say for certain that such previously undisclosed agreements did not impact the validity of the testing that was undertaken to demonstrate Qwest's compliance with the section 271 checklist."[53] Qwest has fatally compromised the results of independent third-party testing of Qwest's wholesale provisioning system and distorted the record of Qwest's performance.

The DOJ leaves the appropriate regulatory response to Qwest's misconduct to the Commission.[54] DOJ acknowledges the Commission's ruling that Qwest's view of the filing requirement was "overly narrow," and merely notes that state enforcement actions are continuing and that Qwest filed additional agreements with state commissions in August.[55] Yet, only four of the state commission comments even touch on the issue, and those do little more than note the

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[51] AT&T at 48; Wilson Matrix (attachment 2 to AT&T (Qwest III) Comments).

[52] *See* WorldCom at 24 ("there is little doubt that the testimony of Eschelon and McLeod could have proven critical" in documenting OSS problems"); Touch America at 21 (Qwest's conduct "tainted and undermined the performance data relied upon in this proceeding and, consequently, the reliability of the record"); *id.* at 22 (asserting that Qwest's silencing of its critics is "akin to subornation of a witness or witness tampering").

[53] Nebraska at 2.

[54] DOJ Eval. at 2 n.5 (emphasis in original).

[55] *Id.*

status of their review of the agreements Qwest finally filed in August.[56] Given the scope of the misconduct identified in Minnesota, and the impact of such misconduct on numerous other states, bland assertions by other state commissions that Qwest is in compliance with the checklist can simply not be given any weight.

Qwest will continue to urge the Commission to approve Qwest's Applications while state review of the previously-unfiled agreements is ongoing, and while state investigations of Qwest's secret deals misconduct are continuing. The Act precludes such a result. The Act makes open markets and checklist compliance a *pre-condition* to long distance entry by a BOC.[57] Because Qwest's systematic discrimination is at the heart of the Act's market opening obligations, the only lawful course is for the Commission to deny Qwest's Applications until Qwest proves, based upon actual record evidence, rather than naked assertions, that Qwest has filed *all* of its secret deals and established a record that eliminates the taint of those deals.

III. QWEST ADMITS THAT IT RETAINS LOOP INFORMATION THAT IT DOES NOT PROVIDE TO COMPETITORS AND THAT IT "REMOVED" REFERENCES TO SUCH INFORMATION DURING STAFF VISITS.

It is now essentially undisputed that, with regard to mechanized loop testing ("MLT"), which provides important loop information, Qwest has both misrepresented its practices to CLECs and *concealed those practices* from the Commission's staff and other regulators. Qwest may quibble at the margins, but it can no longer seriously argue that has met its checklist obligation for OSS to provide CLECs with "the same underlying information [about the loop] that the incumbent LEC has in *any* of its own databases or internal records."[58] Qwest's own

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[56] *See* Nebraska at 2 (noting that the Nebraska PSC approved the ten late-filed agreements submitted by Qwest); North Dakota at 1 (noting that the North Dakota PSC approved the late-filed agreements submitted by Qwest); Wyoming at 4 (noting that the package of agreements submitted by Qwest will be noticed for public review and comment); Colorado at 3-4 (noting that Colorado's review of the 16 late-filed agreements submitted by Qwest is ongoing and that an additional informal investigation is ongoing).

[57] *See generally* 47 U.S.C. § 271.

[58] *UNE Remand Order* ¶ 427 (emphasis added).

documents establish that Qwest took steps to "diminish the visibility" to Qwest's MLT process, precisely because CLECs had demanded the results of MLTs that Qwest claimed it did not run, and Qwest was concerned that providing such material to CLECs would be "detrimental to [its] business."[59]

Not surprisingly, the Department of Justice found this evidence "troubling," because it suggests that "Qwest, in its eagerness to protect its position, sought to limit the information available to regulatory decision-makers."[60] In particular, the Department found the "procedural implications" of Qwest's apparent conduct to be "disturbing," given the Commission's "fundamental requirement" that entities appearing before it have a "duty of absolute truth and candor."[61] The Department therefore urges the Commission to "assure itself that it has full and accurate information *before* proceeding to address the remainder of the issues" in Qwest's application.[62]

Prompted by "questions from the FCC staff and the Department of Justice," Qwest filed an *ex parte* letter that summarily addresses its MLT transgressions.[63] However, Qwest also promises to provide "further information" in its reply comments, and AT&T will await the filing of that material before responding fully.[64] What is most remarkable about Qwest's response is that it openly concedes *both* that it has loop information derived from the MLT process which it does not share with CLECs and that, in what Qwest labels "ill-advised" actions and "lapse[s] of judgment," "information on MLT testing was removed [by Qwest employees]. . . before certain

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[59] Stemple Decl. Exh 1.

[60] DOJ Eval. at 4-5.

[61] *Id.* at 5 & n.21.

[62] *Id.* (emphasis added).

[63] *See* Letter from R. Steven Davis, Qwest, to Marlene H. Dortch, FCC, WC Docket No. 02-314 (Oct. 21, 2002) ("*MLT Ex Parte*").

[64] *Id.* at 1. In this regard, Qwest's apparent tactic will be to attack Mr. Stemple's credibility (it promises, for example, a "confidential declaration" regarding "Mr. Stemple's employment history") – even though Qwest *admits* (continued)

site visits to the QCCC by regulators."[65] In other words, Qwest admits both that it has violated the competitive checklist obligations and that it did not act with "absolute truth and candor" when its employees hid information from regulators.

With regard to the checklist violation, Qwest's *MLT Ex Parte* admits the allegation in Mr. Stemple's declaration that, for "*all* unbundled loops it provisioned on behalf of CLECs," it performs "an MLT two or three days prior to the due date."[66] And Qwest admits that the "resulting information" from the MLT is "retained by Qwest" (again, just as Mr. Stemple described) and is "used . . . to provide assurance that the provisioned loop will perform as specified."[67] Thus, it is now undisputed that Qwest has been performing the testing that it never disclosed, that it retains the test results, but does not made them available to CLECs, and that the reason for this conduct is that the Commission has a "tendency" to "respond to CLEC requests" for such information in an "unfavorable" way that is "detrimental to [Qwest's] business."[68] This easily establishes that Qwest is not complying with its unambiguous obligation to provide CLECs with "the same underlying information [about the loop] that the incumbent LEC has in *any* of its own databases or internal records."[69]

Indeed, Qwest's response also confirms the critical value of MLT information to carriers by affirming that MLT is an important "part of the overall quality check . . . to assure that the provisioned loop will perform as specified."[70] This is precisely why CLECs also seek access to the results of MLT – to gain information about the facilities used to provide service so they can

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that much of his account (such as his description of the Qwest's practices regarding MLT process at Qwest's CLEC Coordination Center ("QCCC")) is accurate.

[65] *Id.* at 5.

[66] *MLT Ex Parte* at 3 (emphasis added); *cf.* Stemple Decl. ¶ 5.

[67] *MLT Ex Parte* at 3-4; *Compare* Stemple Decl. ¶ 6 (describing cutting and pasting of MLT results into the "osslog" note) *with MLT Ex Parte* at 4 ("information from the MLT is 'cut' from the coordinator's screen and 'pasted'" into another Qwest system).

[68] Stemple Decl., Exh. 1.

[69] *UNE Remand Order* ¶ 427 (emphasis added).

in fact provide the quality of service they promise their customers. And contrary to claims that MLT results are useful only for repair and maintenance, Qwest's response shows that it performs MLT "as part of the provisioning process for unbundled loops."[71] Again, CLECs also seek MLT information during the ordering and provisioning process for the many of the same reasons as Qwest – *e.g.,* "[t]o ensure" that "marginal performance problems" are detected and avoided "*prior* to turning the loop to . . . the CLEC customer."[72]

Qwest nonetheless contends that its MLTs "have no relationship to or connection with loop qualification," a claim that, in Qwest's view, is demonstrated by the fact that MLT results are "not used to populate any of Qwest's databases that contain loop make-up information," such as its LFACS database.[73] But Qwest's admission that it does not use MLT results to update its LFACS or other databases it makes available to CLECs hardly demonstrates that MLT results do not provide useful loop qualification information. To the contrary, Qwest's admission proves the claims of CLECs that Qwest provides inadequate loop qualification information in its LFACS and other databases, and then buries additional useful information like MLT results in other databases that it does not make available to CLECs – precisely because making such information available would be "detrimental to [its] business" by assisting CLECs.[74]

With regard to its candor, Qwest's facially absurd attempts to justify its senior employees' thrice-"repeated" "lapse[s] in judgment" and concededly "ill-advised" and intentional conduct raises as many questions as it attempts to answer. As to the repeated removal of "chart-boards" referencing MLT during visits by regulators on May 15, June 5, *and* July 23,

[70] *MLT Ex Parte* at 3; Stemple Decl. Exh 1 (e-mail from Qwest stating that "the MLT test is critical to our success").
[71] *MLT Ex Parte* at 3.
[72] *Id.* (emphasis added).
[73] *Id.* at 4.
[74] Stemple Decl. Exh. 1.

Qwest admits that its employee Ms. Lubamersky "asked that [the boards] be removed."[75] Qwest's *MLT Ex Parte* seeks to assure the Commission that this action, though one that she "greatly regrets," was not taken "to hide the fact that the QCCC was conducting MLT testing" or otherwise to "mislead regulators."[76] Rather, it was because Ms. Lubamersky, a twenty year veteran on telecommunications regulatory issues, "did not want to trigger a discussion" about what she apparently viewed as "unrelated" issues on MLT, since she was "not prepared to address" the topic on "that day."[77] Qwest never explains, however, why someone with such experience, if questioned without adequate preparation on an allegedly irrelevant topic, would not simply respond honestly to regulators' inquiries by producing a subject matter expert, or by promising to follow up at a later date. And Qwest never explains why, if the initial May 15 incident caused Ms. Lubamersky such concern given her "great pride" in responding "thoroughly" to "every single question asked by a regulator," she was not then fully prepared to address the topic of MLT on June 5 or July 23 – but instead *again* apparently had the chart boards on MLT removed or altered while regulators visited the QCCC.[78]

And as for the e-mail stating that Qwest sought to "diminish the visibility" of the MLT process during regulators' visits, Qwest's *ex parte* assures the Commission that it was "taken out of context."[79] Thus, according to Qwest, when the "Director of Operations" at the QCCC wrote that "[w]e have made an effort to diminish the visibility of MLT during these visits for the sole purpose of protecting access to our legacy systems" and that "we don't want to bring attention to [MLT] in front of the FCC as they have a tendency to respond to CLEC requests in a manner which may be unfavorable to us," she was, in reality, only soothing the concerns of Qwest

[75] *MLT Ex Parte* at 4.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 5.

employees like Mr. Stemple and was, in Qwest's words, "attempt[ing] to explain the truth – that there is absolutely nothing wrong with MLT testing that is conducted at the QCCC."[80] Given these twisted explanations of such plainly intentional and deceptive misconduct (as well as Qwest's shameful record of secret deals, accounting improprieties, and other such transgressions), Qwest's assertion that it is, in fact, *AT&T* that is "trying to create a smokescreen" (*MLT Ex Parte* at 5) confirm that Qwest will say or do anything to win section 271 authorization. But there is simply no way, on this record, that the Commission can reasonably conclude that Qwest provides CLECs with "the same underlying information [about the loop] that the incumbent LEC has in *any* of its own databases or internal records."[81] Rather, the Commission should follow the DOJ's suggestion to open a complete investigation into Qwest's MLT practices and suspend these proceedings until that investigation is complete.

IV. THE COMMENTS CONFIRM THAT QWEST IS NOT PROVIDING NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

The comments confirm that Qwest has failed to provide parity of access to *any* of the various OSS functions, including pre-ordering, ordering, provisioning, billing, and maintenance and repair. Unless it corrects the fundamental deficiencies in its OSS described in the comments, Qwest's performance will only worsen in the future, as the volumes and transactions submitted by CLECs on the OSS continue to increase.[82]

Qwest still fails to provide CLECs with access to all of the loop qualification information in its possession, while denying CLECs the same ability to perform (or have performed) mechanized loop testing ("MLT") before actual provisioning that Qwest has. Furthermore, Qwest's unique pre-ordering and ordering processes are unnecessarily complex – thereby

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[80] *Id*.

[81] *UNE Remand Order* ¶ 427 (emphasis added).

increasing CLECs' costs and the likelihood of order rejections and provisioning delays. Qwest's OSS continue to be plagued by high rates of order rejections, manual processing, and manual errors. And, as its latest CRIS BOS BDT bills to AT&T demonstrate, Qwest still fails to provide a readable, accurate, and auditable wholesale bill. Finally, the test environments offered by Qwest still fail to mirror the production environment.

Loop Qualification Information and Mechanized Loop Testing. As noted, the comments show that Qwest denies nondiscriminatory access to pre-ordering functions by failing to meet the Commission's requirement that it provide CLECs with access to all of the loop qualification information available to it, regardless of whether the information is actually accessed by Qwest's personnel.[83] Qwest compounds the problem by failing to give CLECs the ability to perform pre-order MLTs (or have such MLTs performed for them) prior to actual provisioning – even though Qwest performs such MLTs in its own operations.

Qwest has attempted to respond to this evidence in an *ex parte* filed four days ago with the Commission.[84] Because Qwest states that it will provide "further information regarding this matter later" in its reply comments,[85] AT&T will submit at a later date a full response to the *ex parte*, and to the "further information" in Qwest's reply comments. Qwest's *ex parte*, however, already makes clear that it has denied parity to CLECs. Qwest admits that its QCCC performs MLTs before actual provisioning as part of its "quality assurance processes," *and* that it has not made the information returned from those tests available to CLECs.[86]

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[82] *See, e.g.,* AT&T at 50-69; Eschelon at 20-54; Touch America at 5, 24-26; WorldCom at 1-18.

[83] *See, e.g., Alabama 271 Order* ¶ 141 & n.483 (citing *UNE Remand Order* ¶¶ 427-431).

[84] *See* letter from R. Steven Davis (Qwest) to Marlene H. Dortch, dated October 21, 2002 "October 21 *ex parte*").

[85] *Id.* at 1.

[86] *Id.* at 3-4 ("All MLTs that the QCCC performs occur as a part of the provisioning process for unbundled loops. … The information returned by the MLT is minimal and is not used to populate any of Qwest's databases that contain loop makeup information").

The Complexity of Qwest's Pre-Ordering and Ordering Processes. Qwest has further denied parity of access to its OSS by requiring CLECs to follow pre-ordering and ordering processes that, as WorldCom states, "are much more complex than for any other BOC."[87] Collectively, Qwest's processes unnecessarily impose substantial burdens and costs on the CLECs, contribute to the extraordinarily high rejection rates of Qwest's OSS, and harm CLEC customers.[88]

As AT&T and WorldCom demonstrate in their comments, a CLEC seeking to migrate a Qwest customer to its service must follow numerous steps (and encounter numerous obstacles) that are required in no other RBOC's region. There are numerous such examples. In the Qwest region (in contrast to the regions served by other RBOCs): (1) a CLEC must type customer's name and address into the CSR query in order to retrieve a customer service record ("CSR"); (2) CLECs cannot readily auto-populate pre-ordering data into an LSR;[89] (3) CLECs wishing to change a customer's directory listing must perform a separate directory listing inquiry, rather than simply obtain the directory listing information that it needs from the CSR; (4) CLECs must enter the customer's address on the LSR (and not simply the customer's telephone number), because Qwest has not implemented "telephone number migration"; (5) using different codes, CLECs must differentiate on the LSR between the services that the customer has been taking from Qwest (and wishes to retain) and additional services that the customer is taking for the first

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[87] WorldCom at 3.

[88] AT&T at 58-61; WorldCom at 3-12.

[89] This problem exists because the design of Qwest's CSR is based on the USOCs for the various products and services ordered by the customer (rather than on the customer's telephone number). The difficulty of retrieving features information due to this design further complicates the CLEC's task (described below) of having to distinguish on the LSR between "retained" and "new" features.

time from the CLEC;[90] (6) CLECs must enter a separate Class of Service USOC for the *retail* service that the customer has been taking from Qwest – information that the CLEC can only obtain by finding it among the numerous data items on the CSR; and (7) if (as is often the case) a customer who has migrated to a CLEC requests an additional feature that it forgot to include in its original order, the CLEC must wait until Qwest has updated the CSR to reflect the CLEC's ownership of the account before it can successfully submit a supplemental order.[91]

In short, Qwest requires CLECs to perform more pre-order transactions, and enter far more information into the LSR and the CSR query, for a basic UNE-P migration order than in any other RBOC region. As a result of these requirements, CLECs must expend substantial amounts of time and resources (both in dealing with customers and in entering additional information into the OSS), and experience an increased risk of order rejections, that they do not experience outside the Qwest region.[92] Until Qwest removes *all* of these unnecessary impediments, the Commission cannot reasonably find that CLECs have a meaningful opportunity to compete.[93]

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[90] In fact, even *after* the customer has migrated to a CLEC, the CLEC must distinguish between "existing" and "new" features if it submits a subsequent LSR adding a feature to the customer's service.

[91] *Id.*; AT&T (Qwest II) at 44-45 & AT&T (Qwest II) Finnegan/Connolly/Menezes Decl. ¶¶ 225-230. That updating process typically takes 5 days, and sometimes as long as 30 days (in contrast to other RBOCs, which take no more than 24 hours to update a CSR). Moreover, the CLEC must include on any supplemental order the customer service code, which it can only retrieve by accessing the CSR. If the CLEC attempts to submit a supplemental order before the updating occurs, the order will be rejected, unless it follows a cumbersome "workaround" procedure that still does not ensure that Qwest will update the CSR as expeditiously as other RBOCs. Regardless of when the CLEC submits the supplemental order, the order may be rejected if it fails to include the customer service code.

[92] AT&T at 60; WorldCom at 9. Although Qwest has promised to implement changes that will eliminate three of these requirements (entry of address information into a CSR query, entry of address information onto the LSR, and differentiation between "new" and "retained" features on the LSR), those changes will not be implemented until April 2003, at the earliest. AT&T (Qwest III) at 61; WorldCom at 11. Even if the changes are implemented successfully, Qwest's systems will retain the other above-described features that make them unnecessarily complex, such as the design of the CSR, the need to perform a separate directory listings query, and the requirement that a retail Class of Service USOC be included on the LSR. AT&T at 61; WorldCom at 9 n.7.

[93] AT&T at 61; WorldCom at 12.

Rejection Rates, Manual Processing Rates, and Manual Errors. The comments confirm that the design flaws and unnecessary requirements of Qwest's OSS result in high rates of order rejections, substantial manual processing of non-rejected electronically submitted orders, and frequent errors by Qwest on manually processed orders.[94]

Qwest's systems, for example, continue to reject nearly one-third of all electronically-submitted LSRs – a rate that is unreasonable by any standard. Those rejection rates are attributable, at least in substantial part, to Qwest's own design decisions (such as its refusal to implement "telephone number migration" and its requirements that CLECs include information on the LSR that is not required by other RBOCs).[95]

Qwest's flow-through performance similarly "continues to be sub-par, requiring significant manual processing for CLEC orders."[96] For a number of types of orders, and in four of the nine states covered by Qwest's application, flow-through rates have actually *decreased* since Qwest filed its previous applications. Qwest's excessively high rates of manual processing increase the likelihood of delays and errors in provisioning that are not experienced by Qwest's retail operations.[97]

Finally, the comments show that Qwest commits a high number of errors in manually processing CLEC orders – and that its already-unacceptable performance is likely to deteriorate

[94] AT&T at 61-62; Eschelon at 20-27; Touch America at 5, 24-25; WorldCom at 2, 18.

[95] AT&T at 60; WorldCom at 9 WorldCom states that its rejection rate in the Qwest region was approximately 40 percent in late September and early October 2002 – a rate that is more than *twice* the rejection rate experienced by WorldCom in any other RBOC region. WorldCom at 2. As WorldCom states, the flaws in Qwest's systems preclude Qwest from attributing its high order rejection rates to "CLEC errors." WorldCom at 11. *See also* AT&T at 58. Although Qwest has previously cited variations in rejection rates among CLECs as evidence that it is not responsible for the high rejection rates, those variations are of no probative value, particularly since the low rejection rates that Qwest describes for some CLECs "may result from the types of orders they are placing, which Qwest does not describe." WorldCom at 9-10.

[96] Touch America at 24-25. *See also* AT&T at 61-62; WorldCom at 18.

[97] AT&T at 61-62; Touch America at 25.

in the future, as CLECs submit increasing volumes of orders.[98] For example, during the last week of August 2002, *40 percent* of the service orders typed by Qwest for Eschelon's "off-net conversion orders" (*i.e.,* orders for resale, the UNE-P, or the UNE-E) had service-affecting errors. During the last week of September 2002, 21 percent of Eschelon's manually processed off-net orders had service order errors committed by Qwest, which Eschelon had to correct before the due date.[99] Some of Qwest's manual errors resulted in total disconnection of a customer's service – which is particularly upsetting to a business customer, because the disconnection may lead callers to believe that the business has terminated its operations. As Eschelon states, "It does not take many problems such as this one to harm a CLEC's reputation."[100]

Given the frequency of errors in Qwest's manual processing of a relatively small volume of orders (a concern expressed by KPMG in its final report on its OSS testing), Qwest has not shown that it is capable of manually processing orders accurately when CLECs provide local exchange service on a mass-market basis.[101] To the contrary, the comments show that Qwest's systems are so fundamentally flawed that: (1) Qwest is committing customer-affecting errors on service orders *even for LSRs that flow through without manual intervention;* and (2) Qwest is committing errors on line side switch translations *even when no errors are committed on the service order*.[102] Only two weeks ago, in response to Eschelon's concerns that service orders on flow-through LSRs were in error, Qwest acknowledged that "Flowthrough is not creating perfect orders at this time," and that "It will be a process issue as to how much time Qwest will have to

[98] AT&T at 62; Eschelon at 20-27; WorldCom at 18.
[99] Eschelon at 20, 22, 26.
[100] *Id.* at 21.
[101] *Id.* at 24; WorldCom at 18; Touch America at 24.
[102] Eschelon at 27-32.

identify flowthrough order issues and correct them."[103] By itself, Qwest's own admission that its systems cannot even accurately process flow-through orders shows that it has not satisfied its OSS obligations.

Billing. The comments demonstrate that Qwest has failed to meet its obligation to provide nondiscriminatory access to billing functions.[104] For example, Qwest has failed to provide Eschelon with complete and accurate usage records – a deficiency confirmed by a third-party audit commissioned by Eschelon, which found that the records failed to account more than 20 percent of calls.[105] The DOJ correctly finds that this failure raises serious concerns that warrant "careful attention" by the Commission. DOJ Eval. at 5 n.22.

The comments also demonstrate that Qwest has failed to provide readable, auditable, and accurate wholesale bills to CLECs.[106] Eschelon, for example, states that Qwest's "UNE-P bills contain inaccuracies of 9% to 18% or more, which are not reflected in Qwest's reporting," and

[103] *Id.* at 31-32 & Exh. 34.

[104] AT&T at 62-64; Eschelon at 42-54; Touch America at 25-26.

[105] Eschelon at 47-53. Qwest's inability to provide complete DUFs is further confirmed by its failure to do so during its joint testing with AT&T, and by its repeated failures of KPMG's third-party test for the completeness and accuracy of its DUFs before Qwest finally (and barely) passed. *See* AT&T (Qwest II) Finnegan/Connolly/Menezes Decl. ¶¶ 243-248.

[106] AT&T at 62-64; Eschelon at 42-54; Touch America at 25-26. Qwest's failure to provide accurate bills is not confined to the wholesale context. This week, the California Public Utilities Commission fined Qwest $20.3 million for misbilling and switching the long-distance service of thousands of long-distance customers without their permission. In assessing the fine, the PUC cited (*inter alia*) Qwest's practice of including unauthorized charges – a practice commonly referred to as "cramming" – on the bills of thousands of California consumers, most of whom had indicated Spanish or Asian languages as their preferred language. The penalty assessed by the CPUC is the largest penalty ever assessed against a provider of long-distance service. The CPUC stated that the fines, and the various corrective actions that it ordered Qwest to take, "are designed to provide Qwest with the clear message that slamming and cramming are not acceptable in California, and that Qwest must make substantial changes to its marketing practices and policies related to long-distance sales." *See* "PUC Fines Qwest Communications for Slamming and Cramming California Consumers," California PUC News Release issued October 24, 2002 (available at http://www.cpuc.ca.gov/static/announcements/qwestfine.htm).

that Qwest's bills for UNE-E are *totally* inaccurate (because they continue to reflect the rates for resale, not UNE-E rates).[107]

AT&T has previously shown that the wholesale bills that it received from Qwest through September 2002 were neither accurate nor auditable.[108] The electronic CRIS BOS BDT bills that Qwest provided to AT&T for October 2002 are, like those for preceding months, replete with errors and incapable of being audited. The charges on the October CRIS BOS BDT bill for Washington State are again out of balance, because the details on the bill do not add up to the total amount listed as due on the bill.[109] Thus, AT&T was unable to process the bill (and was again forced to rely on the CRIS paper bill for processing). Remarkably, Qwest has advised AT&T that it will be "a couple of months" before Qwest can correct this problem.[110]

All of the October CRIS BOS BDT bills received by AT&T (which were for Arizona, Colorado and Washington state) contain numerous other deficiencies that render them inauditable. For example, the bills continue to "lump" nonrecurring and other charges into categories, such as Phrase Code X15 ("Charges for Unbundled Services") and Phrase Code X18 ("Adjustment for Unbundled Services"), that are so broad and undefined that AT&T cannot

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[107] Eschelon at 43. *See also* Touch America at 25 (noting that "Qwest has proferred no additional credible information pertaining to electronic auditability issues raised in connection with its original applications"). Eschelon also shows that, even leaving aside the inaccurate wholesale bills which it provided to Eschelon for UNE-E and other "off-net" services, Qwest frequently assesses inaccurate charges for maintenance and repair against Eschelon, in part because Qwest frequently closes trouble reports with incorrect cause and disposition codes. Eschelon at 41-42.

[108] AT&T at 62-64.

[109] The October paper bills that Qwest provided to AT&T for Arizona and Colorado State were out of balance as originally sent and even after Qwest resubmitted them to AT&T. Only when Qwest resubmitted the bills a second time (*i.e.*, on the third version) were these bills finally in balance.

[110] Because AT&T is still is in the process of reviewing the October bills, it has not yet determined whether – as was the case on previous CRIS BOS BDT bills – the total recurring charges on the bills are out of balance with the information on the CSRs or otherwise fail to include all CSR data. *See* AT&T at 63; AT&T (Qwest III) Finnegan/Connolly/Wilson Decl. ¶¶ 81-82, 102.

verify whether certain charges on the bills are correct.[111] Furthermore, the bills do not enable AT&T to verify the accuracy of the "other charges and credits" ("OC&C") listed on the bills, because Qwest simply listed the amount of the OC&C and the generic Phrase Code X15 without listing the USOCs that support them. Without the USOC information, which defines the recurring or one-time charges that are being applied or credited, AT&T has no means of determining whether the OC&C are correct.

Finally, for each of the five states for which AT&T received bills (whether paper, electronic, or both) in October, the bills – like those for previous months – contain numerous errors, some of which were brought to Qwest's attention more than six months ago. The October bills, for example, continue to include long-distance charges by long-distance carriers and by Qwest itself.[112] Some of the bills include pay-per-use charges (such as "Call Return" and "Continuous Ring"), even though Qwest previously admitted that it had erred in billing AT&T for these charges and promised months ago to correct its systems to avoid their inclusion on future bills and credit prior charges.[113] And, for some accounts, the bills charge AT&T for Federal, State, and local taxes (which are actually billable by AT&T to the end-user).

Qwest's recent *ex parte* letter to the Commission regarding its electronic CRIS BOS BDT bills simply provides further confirmation that such bills are neither adequate nor auditable.[114] With respect to CRIS BOS BDT bills which it provided to AT&T for July 2002, Qwest acknowledges that: (1) the summary of monthly charges did not match the CSR data for the month, due to Qwest's use of "differing extraction dates;" (2) not all CSR data were included,

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[111] *See* AT&T (Qwest III) Finnegan/Connolly/Wilson Decl. ¶¶ 84-89.
[112] *Id.* ¶ 109.
[113] AT&T (Qwest II) Finnegan/Connolly/Menezes Decl. ¶¶ 266-267 & n.200.
[114] *See ex parte* letter from R. Hance Haney (Qwest) to Marlene H. Dortch, dated October 11, 2002 ("October 11 *ex parte*").

due to Qwest's failure to include CSR data from one of the two sources of such data; (3) directory advertising charges were erroneously included; (4) Qwest "did not always provide a usage rate"; and (5) no "from" and "through" dates were included for fractionalized charges.[115] Although Qwest asserts that the first three of these errors have not occurred in bills since July due to process changes that it implemented,[116] the evidence shows otherwise. In AT&T's bills for August *and* September, the total recurring charges were inconsistent with the data on the CSRs, and Qwest continued its erroneous (and longstanding) practice of billing AT&T for directory advertising charges.[117] Moreover, Qwest effectively acknowledges that the last two of the problems it discusses have not yet been corrected.[118]

As the DOJ notes, Qwest's BOS BDT bills "remain[] sufficiently flawed that Qwest will not permit CLECs to designate the BOS BDT bill as the bill of record."[119] Qwest, obviously recognizing the serious deficiencies in that bill, promises in its October 11 *ex parte* that it will implement various additional "fixes" between now and December to correct the various problems it describes in the October 11 *ex parte*.[120] Promises of future improvements, however, cannot change the fact that Qwest's bills currently fall short of meeting its obligations under the checklist.[121]

[115] *Id.* at 2-3.

[116] *Id.*

[117] AT&T (Qwest III) at 63-64 & Finnegan/Connolly/Wilson Decl. ¶¶ 102-104, 108.

[118] October 11 *ex parte.* Qwest has sought to excuse its failure to include usage rates in its bills by rationalizing that CLECs can calculate the usage rate by dividing the total charges on the bill by the number of minutes of use. *Id.* Qwest misses the point. The need for CLECs to perform such a manual calculation defeats the purpose of an electronic bill. The inclusion of rates in the rate field of an electronic bill would enable CLECs electronically to load the rates into their reporting systems and verify those rates.

[119] DOJ Eval. at 7-8.

[120] October 11 *ex parte* at 2-3.

[121] *See Michigan 271 Order* ¶¶ 55, 179 (a BOC's promises of future performance are irrelevant to the issue of its current compliance with the checklist); Touch America at 26 ("Promises of future performance are not sufficient").

Test Environment. The comments confirm that Qwest does not satisfy the Commission's requirement that it provide a "stable testing environment that mirrors production."[122] Qwest's Stand-Alone Test Environment ("SATE") does not mirror the production environment, because: (1) the SATE supports fewer than 50 percent of the products that Qwest offers in the production environment; (2) the responses generated in the SATE may differ from those in the production environment; and (3) the SATE, unlike the production environment, requires CLECs to choose a "path" for the response that will determine the time within which the response will be returned.[123]

As WorldCom points out in its comments, the SATE suffers from other fundamental defects that preclude it from mirroring the production environment. First, reflecting the SATE's failure to support numerous products offered in production, the test scenarios in the SATE "include only the simplest order types" and only a fraction of pre-ordering transactions that CLECs commonly perform by CLECs in the real world.[124] Qwest has not offered, and cannot offer, any reasonable justification for limiting the use of the SATE in this manner.

Second, even when Qwest agrees to include additional scenarios in the SATE, it imposes unreasonable and discriminatory conditions on their availability. When it granted WorldCom's request to add certain test scenarios, Qwest refused to notify the other CLECs and stated that it will not make the new scenarios available to these CLECs without a request from each CLEC.

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[122] *See Georgia/Louisiana Order* ¶ 179; AT&T (Qwest III) at 64-65; WorldCom at 16-17.

[123] AT&T (Qwest III) at 64-65.

[124] WorldCom at 17 & Lichtenberg Decl. ¶ 45. The SATE does not even include the pre-order inquiry that Qwest requires CLECs to use in order to access directory listing information and place a directory listing order. Thus, a CLEC has no way of testing, through the SATE, whether a directory listing inquiry will work correctly (much less whether a directory listing order will be successful) in the production environment. WorldCom at 16.

This practice is blatantly discriminatory, since it leaves other CLECs unaware of the availability of the new scenarios and thus forces them to "bear the consequences in production."[125]

In addition, Qwest has refused to agree that any new test scenarios that it creates will be included in all future versions of the SATE.[126] Instead, whenever Qwest introduces a new version of the SATE, CLECs "will again have to go through the process of requesting these scenarios and waiting for Qwest to create them" if they wish the scenarios to be included in the new version. This requirement is indefensible. A test environment can mirror the production environment only if it continuously enables CLECs to test all of the products and transactions available in production. Furnishing such a test environment is part of Qwest's OSS obligations under the checklist – not a matter for the CLECs to request.

Performance Data. The comments confirm that Qwest's performance data cannot legitimately be relied upon as incontrovertible proof that Qwest has satisfied its statutory obligations. *First*, the comments show that Qwest's performance data are wholly inadequate to prove statutory compliance because the underlying performance measures, as defined or as implemented, do not accurately capture Qwest's actual performance.[127] *Second*, the comments demonstrate that even Qwest's flawed commercial data show that Qwest has not satisfied its section 271 obligations.[128]

In an effort to bolster its assertion that it accurately provisions LSRs that fall out for manual processing, Qwest relies on its self-reported data for three measures: PO-20 (Service Order Accuracy); OP-5 (New Installation Quality); and OP-5++ (Service Order Accuracy-via

[125] WorldCom at 17.
[126] *Id.*
[127] AT&T (Qwest III) Finnegan Decl. ¶¶ 10-33; WorldCom at 13-15; WorldCom (Qwest III) Lichtenberg Decl. ¶¶ 33-40; Eschelon at 5-20, 34.
[128] AT&T (Qwest III) Finnegan Decl. ¶¶ 34-122; WorldCom at 11, 18; Touch America at 24-26.

Call Center Data). However, the comments demonstrate that these measures are not reliable indicators of Qwest's actual performance in manually processing CLEC orders.

Qwest's reported results for PO-20 – a measure that Qwest developed unilaterally – are unreliable and do not accurately capture Qwest's actual performance.[129] The comments confirm that Qwest's PO-20 measure is extremely limited in product and service scope and fails to assess errors in critical fields such as USOCs and FIDs that identify the services and features requested by the CLEC.[130] Moreover, because PO-20 does not examine fields that are more prone to human error, Qwest's reported results for PO-20 are necessarily biased in Qwest's favor.[131]

Similarly, Qwest cannot credibly rely on its performance results for OP-5 (New Installation Quality) as proof of the quality of its installations for CLECs. Qwest's reported results on OP-5 do not capture troubles occurring within the first 72 hours of installation or errors in provisioning that can be cured through a service order.[132] Relatedly, although DOJ states that "[t]he extremely abbreviated briefing schedule," precluded it from "resolv[ing]" the issues, DOJ notes its concern that "customer-affecting troubles…which occur at or immediately after conversion are not reflected in Qwest's regularly reported performance data."[133]

Indeed, in its Data Reconciliation Report dated October 24, 2002, Cap Gemini Ernst & Young ("Cap Gemini"), in evaluating Qwest's reported results for Eschelon, found that Qwest's OP-5 results were inaccurate. In this regard, Cap Gemini "found that Qwest failed to include its OP-5 performance results eligible repeat troubles, troubles reported before LMOS has been updated with the new service order information, and troubles on lines within 30 days of an

[129] AT&T (Qwest III) Finnegan/Connolly/Williams Decl. ¶¶ 67-68; AT&T (Qwest III) Finnegan Decl. ¶¶ 14-20; Eschelon at 35.

[130] AT&T (Qwest III) Finnegan Decl. ¶¶ 14-20; Eschelon at 35; AT&T (Qwest III) Finnegan/Connolly/Williams Decl. ¶ 68.

[131] AT&T (Qwest III) Finnegan Decl. ¶ 22.

[132] Eschelon at 2, 8-20; AT&T (Qwest III) Finnegan Decl. ¶¶ 23-27.

[133] DOJ (Qwest III) Eval. at 5 n. 22.

inward installation…"[134] Cap Gemini also "identified cases when troubles appeared to be coded to the responsibility of the wrong party."[135] Moreover, Cap Gemini found "that of the 83 troubles coded as OP-5 eligible by either Qwest or CGE&Y, Qwest coded 61% (51) incorrectly."[136] Thus, the Cap Gemini report underscores that Qwest's performance results on OP-5 included in its Application are inherently suspect and should not be accepted at face value.

Equally unavailing is Qwest's reliance on its new OP-5++ measure ("Service Order Accuracy – via Call Center Data"). This measure, which was developed without CLEC input, is both incomplete and inadequate to demonstrate full checklist compliance. Because Qwest's OP-5++ measure captures both electronically-submitted, as well as manually processed orders, it cannot reasonably be relied upon as probative evidence of the accuracy with which Qwest provisions manually-processed orders.[137] Furthermore, because the measure is designed to evaluate discrepancies between the LSR and service orders, the measure does not accurately assess Qwest's actual performance relating to the provisioning of the service.[138]

The fundamental infirmities in Qwest's performance results are not confined to its performance data for measures that evaluate service order and provisioning accuracy. Thus, for example, Qwest's FOC timeliness results cannot be accepted at face value. A CLEC should receive a FOC only if the order is accepted by Qwest's systems. If the order has fatal errors requiring rejection, a rejection notice should be returned to the CLEC.[139] Once the FOC is issued, a jeopardy notice should be issued if there is a risk the order may not be completed by the confirmed due date on the FOC. However, the comments show that, after Qwest returns a FOC

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[134] Cap Gemini Ernst & Young Qwest/Eschelon OP-5 Data Reconciliation Report, October 24, 2002 at 3.
[135] *Id.*
[136] *Id.* at 36.
[137] Eschelon at 35-36; AT&T (Qwest III) Finnegan Decl. ¶ 29.
[138] AT&T (Qwest III) Finnegan Decl. ¶¶ 31-33; Eschelon at 35-36.
[139] AT&T (Qwest II) Finnegan/Connolly/Menezes Decl. ¶¶ 208-212.

to the CLEC, Qwest sometimes will issue a jeopardy notice which actually functions as a rejection notice "requir[ing] the CLEC to submit a supplemental order."[140] When Qwest issues jeopardy notices (which serve as rejection notices), its FOC timeliness results are erroneous because the FOC should never have been returned to the CLEC in the first instance.

Similarly, Qwest's performance data on completion notice and installation timeliness are highly suspect. Thus, WorldCom notes that Qwest has acknowledged that it "auto-completes" orders and returns completion notices even when Qwest has not completed the order.[141] If Qwest is following such a practice, its reported results on completion notices, installation commitments met, and installation intervals are inaccurate.[142]

Assuming *arguendo* that Qwest's performance data are accurate – and they are not – even Qwest's inadequate data show that its performance has fallen far short of the statutory requirements. Thus, Qwest's own data show that its rejection rates – which amount to approximately 30 percent of CLEC orders -- are far too high.[143]

The comments also show that Qwest's flow-through rates are inadequate, and that Qwest manually processes far too many CLEC orders.[144] Indeed, the total flow-through rates for certain categories of orders and the total flow-through rates in four of the States covered in the

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[140] WorldCom at 13 (footnote omitted). *See also* AT&T (Qwest II) Finnegan/Connolly/Menezes Decl. ¶¶ 208-212.

[141] WorldCom at 15; WorldCom (Qwest III) Lichtenberg Decl. ¶¶ 37-40.

[142] In Observation 1035, Liberty noted that, prior to May 12, 2001, SOLAR, Qwest's service order processor in five eastern states, automatically prepopulated the completion date field with the confirmed due date and passed the completion date to the RSOR database which is used to generate performance results. In its disposition of this observation, Liberty stated that, as of May 12, 2001, Qwest "implemented a real time connection between SOLAR and RSOR," and that "[w]hile SOLAR still assigns a completion date equal to the due date, this date is no longer passed to the RSOR database." Liberty Disposition of Observation 1035. Liberty also found that, because of this live feed, "[i]t is no longer possible for inaccurate completion dates to be automatically carried forward; it is, however, still theoretically possible for manually-closed orders to have completion dates that were not entered correctly." *Id.* However, WorldCom's comments highlight the fragility of Liberty's assumption that Qwest no longer automatically forwards to the RSOR database erroneous completion dates.

[143] AT&T (Qwest III) Finnegan/Connolly/Wilson Decl. ¶¶ 59-61. *See also* WorldCom at 2, 11; AT&T at 61.

[144] WorldCom at 18; AT&T at 61-62; Touch America at 24-25.

Application have declined since May 2002.[145] Qwest's excessive reliance on manual processing necessarily increases the risk of provisioning delays and errors.[146] Remarkably, the comments confirm that Qwest not only makes numerous errors when manually processing CLEC orders, but also commits service-affecting errors in processing orders that are not subject to manual intervention.[147]

Furthermore, this Commission has recognized the critical importance of issuing timely jeopardy notices to CLECs.[148] However, Qwest's own data show that it has failed to provide timely jeopardy notices for unbundled loop orders.[149] As Touch America aptly observes, "[u]nbundled loops are the most fundamental network element for CLECs and, as such, routine lapses with respect to loops cannot be trivialized."[150]

The comments also show that Qwest has not performed at parity during the provisioning process. In this regard, Qwest has failed to satisfy the performance standards for its measures on installation commitments met, completion intervals, and new service installation quality.[151] Additionally, "Qwest's performance for CLECs for delayed days for non-facility reasons continued to be far worse than Qwest's performance for its own customers."[152]

Qwest also has failed to perform at parity during the maintenance and repair process. Qwest's own performance data show that it has given preferential treatment to its own retail

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[145] Touch America at 24-25; AT&T (Qwest III) Finnegan/Connolly/Wilson Decl. ¶ 65; AT&T (Qwest III) Finnegan Decl. ¶ 39.

[146] Touch America at 25; WorldCom at 18; AT&T at 61-62; Eschelon at 20-27.

[147] AT&T at 62; WorldCom at 18; Eschelon at 20-34.

[148] *See Louisiana II 271 Order*, ¶ 131.

[149] Touch America at 26; AT&T (Qwest III) Finnegan Decl. ¶¶ 40-41, 73, 98.

[150] Touch America at 26.

[151] AT&T (Qwest III) Finnegan Decl. ¶¶ 41-46, 49-51, 64-66, 90, 100, 107-108; Touch America at 26.

[152] Touch America at 26.

customers and discriminated against CLECs when meeting repair appointments and resolving troubles.[153]

Additionally, Qwest's performance in the area of billing has been subpar. By Qwest's own admission, it has "missed two key billing parity standards in nearly all of the states."[154] Qwest's own commercial data show that it has repeatedly failed to satisfy the performance standards for measures that assess its performance with respect to billing accuracy and completeness.[155]

Against this backdrop, Qwest has failed to show that its performance data are accurate and reliable and show checklist data. Given the patent inadequacies of the measurements upon which Qwest relies, as well as its own flawed results, which show that it has failed to meet parity and benchmark standards in any number of areas, Qwest has failed to meet its burden of demonstrating that its performance data prove full compliance with the checklist.

V. THE COMMENTS CONFIRM THAT QWEST'S RECURRING AND NON-RECURRING RATES DO NOT SATISFY CHECKLIST ITEM TWO AND THAT APPROVAL OF QWEST'S APPLICATIONS WOULD CONTRAVENE THE PUBLIC INTEREST.

As demonstrated by multiple commenters, it is clear that the state commissions in 8 of the 9 states (Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming) for which Qwest seeks section 271 approval have never even seriously attempted to set rates through the application of the Commission's TELRIC rules.[156] Qwest therefore contends that the Commission can simply ignore those flawed state rate proceedings on the grounds that Qwest has implemented a series of last minute UNE rate reductions that, according to Qwest, allow the

[153] AT&T (Qwest III) Finnegan Decl. ¶¶ 53-59, 75-78, 81, 91, 101-103, 109-116.
[154] Touch America at 25 (footnote omitted).
[155] AT&T (Qwest III) Finnegan Decl. ¶ 60-61, 69-70, 79-80, 82-83, 85, 92, 117, 121-122.
[156] *See, e.g.,* Integra at 2-7, 8-15; OneEighty at 2-6; AT&T at 69.

rates in those states to pass the Commission's benchmarking test, using Colorado as a benchmark state. Qwest's argument is flawed for multiple independent reasons.

As a preliminary matter, Colorado is not a valid benchmark state. On the contrary, AT&T has demonstrated that Qwest's recurring loop rates, recurring switching rates and nonrecurring charges in Colorado are inflated by numerous clear TELRIC errors.[157] And further review of Qwest's Colorado cost models confirms that Qwest's loop rates are inflated by additional clear TELRIC errors. For example, AT&T recently determined that Qwest's loop rates are inflated by more than a dollar per line, because those rates are based on Qwest's fully embedded network operations costs, with almost no forward-looking adjustment.[158] As the Commission has stated, "[w]ithout a finding of TELRIC compliance for the benchmark state, a comparison loses all significance."[159] Thus, Qwest's benchmarking analysis, which relies on Qwest's non-TELRIC Colorado rates as the benchmark, must be rejected.

Even assuming *arguendo* that Colorado is a valid benchmark state, the comments demonstrate that the rates in many of the states in Qwest's application do not pass a properly administered benchmark test.[160] Qwest's benchmark test is fundamentally flawed because (1) it relies on standardized usage assumptions rather than state-specific usage assumptions and (2) it fails to account for the fact that the Commission's Synthesis cost model cannot reasonably be used to compare costs for transport and tandem switching between very rural states and less rural states – and without a valid cost adjustment mechanism, a benchmarking analysis is

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[157] *See* AT&T at 69; AT&T (Qwest III) Mercer/Chandler Decl. (switching rates in Colorado are not TELRIC-compliant); AT&T (Qwest III) Mercer/Fassett Decl. (loop rates in Colorado are not TELRIC-compliant); AT&T (Qwest III) Denney Decl. (loop rates in Colorado are not TELRIC-compliant); AT&T (Qwest III) Weiss Decl. (Qwest Colorado NRCs are not TELRIC-compliant); DOJ (Qwest I) Eval. at n.156.

[158] *See* AT&T at 71-73; AT&T (Qwest III) Denney Decl. ¶¶ 5-13.

[159] *Pennsylvania 271 Order* ¶ 67.

[160] *See, e.g.,* AT&T at 73-77; OneEighty at 3-4.

meaningless.[161] A properly conducted benchmark analysis shows that Qwest's Washington and North Dakota non-loop rates are as much as 14% higher than those in Colorado, and Qwest's switching rates in the more rural states are as much as 27% higher than those in Colorado, on a fully cost-adjusted basis.[162] Thus, Qwest's rates in those states flatly fail the Commission's benchmarking test, even using Colorado's overstated rates as the benchmark.

On this record, it is clear that Qwest has not satisfied its burden of proving that its rates in any states for which it seeks section 271 authority are TELRIC-compliant. And recent developments confirm that Qwest continues to do everything in its power to ensure that UNE rates remain excessive and discriminatory. In its comments the Montana PSC explains that Qwest has refused to comply with a recent order to supply critical information that would allow the Montana PSC to ensure that Qwest's rates do no result in a price squeeze in that state. Qwest's refusal to comply with the Montana PSC's order, has caused the Montana PSC to withdraw its initial conditional support for Qwest's federal 271 application.[163]

In particular, the Montana PSC determined that Qwest's current rate structure implements a "price squeeze" that "will disable competitors attempting to compete with Qwest in both toll and local markets in Montana."[164] The Montana PSC further determined that "[m]itigation [of the price squeeze] can be achieved by way of a revenue requirement and rate design case."[165] Accordingly, as a condition of supporting Qwest's section 271 application, the Montana PSC ordered Qwest to file a revenue requirement and rate design case by October 1, 2002.[166] Qwest, however, has flouted that mandate. As a substitute for compliance, Qwest

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[161] *See* AT&T at 73-79; DOJ (Qwest II) Eval. at 19-20.
[162] *See* AT&T at 6; AT&T (Qwest III) Lieberman/Pitkin Decl. ¶ 13, 20.
[163] Montana at 3.
[164] Montana (Qwest II) Eval. at 5.
[165] *Id*.
[166] *Id*.

mailed a letter to the Montana PSC, indicating that Qwest would not submit additional price-squeeze data unless the Montana PSC opened a much broader investigation, including an investigation of the rates of other LECs in Montana.[167] Given Qwest's naked attempt to block the Montana PSC's investigation of Qwest's ability to squeeze competitors in that state, the Montana PSC has expressly "recommend[ed that] the FCC deny Qwest's bid to enter the InterLATA market in Montana."[168]

The Commission should take an equally hard line in this proceeding. The existence of a price squeeze in any state has two independent implications in the section 271 context. First, the existence of a price squeeze is strong evidence that the rates are discriminatory in violation of checklist item 2.[169] Second, the existence of a price squeeze, is strong evidence that a grant of the application would not be in the public interest.[170] Indeed, just this week, the D.C. Circuit reminded the Commission yet again that it must seriously consider evidence of the existence of a price squeeze.[171]

In this regard, the D.C. Circuit's recent decision corrects the Commission's reliance on the wrong standard for assessing whether a price squeeze exists. In the *Vermont 271 Order*, the Commission rejected AT&T's and WorldCom's price squeeze arguments because, according to

[167] *See* Letter from Rick Hays (Qwest Vice President – Montana State Office) to Gary Feland (Chairman, Montana PSC) (dated October 1, 2002) (attached to Montana PSC (Qwest III) Eval. as Exhibit A). Although, a state-wide access reform proceeding for Montana may be important to fully eliminating the price squeeze in Montana, there is no question that because Qwest is by far the largest access provider in Montana, access reform with respect to Qwest's service is particularly important.

[168] Montana at 3.

[169] *See, e.g.,* AT&T at 78-79. The Supreme Court has held that even if a utility's wholesale rates are within the range of reasonable cost-based rates, the rates are "discriminatory" and "anticompetitive" if they fall at the high end of that range and if they preclude wholesale purchasers from economically competing with the utility's retail services to any class of customers. *FPC v. Conway Corp.,* 426 U.S. 271, 278-79 (1976). Thus, if Qwest's high-end UNE rates foreclose UNE purchasers from economically providing residential competition, Qwest is engaged in "discrimination" and has not satisfied checklist item two. And because section 271 categorically bars long distance authorization unless checklist item two has been "fully implemented," to the extent that Qwest's UNE rates in any state are discriminatory, the Application must be denied.

[170] *See* AT&T at 86-87; WorldCom at 25-26.

[171] *WorldCom* v. *FCC*, No. 01-1198, Slip Op. at 8 (October 22, 2002) ("*Massachusetts 271 Appeal Decision*").

the Commission, those parties had not shown that "the UNE pricing at issue "dooms competitors to failure."[172] As explained by the Court in the Massachusetts 271 decision, a "classic price squeeze cases have never turned on a finding that competition by the input-purchasing firms was absolutely precluded."[173] On the contrary, a proper price squeeze inquiry would assess whether "the challenged conduct has exerted *any* anticompetitive effects."[174] Given that the Montana Commission has expressly found that the price squeeze in Montana "confers on Qwest a clear advantage in competition that seek to compete with Qwest in the provision of both toll and local services, there is no question that the price squeeze in Montana has "exerted" at least some anticompetitive effects – indeed, local entry in Montana is nearly non-existent.[175]

As demonstrated by the comments, Montana is not the only state where Qwest's rates preclude local entry. A properly conducted margin analysis shows that even a residential entry strategy that employs a combination of UNE-based and resale entry is *not* economically feasible in Idaho, Iowa, Montana, or Washington.[176] State-wide average *gross* margins (not accounting for carriers' internal costs) in those states are only \$5.38 (Iowa), \$6.52 (Idaho), 6.28 (Montana) and \$6.76 (Washington).[177] And as explained by AT&T and WorldCom, an efficient carrier's internal costs exceed \$10.00 per line.[178] Net margins available to new entrants in Idaho, Iowa, Montana, and Washington, therefore, are *negative.* Accordingly, Qwest's application for these states must be rejected because approval would not be in the public interest *and* because the existence of the price squeeze demonstrates that the rates in those states are discriminatory in violation of the checklist.

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[172] *Vermont 271 Order* ¶ 66.

[173] *Massachusetts 271 Appeal Decision* at 8.

[174] *Massachusetts 271 Appeal Decision* at 8 (quoting Anaheim v. FERC, 941 F.2d 1234, 1238 (D.C. Cir. 1991) (emphasis added).

[175] *See* AT&T Comments at 85 (less than 0.01% of residential lines in Montana are served by competitors).

[176] AT&T at 78-79; WorldCom at 25-26.

[177] AT&T (Qwest III) Lieberman/Pitkin Decl. ¶ 46; WorldCom at 25-26.

VI. THE COMMENTS CONFIRM THAT QWEST'S PROVISION OF INTERLATA SERVICE IS NOT IN THE PUBLIC INTEREST.

As AT&T and other commenters have demonstrated, Qwest has engaged in a pattern of discriminatory and other anticompetitive conduct that precludes any finding that Qwest's local markets are open to competition and will remain open if Qwest receives the requested interLATA authority. In a variety of states and a variety of ways, Qwest has inhibited local entry, violated section 271, entered patently discriminatory secret interconnection deals - *both oral and written*, purchased the silence of complaining CLECs with these secret deals, and worse yet, engaged in a significant effort to conceal its practices from state regulatory commissions and the Commission. Indeed, as the press reports of the hearing this week before the Minnesota PUC indicate, the Chairman of the Minnesota PUC, which is actively involved in reviewing Qwest's misconduct, is "tired of presiding over regulatory proceedings on questionable Qwest business practices."[179] Chairman Scott's colleague on the Minnesota PUC, Commissioner Johnson, spoke of similar concerns, and noted that "for years we have been promoting competition, and then these people work behind our backs to make secret deals. It just isn't right."[180] And now the Commission and the states must address the clear import of internal Qwest correspondence that acknowledges Qwest's desire to "diminish the visibility" of "access to" certain Qwest capability in front of regulators because the Commission "may have a tendency to respond to CLEC requests in a manner which may be unfavorable to" Qwest.[181]

AT&T will not here belabor the multiplicity of misconduct that has been catalogued throughout Qwest's attempt to obtain section 271 authority in these nine states.[182] Commenters in addition to AT&T have demonstrated that Qwest has violated section 271 in a number of

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[178] AT&T at 78-79, 85-86; WorldCom at 25-26.
[179] Steve Alexander, *Ruling Against Qwest Backed*, Minneapolis Star Tribune, Oct. 22, 2002.
[180] *Id*.
[181] *See* AT&T (Qwest III) at 56 (quoting Qwest e-mail attached to Stemple declaration).

instances, and that currently, Qwest's sales of "lit fiber capacity IRUs" constitute an ongoing prohibited provision of long distance services.[183] Commenters also have detailed Qwest's longstanding discriminatory practice of entering oral and written interconnection agreements that not only disadvantaged competitors, but prevented the development of complete records in state section 271 proceedings.[184] Indeed, the only evidence more damning of Qwest's conduct than the outrage of these competitors are the recent findings of the state commissions in Arizona and Minnesota, the only states where extensive discovery and factual hearings were conducted.[185] These findings, of course, fly squarely in the face of the assertions that Qwest has put forward regarding its own conduct.

Previously, Qwest has been faced with the serious implications raised by its own accounting inaccuracies and improprieties. Its effort to deal with those problems was the rapid deployment of a new façade behind which it could hide. As AT&T and others have demonstrated, this effort must be rejected. And it is now beyond dispute that Qwest has misled competitors and regulators and that it continues to deny CLECs access to critical loop information in direct violation of the checklist. Indeed, this misconduct, which Qwest has addressed only with artifice, implausible denial and excuse invokes in letter and spirit the admonishment the Commission adopted in its *Michigan 271 Order* that it would deny section 271 authority where RBOC recalcitrance demonstrated proclivities for anticompetitive and illegal action rather than cooperation.[186]

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[182] *See* AT&T at 81-88.

[183] *See, e.g.*, Touch America, Inc., at 14-17.

[184] *See, e.g, id.* at 17-22; WorldCom at 21-24.

[185] *See id*. *See also* AT&T at 40-46.

[186] As the Commission has recognized, if Qwest "has engaged in discriminatory or other anticompetitive conduct, or failed to comply with State and federal telecommunications regulations," it can be denied section 271 authority because the market-opening provisions of the 1996 Act "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECS with their statutory obligations." *Michigan 271 Order* ¶ 397. While the Commission has stated that it "will not withhold Section 271 (continued)

Where the facts and findings that demonstrate Qwest hostility to the "market-opening" provisions of the Act have accumulated with the passage of time rather than abated, it is difficult to imagine a more compelling "public interest" case for the denial of section 271 authority. Qwest's conduct in entering secret interconnection agreements, evading the requirements of section 271, and inhibiting the entry of competitors to its markets through delay, denial, and dissembling cannot be the subject of a cavalier referral to another proceeding on another day. In this time of national resolve to establish and mandate corporate responsibility and effective government oversight, the Commission must find the resolve to deal squarely and forthrightly with Qwest's malfeasance. Qwest has attempted to thwart competition with the hope that any long-delayed sanction will be a trivial cost of doing illicit business. The Commission must not grant Qwest section 271 interLATA authority and reward this strategy.[187]

authorization on the basis of isolated instances of allegedly unfair dealing or discrimination," it has indicated that it will take such action where, as here, "a pattern of discriminatory conduct" exists that undermines its confidence that the relevant "local market is open and will remain so" after the grant of section 271 authority. *Id*.

[187] As demonstrated above, a grant of Qwest's application also would contravene the public interest because Qwest's rates in several states create a price squeeze that makes local entry economically infeasible.

CONCLUSION

For the foregoing reasons, and for the reasons set out in AT&T's opening comments, Qwest's second application for authorization to provide in-region, interLATA services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming must be denied.

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October 25, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2002, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: October 25, 2002
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/s/ Peter M. Andros

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