sharing pursuant to its SGAT and state-approved interconnection agreements.[1290] According *to* Qwest, as of September 30,2002, it had in service approximately 5,855 unbundled shared loops in Colorado, 4 unbundled shared loops in Idaho, 312 unbundled shared loops in Iowa, 309 unbundled shared loops in Montana, 126 unbundled shared loops in Nebraska, no unbundled shared loops in North Dakota, 1,858 unbundled shared loops in Utah, 5,850 unbundled shared loops in Washington, and 95 unbundled shared loops in Wyoming.[1291]

356. Both Covad and Touch America argue that Qwest's performance under measures of maintenance and repair timeliness reveals multiple disparities.[1292] We recognize that Qwest's performance with regard to the line sharing maintenance and repair measure – the All Troubles Cleared Within 24 hours metric – is out of parity for some months in Colorado, Utah and Washington,[1293] but we do not find that these disparities warrant a finding of checklist noncompliance given the relatively low volumes observed during these months and the difficulties associated with drawing strong conclusions based on **low** volumes of data.

357. We note that Qwest's performance with regard to two other line-sharing maintenance and repair measures – the All Troubles Cleared Within 48 Hours and the Mean Time to Restore metrics – is also out of parity for some recent months in Colorado, Utah and Washington. First, the All Troubles Cleared Within 48 Hours metric shows that Qwest missed

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review[] and remand[ed] the ***Line Sharing Order***...to the Commission for further consideration in accordance with the principles outlined." Id. at 430. On September 4,2002, the D.C. Circuit denied petitions for rehearing filed by the Commission and others. ***See Order,*** **Nos.** 00-1012 and 00-1015 (D.C. Circuit, filed Sept. 4,2002). The court's mandate has been stayed until January 2,2003, leaving the ***Line Sharing Order*** in effect. We are addressing the line sharing rules **as** part of **our** ***Triennial Review Proceeding. See Triennial Review Notice,*** 16 FCC Rcd at 22805, paras. 53-54.

[1290] ***See*** Qwest I Stewart Line Sharing/Line Splitting Decl. at para. 2; Qwest II Application App. A, Tab 14, Declaration of Karen A. Stewart (Qwest II Stewart Line Sharing/Line Splitting Decl.) at para. 2.

[1291] ***See*** Nov. 7c Ex *Parte* Letter at *3*.

[1292] ***See*** Covad Qwest **II** Comments at 42-43; Touch America Qwest II Comments at Exhibit A, A-5

[1293] ***See*** MR-3 (Out of Service Cleared Within 24 **Hours)** for line sharing requiring dispatch in Utah, indicating a disparity in June, August and September with competitive LEC rates of 0%, **50.00%**, and 66.67%, and Qwest rates of 90.18%, 90.59%, and **88.33%**, but with low competitive LEC volumes of **1** and 4 in June and August, and a volume of **15** in September; MR-3 (Out of Service Cleared Within 24 Hours) for line sharing requiring dispatch in Washington, indicating a disparity in July, August, and September with competitive LEC rates of 42.86%, 76.92%, and 71.43%, and Qwest rates of 90.77%, 92.31%. and 92.93, but with relatively low competitive LEC volumes of 7, 13, and 7 respectively. ***See also*** MR-3 (Out of Service Cleared Within 24 Hours) for line sharing requiring dispatch in Colorado, indicating a disparity in July and September with competitive LEC rates of 46.15% and 71.43%. and Qwest rates of 92.09% and 91.84%, but with a relatively low competitive LEC volume of 13 in July; MR-3 (Out of Service Cleared Within 24 Hours) for line sharing not requiring dispatch in Colorado, indicating a disparity in June and September with competitive LEC rates of 62.50% and 84%, and Qwest rates of 96.70% and 96.42%, but with a low competitive LEC volume of 8 in June; MR-3 (Out of Service Cleared Within 24 Hours) for line sharing not requiring dispatch in Utah, indicating a disparity in July and September with competitive LEC rates of 66.67% and 83.33%, and Qwest rates of 95.58% and 96.88%, but with relatively low competitive LEC volumes of 9 and **18**.

the parity standard for two of the relevant months in Colorado, Utah, and Washington.[1294] Next, Qwest's performance for the Mean Time to Restore metric indicates that Qwest missed parity for dispatch orders for two of the relevant months in Colorado and Utah,[1295] and for three of the relevant months in Washington.[1296]

358. With respect to its maintenance and repair problems under the All Troubles Cleared Within 48 Hours metric, Qwest contends that all of the restoration interval and mean time to restore measures in Washington are adversely affected by occurrences beyond its control.[1297] Specifically, Qwest claims that a prominent data local exchange carrier in Washington makes requests for "future" repair work as opposed to immediate repairs approximately 10% of the time, and that this waiting time is included in these measures and inappropriately attributed to Qwest's performance in providing timely maintenance and repair services.[1298] For example, Qwest shows that for non-dispatch orders in September, 33 of the 119 (27.7%) trouble reports were competitive LEC requests for future appointments, and that the competitive LEC requested a hold time of greater than 48 hours for 9 of the 33 requests for future repairs, thus making it impossible for Qwest to meet the 48-hour objective under the All

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[1294] See MR-4 (All Troubles Cleared Within 48 Hours) for non-dispatch line sharing in Colorado, indicating a disparity in August and September, with competitive LEC rates of 96.43% and 90.20%, and Qwest rates of 99.80% and 99.55% respectively; MR-4 (All Troubles Cleared Within 48 Hours) for non-dispatch line sharing in Utah, indicating a disparity in July and September, with competitive LEC rates of 92.86% and 84.21%. and Qwest rates of 99.58% and 99.86% respectively; MR-4 (All Troubles Cleared Within 48 Hours) for line sharing requiring dispatch in Washington, indicating a disparity in June and July, with competitive LEC rates of 72.73% and 87.50%, and Qwest rates of 98.37% and 97.67% respectively; MR-4 (All Troubles Cleared Within 48 Hours) for non-dispatch line sharing in Washington, indicating a disparity in June and July, with competitive LEC rates of 95.24% and 94.44%, and Qwest rates of 99.65% and 99.70% respectively.

[1295] See MR-6 (Mean Time to Restore) for line sharing requiring dispatch in Colorado, indicating a disparity in June and July, with competitive LEC average times of 19:46 and 1:03:32, and Qwest average times of 14:51 and 14:37 respectively; MR-6 (Mean Time to Restore) for line sharing not requiring dispatch in Colorado, indicating a disparity in June and September, with competitive LEC average times of 9:53 and 15:21, and Qwest average times of 6:17 and 6:22 respectively; MR-6 (Mean Time to Restore) for line sharing requiring dispatch in Utah, indicating a disparity in June and July, with competitive LEC average times of 1:12:39 and 1:04:38, and Qwest average times of 15:58 and 16:51 respectively, but with low volumes of 10 and 9; MR-6 (Mean Time to Restore) for line sharing not requiring dispatch in Utah, indicating a disparity in July and September, with competitive LEC average times of 13:08 and 13:58, and Qwest average times of 7:48 and 7:44 respectively, but with relatively low volumes of 14 and 19 respectively.

[1296] See MR-6 (Mean Time to Restore) for line sharing requiring dispatch in Washington, indicating a disparity in June, July, and August, with competitive LEC average times of 1:13:49, 1:15:47, and 21:31, and Qwest average times of 13:37, 14:40, and 14:03 respectively.

[1297] See Qwest II Stewart Line Sharing/Line Splitting Decl. at para. 48. See also MR-3 (Out of Service Cleared Within 24 Hours) for line sharing, MR-4 (All Troubles Cleared Within 48 Hours) for line sharing, MR-6 (Mean Time to Restore) for line sharing.

[1298] See Qwest II Stewart Line Sharing/Line Splitting Decl. at para. 48. See also Letter from Hance Haney, Executive Director - Federal Regulatory, Qwest, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 (dated August 20g, 2002) (Qwest Aug. 20g Ex *Parte* Letter).

Troubles Cleared Within 48 Hours metric.[1299] We agree that the disparity in Qwest's performance under these measures may not always be attributed to Qwest. and that in some instances the recorded disparity **does** not appear to be competitively significant. Therefore, we decline to find that these disparities warrant a finding of checklist noncompliance. We will monitor Qwest's performance after approval. If this situation deteriorates, we will not hesitate to take appropriate enforcement action pursuant to section 271(d)(6).

359. With respect to Qwest's performance under the Mean Time to Restore metric, Qwest contends that it is commonplace **for** shared lines to receive a higher percentage of trouble reports **than** other loops due to the shared lines' unique characteristic of providing both voice and data on the same circuit, and that many of these troubles are for other than "out-of-service" situations.[1300] For example, Qwest states that in January 2002, it received 52 competitive LEC trouble reports for line-shared loops that did not require a technician dispatch and of these reports, only 18 (35%) were for "out-of-service" situations.[1301] The retail comparison for line shared loops, however, is an aggregate of residential and business POTS, and **for** Qwest retail, 52% of the troubles reported in January were "out-of-service" situations.[1302] Since "out-of-service" situations have a higher priority in the repair **queue** than non-"out-of-service" situations, a higher percentage of Qwest retail trouble reports had a higher priority.[1303] Thus, Qwest demonstrates why the mean time to restore was often shorter for its retail comparison than for competitive LECs.[1304] Furthermore, Qwest argues that when its mean time to restore

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1299 ***See*** Nov. 7c ***Ex Parte*** Letter at *5*

1300 See Qwest I Stewart Line Sharing/Line Splitting Decl. at para. **46;** ***see also*** Qwest I Williams Decl. at para **248.**

1301 ***See*** Qwest I Stewart Line Sharing/Line Splitting Decl. at para. **46;** see ***also*** Qwest I Williams Decl. at para. **248.**

1302 ***See*** Qwest I Stewart Line Sharing/Line Splitting Decl. at para. **46:** ***see also*** **Qwest** I Williams Decl. at para. **248.**

1303 ***See*** Qwest I Stewart Line Sharing/Line Splitting Decl. at para. 46; ***see also*** **Qwest I** Williams Decl. at para **248,** Letter from Yaron Dori, Counsel to Qwest, to **Ms.** Marlene H. Donch. Secretary. Federal Communications Commission, CC Docket No. **02-148** at **23** (dated July **19, 2002)** (Qwest July **19** ***Ex Parte*** Letter).

1304 Covad asserts that Qwest's explanation, as stated in Karen Stewart's Declaration, regarding Qwest's trouble rate and mean time to restore measures, is contradicted by an earlier testimony made by another Qwest wimess, Michael Williams, during a state proceeding. According to Covad, Michael Williams. **in** response to AT&T and Covad's questions regarding how Qwest defined "out of service" for data or line-shared loops, stated that Qwest had changed its procedure to treat all line-shared trouble reports as "out of service" reports. In light of the Williams testimony, Covad argues that all line-shared loop UNE trouble tickets should be coded as "out of service" reports and given priority in the repair queue. Thus, Covad asserts that Stewart's declaration regarding Qwest's trouble reports performance is inaccurate and inapplicable as an explanation. See Covad Qwest I Comments at 33. In response, Qwest states that Covad misinterpreted Michael Williams' statement. According to Qwest, while Michael Williams' statement that all line-shared loop trouble reports will be treated as "out of service" reports is true, he also stated that the policy change would take place via the change management process. The change management process was originally intended to begin in March or April of **2002.** Qwest stated that, due to delay, it began a notice period for the change on July 26, 2002. See Letter from Yaron Dori, Counsel to Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. **02-148** at **23** (tiled July **19, 2002)** (Qwest July 19 ***Ex Parte*** (continued....)

performance for competitive LECs in Washington is averaged for both dispatch and non-dispatch orders, it still manages to clear competitive LEC troubles on average within the 24 hour objective for clearing out line-shared loop troubles.[1305] In light of these explanations, and given Qwest's nondiscriminatory performance under other line sharing maintenance and repair metrics,[1306] we find that Qwest's performance under these metrics does not warrant a finding of noncompliance with checklist item 4. We will monitor Qwest's performance after approval. If this situation deteriorates, we will not hesitate to take appropriate enforcement action pursuant to section 271(d)(6).

360. Covad also argues that maintenance and repair performance for line shared loops would improve if Qwest provided competitive LECs with the same "router test" for end-to-end data continuity that Qwest provides for its **own** customers as part of the provisioning process.[1307] Specifically, Covad states that many of the line shared loop orders for which it receives a service order completion notice suffer from missing or incomplete cross-connects in the central office that would be detected by use of the router test, and could be corrected prior to delivery of the line shared loop.[1308] Covad explains that its request in this proceeding for access to router testing is designed to ensure that the loop has been properly provisioned and is a good loop upon delivery, whereas its request for a pre-order MLT is designed and limited to addressing deficiencies and inaccuracies in loop makeup information.[1309] Qwest states that it has recently agreed to develop a router testing option as part of its line shared loop provisioning process, and that it has not proposed a charge for this testing, though it reserves the right to propose alternate rate structures for line sharing in future rate proceedings.[1310] Qwest plans to implement this

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Letter); see ***also*** Qwest I Stewart Reply Decl. at paras. 44-50. According to Qwest, this agreement under the change management process became effective July 29,2002. See Qwest Nov. 7c ***Ex Parte*** Letter at 3-4. We note that no misses were reported in September under this measure for line sharing requiring dispatch. See MR-6 (Mean Time to Restore) for line sharing requiring dispatch in the applicant states.

1305 See Qwest II Stewart Line Sharing/Line Splitting Decl. at para. 47. **As** noted above, Qwest also argues that requests for future appointments adversely affect its performance under the restoration interval and mean time to restore measures. See ***supra*** at para. **358.** For example, Qwest states that 27.7% of the trouble reports in September were requests for future appointments with hold times of more than 24 hours, and that when the time attributed to these future requests is removed, Qwest's average mean time to repair for those tickets would be reduced from 33 hours and 15 minutes, to I hour and 40 minutes. See Qwest Nov. 7c *Ex* ***Parte*** Letter at 4-5.

1306 ***See generally*** MR-7 (Repair Repeat Report Rate); MR-8 (Trouble Rate) for line shared loops in the applicant states. We note that Qwest missed parity for **two** months in Colorado under MR-7, but improved to parity performance in August and September. See MR-7 (Repair Repeat Report Rate) for nondispatch line shared loops.

1307 See Covad Qwest II Comments at 18-23, 43. See ***also*** Touch America Qwest III Comments at 25-26.

1308 See Covad Qwest II Comments at 19, 22.

1309 See Covad Qwest II Comments at **35** n.53

1310 Qwest 111 Application Addendum, Tab 9 at 1-2; Qwest III Stewart Reply Decl. at para.5

testing option by the first quarter of 2003.[1311] Covad states that it is encouraged by Qwest's commitment to provide router testing, and that it is continuing to work with Qwest to make sure that router testing will be provided in all central offices where Qwest provides router testing for itself, and at no additional charge as part of Qwest's obligation to provide non-discriminatory access to a working loop.[1312] As noted above, we find that Qwest's overall performance with respect to maintenance and repair of line shared loops is nondiscriminatory. While the Commission has no requirement for router testing, we are encouraged that Qwest's decision to implement a router testing option may help to ensure continued improvement in Qwest's provisioning performance for line shared loops.[1313]

361. ***Network Interface Devices.*** We find that Qwest demonstrates that it provides nondiscriminatory access to network interface devices (NIDs).[1314] We disagree with AT&T's allegation of discriminatory access to NIDs. AT&T contends that Qwest denies competitive LECs nondiscriminatory access to NIDs because Qwest does not permit the removal of its unused loops from the network protector side of the NID in order to make room for a competitive LEC to attach its own loops.[1315] According to AT&T, this issue arises in the context of AT&T's cable telephony offerings, where AT&T provides its own loops to a multi-tenant building.[1316] In such cases, the multi-tenant building often has covenants that prohibit competitors from installing additional NIDs.[1317] Thus, AT&T argues that it is unable to serve its customer because Qwest's unused loops remain attached to the only available terminals.[1318] According to Qwest, this issue was previously challenged in the Colorado, Idaho, Iowa,

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1311 Qwest III Application Addendum, Tab 9 at 1-2; Qwest III Stewart Reply Decl. at para.6. Touch America argues that the Commission should not accept Qwest's promise of future action regarding implementation of the router test. Touch America Qwest III Comments at 25-26

1312 Covad Qwest III Comments at 2, n.2.

1313 The Department of Justice agrees that Qwest's accommodation of Covad's requests would be responsive to the Department's concern that competitive LECs have nondiscriminatory access to router testing. See Department of Justice Qwest III Evaluation at 8.

1314 Qwest allows requesting competitive LECs to connect their own loop facilities to on-premises wiring through Qwest's NID or at any other technically feasible point. See Qwest I Stewart NIDs/Subloops Decl. at para. 3; Qwest II Application App. A, Tab 15, Declaration of Karen A. Stewart (Qwest II Stewart NIDs/Subloops Decl.) at para. 3. Qwest states that, to date, it has not received any orders for stand-alone unbundled NIDs in its region, but it stands ready to provision stand-alone NIDs upon request. See Qwest I Stewart NIDs/Subloops Decl. at para. 4; Qwest II Stewart NIDs/Subloops Decl. at para. 4 (where Qwest states that it has provisioned NIDs to competitive LECs in conjunction with loops and subloops).

1315 See AT&T Qwest I Comments at 103; AT&T Qwest II Comments at 118-119. Under Qwest's SGAT, neither the competitive LEC nor Qwest is allowed to remove the other party's loop facilities from the other party's NID. See SGAT § 9.5.2.1.

1316 See AT&T Qwest I Comments at 103; AT&T Qwest II Comments at 118-119.

1317 See AT&T Qwest I Comments at 103; AT&T Qwest II Comments at 118-119.

1318 See AT&T Qwest I Comments at 103; AT&T Qwest II Comments at 118-119.

Nebraska, and North Dakota state proceedings, and the state commissions all found that the safety concerns with wire removal are valid, and thus approved Qwest's policy.[1319] We find Qwest's practice here to be reasonable given these state commissions' exhaustive review and their unanimous conclusions regarding the impact of Qwest's policy in the application states.

362. *Other* ***Issues.*** AT&T contends that Qwest discriminates against competitive LECs that order UNEs requiring construction of new facilities before installation.[1320] Specifically, AT&T claims that if a competitive LEC orders an unbundled loop and the facilities are not currently available, Qwest will build the loop only "if Qwest would be legally obligated to build such facilities to meet its Provider of Last Resort obligation to provide basic Local Exchange Service or its Eligible Telecommunications Carrier obligations to provide primary basic Local Exchange Service."[1321] AT&T, however. does not provide any specific instances in which Qwest's policy has prevented competitive LECs from obtaining or serving customers. Qwest states that it provides UNEs, including loops, for competitive LECs where facilities are available, and that it meets its obligations under the Act and Commission orders by implementing its procedures from the SGAT when the facilities are not currently available."" According to Qwest, it follows procedures intended to provide facilities to the requesting competitive LEC.[1323] Absent additional information, we are not convinced that Qwest's policy has denied competitive LECs a meaningful opportunity to compete to date. Accordingly, we decline to find that this allegation warrants a finding of checklist noncompliance.

[1319] See Qwest I Stewart NIDs/Subloops Decl. at para 12. During the proceeding in Colorado, the Staff recommended, and the Hearing Commissioner determined, that "Qwest's determination that the capping off of its drop wire is an unsafe practice that Qwest is not willing to accept is a reasonable decision within the bounds of utility management discretion." See Colorado Staffs Final Report on the Fifth Workshop. Checklist Items **2, 4** and **11** (Volume V-A, Impasse Issues) February 8,2002.

[1320] ***See*** AT&T Qwest I Comments at 82

[1321] See AT&T Qwest I Comments at **82;** see also SGAT § 9.1.2.1. The SGAT in Colorado, however, requires Qwest to build facilities whenever it would build for itself. See Colorado SGAT § **9.19.** AT&T argues that Qwest's policy is discriminatory and violates the requirements of section 251(c). *See* AT&T Qwest I Comments at **84.**

[1322] ***See*** Qwest I Campbell Loops Decl. at para. 62; ***see*** also SGAT §§ 9.1.2.1.3, 9.1.2.1.3.1., 9.1.2.1.3.2., and 9.2.2.16. for Qwest's procedure for unbundled loops when no compatible facilities are available. The Eighth Circuit has previously concluded that "subsection **251(c)(3)** implicitly requires unbundled access only to an incumbent LECs's existing network—not to a yet unbuilt superior one." See *Iowa Util Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997). We also note that we do not require incumbent LECs to construct new transport facilities to meet specific competitive LEC demand requirements for facilities that the incumbent LEC has not deployed for its own use. See UNE ***Remand Order,*** 15 FCC Rcd at **3843,** para. **324.**

[1323] Qwest says that if a competitive LEC requests an unbundled loop and no compatible facilities exist, a 5-step procedure takes place in an effort ***to*** provide the facilities to the requesting competirive LEC. See Qwest I Campbell Loops Decl. at para. 60-61. Qwest explains that if compatible facilities are still **not** available, it holds the order for 30 business days and continues to attempt to assign compatible facilities. See Qwest I Campbell Loops Decl. at para. 60; see also SGAT § 9.2.2.16. If, after the 30 business days, compatible facilities are still unavailable, Qwest will then reject the order and inform the competitive LEC that no compatible facilities exist. See Qwest I Campbell Loops Decl. at para. 60. After 30 days, the competitive LEC may submit a second order and Qwest will continue to attempt to assign compatible facilities for another 30-day period. See ***id.***

C. Checklist Item 5 – Unbundled Local Transport

363. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[1324] Based on our review of the record, we conclude, as did each state commission, that Qwest complies with the requirements of this checklist item.[1325]

364. We reject AT&T's concern with the way Qwest charges for unbundled local transport in Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, and Wyoming.[1326] In particular, AT&T alleges that Qwest's different classification of unbundled dedicated interoffice transport (UDIT) and extended unbundled dedicated interoffice transport (EUDIT)"" facilities is baseless and serves only to raise the cost of transport to competitive LECs.[1328] UDIT is a flat-rated charge that is based on distance and applies to dedicated transport between Qwest's wire centers, end offices, or tandem switches in the same LATA and state."" EUDIT is a flat-rated, ***non-distance sensitive*** charge that is defined as "the portion of transport between a competitive LEC wire center and a Qwest wire center."[1330] AT&T alleges that Qwest's EUDIT charges are unlawful because they fail to reflect the way costs ***are*** incurred.[1331]

365. As discussed in the UNE pricing section above, we generally defer to **the** states with respect to UNE pricing, unless we conclude that the state has made a clear error in applying our TELRIC rules. We find no such error with respect to the decision in these seven states to permit Qwest to impose flat-rated non-distance sensitive charges for connections between a Qwest switch and a competitive LEC switch. While AT&T is correct that the Commission

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1324 47 U.S.C. § 271(c)(2)(B)(v); see *also* Appendix K at para. 53

1325 See Qwest II Application App. A, Tab 16, Declaration of Karen A. Stewart (Qwest II Stewart Transport Decl.) at para, 7; Qwest 1 Application App. A, Tab 17, Declaration of Karen A. Stewart (Qwest I Stewart Transport Decl.) at paras, 6-51; Colorado Commission Comments at 21-22; Idaho Commission Comments at 13-14; Iowa Commission Comments at 46; Montana Commission Comments at 30; Nebraska Commission Comments at 8; North Dakota Commission Comments at 137-144; Utah Commission Comments at 5-6; Washington Commission Comments at 21; Wyoming Commission Comments at 8, para 17.

1326 AT&T Qwest III Comments at **81**; AT&T Qwest II Comments at 114; AT&T Qwest II Wilson Decl. at paras. 57-63; AT&T Qwest I Wilson Decl. at paras. 56-62.

1327 AT&T advances a similar argument with respect to the pricing of entrance facilities. Qwest clarified that EUDIT and entrance facilities are the same thing and these are not two separate pricing issues. See, *e.g.*, Qwest I Thompson Reply Decl. at para. 106.

1328 AT&T Qwest II Comments at 114-116; AT&T Qwest II Wilson Decl. at para. 57; AT&T Qwest I Wilson Decl. at para. 56.

1329 Qwest II Stewart Transport Decl. at para. 9 n.16; Qwest I Stewart Transport Decl. at para. 9 n.15.

1330 Qwest II Stewart Transport Decl. at para. 9 n.16; Qwest I Stewart Transport Decl. at para. 9 n.15

1331 AT&T Qwest II Wilson Decl. at para. 10; AT&T Qwest I Wilson Decl. at para. 10.

"requires dedicated transport to be recovered through a flat-rated charge,"[1332] the Commission's TELRIC rules do not specify that such charges must be based on distance.[1333] Qwest also notes that the Commission has approved a number of section 271 applications in states that have used a similar rate structure.""

366. We also dismiss AT&T's argument that the charge for the link between a competitive LEC switch and a Qwest switch should be recovered in the same manner as links between Qwest switches, because there is "no economic **or** engineering difference whatsoever" between these two types of facilities.[1335] In response, Qwest argues that there are both economic differences and engineering differences that warrant a different rate structure and different rates. Specifically, Qwest argues that there are economies of scale and scope that reduce the per-trunk cost for trunks between Qwest offices.[1336] Qwest also argues that it is more likely that additional electronics will be needed for links to competitive LEC offices.[1337] AT&T has not refuted these arguments, and therefore provides no reason for the Commission not to defer to the decisions made by the state commissions on this issue.

367. We further reject AT&T's claims that "QC and QCC are now part of a merged firm that is integrating its operations," and that at least to some extent, QCC is **a** "successor or assign" of QC under section 251(h).[1338] On the basis of the record before us, we do not find QCC **or** any other Qwest *affiliate* to be a successor *or* assign of QC, and therefore Qwest is not discriminating in denying unbundled access to affiliate-owned facilities. Qwest affirms that QC has not transferred any assets to any affiliate, that **no** affiliate of QC has continued QC's business without interruption **or** substantial change, and that no affiliate of QC has stepped into the shoes of QC.[1339] AT&T notes that the Colorado Commission has directed Qwest to amend its SGAT to offer unbundled access to any QCC dark fiber to which QC has access rights, out of concern about the parent's access to the affiliate's dark fiber."" Nonetheless, AT&T does not suggest

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1332 AT&T Qwest II Wilson Decl. at para. 58; AT&T Qwest I Wilson Decl. at para. 57.

1333 47C.F.R. § 51.509(c) (2001)

1334 ***See, e.g., SWBT Texas Order,*** 15 FCC Rcd at 18392, para. 82; ***Verizon Pennsylvania Order,*** 16 FCC Rcd at 17476, para. 104.

1335 AT&T Qwest **II** Wilson Decl. at para. 60; AT&T Qwest I Wilson Decl. at para. 59.

1336 Qwest I Thompson Reply Decl. at paras 110-111

1337 Qwest I Thompson Reply Decl. at para. 111 n.139

1338 AT&T Qwest I Comments at 85-86.

1339 Qwest I Reply Comments at 81

1340 AT&T points to the Colorado Staffs conclusion that "[a]s it is occurring today, and as **it** continues into the future, the merged entities' facilities are becoming operationally integrated, and it is becoming virtually impossible to distinguish between fiber routes used exclusively for long distance or data services, and fiber routes that contain fibers used for transport of local exchange services." AT&T Qwest I Comments at 87-88 (quoting Colorado Staff (continued.. ..)

that the Colorado Commission found QCC to be a successor or assign of QC, or that Qwest had failed to meet its unbundling obligations under section 251(c)(3). Based on the foregoing, then, we find no evidence in the record that warrants a finding of checklist noncompliance in this area. If, in the future, we receive evidence that Qwest is merging its incumbent LEC operations with QCC or that any affiliate is becoming a successor to QC, we will expect Qwest to extend the unbundling obligations accordingly.

368. We also find AT&T's argument that Qwest offers discriminatory and inferior access to dark fiber without merit.[1341] AT&T claims that when Qwest provides dark fiber to its own customers, it guarantees that it will maintain transmission performance at the designed transmission parameters and will restore the fibers if they fall below the design standard."[1342] AT&T further claims that for competitive LECs, Qwest considers a fiber as good when there is "optical continuity" regardless of performance.[1343] We note that Qwest withdrew the retail dark fiber offering cited by AT&T for new customers several years ago.[1344] Consequently, Qwest no longer provides any new dark fiber arrangements under its federal tariff and its retail dark fiber product is grandfathered.[1345] Qwest further notes that continuity is the standard required for both unbundled dark fiber and the grandfathered retail dark fiber product and that neither the grandfathered retail nor the unbundled dark fiber technical publications states that the fiber has a certain level requirement for attenuation.[1346]

369. Finally, we reject AT&T's argument that Qwest unlawfully denies access to dark fiber by applying the local use restrictions test that the Commission has adopted for loop-transport combinations ("enhanced extended links," or "EELs") already combined in the incumbent LECs' network.[1347] AT&T argues that the local use restrictions have no possible

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Report on Emerging Services at 9 (Jan. 10,2002)). Colorado directed Qwest to amend its Colorado SGAT to offer unbundled access to any QCC dark fiber to which QC has access rights. Qwest I Reply Comments at 82 (citing Colorado SGAT § 9.7.1).

1341 AT&T Qwest II Comments at 118.

1342 *Id.*

1343 *Id.*

1344 Qwest II Stewart Transport Reply Decl. at 15, para. 28 (stating that Qwest withdrew the offering cited by AT&T on lune 10, 1994).

1345 *Id.*

1346 *Id.* at 16, para. 31.

1347 AT&T Qwest I Comments at 102 (citing SGATs § 9.7.2.9 ("CLEC shall not use UDF [unbundled dark fiber] that is part of a looptransport combination, as a substitute for special or switched Access Services, except to the extent CLEC provides a 'significant amount of local exchange traffic' to its End Users over the UDF as set forth by the FCC")); AT&T Qwest II Wilson Decl. at 30, para. 64. The Commission's local use restriction prevents an interexchange carrier (IXC) from converting special access services to combinations of unbundled loop and transport network elements, unless such combinations are used to provide a significant amount of local exchange service. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 99-370, *Supplemental* Order, 15 FCC Rcd 1760, para. 2 (1999).

application **to** dark fiber, because competitive LECs always light and generally combine unbundled dark fiber themselves.[1348] As a result, AT&T believes that Qwest's application of the local use restriction to dark fiber loop-transport combinations is unlawful.[1349] However, where a competitive LEC procures a dark fiber loop UNE and a dark fiber transport UNE and combines these elements itself, Qwest is in agreement with AT&T that no local usage restriction applies.[1350] Rather, Qwest only applies the local usage restriction to dark fiber where Qwest itself has combined a dark fiber loop with dark fiber transport to create a "dark fiber EEL."[1351] We find that all existing combinations of loops and transport combined by an incumbent LEC, whether lit or not, are within the scope of the local usage restrictions.[1352] We are thus satisfied that Qwest complies with this checklist item.

D. Checklist Item 6 –Unbundled Local Switching

370. Section 271(c)(2)(B)(vi) of the 1996 Act requires a BOC to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services."[1353] To satisfy its obligations under this subsection, an applicant must demonstrate compliance with Commission rules relating to unbundled local switching.[1354] Specifically, Qwest demonstrates that it provides: (1) line-side and trunk-side facilities;[1355] (2) basic switching functions;[1356] (3) vertical features;

[1348] AT&T Qwest I Comments at 102

[1349] AT&T Qwest I Comments at 103.

[1350] Qwest August 15 Ex *Parte* Letter at 1.

[1351] Upon request, Qwest will combine a dark fiber loop with dark fiber transport in the serving wire center of the loop. Qwest can combine these UNEs via a Fiber Distribution Panel or other facility without lighting the dark fiber. To light the dark fiber EEL, the competitive LEC would then have to place electronics at the end-user's premises and at a distant central office. Qwest August 15 Ex *Parte* Letter at 1-2.

[1352] We note that the Multistate Facilitator reached the same conclusion. *See* Multistate Facilitator's Report on Emerging Services at 57 (finding "no doubt that a loop-transport combination that includes dark fiber remains a loop-transport combination").

[1353] 47 U.S.C. § 271(c)(2)(B)(vi); *see also* Appendix K at paras. 54-56

[1354] See 47 C.F.R. § 51.319(c); *see also SWBT Texas Order*, 15 FCC Rcd at 18520-22, paras. 336-38.

[1355] Line-side facilities include, but are not limited to, the connection between a loop termination at a main distribution frame, and a switch line card. Trunk-side facilities include, but are not limited to, the connection between *trunk* termination at a trunk-side cross-connect panel and a switch trunk card. Second *BellSouth Louisiana Order*, 13 FCC Rcd at 20724 nn.679-80. See *also* Qwest II Application App. A, Tab 17, Declaration of Lori A. Simpson and Karen A. Stewart (Qwest II Simpson/Stewart Decl.) at para. 17; Qwest I Simpson/Stewart Decl. at para. 17.

[1356] The basic switching function includes, but is not limited to: connecting lines to lines; lines to trunks; trunks to lines; *trunks* to trunks; as well as the same basic capabilities that are available to the BOC's customers, such as a telephone number, directory listing, dial tone, signaling, and access to 911, operator services, and directory assistance. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20726 n.690. See *also* Qwest II Simpson/Stewart Decl. at para. 18; Qwest I Simpson/Stewart Decl. at para. 18.

(4) customized routing;[1358] (5) shared trunk ports;[1359] (6) unbundled tandem switching;[1360] (7) usage information for billing exchange access;[1361] and (8) usage information for billing for reciprocal compensation.[1362] Based on our review of the record, we conclude, as did each of the state commissions,[1363] that Qwest complies with this checklist item.[1364]

371. Qwest's compliance is challenged by AT&T, WorldCom, and Eschelon. but we reject these challenges.[1365] AT&T alleges that Qwest fails to provide unbundled local switching

(Continued from previous page)

1357 Vertical features provide end users with various services such as custom calling. call waiting, call forwarding, caller ID, and Centrex. ***Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20726, para. 216. See ***also*** Qwest II Simpson/Stewart Decl. at para. 26; Qwest I Simpson/Stewart Decl. at para. 26.

1358 Customized routing permits requesting carriers to designate the particular outgoing trunks associated with unbundled switching provided by the incumbent that will carry certain classes of traffic originating from requesting carriers' customers. ***Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20728-29, para. 221. Customized routing is also referred to as selective routing. ***Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20728 n.704. See ***also*** Qwest II SimpsodStewart Decl. at para. 38; Qwest I Simpson/Stewart Decl. at para. 38.

1359 ***Implementation of the Local Competition Provisions in the TelecommunicationsAct of 1996, Interconnection between Local Exchange carriers and Commercial Mobile Radio Service*** Providers, CC Docket Nos. 96-98 and 95-185, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12475-80, paras. 25-30 (1997) ***(Local Competition Third Reconsideration Order); Ameritech Michigan Order,*** 12 FCC Rcd at 20716-17, paras. 327-29; ***see also Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20732, para. 228. See ***also*** Qwest II Simpson/Stewart Decl. at para. 37; Qwest I Simpson/Stewart Decl. at para. 37.

1360 The requirement to provide unbundled tandem switching includes: (i) trunk-connect facilities, including but not limited to the connection between trunk termination at a cross-connect panel and a switch trunk card; (ii) the base switching function of connecting trunks to trunks; and (iii) the functions that are centralized in tandem switches (as distinguished from separate end-ofice switches), including, but not limited to, call recording, the routing of calls to operator services, and signaling conversion features. ***Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20733 n.732. ***See also*** Qwest II Simpson/Stewart Decl. at para. 41; Qwest I Simpson/Stewart Decl. at para. 41.

1361 ***See Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20733-35, paras. 230-31; see ***also*** Qwest II Simpson/Stewart Decl. at paras. 44-46; Qwest I Simpson/Stewart Decl. at paras. 44-46.

1362 ***See Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20735-37, paras. 232-34; see ***also*** Qwest II Simpson/Stewart Decl. at para. 47; Qwest I Simpson/Stewart Decl. at para. 47.

1363 See Colorado Commission Qwest I Comments at 22; Idaho Commission Qwest 1Comments at 4; Iowa Board Qwest I Comments at 48; Nebraska Qwest I Commission Comments 8; North Dakota Qwest I Commission Comments at 5; Washington Commission Qwest II Comments at 22; Montana Public Service Commission Qwest II Comments at 30-31; Wyoming Commission Qwest II Comments at 8; Utah Commission Qwest II Comments at 5. See ***also*** Qwest III Application at 2; Qwest II Application at 84-86; Qwest I Application at 3; Colorado Commission Qwest I Reply at 24.

1364 Qwest II Application at 84-86; Qwest I Application at 77-79; Qwest II SimpsodStewart Decl. at 3-71; Qwest I SimpsodStewart Decl. at paras. 3-72.

1365 Although related to unbundled local switching, we discuss WorldCom's challenge to Qwest's compliance with the custom routing of OS/DA calls under Directory Assistance/Operator Services because the issue was raised as a violation of section 271(c)(2)(B)(vii). See ***supra*** Part IV.E.2.

in two respects.[1366] First, AT&T claims that Qwest fails to provide unbundled packet switching on a nondiscriminatory basis because it provides competitive LECs with only the lowest quality packet switching, Unspecified Bit Rate ("UBR), while providing its retail customers five grades of packet switching.[1367] AT&T argues that Qwest must offer competitive LECs the same grades of packet switching that Qwest offers to its retail customers.[1368] Qwest explains that its retail DSL service offering (which, it argues, is its only context in which it offers unbundled packet switching when the Commission's four-prong UNE packet-switching rules are not met[1369]) provides only for UBR transmission.[1370] Qwest states that it offers other grades of packet switching to customers ordering other types of services, such as its Cell Relay Service, but not to its retail DSL customers.[1371] Accordingly, based on Qwest's description of its service offerings, we find that Qwest provides its DSL retail service in a nondiscriminatory manner. We, therefore, reject AT&T's argument. Moreover, we find that Qwest offers competitive LECs unbundled packet switching in a nondiscriminatory manner when the conditions established by the Commission in the ***UNE Remand Order*** are met.[1372] We also note that Qwest makes available to competitive LECs the option of requesting other types of bit rates using Qwest's bona fide request process.[1373]

372. We also conclude that Qwest has properly implemented the Commission's rule 51.319(c)(2), under which an incumbent LEC may be excused from providing unbundled local circuit switching in certain high-density areas to end users with "four or more lines."[1374] In the initial Qwest section **271** applications, AT&T challenged Qwest's policy on this issue as

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[1366] AT&T Qwest II Comments at 112-114; AT&T Qwest I Comments at 94-99.

[1367] AT&T Qwest II Comments at 113-114; AT&T Qwest I Comments at 98-99; AT&T Qwest I Wilson Decl. at paras. 71-74.

[1368] AT&T Qwest II Comments at 113-114; AT&T Qwest I Comments at 98-99; AT&T Qwest I Wilson Decl. at paras. 71-74.

[1369] 47 C.F.R. § 51.319(c)(5).

[1370] See Qwest II Reply Declaration of Karen A. Stewart (Qwest II Stewart Reply Decl.) at paras. 62-63; Qwest I Stewart Reply Decl. at para. 54-55.

[1371] See Qwest II Stewart Reply Decl. at paras. 62-69; Qwest I Stewart Reply Decl. at paras. 54-57. We also note that, based on Qwest's representation io its declarations, competing LECs may obtain these services offering transmission at other bit rates for resale at a wholesale discount.

[1372] See Qwest II Stewart Reply Decl. at paras. 64-66; Qwest I Stewart Reply Decl. at paras. 56-57. See also *UNE Remand Order*, 15 FCC Rcd at 3838-3839, para. 313; 47 C.F.R. § 51.319(c)(5).

[1373] See Qwest II Stewart Reply Decl. at 64-65; Qwest I Stewart Reply Decl. at paras. 56-57; see *also* 47 C.F.R. § 51.319(c)(2).

[1374] 47 C.F. R. § 51.319. This rule is known as the "switching carveout exception".

inconsistent with the Commission's rules.[1375] On September 25,2002, before it filed the instant application, Qwest modified its prior policy implementing the switching carveout exception to conform to the Virginia Arbitration *Order*.[1376] Qwest subsequently memorialized its modified policy through the filing of a revised SGAT in two of the three states in Qwest's region where the switching carveout exception applies: in Colorado on October 28,2002; in Utah on October 31, 2002. For the third state, Washington, pursuant to a decision by the Washington Commission, Qwest has had in place since June 25,2002 an SGAT that complies with federal rules.[1377]

373. Under Qwest's revised policy, Qwest has committed to applying the switching carveout exception only in cases where there are four or more lines per customer location.[1378] We conclude that this policy is consistent with the Commission's rules, because the Commission distinguished high-volume customers from those residential and small business customers for whom unbundled local switching would continue *to* be available in the *UNE* Remand Order.';" High-volume customers are more likely to have four or more lines per location, as opposed to residential and small business customers, who are less likely to have four or more lines at a single location. In addition, the Commission in the *UNE* Remand Order focused on the various costs avoided through the purchase of local switching, such as the costs associated with collocation and hot cuts, which are largely a function of customer location.

374. In assessing Qwest's compliance with checklist item *6*, we waive our "complete when filed" rule to consider the revised legal commitment established by Qwest to implement the "switching carveout exception." We find that the interests our standard procedural requirements are designed to protect are not affected by our consideration of Qwest's recent SGAT filings addressing the legal commitment. There are a number of special circumstances that support the granting of this waiver. Qwest modified its policy, effective September 25,2002, and clarified its modification on the record early in the 90-day statutory period for the Commission's consideration of the instant application."" As such, parties were afforded a sufficient opportunity to comment on Qwest's modified policy during the specified comment cycle and

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1375 *See* AT&T Qwest II Comments at 112-113; AT&T Qwest I Comments at 95-98; AT&T Qwest I Wilson Decl. at para. 69 (maintaining that Qwest did not correctly interpret the Commission's "switching carveout exception" because it counted customers' lines on a "per wire center" basis).

1376 ***Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration, et al.***, CC Docket No. 00-218, ***Memorandum Opinion and Order,*** DA 02-1731 at 173-178, paras. 355-363 (July 17,2002) ***(Virginia Arbitration Order)*** (emphasis added). ***See also*** Qwest III Application, Tab 11 (confirming that its policy was revised effective September 25,2002).

1377 ***See*** Letter from Hance Haney, Executive Director-Federal Regulatory, Qwest. to Marlene Dortch, Secretary, Federal Communications Commission, ***WC*** Docket No. ***02-3*** 14 (filed November 14d, 2002) ***(Qwest Nov. 14d Ex Parte).***

1378 Qwest III Application, Tab 11.

1379 ***See UNE Remand*** Order, 15 FCC Rcd at 3830-31, para. 297.

1380 ***See*** Qwest Application, Tab 11.

could avail themselves of the terms retroactive to September 25,2002, prior to the filing of the instant section 271 application. Moreover, Qwest modified its policy immediately after the issuance of the Bureau order and demonstrated good faith in its efforts to comply with the Commission's rules. We find that to not consider Qwest's **SGAT** filing would elevate form over substance. **As** a practical matter, no parties have been denied unbundled local circuit-switching. as Qwest maintains that it has never enforced the switching carveout in the three states where the exception applies. Finally, we find that Qwest's filing of revised SGATs is a straightforward step that has already been taken and does not constitute a promise of future action. For these reasons, we find that the circumstances present in this instance warrant a waiver of **our** procedural requirements, and allow consideration of Qwest's revised legal commitment to implement the "switching carveout exception."

375. We also conclude that Eschelon's assertions regarding tandem switch failures are insufficient to rebut Qwest's evidence showing compliance with the requirements of this checklist item.[1381] While we are concerned that such outages can have an adverse affect on competitive LECs, the present record does not reflect a systemic problem. Rather it appears that the tandem switch failures represented a series of isolated outages.[1382]

E. Checklist Item 7 – 911/E911 Access & Directory Assistance/Operator Services

1. 911 and E911 Access

376. Section 271(c)(2)(B)(vii) of the Act requires a BOC to provide "[n]on discriminatory access to 911 and E911 services."[1383] Qwest must provide competitors with access to its 911 and E911 services in the same manner that it provides such access to itself, *i.e.*, at parity.[1384] Specifically, the BOC "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers."[1385] We find, as did the commissions of the nine application states,[1386] that Qwest provides nondiscriminatory access to 911 and E911 services. We note that no commenter challenges Qwest's compliance with this aspect of checklist item 7.

1381 ***See*** Eschelon Qwest II Comments at 44-46; Eschelon Qwest I Comments at 28.

1382 We note that only seven outages occurring over a nine month period were reported by Eschelon and there have been no recent allegation **of** outages. No other commenter reported a similar problem.

1383 47 U.S.C. § 271(c)(2)(B)(vii); ***see also*** Appendix K at paras. 57-58.

1384 ***Bell Atlantic New York Order,*** 15 FCC Rcd at 4130-31, para. 349 (citing ***Ameritech Michigan Order,*** 12 FCC Rcd at 20679, para. 256).

1385 ***Ameritech Michigan Order,*** **12** FCC Rcd at 20679, para. 256.

1386 ***See*** Colorado Commission Qwest I Comments at 12; Idaho Commission Qwest I Comments at **4;** Iowa Board Qwest I Comments at 50; Montana Commission Qwest II Comments at **32;** Nebraska Commission Qwest I Comments at 8; North Dakota Commission Qwest I Comments at 5; Utah Commission Qwest II Comments at 5; Wyoming Commission Qwest II Comments at 8.

2. Directory Assistance / Operator Services

377. Section 271(c)(2)(B)(vii)(II) and section 271(c)(2)(B)(vii)(III) require a BOC to provide nondiscriminatory access to "directory assistance services to allow the other carrier's customers to obtain telephone numbers" and "operator call completion services," respectively.[1387] Additionally, section 251(b)(3) of the 1996 Act imposes on each LEC "the duty to permit all [competing providers of telephone exchange service and telephone toll service] to have nondiscriminatory access to . . . operator services, directory assistance, and directory listing, with no unreasonable dialing delays."[1388] Qwest provides competitive LECs access to the same directory assistance services and operator services that it provides to Qwest's retail customers.[1389] Qwest's processes for providing directory assistance services and operator services are designed to ensure competitive LECs that all calls are handled in the same manner regardless of whether they are originated by a competitive LEC's customers or by Qwest's customers.[1390] Qwest also provides branding for competitive LECs that purchase operator services and directory assistance from Qwest.[1391] Based on our review of the record, we conclude, as did each of the state commissions,[1392] that Qwest offers nondiscriminatory access to its directory assistance services and operator services (OS/DA).[1393]

378. We reject WorldCom's allegations that Qwest refuses to provide customized routing as required by Commission precedent.[1394] Specifically, WorldCom seeks to carry OS/DA

1387 47 U.S.C. § 271(c)(2)(B)(vii)(II)-(III). *See also Bell Atlantic New York Order,* 15 FCC Rcd at 4131, para. 351.

1388 47 U.S.C. § 251(b)(3). We have previously held that a BOC must be in compliance with section 251(b)(3) in order to satisfy sections 271(c)(2)(B)(vii)(II) and (III). See *Second BellSouth Louisiana Order,* 13 FCC Rcd at 20740, n.763. See *also Bell Atlantic New York Order,* 15 FCC Rcd at 4132-33, para 352.

1389 Qwest II Application at 89-91; Qwest I Application at 82-83. See *also* Qwest II Applications App. A, Tab 19, Declaration of Lori A. Simpson (Qwest II Simpson-OS/DA Decl.) at para. 4; Qwest I Application App. A, Tab 20, Declaration of Lori A. Simpson (Qwest I Simpson-DA/OS Decl.) at para. 4.

1390 Qwest II Application at 89-91; Qwest I Application at 82-83. See *also* Qwest II Simpson-OS/DA Decl. at para. 4; Qwest I Simpson-DA/OS Decl. at para. 4.

1391 Qwest II Application at 89-91; Qwest I Application at 82-83. See *also* Qwest II Simpson-OS/DA Decl. at para. 4; Qwest I Simpson-DA/OS Decl. at para. 4.

1392 See Colorado Commission Comments at 12; Idaho Commission Comments at 4; Iowa Board Comments at 74; Montana Commission Comments at 32; Nebraska Commission Comments at 8; North Dakota Commission Comments at 8; Utah Commission Comments at 5; Wyoming Commission Comments at 8.

1393 See Qwest II Application at 89-91; Qwest I Application at 82-83. See *also* Qwest II Simpson-OS/DA Decl. at paras. 3-72; Qwest I Simpson-OS/DA Decl. at paras. 3-79.

1394 See WorldCom Qwest III Comments at 26; WorldCom Qwest II Comments at 36-40; WorldCom Qwest I Comments at 34-37; WorldCom Qwest 11 Reply at 21-23; WorldCom Qwest I Reply at 19-20; Letter from Lori E. Wright, Associate Counsel-Federal Advocacy, WorldCom, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docker Nos. 02-148, 02-189 (dated August 19,2002) (WorldCom August 19, *Ex Parte).* Customized Routing is a function provided by the switch and is included in the requirements addressed (continued.. . .)

traffic over its existing Feature Group D trunks.[1395] WorldCom maintains that Qwest requires that it purchase "unique" Feature Group D trunks dedicated to OS/DA traffic.[1396] Qwest states that this requirement is supported by the terms and conditions of the interconnection agreements.[1397] The Commission has previously addressed customized routing in the *Second BellSouth* ***Louisiana Order,*** finding that if it is technically feasible for the incumbent LEC to offer a particular customized routing arrangement, failure to do so would be a violation of section 251(c)(3) of the Act.[1398] We find that Qwest's general customized routing offering in its **SGAT** complies with our rules because it allows competitive LECs to have customers' calls routed as Qwest's customers' calls are, or to choose customized routing to the extent it is technically feasible.[1399] This offering is available to all competing LECs, including WorldCom. **The** fact that WorldCom is dissatisfied with its current contract,[1400] which contains the language regarding "unique" trunks, does not rise to the level of a checklist violation, particularly in light of Qwest's **SGAT** offering. Therefore, consistent with Commission precedent,[1401] we decline to resolve this matter within the context of this section 271 proceeding.[1402]

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under checklist item **6.** ***See also*** **47** C.F.R. § 51.319(c)(1)(iii)(B). This issue is discussed in this section because WorldCom raises it as a violation of checklist item **7** rather than as a violation of checklist item **6.**

1395 WorldCom Qwest II Comments at **36-37;** WorldCom Qwest I Comments at **35.** See ***also*** WorldCom Qwest II Reply at **21-23;** WorldCom Qwest I Reply at **19.**

1396 WorldCom Qwest II Comments at **36-37;** WorldCom Qwest I Comments at **35.** ***See also*** WorldCom Qwest II Reply at **21-23;** WorldCom Qwest I Reply at **19.**

1397 Qwest II Reply Declarations Tab 3, Reply Declaration of Lori A. Simpson (Qwest II Simpson-OS/DA Reply Decl.) at paras. **47-48;** Qwest I Reply Declarations Tab **3,** Reply Declaration **of** Lori **A.** Simpson (Qwest Simpson-OS/DA Reply Decl.) at paras. **29-30.**

1398 ***See Second BellSouth Louisiana Order,*** 13 FCC Rcd at **20731-20732,** paras. 226-227. The Commission also recognized that all incumbent LECs must make network modifications as necessary to accommodate interconnection or access to network elements

1399 Qwest II Simpson OS/DA Decl. **at** paras. **3-22;** Qwest I Simpson OSJDA Decl. at paras. **3-22.** See, *e.g.,* Qwest Application App. B, Vol. 1, Tab **2,** Colorado Statement of Generally Available Terms (Colorado SGAT) at § **9.12.**

1400 See WorldCom Qwest II Comments at **36-40;** WorldCom Qwest I Comments at **34-37.** See ***also*** WorldCom Qwest II Reply at **21-23;** WorldCom Qwest II Reply at **19-20.**

1401 ***See SWBT Texas Order,*** 15 FCC Rcd at **18389-18390,** paras. **77-78** (rejecting AT&T's claim that its rights under section **251** were not fully reflected ***in*** its contract, relying instead on SWBT's contract with WorldCom to find checklist compliance).

1402 We reject Qwest's assertion, raised in its reply comments, that WorldCom's customized routing request is actually a 411 presubscription since the record is inconclusive on this issue and it would best be resolved in state proceedings. **See** Qwest II Simpson-OS/DA Reply Decl. at paras. **41-50;** Qwest I Simpson-OS/DA Reply Decl. at paras. **23-32.** We also note that Qwest states its willingness to work with WorldCom to pursue a workable solution for both parties. See Qwest II Simpson-OS/DA Reply Decl. paras. **40-41;** Qwest I Simpson-OS/DA Reply Decl. at paras. **31-32.**

F. Checklist Item 10 – Databases and Signaling

379. Section 271(c)(2)(B)(x) of the 1996 Act requires a BOC to provide "nondiscriminatory access to databases and associated signaling necessary for call routing and completion."[1403] Qwest states that it provides competitive LECs in each of the application states with unbundled, nondiscriminatory access to its signaling network, including signaling links and transfer points, and to Qwest's call-related databases and service management systems.[1404] Based on the evidence in the record, we find, as did each of the commissions in the nine application states, that Qwest complies with the requirements of checklist item 10.[1405]

380. We reject Touch America's contentions that, because Qwest allegedly discriminated against Touch America in the context of the U S WEST-Qwest merger divestiture with respect to access to databases, Qwest will similarly "discriminate" against other competing carriers.[1406] Touch America's dispute is particular to the U S WEST-Qwest merger and is being addressed by the Commission in a separate proceeding.[1407] We conclude that Touch America's speculative claims about Qwest's future conduct does not warrant a finding that Qwest fails to comply with this checklist item. No other commenter challenges Qwest's compliance with this checklist item.

G. Checklist Item 11 – Number Portability

381. Section 271(c)(2)(B) of the Act requires a BOC to comply with the number portability regulations adopted by the Commission pursuant to section 251.[1408] Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible. number portability in accordance with requirements prescribed by the Commission."[1409] Qwest states that it satisfies the

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1403 47 U.S.C. § 271(c)(2)(B)(x); see *also* Appendix K at para. 62.

1404 See Qwest II Application App. A, Tab 22, Declaration of Margaret S. Bumgarner (Qwest II Bumgarner-Signal Decl.) at para. 4; Qwest I Application App. A., Tab 23, Declaration of Margaret S. Bumgamer (Qwest I Bumgamer-Signal Decl.) at para. 4.

1405 See Montana Commission Qwest II Comments at 6; Utah Commission Qwest II Comments at 6; Washington Commission Qwest II Comments at 22-23; Wyoming Commission Qwest II Comments at 9; Colorado Commission Qwest I Comments at 23-24; Idaho Commission Qwest I Comments at I I; Iowa Board Qwest I Comments at 53-54; North Dakota Commission Qwest I Comments at 4-5; and Nebraska Commission Quest I Comments at 1.

1406 *See* Touch America Qwest II Comments at 11-13; Touch America Qwest I Comments at 10; Touch America Qwest II Reply at 12-13; Touch America Qwest I Reply at 14.

1407 *Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-004 (February I I, 2002) (revised and refiled March I, 2002); *Touch America, Inc. v. Qwest Communications International Inc., et al.*, File No. EB-02-MD-003 (February 8, 2002).

1408 47 U.S.C. § 271(c)(2)(B)(xi); see *also* Appendix K at para. 63.

1409 47 U.S.C. § 251(b)(2).

requirements of checklist item 11 as it complies with the Commission's (a) long term number portability ("LNP) implementation schedule; (b) performance criteria; (c) technical, operational, architectural and administrative requirements and (d) cost recovery rules for number portability.[1410] Based on the evidence in the record, we conclude, as did each of the nine state commissions, that Qwest has satisfied the requirements of checklist item 11.[1411]

382. Only one commenter, OneEighty, offers comments on this checklist item, which we reject for the following reasons. OneEighty alleges that Qwest lacks an adequate system of internal controls to manage number portability, which led to over *6,000* of OneEighty's Montana business customers losing service for three and a half hours in June 2002, and another outage the following month.[1412] Both OneEighty and Qwest agree the July outage is directly related to the June outage.[1413] Accordingly, the outages are addressed jointly.

383. A review of the events leading up to the June and July outages do not demonstrate that Qwest's actions or inaction directly caused or exacerbated the outages. The events in question involve a North American Numbering Plan Administration ("NANPA") administrator and a mistake made with respect to an area code/exchange ("NPA/NXX"). A prospective subsidiary of OneEighty sent an order to the NANPA administrator to change the name and revenue accounting office for the NPA/NXX from the subsidiary to OneEighty.[1414] The NANPA administrator mistakenly processed the transfer order as an order to cancel the subsidiary's use of this NPA/NXX, causing the OneEighty outages.[1415] In accordance with the industry's guidelines, NANPA put the subsidiary/OneEighty and Qwest on notice that the NPA/NXX would be cancelled, a month prior to the outage.'"' Thus, despite the initial error by the NANPA

1410 Qwest II Application App. A., Tab 23, Declaration of Margaret S. Bumgarner at para. 3; Qwest I Application App. A., Tab 24, Declaration of Margaret S. Bumgarner at para. 3.

1411 Colorado Commission Qwest III Comments; Idaho Commission Qwest III Comments; Iowa Commission Qwest III Comments; Montana Commission Qwest III Comments; Nebraska Commission Qwest 111 Comments; North Dakota Commission Qwest III Comments; Utah Commission Qwest III Comments; Washington Commission Qwest III Comments; and Wyoming Commission Qwest III Comments.

1412 OneEighty Qwest III Comments at 9-14; OneEighty Qwest II Comments at 9-12.

1413 See OneEighty Qwest II Comments at 9-12; Letter from Hance Haney, Attorney, Qwest II to Marlene H. Dortch, Secretary, Federal Communications Commission at 3, WCB Docket No. 02-189 (dated August 20b, 2002) *(Qwest II* August *20b* Ex *Parte).*

1414 OneEighty Qwest III Comments at 10; OneEighty Qwest II Comments at 10.

1415 Avista Communications, in anticipation of becoming an operating subsidiary of OneEighty, sent an order to the NANPA administrator, NeuStar, to change the name and revenue accounting office for the NPANXX 406/294 from Avista to OneEighty. NeuStar mistakenly processed the order as an order to cancel Avista's use of this NPANXX and notified Qwest, as the service provider that had ported 406/294 numbers, that it must either assume the 406/294 NPANXX or number changes would have to be done for the customers. OneEighty Qwest II Comments at 10; OneEighty Qwest III Comments at 10.

1416 On May 22,2002 NANPA issued a "Central Office Code (NXX) Assignment Request – Part *3"* form that was sent to both the original code holder, Avista, and to the new code assignee, Qwest, with an effective date of July 13, 2002, pursuant to NANPA's Code Return procedures, § 4.d. Accordingly, the Assignment Request – Part 3 form (continued. ...)

administrator, OneEighty had ample notice of the mistakenly processed order, yet it apparently failed to take expeditious corrective action. In addition, the Qwest Account Service Manager contacted OneEighty prior to performing the work that resulted in the outage.""

384. We recognize that careful coordination between carriers and NANPA is essential to ensure that mistakes of this kind do not lead to customer outages. The evidence in the record, however, does not support a finding that Qwest's process, or its specific actions relating to these incidents, warrant a finding of checklist noncompliance. The service disruptions arose from an error by the NANPA administrator, rather than Qwest's failure to provide portability in compliance with the Act.

385. OneEighty contends that one result of the outages was a drop in call termination records from Qwest. It argues that a drop in call termination records between late June and late August 2002 is a basis for a determination of checklist noncompliance.[1418] OneEighty states that it immediately notified Qwest of the problem. Upon investigation, Qwest determined that the record problem was not region-wide but rather specific to OneEighty. Indeed, Qwest later concluded, and OneEighty concurs, that the record drop was the result of the outages.[1419] Given the mistake of the NANPA administrator and the background of these outages, we do not find Qwest to be noncompliant with this checklist item.

H. Checklist Item 14 – Resale

386. Section 271(c)(2)(B)(xiv) of the Act requires that a BOC make "telecommunications services . . . available for resale in accordance with the requirements of section 251(c)(4) and section 252(d)(3)."[1420] Based on the record, we conclude, as did the state commissions of each of the nine application states,[1421] that Qwest satisfies the requirements of this checklist item.[1422]

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provided OneEighty with approximately one month (between May 22nd and June 25) to correct the mistaken order and avoid the outage. *See* Qwest II August 20b *Ex Parte* Letter at 2-3.

1417 Furthermore, the Qwest Account Service Manager, assigned to OneEighty, provided some additional notice to OneEighty with a courtesy call, advising them that Qwest was beginning the activation of the returned code 406-294. *See* Qwest II August 20b *Ex Parte* Letter at 1.

1418 OneEighty Qwest III Comments at 14-15.

1419 OneEighty Qwest III Comments at 14-15.

1420 47 U.S.C. § 271(c)(2)(B)(xiv); *see also* Appendix K at para. 67.

1421 Colorado Commission Qwest I Comments at 26; Idaho Commission Qwest I Comments at 4; Iowa Commission Qwest I Comments at 61; Nebraska Commission Qwest I Comments at 8; North Dakota Commission Qwest I Comments at 5; Montana Commission Qwest II Comments at 45; Utah Commission Qwest II Comments at 5; Washington Commission Qwest II Comments at 25; Wyoming Commission Qwest 11 Comments at 9.

1422 Qwest recognizes that it has a concrete and specific legal obligation through its SGAT and state-approved interconnection agreements to make its retail services available for resale to competing carriers at wholesale rates. (continued...)

387. We reject the challenges raised by commenters that Qwest does not meet checklist item 14 requirements with respect to DSL.[1423] AT&T asserts that Qwest has not satisfied its resale obligations because it does not offer for resale the volume-discounted DSL-based services that it provides to the Microsoft Network LLC (MSN), an Internet service provider (ISP).[1424] AT&T alleges that an investigation by the Minnesota Department of Commerce has revealed that Qwest is not only selling DSL services to MSN pursuant to its tariff, but is also providing typical retailing functions, including marketing, billing, and collection pursuant to contract arrangements with MSN.[1425]

388. As an initial matter, we note that Qwest makes a retail DSL offering available for resale under section 251(c)(4).[1426] AT&T's argument focuses on whether Qwest's tariffed DSL transmission offering to ISPs that already is discounted based on volume additionally should be subject to a section 251(c)(4) wholesale discount.[1427] We disagree with AT&T that the *AOL Bulk*

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Qwest III Application at 2; Qwest II Application at III; Qwest I Application at 105; Qwest II Application App. A, Tab 26, Declaration of Lori A. Simpson (Qwest II Simpson-Resale Decl.) at para. 3; Qwest I Application App. A, Tab 27, Declaration of Lori A. Simpson (Qwest I Simpson-Resale Decl.) at para. 3. Qwest provisions resale lines in a timely manner, consistently meeting the benchmarks for installation commitments met with the exception of Washington. See discussion above in the provisioning section. PID: OP-3, June 2002-September 2002 (Installation Commitments Met). Competitors also experienced low trouble rates, with limited exceptions, from June through September 2002. We note that even where the trouble rate benchmarks were not met during this period, Qwest demonstrated consistent performance improvements month over month. PID: MR-8, June 2002-September 2002 (Trouble Rate). Moreover, Qwest meets its obligation here because the evidence demonstrates that Qwest consistently repairs competitive LEC troubles in a timely fashion. Accordingly, we also find that Qwest demonstrates that it provides maintenance and repair for resale lines in a manner that affords competitors a meaningful opportunity to compete. Specifically, the commercial data shows that, in at least four out of five months for all categories of resale service, Qwest passed both the mean time to restore metric, and the repair repeat report metric. PID: MR-6, June 2002-September 2002 (Mean Time to Restore); PID MR-7, June 2002-September 2002 (Repair Repeat Report Rate).

[1423] "When considering commenters' filing in opposition to the BOC's application, we look for evidence that the BOC's policies, procedures, or capabilities preclude it from satisfying the requirements of the checklist item. Mere unsupported evidence in opposition will not suffice." *SBC* Texas Order, 15 FCC Rcd at 18375, para. 50.

[1424] AT&T Qwest II Comments at 119-121; AT&T Qwest II Reply at 63; AT&T Qwest I Comments at 104; AT&T Qwest I Reply at 63. AT&T also challenged whether Qwest provides nondiscriminatory access to packet switching. We address the issue under checklist item 6, unbundled local switching.

[1425] AT&T Qwest II Comments at 119; AT&T Qwest I Comments at 105.

[1426] Qwest II Application at 112-13; Qwest I Application at 106; Qwest 1 Reply at 88; Qwest II Simpson-Resale Reply Decl. at para. 25; Qwest I Simpson-Resale Reply Decl. at para. 33; Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 at 1 (filed November 18f, 2002) (*Qwest* Nov. *18f Ex Parte*).

[1427] Bulk discounts range from 11 to 32 percent based on volumes that ISPs are required to maintain. See Qwest Tariff F.C.C. No. 1, 2nd Revised Page 8-310.5 and 1st Revised Page 8-310.6. State wholesale discounts range from 14.74 to 19.37 percent. See Letter from David L. Sieradzki, Counsel for Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-514 at 1-2 (tiled November 12c, 2002) (*Qwest* Nov. *12c* Ex *Parte* Letter) (citing to the applicable discounts in Qwest's SGATs).

Services Order" requires a finding that Qwest's contractual arrangements for marketing, billing and collection services with one ISP, MSN, obligates it to make its bulk DSL transmission offering to ISPs available to other carriers at a further wholesale discount under section 251(c)(4).

389. It is undisputed that Qwest is a marketing, billing and collection agent for MSN.[1429] It appears on this record that MSN **is** purchasing a DSL transmission service on a wholesale basis **for** inclusion in its high-speed Internet access service and that the customer-care functions provided by Qwest are performed in connection with MSN's provision of that information service.[1430] AT&T has not shown that the customer-care functions provided by Qwest transform the wholesale DSL transmission service that Qwest provides to MSN into a retail telecommunications service within the meaning of section 251(c)(4). We note that there currently is a proceeding pending before the Commission regarding Qwest's contractual arrangements with MSN.[1431] Additionally, the Commission currently has pending before it a rulemaking proceeding which addresses related issues.[1432] It is possible we could reach a different conclusion in the future based on additional facts not before us in this proceeding.[1433]

[1428] ***See Deployment of Wireline Services Offering Advanced Telecommunications Capability,*** CC Docket No. 98-147, Second Report and Order, 14 FCC Rcd 19237 (1999) ***(AOL Bulk Services Order).*** The ***AOL Bulk Services Order*** concluded that "advanced telecommunications services sold to ISPs as an input component to the ISPs' retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers." See also 47 C.F.R. § 51.605(c).

[1429] Qwest II Reply at 86-88; Qwest I Reply at 88; Qwest II Simpson-Resale Reply Decl. at para. **53;** Qwest I Simpson-Resale Reply Decl. at para. **35.**

[1430] ***See*** Qwest II Reply at 86; Qwest I Reply at 88 ("Qwest serves as MSN's marketing and billing agent with respect to the bundled DSL ***information*** service that MSN sells to end users.") ***(emphasis in original). See also*** Qwest II Simpson-Resale Reply Decl. at para. 52; Qwest I Simpson-Resale Reply Decl. at para. 35 ("Qwest has a hilling and collection arrangement with MSN whereby the MSN Broadband service appears on the Qwest bill."); Qwest II Simpson-Resale Reply Decl. at para. 53; Qwest I Simpson-Resale Reply Decl. at para. 35 ("[A]ny interactions that Qwest may have with the end user consumers of MSN's DSL ***information service*** could not logically transform the separate bulk DSL transmission service that Qwest sells to MSN into a 'retail' service.") ***(emphasis in original).***

[1431] ***Petition for Declaratory Ruling, Petition of Qwest Corporation for Declaratory Ruling Clarifying that the Wholesale DSL Services Qwest Provides to MSN are not "Retail" Services Subject to Resale under Section 251(c)(4) of the Act,*** WC Docket No. 02-77, filed Apr. 3, 2002.

[1432] ***In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements,*** Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002).

[1433] ***See SWBT Kansas/Oklahoma Order,*** 16 FCC Rcd at 6355, para. 230 ("As we have found in past section 271 proceedings, the section 271 process simply could not function if we were required to resolve every interpretive dispute about the precise content of an incumbent LEC's obligations to its competitors, including fact-intensive interpretive disputes."). See also ***SWBT Kansas/Oklahoma Order*** 16 FCC Rcd at 6246, para. 19 ("[T]here will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of **an** incumbent LEC's obligations to its competitors – disputes that our rules have not yet addressed and that do not (continued.. ..)

To the extent that any commenter believes that the contractual arrangement between Qwest and MSN violates the Commission's rules or the Act, those issues are more appropriately presented to the Commission in a section 208 complaint proceeding.[1434]

390. We also reject AT&T's allegation that Qwest denies competitive LECs nondiscriminatory access to network elements because it converts misdirected maintenance and repair calls into opportunities for winning back competitive LECs' customers.[1435] AT&T maintains that while competitive LECs are allowed to engage in this practice, Qwest's ability to do so should be restricted, given its dominance and significantly more opportunities to win back customers.[1436] In response, Qwest maintains that to prevent it from marketing on such calls would be an impermissible restriction on free speech."[1437] We find that the record is inconclusive as to whether an anticompetitive effect has actually resulted from this practice. Moreover, we note that the Colorado Commission has found that Qwest should not be prohibited from marketing its services during misdirected calls.[1438] We further note that any use by Qwest of customer proprietary network information ("CPNI") generated by customers of competitive LECs to market to customers during misdirected calls would likely run afoul of section 222(b) of the Telecommunications Act,[1439] and our rules governing retention marketing.[1440] However, the record does not reflect allegations that such uses of CPNI are occurring. To the extent that a party believes that a carrier is engaging anticompetitive or prohibited behavior, the section 208 complaint process can be utilized to address fact-specific issues.

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involve *per se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.") *(citing American Tel. and Tel.* Co. *v. FCC*, 220 F.3d 607,631 (D.C. Cir. 2000); *SWBT Texas Order* at 15 FCC Rcd at 18366-18367, paras. 25-26.

[1434] ISPs that believe Qwest is engaging in discriminatory or otherwise unlawful conduct, for example, under our *Computer III* rules, may tile a complaint with the appropriate state authority or this Commission.

[1435] AT&T Qwest I Comments at 91. Misdirected maintenance and repair calls refer to calls placed in error to Qwest by competitive LEC customers seeking maintenance and repair support. *See* Iowa Board Reply at 23 (noting that issue does not apply in Iowa).

[1436] AT&T Qwest I Comments at 91

[1437] Qwest I Simpson-Resale Reply Decl. at para. 22.

[1438] Qwest I Application App. C, Vol. 3, Tab 10 at 96-104, Colorado Commission Hearing Commission Volume IIA Resolution Decision.

[1439] 47 U.S.C § 222(b).

[1440] See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended; 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers,* Third Report and Order and Third Further Notice of Proposed Rulemaking, CC Docket Nos. 96-115, 96-149, 00-257, FCC 02-214, paras.131-134 and Orders cited therein.

391. Other commenters raise issues challenging Qwest's unwillingness to make services available for resale at wholesale rates. The Payphone Associations argue that Qwest does not make Public Access Lines (PALs)[1441] available for resale in all of the applications states.[1442] Specifically, the Payphone Associations allege that Qwest's SGAT in Colorado offers a 0% discount on public access lines (PALs) in Colorado, and that Qwest does not even list PALs as being available for resale in North Dakota and Nebraska.[1443] In response, Qwest maintains that PALs are available for resale in all states within its region.[1444] Qwest states that section 6.1.1 of its SGAT provides that all telecommunications services offered "at retail" to end users that are not telecommunications carriers are available for resale.[1445] Qwest also notes that the SGAT for each state lists services not available for resale in Section 6.2.2, and PAL is not listed there.[1446] As to Colorado, Qwest states that the *0%* discount was the result of a decision by the Colorado Commission in its first cost docket.[1447] In that docket, Qwest presented evidence that it would not avoid any costs in making PALs available for resale because payphone lines are managed by the same business group that manages competitive LECs – same billing systems, same collections activities, same people.[1448] The state payphone association in that case proposed a discount between 18% and **30%** but it did not use an avoided cost methodology.[1449] Based on the record before it, we do not find that the Colorado Commission acted unreasonably in establishing a *0%*

[1441] We use the term Public Access Lines in this discussion to be consistent with the terminology of the Colorado SGAT. We note, however, that the Payphone Associations use the terms Payphone Access Lines and Pay telephone access lines to denote the same lines. See Payphone Associations Qwest I Comments at 3 & n.5.

[1442] See Payphone Associations Qwest I Comments at 2 n.3

[1443] ***Id.*** at 2-3, n.3.

[1444] Qwest I Reply at 90-91; Qwest II Simpson-Resale Reply Decl. at paras. 54-56; Qwest I Simpson-Resale Reply Decl. at paras. 44-47. Qwest also states that in Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, and Washington it will clarify in its SGATs the resale discounts that apply to PALs. See Qwest II Simpson-Resale Reply Decl. at para. 56; Qwest I Simpson-Resale Reply Decl. at para. 47.

[1445] Qwest I Reply at 90-91; Qwest II Simpson-Resale Reply Decl. at para. 54; Qwest I Simpson-Resale Reply Decl. at para. 44.

[1446] Qwest II Simpson Resale Decl. at para. 55; Qwest I Simpson Resale Decl. at para. 45.

[1447] Letter from David L. Sieradzki, Counsel for Qwest Communications International, Inc., to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148 at **4** (dated July 24b, 2002) (Qwest July 24b Ex ***Parte).***

[1448] ***Investigation and Suspension** of **Tariff Sheets filed** by **U S WEST Communications,** Inc., **with Advice Letter No. 261** 7, **Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services***, Docket No. 96S-331T, Rebuttal Testimony of Brian **Johnson** on behalf of U S WEST Communications, Inc. at 68 (Mar. 28, 1997).

[1449] ***Investigation and Suspension** of **Tariff Sheets filed** by **U S WEST Communications, Inc., with Advice Letter No. 261** 7, **Regarding Tariffsfor Interconnection, Local Termination, Unbundling and Resale of Services***, Docket No. 96S-33 IT, Direct Testimony of Richard Hodges on behalf of the Colorado Payphone Association at 6-7 (Feb. 21,1997).

discount for payphone lines. Accordingly, we conclude that Qwest's resale policies as it relates to PALs comply with the requirements of checklist item 14.

I. Remaining Checklist Items

392. In addition to showing compliance with the statutory requirements discussed above, an applicant for section 271 authority must demonstrate that it complies with checklist item 3 (poles, ducts, and conduits), item 8 (white pages), item 9 (numbering administration), item 12 (local dialing parity), and item 13 (reciprocal compensation). Based on the evidence in this record, we conclude, as did each of the state commissions that Qwest complies with the requirements of all of the checklist items: 3, 8, 9, 12, and 13.[1450] None of the commenting parties challenge Qwest's compliance with these items.

VI. SECTION 272 COMPLIANCE

A. Background

393. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."[1451] The Commission set standards for compliance with section 272 in the ***Accounting Safeguards Order*** and the ***Non-Accounting Safeguards Order***.[1452] Together, these safeguards discourage and facilitate the detection of improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.[1453] In addition, these safeguards ensure that BOCs do not discriminate in favor of their section 272 affiliates.[1454] As the Commission stated in prior section 271 orders, compliance with section 272 is "of crucial importance" because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing

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[1450] Colorado Commission Qwest III Comments; Idaho Commission Qwest III Comments; Iowa Commission Qwest III Comments; Montana Commission Qwest III Comments; Nebraska Commission Qwest III Comments; North Dakota Qwest III Commission Comments; Utah Commission Qwest III Comments; Washington Commission Qwest III Comments; and Wyoming Commission Qwest I11 Comments.

[1451] 47 U.S.C. § 271(d)(3)(B); see ***also*** Appendix K.

[1452] ***See Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996,*** CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) ***(Accounting Safeguards Order),*** Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); ***Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,*** CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) ***(Nan-Accounting Safeguards Order);*** First Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), ***aff'd sub nom.*** Bell ***Atlantic Tel. Cos. v. FCC***, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999).

[1453] ***See Non-Accounting Safeguards Order,*** 11 FCC Rcd at 21914, para. 15; ***Accounting Safeguards Order,*** 11 FCC Rcd at 17550, para. 24; ***Ameritech Michigan Order,*** 12 FCC Rcd at 20725, para. 346.

[1454] ***See Non-Accounting Safeguards Order,*** 11 FCC Rcd at 21914, paras. 15-16; ***Ameritech Michigan Order,*** 12 FCC Rcd at 20725, para. 346.

field.[1455] Based on the record, we conclude that Qwest and Qwest LD Corp. ("QLDC"), its section 272 affiliate, have demonstrated compliance with the requirements of section 272.

394. As noted above, Qwest previously filed multi-state applications on behalf of itself and its subsidiaries, Qwest Corporation ("QC"), the BOC, and Qwest Communications Corporation ("QCC"), its designated separate section 272 affiliate, to provide originating in-region interLATA services in Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming.'"' In its initial applications, Qwest stated that its section 272 affiliate for those applications, QCC, maintained its books, records, and accounts in accordance with Generally Accepted Accounting Principles ("GAAP"), and that all transactions between QCC and QC, the BOC, were accounted for in compliance with GAAP.[1457]

395. Subsequent to the initial filing, however, Qwest disclosed that both internal and third party reviews of Qwest's accounting practices were underway, and that certain recently discovered accounting transactions rendered Qwest unable to certify whether certain of its financial statements were consistent with GAAP.[1458] On September 10,2002, Qwest withdrew its section 271 applications.

396. Subsequently, Qwest formed a new section 272 affiliate, QLDC, and filed the instant application on September 30, 2002. QLDC is a switchless reseller, which is a wholly-owned subsidiary of Qwest Services Corporation, which, in turn, is a wholly-owned subsidiary of QCII.[1459]

[1455] ***Ameritech Michigan Order,*** **12** FCC Rcd at **20725,** para. **346;** see SWBT ***Texas Order,*** 15 FCC Rcd at **18549,** para. **395.**

[1456] See **47** U.S.C. § **272 (a)(2)(B)(ii).**

[1457] Qwest I Application App. A, Tab **37,** Declaration of Judith L. Brunsting (Qwest I Brunsting Decl.) at para. **29** ("The **272** Affiliate follows Generally Accepted Accounting Principles ("GAAP), **as** adopted by the FCC in Docket 96-150."); Qwest I Application App. A, Tab **38,** Declaration of Marie E. Schwartz (Qwest I Schwartz Decl.) at para. **48** ("The BOC's books records, records and accounts are maintained in accordance with USOA, Part **32.27,** and Part **64.901,** Allocation of Costs."). GAAP is that common set of accounting concepts, standards, procedures, and conventions that are recognized by the accounting profession as a whole and upon which most enterprises base their external financial statements and reports. GAAP is incorporated into the Commission's Uniform System of Accounts to the extent that regulatory considerations allow. See **47** C.F.R. § **32.1.**

[1458] Letter from Oren G. Shaffer, Vice Chairman and Chief Financial Officer, Qwest Communications International Inc., to Marlene H. Dortcb, Secretary, Federal Communications Commission, WC Docket Nos. **02-148** and **02-189,** at **1-2** (filed August **20,2002)** (Qwest August **20k** ***Ex Parte*** Letter). Qwest stated that the transactions subject to adjustment involve third-party optical capacity and equipment sales, improper recording of expenses, and improper booking of revenues from Qwest's yellow pages operations, *i.e.*, transactions that Qwest claimed do not involve transactions between Qwest and QCC. Qwest later clarified that only QCII was unable to certify its financial statements, since there are no certified financial statements for QCC. Qwest I Supplemental Comments on Accounting Issues at 3, n.7.

[1459] Qwest III Application at 10

397. Consistent with our approach to other BOC applications under section 271, our judgment about Qwest's compliance with section 272 is a predictive one, as required by section 271(d)(3)(B) of the Act.[1460] Specifically, our task is to determine whether Qwest's section 272 affiliate, QLDC, will be complying with this requirement on the date of authorization, and thereafter. In making that predictive judgment, we are informed by the past and current actions of QLDC, including, as addressed more fully below, measures taken by Qwest that affect our predictive analysis. We focus our discussion on those areas where commenters challenge Qwest's compliance with these requirements. For the reasons discussed below, based on the record, we conclude that Qwest has demonstrated that it will comply with the requirements of section 272. We address each section 272 requirement below.

B. Discussion

398. Before turning to the specific requirements of section 272 and our implementing rules, we address the argument that QLDC is a sham corporation that will not actually be providing interLATA service upon grant of section 272 approval.[1461] As set forth below, we conclude that Qwest has adequately demonstrated that QLDC will be the entity providing in-region, interLATA service originating in the nine states that are the subject of this application.""

399. The Commission affords BOCs considerable flexibility in how they structure their section 272 affiliates. The Commission's rules do not mandate how many employees, or the

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[1460] Several courts have addressed the Commission's discretion to make predictive judgments. In different contexts, the United States Supreme Court has recognized that the Commission must necessarily make difficult predictive judgments in order to implement certain provisions of the Communications Act. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582,594-96 (1981) (recognizing that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations) (citing FCC v. *Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775,813-14 (1978)); *NAACP* v. *FCC*, 682 F.2d 993 (D.C. Cir. 1982) ("greater discretion is given administrative bodies when their decisions are based upon judgmental or predictive conclusions"); see *also Pub. Util. Comm'n of State of Cal.* v. *F.E.R.C.*, 24 F.3d 275,281 (D.C. Cir. 1994) (acknowledging that predictions regarding the actions of regulated entities are the type of judgments that courts routinely leave to administrative agencies). Indeed, we note that determining whether a BOC's section 271 application meets the requirements of the competitive checklist, the requirements of section 272, and is consistent with the public interest, convenience and necessity requires the Commission to engage in highly complex, fact-intensive analyses. *See* 47 U.S.C. § 271(d)(3).

[1461] AT&T and Touch America allege that QLDC is a "sham" corporation that will be "merged" with QCC immediately after approval. AT&T Qwest III Comments at 18-20; Touch America Qwest III Comments at 3-4; *see* also AT&T November 7 Ex *Parte* letter at 3.

[1462] *Cf. AT&T Corp.* v. US *WEST Corp.*, 13 FCC Rcd 21465-66, para. 37 ("*Qwest Teaming Order*"), *aff'd sub nom. U.S. West Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1188 (2000). In the *Qwest Teaming Order*, the Commission considered the totality of the circumstances, rather than focusing on any one particular activity, in assessing whether the BOC was providing interLATA service within the meaning of section 271. *Id.* In making its determination, the Commission considered several factors, including whether the BOC was effectively holding itself out as a provider of long distance service, and whether the BOC was performing activities and functions that were typically performed by those who are legally or contractually responsible for providing interLATA service to the public. *Id.* Similarly, we consider, for purposes of this section 271 application, the totality of the circumstances in determining whether QLDC is the entity that will be providing originating in-region, interLATA service.

amount of capitalization, the section 272 affiliate must have prior to section 271 approval.[1463] Our rules do not require a BOC to be a facilities-based provider of interLATA service. Each BOC is free to structure its operations consistent with its own business needs, so long as it complies with the statute and our rules. Here, Qwest adequately demonstrates that QLDC is, in fact, a separate section 272 affiliate that will, following grant of Qwest's application, provide interexchange service in compliance with section 272. Qwest provides evidence that QLDC has applied for state operating authorizations,'" and that QLDC has contracted with WorldCom to resell services.[1465] We, therefore, are not persuaded that Qwest intends for QCC (the proposed section 272 affiliate from the initial applications), not QLDC, to actually conduct operations as the section 272 affiliate. In the event that Qwest does "merge" QLDC with another entity in the future, Qwest must, of course, comply with all of the Commission's rules.[1466] We plan to monitor this situation closely, and may investigate Qwest's compliance with our rules should the circumstances warrant. If QLDC is merged with an entity that is not GAAP compliant or otherwise violates the Commission's relevant section 272 rules, we are prepared to take appropriate enforcement action under section 271(d)(6).

1. Structural, Transactional, and Accounting Requirements of Section 272

400. ***Section 272(b)(1) – Operate Independently.*** Based on the evidence in the record, we conclude that QC and QLDC, Qwest's section 272 affiliate, comply with section 272(b)(1).[1467] The Commission has interpreted the "operate independently" requirement to impose four important restrictions on the ownership and operations of a BOC and its section 272 affiliate: (1) no joint ownership of switching and transmission facilities; (2) no joint ownership of the land and buildings on which switching and transmission facilities are located; (3) no provision by the BOC (or other non-section 272 affiliate) of operation, installation, and maintenance services (OI&M)

1463 We also note that the Commission has not previously required that the BOC applicant have any particular number of, other than a minimum of one, section 212 affiliates. ***See. e.g., Bell Atlantic New York Order,*** 15 FCC Rcd at 4153-54, para. 405 (addressing Bell Atlantic New York's three section 272 affiliates); ***see*** also ***SWBT Texas Order,*** 15 FCC Rcd at 18548-50, para. 398 (addressing SWBT Texas's single section 272 affiliate).

1464 We note that the Commission's rules do not require the section 272 affiliate to be licensed/certified by a state at the time of either the filing or approval of the BOC's section 271 application. However, we take comfort in, but do not rely upon, Qwest's efforts to obtain appropriate state authorizations. We fully expect that Qwest will not offer interLATA services in a particular state without obtaining the necessary regulatory approvals for that state. Qwest III Application at 7-8.

1465 Qwest III Reply at 7-8; Qwest III Reply App. A, Tab 12, Reply Declaration of Judith L. Brunsting (Qwest III Brunsting Reply Decl.) at paras. 2, 5.

1466 Qwest III Application at 9-10, n.11; Qwest III Application App. A, Tab 2, Declaration of Judith L. Brunsting (Qwest III Brunsting Decl.) at paras. 19-20; Qwest III Application App. A, Tab 3, Declaration of Marie E. Schwartz (Qwest III Schwartz Decl.) at paras. 21-24.

1467 Qwest III Application at 10-13; Qwest III Brunsting Decl. at paras. 19-20; Qwest III Schwartz Decl. at paras. 21-24.

with respect to the section 272 affiliate's facilities; and (4) no provision of OI&M by the section 272 affiliate with respect to the BOC's facilities.[1468]

401. Qwest maintains that QLDC and QC do not and will not jointly own telecommunications transmission and switching facilities, or the land and buildings on which such facilities are located.[1469] QLDC asserts that it does not provide QC with OI&M services in connection with Qwest's switching and transmission facilities.[1470] Furthermore, QC and QLDC have committed to comply with the requirements of section 272 and the Non-Accounting Safeguards Order for as long as those rules are in place.[1471] No party disputes these specific showings. Based on the record before us, we conclude that Qwest has adequately demonstrated compliance with the "operate independently" requirement.

402. Section *272(b)(2) – Books*, Records *and Accounts.* Based on the evidence in the record, we find that Qwest has demonstrated that it will comply with the requirement that its section 272 affiliate "shall maintain books, records, and accounts in a manner prescribed by the Commission which shall be separate from the books, records and accounts maintained by the [BOCs]."[1472] In the Accounting Safeguards Order, the Commission determined that the section 272 affiliates must maintain their books, records, and accounts in accordance with GAAP.[1473] Qwest states that its newly formed section 272 affiliate maintains its books, records, and accounts in accordance with GAAP.[1474] There is no persuasive evidence in the record to the contrary.

403. Because QLDC has a limited prior financial history due to its recent formation, we rely in large part on Qwest's implementation of extensive controls designed to prevent, detect, and correct any accounting irregularities in the future.[1475] Specifically, since early July 2002, Qwest has enhanced its internal controls over compliance. In particular, QCII's CFO has

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[1468] 47 C.F.R. §§ 53.203(a)-(c); see ***Non-Accounting Safeguards Order,*** 11 FCC Rcd at 21981-82, para. 158; see ***also Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20787, para. 325.

[1469] Qwest III Application at 10; Qwest III Brunsting Decl. at para. 19; Qwest III Schwartz Decl. at para. 21

[1470] Qwest III Brunsting Decl. at para. 19. Correspondingly, QC states that neither it nor any other Qwest affiliate performs any OI&M services related to any QLDC switching and transmission facilities, nor will it do so as long as a restriction applies. Qwest III Application at 10 (noting that QLDC is presently a switchless reseller).

[1471] Qwest III Brunsting Decl. at para. 6; Qwest III Schwartz Decl. at paras. 5-14.

[1472] 47 U.S.C. § 271(b)(2); 47 C.F.R. § 53.203(b).

[1473] ***Accounting Safeguards Order,*** 11 FCC Rcd at 17617, para. 170. GAAP is that common set of accounting concepts, standards, procedures, and conventions that are recognized by the accounting profession as a whole and upon which most enterprises base their external financial statements and reports. The Commission reasoned that GAAP would result in a uniform audit trail at minimum cost, and would impose a degree of uniformity on the affiliates. *Id.*

[1474] Qwest III Brunsting Decl. at para. 21

[1475] Qwest III Application at 11-12.

required and reviewed regular reports from KPMG and the Senior Vice President.[1476] In addition to generally increasing the staffing of the accounting group, Qwest's CFO has also retained approximately 20 experienced consultants in order to ensure sufficient resources to properly account for new transactions.[1477] Also, a new "Projects and Analysis Group" has been created that is responsible for "establishing and managing the accuracy of QCII's books, records, and accounts and implementing internal control enhancements."[1478]

404. Moreover, we note that the accounting concerns in Qwest's prior section 271 applications are not present here. In Qwest's initial applications, Qwest revealed that certain transactions involving its designated section 272 affiliate were subject to restatement.[1479] Here, in addition to the evidence of the mechanisms, procedures and controls that QC and QLDC have in place to ensure compliance, there is no evidence in the record suggesting that QLDC's financial statements are subject to accounting irregularities.

405. Contrary to the allegations of AT&T and Touch America, we do not think the underlying purposes of our section 272 accounting and audit requirements would be well served by focusing on the fact that certain past transactions conducted by QCC, which is not the section 272 affiliate for purposes of this application, may need to be restated.'"' Our evaluation necessarily is informed by the underlying purpose of section 272(b)(2) and the specific requirement – namely, compliance with GAAP by the section 272 affiliate – the Commission adopted to implement that statutory provision. A principal reason that the Commission adopted this requirement was to ensure that the company would have accounting records in a format that would result in "a uniform audit trail."'"' *An* important use for such an audit trail is *so* the Commission can determine whether any impermissible cross-subsidization between the BOC and its section 272 affiliate has occurred.[1482] In other words, maintaining books, records, and accounts in accordance with GAAP is required as a means to the ultimate goals of ensuring that the BOC does not misallocate its costs in a way that favors its section 272 affiliate and that all

[1476] Qwest III Application at I1; Qwest III Reply at *15;* Qwest August 26c *Ex Parte* Letter at 2; Qwest I Supplemental Comments on Accounting Issues at 15-17. Furthermore. Qwest's CFO "has also approved the elevation of the controller function to [that of Senior Vice President]." Id

[1477] Qwest III Application at 11; *see also* Qwest 111 Reply at 15-16.

[1478] Qwest III Reply at 15.

[1479] Qwest August 20k Ex *Parte* Letter

[1480] For example. AT&T has asserted that because Qwest acknowledges that there is a broad ongoing investigation of its accounting practices, the Commission lacks sufficient basis to conclude that QLDC's accounting practices will comply with the requirements of section 272. AT&T Qwest III Comments at 25.

[1481] *Accounting Safeguards Order,* 11 FCC Rcd at 17617, para. 170.

[1482] See *id.* at para. 243 (finding with respect to analogous concerns posed by section 274 information services affiliates that "[a] requirement of GAAP imposes a set of uniform accounting principles. Such uniformity will assist the Commission in ensuring that transactions between 'separated' affiliates or joint ventures required under section 274 and their affiliated BOCs are conducted 'in a manner consistent with such independence'....").

transactions between the BOC and its section 272 affiliate occur on an arm's length basis once section 271 approval is granted. As stated above, because we are confident QLDC's books, records, and accounts will be maintained separate from the BOC and in accordance with GAAP on a forward-going basis, the underlying purpose of section 272(b)(2) will be satisfied. Accordingly, while we are generally concerned about, and may address in other proceedings, the accounting discrepancies, alleged by AT&T and Touch America, of other affiliates in the Qwest corporate family, such as QCC, we do not address those allegations here because there is not adequate evidence in the record to suggest that they have a bearing on the relationship between the BOC and its designated section 272 affiliate.

406. We, therefore, reject AT&T's argument that Qwest is unable to demonstrate current and future compliance with this Commission's GAAP requirements because Qwest has informed the Securities and Exchange Commission ("SEC") that Qwest is unable to state when internal and third party investigations and remedial actions will be completed.[1483] In the instant case, the record contains no evidence that QLDC has, either in the past or present, improperly accounted for transactions. We find that QLDC has shown that it has implemented adequate policies and controls that ensure GAAF' compliance today and on a going-forward basis. We expect to examine Qwest's compliance with these requirements in the section 272(d) biennial audit. To the extent the audit results reveal any potential noncompliance, Qwest could be subject to appropriate enforcement action.

407. Lastly, we take comfort in the fact that Qwest is, on its own initiative, taking the necessary steps both to evaluate its past accounting policies and practices, as well as to restate the financial statements, if necessary, of all Qwest entities. Qwest has replaced its top management team since the filing of its first application and has hired a new independent auditor, KPMG LLP, to conduct a comprehensive examination of QCII's financial statements.[1484] Further, Qwest has committed to conducting a transparent internal analysis of past accounting practices and expeditiously filing audited financial statements for the parent corporation.[1485] Given the current pending SEC investigation, and Qwest's aggressive responses to past accounting improprieties, Qwest has demonstrated that the current management will continue to take proactive measures to ensure that all transactions involving QLDC will be recorded in its books, accounts, and records in accordance with GAAP. To do otherwise would potentially expose Qwest to consequences far more severe than denial of this section 271 application.

408. ***Section 272(b)(3) – Separate Officers, Directors, and Employees.*** Based on the evidence in the record, Qwest has demonstrated that it will comply with the "separate officers, directors, and employees" requirement of section 272(b)(3).[1486] In the ***Ameritech Michigan Order,***

1483 AT&T Qwest I Supplemental Comments on Accounting Issues at 2.

1484 Qwest August 26c Ex Parte Letter at 2; *see also* Qwest Supplemental Comments on Accounting Issues at 15-17.

1485 Qwest August 26c Ex Parte Letter at 2.

1486 Qwest III Application at 12; Qwest III Brunsting Decl. at paras. 22-24; Qwest III Schwartz Decl. at paras. 33-39.

the Commission emphasized that section 272(b)(3) requires the BOC and its section 272 affiliate to have independent management. The Commission concluded that the BOC and its affiliate must appoint a separate board of directors if the corporations are wholly-owned subsidiaries of the same parent corporation, and applicable state law imputes the responsibilities of directors for the wholly-owned subsidiary to the shareholders of the parent corporation.[1487]

409. We disagree with AT&T that Qwest cannot meet its burden under section 272(b)(3) because "QLDC is merely a shell, with an insignificant number **of** its own employees, and entirely dependent upon the services of employees of QC and other Qwest affiliates."[1488] The Commission has never specified a minimum number of employees that a section 272 affiliate must have. The Commission has previously found that a comparison of officer and director lists and payrolls, which Qwest provides, can be used to demonstrate that the BOC and its section 272 affiliate have separate employees.[1489] Furthermore, the record indicates that employees and directors are not shared by the companies in any manner.[1490] Qwest states that no employees have ever been loaned between QC and QLDC and a policy is in place to prohibit exchanges of employees.[1491] In addition, QC and QLDC have implemented training on the requirements of section 272[1492] and have employees certify that they understand and will comply with the requirements, particularly the limitations on the disclosure of confidential information.[1493] In sum, the record reflects that QC and QLDC have established multiple procedures and controls to ensure compliance with the requirements of this section.

410. ***Section 272(b)(5) – Affiliate Transactions.*** Based on our review of Qwest's application, we conclude that Qwest demonstrates that it will comply with the public disclosure requirements ***of*** section 272(b)(5) for transactions between QC, the BOC, and QLDC, its section 272 affiliate. Section 272(b)(5) requires that a section 272 affiliate conduct all transactions with its affiliated BOC on an arm's length basis.[1494] In addition, the statute requires section 272 affiliates to reduce all such transactions to writing and make them available for public

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1487 ***Ameritech Michigan Order.*** 12 FCC Rcd at 20728-32, paras. 353-62.

1488 AT&T Qwest III Comments **at** 32. AT&T also asserts that Qwest fails **to** meet the requirements of section 272(b)(3) **because** it makes **no** representation regarding whether employees originated with the BOC, "but passed through QCC before **landing** at QLDC." AT&T Qwest III Comments **at** 33. The Commission's rules only address current sharing/transferring of employees directly between the BOC and the section 272 affiliate. See *Non-Accounting Safeguards* ***Order,*** 11 FCC Rcd at 21990-91, para. 178.

1489 *See Bell Atlantic New York Order,* 15 FCC Rcd at 4155, n.1261.

1490 Qwest III Application at 12; Qwest III Brunsting Decl. at para. 22-24.

1491 Qwest III Brunsting Decl. at para. 22; Qwest III Schwanz Decl. **at** para. 33.

1492 Qwest III Brunsting Decl. at para. 22; Qwest III Schwartz Decl. at para. 36.

1493 Qwest III Schwartz Decl. **at** para. 36, Exhibit MES-QC-15

1494 47 U.S.C. § 272(b)(5); 47 C.F.R. § 53.203(e)

inspection.[1495] Consistent with the Commission's ***Accounting Safeguards Order,*** Qwest must ensure that all transactions between its section 272 affiliate, QLDC, and any affiliated BOC are posted on the company's Internet homepage within 10 days of the transaction.[1496] To ensure that all affiliate transactions occur at **arm's** length, Qwest must also abide by the Commission's affiliate transactions rules.[1497]

411. We find that QLDC will comply with the public disclosure requirement of section 272(b)(5). AT&T argues that Qwest has failed to post all transactions between QC and QLDC on the Internet, and that Qwest fails to provide sufficient detail of such transactions.[1498] The record, however, demonstrates that Qwest provides adequate details of each transaction in accordance with the Commission's requirements, and furthermore, that Qwest has several safeguards in place to ensure compliance with section 272(b)(5), including all posting requirements.[1499] Moreover, the section 272(d) biennial audit requirement should ensure that QLDC continues to provide adequate descriptions of its posted transactions. Inadequate descriptions, if any, will be identified in the audit, and disclosed in the subsequent audit report, which could subject Qwest **to** enforcement action.

412. We also conclude that Qwest complies with the Commission's rules regarding the pricing, and the posting of such prices, of transactions between QC and QLDC. AT&T asserts that Qwest violates the affiliate transaction rules, which require QC and QLDC to conduct all transactions with each other on an arm's length basis, by improperly using the "prevailing company price" method for valuing certain transactions between QC and QLDC.[1500] Specifically, AT&T claims that QC and QLDC price their joint-marketing services agreement using the prevailing company price method, despite never having sold such services to "even one unaffiliated third party."[1501] Although AT&T is correct in stating that Qwest's application

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[1495] Section 272(b)(5) states that the section **272** affiliate "shall conduct *all* transactions with the [BOC] of which it is an affiliate on an arm's length basis with ***any such*** transactions reduced to writing and available for public inspection." **47** U.S.C. § 272(b)(5) (emphasis added).

[14%] ***See Accounting Safeguard Order,*** 11 FCC Rcd at **17593-94,** pan. 122; ***Ameritech Michigan Order,*** 12 FCC Rcd at **20734-37,** paras. 366-73; ***Second BellSouth Louisiana Order, I3 FCC*** Rcd **at 20790-95,** paras. 332-39.

[1491] **47** C.F.R. § **32.27;** ***Accounting Safeguards Order,*** **11** FCC Rcd at 17620, para. 116; ***see Second BellSouth Louisiana Order,*** 13 FCC Rcd at **20790-95,** paras. 332-39. The Commission's affiliate transactions rules require BOCs to report transactions between regulated and nonregulated affiliates, and to value the cost of affiliate transactions in accordance with a hierarchy of valuation techniques.

[1498] AT&T Qwest III Comments at **37; AT&T** Qwest III Selwyn Decl. at 26-28. Qwest acknowledges discrepancies with past disclosures for transactions between QC and QCC (the section **272** affiliate for the previous applications). Qwest I Schwartz Decl. at paras. **19-27.**

[1499] Qwest III Application at **13;** Qwest III Brunsting Decl. at paras. **29-39;** Qwest III Schwartz Supplemental Decl. at paras. **44-57.**

[1500] AT&T Qwest III Comments at **33-34.**

[1501] AT&T Qwest III Comments at **35.**

identifies prevailing company price as the valuation method **for** all current QLDC transactions, Qwest explains that it has not posted a work order (and the accompanying rate) for actual joint-marketing services because it has yet to receive section 271 approval.[1502] Qwest states that when it does post a work order between QC and QLDC for joint-marketing services, *i.e.*, post-approval of Qwest's application, it will properly value the costs of such joint-marketing services at the higher of **fair** market value or fully distributed cost.[1503] Should Qwest do otherwise, we are prepared to take appropriate enforcement action under section 271(d)(6).

413. ***Section 272(c)(2) – Accounfing Principles.*** Based on the evidence in the record, the Qwest BOC, QC, demonstrates that it accounts **for** all transactions with its section 272 affiliate in accordance with the accounting principles designated or approved by the Commission.[1504] In the ***Accounting Safeguards Order,*** the Commission concluded that complying with the **Part** 32 affiliate transactions rules satisfies the accounting requirements of section 272(c)(2), which pertain to the BOC's "dealings" with its separate affiliate.[1505] AT&T argues that because other "members **of** the Qwest corporate family" are revising their accounting practices, ***this*** demonstrates a "complete breakdown in accounting control systems" which prevents the Commission from making a reasoned finding that QC properly accounts for transactions with QLDC.[1506] We find, however, that the record in this proceeding indicates that QC has implemented the necessary controls to ensure that all transactions with QLDC are recorded in accordance with accounting principles designated or approved by the Commission.[1507] There is no evidence in the record to support the conclusion that QC does not comply with the requirements **of** section 272(c)(2).

1502 Qwest III Reply at 20, n.23. Qwest states that it uses the prevailing company price method when it makes the same service available to third parties at the same price provided to its section 272 affiliate, regardless of whether third parties actually choose to purchase such services from Qwest. Qwest III Reply at 19; ***see Accounting Safeguards Order,*** 11 FCC Rcd at 17601, para. 137.

1503 Qwest III Reply at 20 n.23. We also reject AT&T's claims that Qwest has not properly made the details of transactions between the BOC and QLDC available for public inspection. AT&T Qwest III Comments at 36-37. The record demonstrates that Qwest, with the exception of confidential information which is available at Qwest's headquarters to third parties under **a** non-disclosure agreement, properly posts on the Internet sufficient details of all relevant master service agreements, work orders, and individual agreements. Qwest 111 Reply at 24-26. Similarly, we reject AT&T's claims that Qwest improperly "backdates" agreements between QC and QLDC. AT&T Qwest III Comments at 36. Qwest demonstrates that it makes services available to unaffiliated entities within 10 days of executing a transaction in compliance with the Commission's rules. Qwest III Reply at 26 (citing ***Accounring Safeguards Order,*** 11 FCC Rcd at 17593-94, para. 122).

1504 Qwest III Application at 13-14; Qwest III Schwartz Supplemental Decl. at paras 59-64.

1505 47 C.F.R. § 32.21; ***Accounting Safeguards Order,*** 11 FCC Rcd at 17618, para. 170; ***Second BellSouth Louisiana Order,*** 13 FCC Rcd at 20795-96, para. 340.

1506 AT&T Qwest 111 Comments at 23-28

1507 Qwest III Schwartz Decl. at para. 64.

414. Qwest's disclosure of certain past accounting problems does not affect our conclusion that Qwest complies with section 272(c)(2). The record demonstrates that QC properly accounts for and publicly discloses transactions between the BOC and the section 272 affiliate, and that it will continue to do so.[1508] Based on the evidence before **us,** there is no indication that Qwest's showing of compliance with section 32.27 is deficient. We reject AT&T's assertion that Qwest has made only "paper promises" that its inter-affiliate transactions comply with GAAP.[1509] Simply put, the relevant requirement for purposes of section 272(c)(2) is whether QC is complying with the Commission's affiliate transaction rules. **As** noted above, Qwest has submitted several verified declarations expressly stating that QC presently accounts for these transactions in compliance with our affiliate transaction rules.[1510] We expect to examine Qwest's compliance with these requirements in the section 272(d) biennial audit. To the extent the audit results reveal any potential noncompliance, Qwest could be subject to appropriate enforcement action.

a. Nondiscrimination Safeguards of Section 272

415. ***Section 272(c)(1) –Nondiscrimination Safeguards.*** Based on the evidence in the record, we conclude that Qwest demonstrates that QC will comply with section 272(c)(1), which prohibits a BOC from discriminating in favor of its section 272 affiliate in the "provision or procurement of goods, services, facilities, and information, or in the establishment of standards."[1511] The Commission's nondiscrimination safeguards require a BOC to, among other

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[1508] Qwest III Schwartz Supplemental Decl. at para 64.

[1509] AT&T Qwest III Comments at 14

[1510] Qwest III Schwartz Supplemental Decl. at paras. 59-64; see *also* Qwest August 26c *Ex Parte* Letter at 1-2. In the initial applications, Qwest hued an independent accountant, KPMG, to conduct an attestation review of QCII's management assertion that transactions between QC and QCC comply with section 32.27 of the Commission's rules. Qwest Supplemental Comments on Accounting Issues, KPMG Independent Accountant's Report. KPMG's "Report of Management on Transactions between Qwest Corporation and Qwest Communications Corporation" states: "Based on our review, nothing came to our attention that caused us to believe that management's assertion ... is not fairly stated, in all material respects, based on Section 32.27 ..." Id On November 22, 2002, KPMG withdrew its attestation report, stating that its conclusions regarding transactions between QC and QCC could "no longer be relied upon." Letter from Jim Bickell, KPMG, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314, at 1 (filed November 22,2002). In response, AT&T now argues that Qwest's application must be denied because KPMG's withdrawal is evidence that Qwest cannot comply with section 272. Letter from C. Frederick Beckner III, Counsel for AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314, at 1 (filed December 4,2002). We disagree with AT&T and, as discussed herein, find that QC and QLDC comply with the Commission's rules. Moreover, KPMG's determinations with regard to QC's relationship with QCC are not relevant here because QCC is not the section 272 affiliate for the instant application.

[1511] 47 U.S.C. § 272(c)(1); ***Non-Accounting Safeguards Order,*** 11 FCC Rcd at 21997-17, paras. 194-236; Second ***BellSouth Louisiana Order,*** 13 FCC Rcd at 20796-803, paras. 341-55. The Commission found that the nondiscrimination safeguards extend to any good, service, facility, or information that a BOC provides to its section 272 affiliate, including administrative services and other non-telecommunications goods and services. *Non-**Accounting Safeguards Order,*** 11 FCC Rcd at 22003-07, paras. 210-17.

things, "provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions."[1512]

416. Nothing in the record before us indicates that QC has discriminated in favor of its section 272 affiliate.[1513] We are not persuaded by the unsupported assertions made by AT&T that QLDC has improper access to confidential Qwest information."[1514] Qwest states that QC requires the section 272 affiliate and other interexchange carriers to contact its IXC Wholesale Account Team to obtain services, whether requesting standard or non-standard services.[1515] To ensure compliance with the nondiscriminatory provisions of section 272, a process for product/service/information requests has been established so that the section 272 Compliance Oversight Team can assess all requests.[1516] We find that the record demonstrates that Qwest has implemented the necessary controls to prevent the improper sharing of confidential information between the BOC and the section 272 affiliate. We expect to examine Qwest's compliance with these requirements in the section 272(d) biennial audit. To the extent the audit results reveal any potential noncompliance, Qwest could be subject to appropriate enforcement action.

b. Joint Marketing Requirements of Section 272

417. ***Section 272(g)(1) – Affiliate Sales of Telephone Exchange Access Services.*** Section 272(g)(1) states that "[a] Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services."[1517] We conclude that Qwest has demonstrated that QLDC will comply with the joint marketing provisions of section 272(g)(1).[1518] We disagree with AT&T that Qwest's showing on this issue is deficient."[1519] To the contrary, Qwest demonstrates that QC

[1512] *Non-Accounting Safeguards Order,* 11 FCC Rcd at 22000-01, para. 202.

[1513] Moreover, nothing in the record before us indicates that QC has engaged in preferential treatment in payment terms for its section 272 affiliate. To the extent any issues in this area should arise in the future, we expect them to be identified in the course of the section 272(b)(5) biennial audit. To the extent QC does provide preferential treatment to its section 272 affiliate, we would pursue appropriate enforcement action.

[1514] AT&T Qwest III Comments at 38-39.

[1515] Qwest III Schwartz Decl. at para. 59

[1516] Qwest III Schwartz Decl. at para. 59, Exhibit MES-QC-8 (denoting that the process flow is applicable to QLDC requests and those made by thud parties).

[1517] 47 U.S.C. § 272(g)(1).

[1518] Qwest III Brunsting Decl. at paras. 40-46; Qwest III Schwartz Decl. at paras. 73-76.

[1519] AT&T presents no evidence that undermines our predictive judgment that Qwest will comply with the joint marketing requirements of section 272(g). AT&T Qwest III Comments at 39. Although AT&T does reference a finding by a Minnesota ALJ of premature marketing of QCC's services, Qwest alleges that QC was not a party to the sale of QCC's services and, accordingly, there was no violation of section 271(g)(1). Qwest I Reply App. A, Tab 11, Declaration of Marie E. Schwartz (Qwest I Schwartz Reply Decl.) at para. 3. At any rate, we note that this finding was not made by an ALJ of one of the applicant states and, thus, is not relevant to the present application.

currently complies with the joint marketing requirements and will not market or sell in-region, long distance services until it is authorized to do so.[1520] Moreover, Qwest describes, in detail, the annual compliance training efforts that are designed to ensure that QC and QLDC employees are aware of the section 272 requirements and understand how to comply with them.[1521]

418. ***Section 272(g)(2) – Bell Operating Company Sales of Affiliate Services.*** We conclude that Qwest demonstrates that QC will comply with section 272(g)(2), which prevents a BOC from marketing or selling within its region any interLATA service provided by a section 272 affiliate absent authorization obtained pursuant to section 271(d).[1522] We note that Touch America, in the previous Qwest section 271 applications asserted that Qwest offers "lit capacity IRUs" and other services through its affiliate without section 271 authority."" This matter is the subject of a formal complaint filed with the Commission's Enforcement Bureau."" Because this issue is before the Commission in another proceeding, and no other party has raised it, we do not address this matter further.

VII. PUBLIC INTEREST ANALYSIS

419. Apart from determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity."" At the same time, section 271(d)(4) of the Act states that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."[1526] Accordingly, although the Commission must make a separate determination that approval of a section 271 application is "consistent with the public interest, convenience, and necessity," it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B). Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected.

420. We conclude that approval of this application is consistent with the public interest. From our extensive review of the competitive checklist, which embodies the critical

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1520 Qwest III Schwartz Decl. at para. 80.

1521 Qwest III Brunsting Decl. at para. 47-50; Qwest III Schwartz Decl. at paras. 77-85

1522 Qwest III Application at 15; Qwest III Brunsting Decl. at paras. 40-45; Qwest III Schwartz Supplemental Decl. at paras. 73-76; see also 47 U.S.C. § 272(g)(2).

1523 Touch America Qwest I Comments at 12-14

1524 See Touch America v. Qwest, EB-02-MD-003 (filed February 8,2002).

1525 47 U.S.C. § 271(d)(3)(C); Appendix K, paras. 70-71.

1526 47 U.S.C. § 271(d)(4).

elements of market entry under the Act, we find that barriers to competitive entry in the application states' local exchange markets have been removed, and that these local exchange markets are open to competition. We further find that the record confirms the Commission's view that BOC entry into *the* long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist.[1527]

421. We disagree with commenters that assert that we must, under our public interest standard, consider a variety of other factors as evidence that the local market is not yet truly open to competition, despite checklist compliance.[1528] **For** example, AT&T and Sprint *argue* that low levels of entry in the application states indicate that the application is not in the public interest.'"' **We** note that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance.[1530] Given an affirmative showing that the competitive checklist has been satisfied, low customer volumes or the failure of any number of companies to enter the market in and of themselves do not necessarily undermine that showing. **As** the Commission has stated in previous section 271 orders, factors beyond the control of the BOC, such as individual competitive LEC entry strategies, can explain low levels of residential competition.[1531]

A. Price Squeeze Analysis

422. In our review of a section 271 application, the public interest requirement is an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, **as** required by **the** competitive checklist, and that entry will therefore **serve** the public interest as Congress expected.[1532] Both AT&T and WorldCom contend that Qwest's section 271 application should be denied on public interest grounds because the margins available to new entrants are insufficient to cover an efficient carrier's internal costs of entry. Specifically, WorldCom contends that it cannot profitably enter the residential telephone market in all nine states using UNE-P because Qwest's UNE rates prevent profitable statewide residential competition.[1533]

1527 *See SWBT Texas Order,* 15 FCC Rcd at 18558-89, para. 419.

1528 Those factors include the level of competitive LEC market share, the *financial* strength **of** Competitive LECs, and the failure **of** other BOCs to enter the market in the application states. ***See, e.g.***, AT&T Qwest II Comments at 132; AT&T Qwest I Comments at 118-119, 135-37; Sprint Qwest II Comments at 4-5, 7, 9-12; Sprint Qwest I Comments at **3-11**.

1529 AT&T Qwest II Comments at 132; AT&T Qwest I Comments at **118,** 135-37; Sprint Qwest II Comments at 10-11; Sprint Qwest I Comments at 10.

1530 ***See, e.g., Ameritech Michigan Order,*** 12 FCC Rcd at 20585, para. 77; ***Sprint v.*** *FCC,* 274 F.3d at 553-54

1531 *See Verizon* ***Pennsylvania Order,*** 16 FCC Rcd 17487, para. 126.

1532 ***See Bell Atlantic New York Order,*** 15 FCC Rcd at 4161-62, paras. 423-24.

1533 WorldCom Qwest III Comments at 26, Attach. ***A;*** WorldCom Qwest II Comments at 35-36; WorldCom Qwest I Comments at 32-34. ***See also*** WorldCom Qwest I Reply at **18.**

AT&T argues that residential-market entry through UNE-P is not economically feasible in Idaho, Iowa, Montana and Washington.[1534] OneEighty also opposes Qwest's application based on price squeeze concerns.[1535] OneEighty contends that Qwest's deaveraged UNE loop rates exclude OneEighty from the residential lines and many of the business lines in Montana.[1536] In response. Qwest has offered its own margin analysis to show that entry *is* economically feasible in all nine states.'"' We find that there is no evidence to conclude that Qwest's UNE rates impede local competition such that granting Qwest's section 271 application would contravene the public

1. Input Cost and Revenue Assumptions

423. The factual information necessary to conduct a price **squeeze** analysis is highly complex. Courts have recognized the particular difficulty of conducting a price squeeze inquiry in a regulated industry.[1539] Such difficulty is exemplified by the competing analyses proffered by AT&T, WorldCom and Qwest in this case. The key elements – input costs, revenues, and internal costs – depend on numerous variables, only some of which are reflected in the analyses. Qwest, AT&T, and WorldCom each assume different input costs and different revenues in each pricing zone within each state. **We** note that WorldCom's analysis reflects only one mode of entry, UNE-P, while AT&T indicates that its calculation optimizes other possible competitive LEC entry strategies such as resale.[1540]

424. A comparison of Qwest's, AT&T's, and WorldCom's assumptions demonstrates a range of estimates as to the potential cost and revenue opportunities available to a new entrant.

1534 AT&T Qwest III Comments at 79; AT&T Qwest III Lieberman/Pitkin Decl. at para. 21; AT&T Qwest II Lieberman/Pitkin Decl. at para. 27; AT&T Qwest I Lieberman Decl. at para. 27; AT&T Qwest II Pitkin Reply Decl. at para. 18; AT&T Qwest I Lieberman Reply Decl. at para. 32. Initially AT&T also alleged that there was a price squeeze in North Dakota and Wyoming. ***See*** AT&T Qwest I Comments at 69-71. AT&T, however, no longer contends that a price squeeze exists in these states. ***See*** Letter from Christopher T. Shenk, Sidley, Austin Brown & Wood LLP, to Marlene H. Dortch, Secretary, Federal Communication Commission, WC Docket No. 02-148, Declaration of Brian F. Pitkin on behalf of AT&T Corp. (filed Aug. 23 2002) (AT&T Aug. 23 ***Ex Parte*** Letter).

1535 OneEighty Qwest III Comments at 5-6; OneEighty Qwest II Comments at 5-6

1536 OneEighty Qwest Ill Comments at 5-6; OneEighty Qwest II Comments at 5-6.

1537 ***See, e.g.***, Qwest II Thompson Montana Decl. at paras. 24-31, Ex. JLT-MT-6; Qwest II Thompson Utah Decl. at paras. 48-53, Ex. JLT-UT-6; Qwest II Thompson Washington Decl. at paras. 50-55, Ex. JLT-WA-6; Qwest II Thompson Wyoming Decl. at paras. 19-24, Ex. JLT-WY-6; Qwest I Thompson Colorado Decl. at paras. 113-118, Ex. JLT-CO-5; Qwest II Thompson Reply Decl. at paras. 68-100, Ex. JLT-12.

1538 ***WorldCom, Inc v.*** FCC, ***308*** F.3d 1 (D.C. Cir. 2002) (citing ***Anaheim v FERC***, 941 F.2d 1234, 1238 (D.C. Cir. 1991)).

1539 ***Concord Massachusetts v. Boston Edison Co.***, 915 F.2d 17 (1st Cir. 1990).

1540 See AT&T Qwest II Comments at 96; WorldCom Qwest II Comments at 35-36, Ex. **A;** WorldCom Qwest I Comments at 32-34; AT&T Qwest II Lieberman/Pitkin Decl. at paras. 50-52; AT&T Qwest I Lieberman Reply Decl. at para. 30.

The parties' line assumptions differ from each other in certain states and in certain zones. With respect to input cost, for example, the parties make different assumptions about average minutes of use (MOU), which affects the cost of purchasing the switching component of UNE-P, the amortization of NRCs, access charges, and DUF rates.[1541] On the revenue side, the parties also make different assumptions about resale revenues, interLATA and intraLATA toll revenue, and subscriber line charges.[1542] WorldCom does not consider revenues available from the universal service fund,[1543] and neither AT&T nor WorldCom considers revenue from services other than traditional voice services, even though UNEs provide competitive LECs the ability to offer additional services not offered by the incumbent LEC.[1544]

2. Internal Cost Assumptions

425. As we have noted previously, conducting a price squeeze analysis requires consideration of what constitutes a "sufficient" profit margin.[1545] AT&T and WorldCom assert that they require $10 of margin to be profitable. Specifically, AT&T provides data that purports to show that a competitive LEC will incur at least $10 in internal costs per line per month to enter the residential market, even taking into account the possible economies of scale, efficiencies, and savings of a large and efficient market competitor."" AT&T's analysis includes data from other companies that provide bundled communications services including cable, telephony, and broadband Internet.[1547] WorldCom provides no new evidence in this docket to support its assertion.[1548] Qwest contends that the resale margin established by each relevant state commission

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1541 *Compare e.g.,* AT&T Qwest III Lieberman/Pitkin Decl., Ex. B *and* WorldCom Qwest III Comments, Attach. A *and* Qwest III Application, Tab 10; Letter from David L. Sieradzki, Counsel for Qwest Communications International Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 5,2002) (Qwest Nov. 5 Pricing *Ex Parte* Letter); Qwest Oct. 7 Pricing *Ex Parfe* Letter; Qwest July 22 *Ex Parte* Letter.

1542 *Compare* AT&T Qwest III Lieberman/Pitkin Decl., Ex. B *and* WorldCom Qwest III Comments, Attach. A *and* Qwest III Application, Tab 10; Qwest Nov. 5 Pricing *Ex Parte* Letter; Qwest Oct. 7 Pricing *Ex Parte* Letter; Qwest July 22 Ex *Parfe* Letter.

1543 *See SBC Arkansas/Missouri Order,* 16 FCC Rcd at 20751, para. 66

1544 *See Local Competition First Report and Order,* 11 FCC Rcd at 15646-47, para. 292 ("section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide any telecommunications services that can be offered by means of the element.").

1545 *Verizon Vermont Order,* 17 FCC Rcd at 7664, para.70; *Verizon Massachusetts Order,* 16 FCC Rcd at 9008-09, para. 41.

1546 AT&T Qwest II Comments, Tab D, Declaration of Steve Bickley, para. 1 (AT&T Qwest II Bickley Decl.); AT&T Qwest I Comments, Tab G, Declaration of Steve Bickley, para. 2 (AT&T Qwest I Bickley Decl.); AT&T Nov. 12 Ex *Parte* Letter, Declaration of Arthur S. Menko (AT&T Menko Decl.), and Declaration of Jerry L. Auriemma and P. Clark Santos (AT&T Auriemma and Santos Decl.).

1547 *See* AT&T Nov. 12 Ex *Parte* Letter, AT&T Menko Decl. at paras. 6-8.

that is required under the "avoided cost" standard under section 252(d)(3) of the Act is the most appropriate indication of necessary margin because it is designed precisely to determine internal costs associated with retail.[1549]

426. Although we do not decide what constitutes a "sufficient" margin, we are not persuaded by AT&T's analysis that an efficient carrier requires a margin **of** at least $10 per line to enter the residential market. Even though AT&T purports to consider some **of** the factors that we identified in our ***Verizon Vermont Order*** and other orders as relevant to the internal costs **of** an efficient competitor, we still find AT&T's analysis lacking. First, we find that AT&T provides us with insufficient information to make a judgment about its internal costs or the relationship between its internal costs and those of an "efficient competitor." Second, AT&T does not adequately explain why its figures represent those of an "efficient competitor."[1550] Finally, AT&T purports to provide a breakdown of the internal costs that an efficient new entrant would have to recover when entering local markets, but fails to provide adequate "cost or other data," as set forth in our ***Verizon Vermont Order,*** to verify these figures."" The internal cost data of other companies that AT&T provides include the internal cost of providing bundled communications services (e.g., bundled cable, telephony, and high speed Internet services), while AT&T's margin analyses include only revenues from local telephone service.[1552] AT&T does not provide any evidence that a company incurs the same internal cost (e.g., customer care costs) regardless of whether it provides basic local telephone services or other services such **as** high speed Internet or cable telephony.[1553] Accordingly, we find unpersuasive AT&T's data reflecting cost structures from various companies. Based on the record, we cannot reasonably conclude that an efficient competitive LEC needs at least $10 of margin to provide local telephone service. Our experience from previous section 271 proceedings shows that parties may be able to enter the local telephone

(Continued from previous page)

[1548] WorldCom Qwest II Comments at 35-36; WorldCom Qwest I Comments at 32-34. WorldCom cites the Huffman Declaration filed by WorldCom in the Verizon Vermont section 271 proceeding to support its allegation that a minimum margin of $10 is necessary to cover its internal costs. See WorldCom Comments, Declaration of Vijetha Huffman, CC Docket No. 02-7 (filed Feb. 6,2002). We rejected this evidence in the ***Verizon Vermont Order*** **as** deficient. ***See Verizon Vermont Order,*** 17 FCC Rcd at 1664, para.70

[1549] Qwest III Thompson/Freeberg Reply Decl. at para. 28. See ***also*** Qwest 11 Thompson Reply Decl. at para. 92; Qwest July 22 ***Ex Porte*** Letter at 29.

[1550] ***Verizon Vermont Order,*** 17 FCC Rcd at 1664, para. 70

[1551] ***See*** AT&T Qwest II Bickley Decl.; AT&T Qwest I Bickley Decl. ***See also Verizon Vermont Order,*** 17 FCC Rcd at 7664, para. 70.

[1552] See AT&T Nov. 12 ***Ex Parte*** Letter, AT&T Menko Decl. at paras. 2-21; AT&T Qwest III Lieberman/Pitkin Decl., Ex. B-1(ID, IA, MT, and WA).

[1553] ***See*** AT&T Nov. 12 Ex ***Parte*** Letter, AT&T Menko Decl., and AT&T Auriemma and Santos Decl. AT&T provides data on the overall internal costs ofcertain companies. The overall internal costs of these companies include the costs of providing services other than basic telephone service. AT&T treats each separate service offering to a customer as a separate connection. AT&T takes the total overall internal cost of each company and divides it equally over the number of connections provided to each customer to determine the internal monthly cost per each connection, or service. See AT&T Nov. 12 ***Ex Parte*** Letter, AT&T Menko Decl. at para. I0. We note that this method has no logical nexus to the actual internal costs of providing cable, Internet, or basic telephone service.

market even where it has been alleged that the available margins were less than $10.[1554] WorldCom, for example is offering its "Neighborhood local service package in Colorado, Iowa, North Dakota, Washington, and Utah, even though it alleges that there is a price squeeze in these states.[1555] Furthermore, WorldCom's own data, filed in a previous section 271 proceeding, shows that the "minimally acceptable" UNE-P margin for WorldCom is substantially lower than $10 and falls between $5 to $7 based on its actual entry decisions.[1556] At a minimum, this data suggests there are factors other than those presented in the competitive LECs' margin analyses that are relevant to a competitive LEC's entry decision. These entry decisions also cast further doubt on AT&T's and WorldCom's estimates of an "efficient" competitive LEC's internal costs, and their analyses of potential margins available to competitive LECs in the states subject to this proceeding.

3. Public Interest Considerations

427. Consistent with our statutory obligations, we must consider the existence and scope of an alleged price squeeze along with all relevant public interest factors. Important public interest benefits are associated with approval of a section 271 application once an applicant has fully implemented the competitive checklist. The opening of the local market, and the entry of the BOC into the interLATA market, leads to increased competition for all services. This competition, in turn, should foster efficiencies, innovations, and competitive pricing for communications services. A party alleging a price squeeze must show that the consequences of the price squeeze undermine these benefits.

428. In addition, in weighing any price squeeze allegation. we must consider whether the price squeeze is the result of a state commission policy to keep rates affordable in high-cost areas. As we stated in the *Verizon Vermont Order,* it is possible that a lack of profitability in entering the residential market may be the result of subsidized local residential rates in one or more zones, and not the fact that UNE rates are at an inappropriate point in the TELRIC range.[1557] AT&T asserts that this type of implicit subsidy is fundamentally incompatible with efficient competition and should be a basis for rejecting a section 271 application.[1558] We do not believe

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[1554] *See, e.g., BellSouth Multistate Order,* 17 FCC Rcd at 17755-57, paras. 284, 286-287; *Verizon Delaware/New Hampshire Order,* 17 FCC Rcd at 18748-50, paras. 157-58; *Verizon New Jersey Order,* 17 FCC Rcd at 12360-61, para. 172.

[1555] In Iowa, for example, WorldCom's analysis alleges that the gross margin in the lowest cost zone is $5.77.

[1556] See Letter from Keith L. Seat, Senior Counsel Federal Law and Public Policy. WorldCom, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-176, Attach. at 2-4 (filed Nov. 30,2000) (WorldCom Massachusetts *Ex Parte* Letter).

[1557] *Verizon Vermont Order,* 17 FCC Rcd at 1663-7664, paras. 68-69. The United States Court of Appeals for the District of Columbia Circuit noted this argument as a potential basis for declining to find a price squeeze. The court did not address this argument because the Commission did not rely on it in the underlying *SWBT Kansas/Oklahoma Order. Sprint v.* FCC, 274 F.3d at 555. See *also BellSouth Georgia/Louisiana Order,* 17 FCC Rcd at 9179-81, paras. 286-289; *Verizon Delaware/New Hampshire Order,* 17 FCC Rcd at 18751, para. 161.

[1558] AT&T Qwest II Reply at 153-154; AT&T Qwest I Reply at 60-61

that conclusion can be drawn so absolutely. State commissions have jurisdiction over retail as well as wholesale prices.[1559] It may be that until states rebalance residential rates, or make high-cost subsidies explicit and portable, UNE-P may not provide a viable means of entry for certain areas in some states. That fact, however, needs to be weighed against competing public policy interests, such as ensuring availability and affordability of local telephone services in rural areas and the benefit to consumers from the BOC's entry into the interLATA market. Given the complex and competing public policy interests at stake, we do not think that we can conclude that the existence of subsidies in rural areas in itself is a circumstance that requires a finding that section 271 authorization would not be in the public interest.""

4. State-by-State Analysis

429. In this section we analyze the various price squeeze claims advanced by the parties. In evaluating the public interest implications of a price squeeze allegation, we will consider the scope of the alleged price squeeze. For example, allegations of a statewide price squeeze for business and residential customers raise far greater concern than an alleged price squeeze that is limited to particular geographic areas, particular types of customers, or particular entry strategies. The fact that competitive LECs have entered "low-margin'' states confirms that the possibility of a price squeeze in limited portions of a state does not necessarily impede local competition such that granting Qwest's section 271 application would contravene the public interest.[1561]

430. The speculative nature of any price squeeze allegation also affects the weight we give such allegations in our public interest analysis. The type of margin analysis proffered by AT&T and WorldCom in this case is simply an educated guess about what might happen if a competitive LEC chose to enter a particular part of the state using a particular entry strategy. As discussed above, there are many variables not reflected in these analyses, and much uncertainty about those variables that are included. We find that, in most cases, this type of evidence is far less reliable than hard evidence about the actual experience of competitive LECs.

a. Colorado

431. WorldCom asserts that a price squeeze exists in Colorado, but it concedes that the minimum gross margin is $15.86 in zone 1 (6 percent of the residential lines) and $9.46 in zone 2 (75 percent of the residential lines).[1562] In the remaining zone, covering 19 percent of the residential lines, WorldCom alleges a negative gross margin. A similar argument was advanced

[1559] For this reason, we think these issues are best presented to the state commission in the first instance.

[1560] See *Verizon Delaware/New* Hampshire Order, 17 FCC Rcd at 18751, para. 161

[1561] WorldCom, *Inc. v. FCC*, 308 F.3d 1 (D.C. Cir. 2002) (citing *Anaheim v FERC*, 941 F.2d 1234, 1238 (D.C. Cir. 1991)).

[1562] See Letter from Lori E. Wright, Associate Counsel, Federal Advocacy, WorldCom, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148 (filed Aug. 13, 2002) (WorldCom Aug. 13 *Ex Parte* Letter).

by AT&T before the Colorado Commission in the 577T UNE pricing docket. The Colorado Commission reviewed the record in that case and concluded that "we reject the notion that our adopted rates will likely lend to a price squeeze and will not enable competitive LECs to enter the local exchange market through the purchase of UNEs from Qwest."[1563]

432. We agree with the decision of the Colorado Commission on this issue. In zones 1 and 2, we find that the margins are sufficient for an efficient competitor and that there is no price squeeze in these zones. As to zone 3, we have stated previously that a negative margin for the provision of residential service in high-cost areas using UNE-P is insufficient to support a finding that TELRIC rates substantially impede local competition.[1564] WorldCom's analysis fails to consider resale, which we previously have held should be considered in this type of analysis.[1565] Furthermore, WorldCom assumes that average end users will order only one vertical feature, even though it is presently competing in Colorado with an offering that includes five features.[1566] Based on this evidence, and consistent with the finding of the Colorado Commission, we are not persuaded that Qwest's Colorado UNE rates impede local competition in Colorado such that granting Qwest's section 271 application would contravene the public interest.

b. Idaho

433. AT&T and WorldCom both allege that a price squeeze exists in Idaho. In zone 1, which covers at least half of the residential lines in Idaho, WorldCom's analysis yields a margin of only $6.95, while AT&T's analysis yields a significantly higher margin, close to the $10 that AT&T and WorldCom claim is necessary for entry.[1567] Both margins are above the level that has supported competitive entry in other states.[1568] For these reasons, we find that there is no price squeeze in zone 1. For the remaining zones in Idaho, WorldCom alleges various negative gross margins.[1569] AT&T's analysis, however, yields positive margins, taking into account resale.[1570] We have previously stated that resale should be considered in a margin analysis, which WorldCom has not done in this case. Consequently, we do not consider the negative gross margins alleged by WorldCom to be relevant.

1563 *Colorado Pricing Reconsideration Order* at *22*.

1564 *See Verizon Vermont Order*, 17 FCC Rcd at *1663*, para. *68*

1565 *See id.*

1566 WorldCom Qwest I Comments at 33. We also note that AT&T, for example, offers residential telephony service through its broadband cable facilities in Colorado.

1567 There is disagreement among the parties as to the percentage of lines in zone 1, with estimates ranging from 50 percent to 59 percent. *See* WorldCom Qwest 111 Comments, Attach. A; AT&T Qwest III Lieberman/Pitkin Decl., Ex. B-1(ID).

1568 *See* note 1554, *supra*

1569 *See* WorldCom Qwest III Comments, Attach. A.

1570 AT&T Qwest III Lieberman/Pitkin Decl., Ex. B-1(ID)

434. In the ***Verizon Vermont Order,*** we concluded that there was no price squeeze because competitive entry was economically feasible in portions of the state, and because **of** certain deficiencies in the margin analyses provided by the competitive LECs.[1571] We reach a similar conclusion with respect to Idaho. With respect to the alleged gross margins in zone 2 and zone **3,** the record does not contain any evidence that these margins are the result of setting the UNE rate too high in the TELRIC range. Rather, the more likely explanation is that low margins in these zones are the result of subsidized local residential rates.[1572] Furthermore, AT&T and WorldCom have failed to establish that the alleged price squeeze in zones 2 and 3 forecloses entry in the other half of the state. AT&T contends that a statewide margin of **$7.53** is available in this state.[1573] As stated above, this statewide margin is higher than the level that has supported competitive entry in other states.[1574] Accordingly, we are not persuaded that Qwest's Idaho UNE rates impede local competition in Idaho such that granting Qwest's section 271 application would contravene the public interest.

c. Nebraska

435. In Nebraska, WorldCom concedes that the minimum gross margin in zone 1 (81 percent of the residential lines) is $14.87.[1575] We find that a price squeeze is not present in this zone. For the remaining zones, covering 19 percent of the residential lines, WorldCom alleges negative gross margins. We have previously stated that resale should be considered in a margin analysis, which WorldCom has not done in this case. Consequently, we do not consider the negative gross margins alleged by WorldCom to be relevant. Nevertheless, using WorldCom's own estimates, we note that a statewide average gross margin of $8.92 is available in this state, a level that exceeds what has supported competitive entry in other states.[1576] In addition, facilities-based competitive LECs serve a significant share of the market in this state."" Accordingly, we are not persuaded that Qwest's Nebraska UNE rates impede local competition in Nebraska such that granting Qwest's section **271** application would contravene the public interest.

d. North Dakota

436. Only WorldCom alleges that **a** price **squeeze** exists in North Dakota. While AT&T previously alleged that there was a price squeeze in North Dakota,[1578] it no longer does

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1571 ***Verizon Vermont Order,*** 17 FCC Rcd at 7663-65, paras. 68-73.

1572 ***Id.*** at 7663-7664, paras. 68-69

1573 AT&T Qwest **111** Comments **at** 86

1574 See note **1554,** ***supra***

1575 See WorldCom Qwest III Comments, Attach. A

1576 See note **1554,** ***supra.***

1577 See Department of Justice Qwest **1** Evaluation **at** 12

1578 See AT&T ***Qwest*** I Comments **at** 69-71.

so.[1579] In zone 1 (88 percent of the residential lines), WorldCom's analysis yields a margin of $13.27. For the remaining zones (12 percent of the residential lines), WorldCom alleges gross margins ranging from negative to $4.00.[1580] As discussed above, WorldCom's analysis fails to consider resale, which we previously have held should be considered in this type of analysis.[1581] WorldCom also fails to explain why its current margin analysis yields lower margins than its previous one, even though WorldCom has reflected additional cost reductions Qwest has made in its local switching usage rate.[1582] Furthermore, WorldCom recently has entered the local market in North Dakota, and it projects a statewide margin of $10.74 using a UNE-P entry strategy.[1583] We find that this constitutes ample evidence that Qwest's North Dakota UNE rates does not impede local competition in North Dakota such that granting Qwest's section 271 application would contravene the public interest.

e. Utah

437. WorldCom asserts that a price squeeze exists in Utah. WorldCom claims a statewide average gross margin of $4.96, with a gross margin of $6.40 in zone 1 (72 percent of residential lines) and $3.43 in zone 2 (17 percent of residential lines).[1584] In the remaining zone, which covers 11 percent of residential lines in the state, WorldCom alleges a gross margin of negative $2.31.[1585]

438. WorldCom's analysis is lacking in several respects. First, WorldCom fails to consider other means of competitive entry such as resale.[1586] Second, WorldCom fails to explain why Qwest's most recent cost reductions negatively affect WorldCom's margin analysis, and result in lower margins than its previous analysis.[1587] Finally, WorldCom assumes that average end users will order only one vertical feature, even though it is currently competing in Utah with an offering that includes five features.[1588] Therefore, we do not consider WorldCom's gross

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1579 *See* AT&T Aug. 23 *Ex Parte* Letter, Pitkin Reply Decl.

1580 *See* WorldCom Qwest III Comments, Attach. A. We note that even though Qwest has reduced its rates in North Dakota since WorldCom's previous gross margin analysis, WorldCom's previous gross margin analysis yields higher margins than the current one. WorldCom does not explain why such cost reductions affect negatively its profit margin. *Compare* WorldCom Qwest III Comments, Attach. A *to* WorldCom Aug. 13 *Ex Parte* Letter.

1581 *See Verizon Vermont Order,* 17 FCC Rcd at 7663, para. 68

1582 *Compare* WorldCom Qwest III Comments, Attach. A *to* WorldCom Aug. 13 *Ex Parte* Letter.

1583 WorldCom Qwest III Comments, Attach. A.

1584 *See* WorldCom Qwest III Comments, Attach. A

1585 WorldCom Qwest III Comments, Attach. A.

1586 *See Verizon Vermont Order,* 17 FCC Rcd at 7663, para. 68

1587 *Compare* WorldCom Qwest III Comments, Attach. A *to* WorldCom Qwest II Comments at Ex. A.

1588 Qwest 11 Thompson Reply Decl. at para. 74

margins to be sufficiently complete to support a finding of a price squeeze. AT&T, which does not allege that a price squeeze currently exists in Utah, proffers a statewide gross margin of $10.06, with deaveraged gross margins of $12.67 in zone 1, $9.46 in zone 2, and $2.29 in zone 3, for Utah."" Similarly, Qwest asserts a gross margin of $11.75 in zone 1, $8.70 in zone 2 and $2.91 in zone 3.[1590] We find that the gross margins proffered by AT&T and Qwest, which show that a price squeeze is not present in Utah, reflect more accurately the Utah competitive residential market. Based on the record, we are not persuaded that Qwest's Utah UNE rates impede local competition in Utah such that granting Qwest's section 271 application would contravene the public interest.

f. Washington

439. Both AT&T and WorldCom allege that a price squeeze exists in Washington. We note that Washington contains five deaveraged zones. In zones 1 to 4, which cover 60 percent of Washington, WorldCom's analysis yields a margin of $13.74, $8.80, $7.39, and $5.84 respectively.[1591] AT&T's analysis shows a brighter prospect for market entry, with gross margins (utilizing UNE-P, and excluding toll revenue) of $15.65 for zone 1, $10.68 for zone 2, $9.27 for zone 3, and $7.72 for zone 4.[1592] For zone 5, which covers 40 percent of the residential lines, WorldCom alleges a gross margin of $1.09, while AT&T alleges a margin of $2.97 (including resale but excluding toll revenues).[1593]

440. As stated above, we find it significant that WorldCom did not address any of the factors that we identified in past orders as relevant to a price squeeze analysis. For all the reasons that we found that WorldCom did not prove a price squeeze in all the other states in this proceeding, we find WorldCom does not prove a price squeeze in Washington, and we will not consider its analysis further. Based on AT&T's analysis, an average margin of $10 is available in zones 1 to 4 covering 60 percent of residential lines. Accordingly, we find that there is no price squeeze present in Washington for zones 1 to 4. As for the low margin available in zone 5, we have previously determined that a low margin in a portion of the residential lines alone is insufficient to support a finding that the local market is substantially foreclosed to competitive

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1589 AT&T's gross margins account for UNE-P and resale, but exclude intraLATA toll and interLATA toll revenue. See AT&T Qwest II Lieberman/Pitkin Decl. at paras. 52-53. Adding revenues from toll contributions significantly improves this statewide margin. See *id.* at Ex. D. Also, this analysis does not reflect Qwest's recent rate reductions.

1590 See Qwest II Thompson Reply Decl. at Ex. JLT-12. Qwest's analysis also does not reflect its recent rate reductions.

1591 WorldCom Qwest III Comments, Attach. A. The parties disagree as to the percentage of lines in zones 1, 2, 3, and 4. AT&T's and Qwest's analyses indicate that zones 1 to 4, in the aggregate, encompass 60 percent of the lines, while WorldCom's analysis indicates that zones 1 to 4 encompass 67 percent of the lines.

1592 AT&T Qwest III Lieberman/Pitkin Decl. at Ex. B-1(WA).

1593 WorldCom Qwest III Comments, Attach. A; AT&T Qwest III Lieberman/Pitkin Decl. at Ex. B-1 (WA).

entry."" We also find that AT&T's alleged statewide average margin of $6.76 (excluding toll revenues)[1595] is higher than the margin that has supported UNE-P entry in other states.[1596] Furthermore, we note that WorldCom has been able to enter the Washington market in certain areas with its premium-priced local service offering despite this alleged price squeeze.[1597] Based on the record, we are not persuaded that Qwest's Washington UNE rates impede local competition in Washington such that granting Qwest's section 271 application would contravene the public interest.

g. Wyoming

441. WorldCom is the only party that alleges that a price squeeze exists in Wyoming. WorldCom alleges gross margins of $1 1.02 in the Base Rate Area (74 percent of residential lines).[1598] We find that a price squeeze is not present in this zone based on WorldCom's own analysis. WorldCom alleges gross margins of $3.99 in zone 1 (13 percent of residential lines), and $0.80 in zone 2 (5 percent of residential lines), with a negative gross margin in the remaining zone (8 percent of residential lines).[1599] We have previously stated that resale should be considered in a margin analysis, which WorldCom has not done in this case. Consequently, we do not consider the negative gross margins alleged by WorldCom to be relevant. Despite WorldCom's failure to consider resale, we note that a statewide average gross margin of $7.99 is available in this state, using WorldCom's own analysis. The $7.99 gross margin is considerably higher than the margins that have supported UNE-P entry in some states.[1600] Based on this evidence, we are not persuaded that Qwest's Wyoming UNE rates impede local competition in Wyoming such that granting Qwest's section 271 application would contravene the public interest.

1594 *See Verizon Vermont Order,* 17 FCC Rcd at 7662-63, paras. 67-68; *BellSouth Georgia/Louisiana Order,* 17 FCC Rcd at 9179-80, paras. 286-87.

1595 The margin improves significantly if toll revenue is included. AT&T Qwest III Lieberman/Pitkin Decl. at Ex. B-2 (WA) (confidential).

1596 See note 1554, *supra*

1597 WorldCom Qwest II Comments at 35.

1598 See WorldCom Qwest III Comments, Attach. A. Initially AT&T also alleged that UNE-P entry is not economically feasible in Wyoming. See AT&T Qwest II Comments at 96-155. AT&T, however, no longer contends that UNE-P entry is not economically feasible in this state. See AT&T Qwest III Comments at 78-79 and 86; AT&T Qwest III Lieberman/Pitkin Decl. at para. 21.

1599 See WorldCom Qwest III Comments, Attach. A.

1600 See note 1554, *supra*

h. Iowa

442. Both AT&T and WorldCom assert that a price squeeze exists in Iowa. In zone 1, which covers 28 percent of the residential lines in Iowa, WorldCom alleges a margin of $5.05.[1601] WorldCom states that the margin in zone 2 (56 percent of the residential lines) is $2.62 and that there is a negative gross margin in zone 3 (16 percent of the residential lines). We have previously stated that resale should be considered in a margin analysis, which WorldCom has not done in this case. Consequently, we do not consider the negative gross margins alleged by WorldCom to be relevant. AT&T's analysis yields a margin of $7.36 in zone 1, and a margin of $4.62 in the remaining zones (including resale but excluding intraLATA and interLATA toll revenues).[1602]

443. When intraLATA and interLATA toll revenues are included, we note that AT&T's own analysis shows that the statewide average gross margin exceeds the margins that have supported UNE-P entry in other states.[1603] Further, the record does not contain any evidence that these margins are the result of setting the UNE rate too high in the TELRIC range. Rather, the more likely explanation is that low margins in zones 2 and 3 are the result of subsidized local residential rates.[1604] We note that Qwest's data show that margins available to competitive LECs serving high-end customers with premium features packages (20 percent of residential lines) are $23.93, $21.48, and $10.23 in zones 1, 2, and 3 respectively.[1605]

444. Notwithstanding the alleged relatively low margins, Iowa has one of the highest levels of UNE-P based competition.[1606] We note that WorldCom has entered the local market in this state through UNE-P. Furthermore, the record indicates that competitive LECs are serving approximately 14,611 residential lines (1.9 percent) and 95,828 business lines (26.8 percent) using UNE-P in this state.[1607] In total, competitive LECs, the majority of which are facilities-based, have

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1601 We note that even though Qwest has reduced its rates in Iowa since WorldCom's previous gross margin analysis, WorldCom's previous gross margin analysis yields higher margins than the current one. WorldCom does not explain why such cost reductions affect negatively its profit margin. ***Compare*** WorldCom Qwest 111 Comments, Attach. A *to* WorldCom Aug. 13 Ex *Parte* Letter.

1602 AT&T Qwest 111 Lieberman/Pitkin Decl., Ex. B-1(IA). The margins improve significantly if toll revenue is included, See Letter from Amy L. Alvarez, District Manager Federal Government Affairs, AT&T, to Marlene H. Donch, Secretary, Federal Communications Commission, WC Docket No. 02-314, Attach. (filed Nov. 1, 2002) (AT&T Nov. 1 Ex *Parte* Letter) (confidential).

1603 See note 1554, *supra*.

1604 *Verizon Vermont Order,* 17 FCC Rcd at 7663-7664, paras. 68-69. See also Qwest Nov. 5 Pricing Ex *Parte* Letter.

1605 See Qwest Nov. 5 Pricing Ex *Parte* Letter.

1606 *See* Qwest 1 Teitzel Decl. at Ex. DLT-Track A/PI-GEN-2, p. 60. See also Department of Justice Qwest I Evaluation at 12.

1607 See Department of Justice Qwest I Evaluation at 12.

already captured a total of 65,599 residential lines out **of** 796,044 (8.4 percent) and 135,875 business lines out of 357,568 (38 percent).[1608] We note that the margins available to competitive LECs were even lower in Iowa before Qwest reduced its UNE-P rates. We believe that Qwest's newly-lowered UNE-P rates will only enhance this competitive environment. For these reasons, we are not persuaded that Qwest's Iowa UNE rates impede local competition in Iowa such that granting Qwest's section 271 application would contravene the public interest.

I. Montana

445. ***Montana Wholesale UNE/Retail Rates Price Squeeze.*** One Eighty, WorldCom and AT&T allege that a price squeeze exists in Montana. OneEighty contends that UNE loop rates are $23.10, $23.90, $27.13, and $29.29 in zones 1, 2, 3, and 4 respectively, but the basic residential rate is $16.73 throughout Montana.[1609] OneEighty, however, submits an incomplete margin analysis that neglects to account for switch port, switching usage, and transport costs, as well as revenue other than basic service that is available to competitive LECs. We therefore cannot rely on OneEighty's analysis. In the base rate area (78 percent of the residential lines), WorldCom alleges a margin of $2.20.[1610] WorldCom alleges margins from positive to negative in the remaining zones (22 percent of the residential lines).[1611] **As** stated above, WorldCom's analysis fails to consider some of the factors that we identified in our ***Verizon Vermont Order*** and other orders as relevant to a price squeeze analysis (such as the effect of including a resale entry strategy; the internal costs of an efficient competitor; and other revenues that may be available to competitors, such as toll revenues and federal universal service fund revenues). WorldCom's margin analysis also understates the revenue available in the outer zones. Consequently, we do not consider the gross margins alleged by WorldCom to be relevant.

446. AT&T's analysis yields a margin of $6.33 (excluding intraLATA and interLATA toll revenues) in the base rate area and margins ranging from $6.28 to $5.89 (excluding intraLATA and interLATA toll revenues) in the remaining zones.[1612] AT&T's analysis also yields a statewide average gross margin of $6.28 (excluding toll contributions).[1613] We note that the margins in all the zones are above the margins that have supported UNE-P entry in other states.[1614]

1608 *Id.* The market share of residential resale and business resale is 1.3 percent and **1.8** percent respectively. Facilities-based competitive LECs are serving 5.2 percent of residential lines and 9.3 percent of business lines in this state.

1609 OneEighty Qwest III Comments at 5-6

1610 WorldCom Qwest III Comments, Attach. A.

1611 WorldCom Qwest III Comments, Attach. A

1612 AT&T Qwest 111 Liebermadpitkin Decl., Ex. B-1(MT). These margins improve significantly if toll revenue is included. See AT&T Qwest 111 Liebermadpitkin Decl., Ex. B-2(MT) (confidential).

1613 AT&T Qwest III Lieberman/Pitkin Decl., Ex. B-1(MT); AT&T Qwest III Liebermadpitkin Decl., Ex. B-2(MT) (AT&T's margins including toll revenues) (confidential).

1614 See note **1554,** supra. *Cf.* AT&T Qwest III Lieberman/Pitkin Decl., Ex. B-2(MT) (AT&T's margins including toll revenues) (confidential).

Furthermore, Qwest's data show that margins available to competitive LECs serving high-end customers with premium features packages (22 percent of residential lines) are over $17 in all zones.[1615] In addition, approximately 12 percent of Montana's lines have significant revenue opportunities due to the availability of high-cost universal service fund support.[1616] The record also shows that competitive LECs have captured already an estimated 4.4 percent of the residential market in Montana, with competitive LECs serving at least 11,512 residential lines.[1617] Accordingly, we find that the record does not support a finding that the margins available to competitive LECs in Montana impede the local competition. If there is any difficulty entering the residential market profitably through UNE-P in certain areas, it is possible that this difficulty may be the result of subsidized local residential rates in one or more zones, and not due to UNE rates being at an inappropriate point in the TELRIC range. In many states, particularly rural states, higher business rates subsidize some residential rates, and consequently, certain residential services are priced below cost.[1618] The Montana Commission acknowledges that "its retail and wholesale rates are, in part, the basis of this price squeeze dilemma [competitive] LECs face,"[1619] but the Montana Commission does not recommend denial of Qwest's section 271 application on the basis of a price squeeze between "wholesale loop UNE rates and retail basis exchange service rates."[1620] Indeed, it would not serve the public interest to deny a section 271 application simply because local telephone rates are low to ensure that the communications services are affordable

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1615 ***See*** Qwest Oct. 7 Pricing Ex ***Parte*** Letter.

1616 The 12 percent amount is based on line counts from Montana Commission Docket No. D.20006.89. ***See*** Qwest Aug. 15 Pricing ***Ex Parte*** Letter, Attach. at 4 (08/15/02C). The Montana universal service support per line is based on the Universal Service Administrative Company's (USAC's) report for the third quarter of 2002. ***See*** Federal Universal Service Support Mechanisms Fund Size Projections for the Third Quarter 2001 and Contributions Base for the Third Quarter 2002, App. HC 11, High Cost Model Support by Wire Center, 47-49 (Third Quarter 2002 USAC Report). We included all lines in wire centers that are projected to receive between $5.72 and $50.75 of monthly universal service support per line. We note that, for example, Mid-Rivers Telephone Cooperative has established a presence in some high-cost service areas of Montana that receive universal service support. Mid-Rivers is projected to receive high-cost universal service support in Fairview, Terry, and Wilbaux. See Third Quarter 2002 USAC Report, App. HC 11 at 48-49. As of February 5,2002, Mid-Rivers is estimated to serve 97 percent of the residential and business lines in Terry. ***See*** Qwest II Teitzel Decl. at Ex. DLT-Track A/PI-MT-4.

1617 The 4.4 percent estimate is derived from the "CLEC Entry by State" chart provided in the Deparhnent of Justice Evaluation. See Department of Justice Qwest II Evaluation at 8. We take the 5,272 residential l i e s sewed by facilities-based competitive LECs that were not accounted for in the E-911 database, but confirmed through the white pages listings, and divide this number by the total residential lines of 260,389, resulting in 2.0 percent. We added the 2.0 percent for facilities-based competitive LEC residential market share and the 2.4 percent resale share, resulting in 4.4 percent. ***See id.*** at n.32.

1618 ***See Verizon Vermont Order,*** 17 FCC Rcd at 7663, para. 68,

1619 ***See Montana Commission Public Interest Report*** at 15.

1620 ***See*** Montana Commission Qwest II Comments at 9.

for all consumers.[1621] As we concluded in the *Verizon Vermont* ***Order,*** if UNE rates are priced at cost, we believe competitors will have the opportunity to make competitive entry.[1622]

447. For these reasons, we are not persuaded that Qwest's Montana UNE rates impede local competition in Montana such that granting Qwest's section 271 application would contravene the public interest.

448. AT&T also argues that a proper price squeeze analysis would assess whether "the challenged conduct has exerted any anticompetitive effects."[1623] **We** note that it is difficult to determine accurately a forward-looking assessment of any anticompetitive effect that a rate might have absent a showing that the rate is unlawful or not cost-based. Most price squeeze analyses, in other contexts, are hindsight, not forward-looking, assessments of the prices and their effect on competition during a period in which those prices were in effect.[1624] As discussed above, it is not "self-evident" that the rates we find TELRIC-compliant today create a price squeeze that will adversely affect competition.[1625] The rates **are** newly adopted, and it is difficult to predict whether these rates will have any anticompetitive effect in the relevant markets in the future. Absent a clear showing that the rates before us are high in **the** TELRIC range, and the available margins are below the level that allowed competitive entry in other states, it will be difficult to justify a finding of a price squeeze that is likely to impede local competition enough to render section 271 approval in contravention **of** the public interest. As discussed above, Iowa has allegedly low margins but significant competitive entry. Nothing in the record supports a finding that the margins available to competitive LECs in Montana will cause a price squeeze that frustrates the congressional intent that markets **be** open, as required by the competitive checklist, and that Qwest's entry in the long distance market will therefore not **serve** the public interest as Congress expected.[1626] **We** believe that any future allegation that the disparity between wholesale and retail rates causes an anticompetitive effect in Montana would be most appropriately reviewed by the Montana Commission because the state commission has authority to adjust both wholesale and retail rates. **We** note, however, that, pursuant to section 271(d)(6)(A), the Commission can review BOCs' actions after approval of their 271 applications if competitors allege that the BOCs' actions are impeding local competition.'"[1627]

1621 Verizon Vermont Order, 17 FCC Rcd at 7664, para. 68. See also Qwest Oct. 7 Pricing *Ex Parte* Letter.

1622 Verizon Vermont Order, 17 FCC Rcd at 7664, para. 68.

1623 AT&T Qwest III Reply at 44 (quoting *Anaheim v. FERC*, 941 F.2d 1234, 1238 (D.C. Cir. 1991)).

1624 See Anaheim, 941 F.2d at 1247-48 (explaining the procedure under which the Federal Energy Regulatory Commission reviews price squeeze allegations, and holding that the anticompetitive effects resulting from a price squeeze are a function of the magnitude and the duration of the price discrimination).

1625 See Anaheim, 941 F.2d at 1249 (citing *Federal* Trade Comm'n v. *Morton Salt* Co., 334 U.S. 37, 50 (1948)).

1626 Even if we assume that, in the past, there was a disparity between wholesale and retail rates sufficient to cause an anticompetitive effect in Montana, Qwest's reductions of its wholesale rates remedy this situation.

1627 See 47 U. S. C. § 271(d)(6)

449. As support for its contention that Qwest's UNE rates create a price squeeze, AT&T cites the Montana Commission's concern about a price squeeze between intrastate retail toll rates and intrastate access charge rates.[1628] We address this price squeeze issue below.[1629] We disagree with AT&T that the Montana Commission's concern over the relative differences between intrastate toll rates and intrastate access charge rates demonstrates the existence of a price squeeze in the local market. In reviewing Qwest's UNE rates under the public interest analysis, we examine whether a price squeeze exists between Qwest's wholesale UNE rates and the state's retail rates. **As** part of this analysis, we take into account available sources of revenue, including intrastate toll rates and access charges. **As** discussed above, we do not find the existence of a price squeeze in Montana between UNE rates and retail rates. Therefore, any potential price squeeze that may exist between intrastate toll and access charge rates does not impede local competition in Montana such that granting Qwest's section 271 application would contravene the public interest.

450. ***Montana Intrastate Toll/Access Rates Price Squeeze.*** In its comments on Qwest's prior section 271 application, the Montana Commission states that there is a price squeeze between Qwest's Montana retail intrastate toll rates and intrastate carrier access charge rates that disadvantages Qwest's competitors in both the toll and local markets in Montana.[1630] According to the Montana Commission, this price squeeze constitutes an "unusual circumstance" that would make Qwest's entry in the long distance market contrary to the public interest.[1631] The Montana Commission, however, found that Qwest could mitigate this price squeeze by filing a revenue requirements and rate design case by October 1,2002, and this mitigation would allow the commission to recommend approval of Qwest's section 271 application.[1632] Qwest did not file a revenue requirements and rate design case, instead filing a letter with the Montana Commission proposing an industry-wide, collaborative review of access charges.[1633] Therefore, the Montana Commission recommends denial **of** Qwest's current section 271 application based on Qwest's refusal to comply with the state commission's condition to mitigate this price squeeze.[1634] AT&T asserts that the Montana Commission's finding **of** a price squeeze indicates that there have been anticompetitive effects, and therefore granting Qwest's section 271 application would not be in the public interest.[1635]

1628 AT&T Qwest 111 Reply at **42-44.**

1629 ***See*** paras. **450-452,** ***infra.***

1630 Montana Commission Qwest II Comments at **5-7.**

1631 Montana Commission Qwest II Comments at **7.**

1632 ***Id.***

1633 Qwest Oct. I1 Pricing ***Ex Parte*** at Anach. 3

1634 Montana Commission Qwest III Comments at 2-3.

1635 AT&T Qwest III Reply at **43-44** (citing ***WorldCom, Inc. v. FCC*, 308** F.3d 1 (D.C. Cir. **2002)).**

451. Qwest contends that there is no nexus between intrastate access rates and the public interest issue implicated by section 271, and that intraLATA, intrastate access charge rate rebalancing should involve all LECs in Montana to address the alleged price squeeze.[1636] The Montana Consumer Counsel asserts that the Montana Commission is empowered by state law to regulate toll rates and access charge rates, and that commission should do so independent of a section 271 application review.[1637]

452. We find that the price squeeze allegation raised by the Montana Commission does not relate to the openness of the local telecommunications market to competition within the scope of section 271 of the Act. Therefore, we do not deny Qwest's section 271 application for failure to comply with the public interest on this basis. While we encourage states to establish cost-based intrastate access rates, we agree with Qwest and the Montana Consumer Counsel that their establishment is not a precondition to section 271 approval.[1638] We do not have jurisdiction to set intrastate intraLATA access charges or intrastate long distance toll rates, and our review of these rates in a section 271 application is limited to their role in any potential wholesale UNE rate/retail rate price squeeze.[1639] Jurisdiction to set intraLATA, intrastate toll rates and access charge rates rests solely with the Montana Commission. The price squeeze alleged by the Montana Commission is in the intrastate intraLATA toll market, where Qwest already is authorized to provide service. Denying Qwest's section 271 application would not address the alleged price squeeze in the intrastate intraLATA toll market. Accordingly, this alleged price squeeze, and any potential violation of state regulations by Qwest's failure to file a revenue requirements and rate design case, are within the Montana Commission's authority and ability to address, and are more appropriately addressed by that commission.

B. Assurance of Future Compliance

453. As set forth below, we find that the performance assurance plans (PAP) that will be in place in the nine states provide assurance that the local market will remain open after Qwest receives section 271 authorization in the nine application states. We find that these plans fall within a zone of reasonableness and are likely to provide incentives that are sufficient to foster post-entry checklist compliance. In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentives to continue to satisfy the requirements of section 271 after entering the long distance market.[1640] Although it is not a requirement for section 271 authority that a BOC be subject to

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1636 Qwest III Thompson/Freeberg Reply Decl. at paras. 19-20 (citing Commissioner Rowe's dissenting statement in the Montana Commission Qwest III Comments).

1637 Montana Consumer Counsel Qwest *III* Reply at 2; Montana Consumer Counsel Qwest II Reply at 2-4.

1618 *See* Qwest II Application at 191-92; Qwest Aug. 15 Pricing *Ex Parte* Letter at 18. *See also* Montana Consumer Counsel Qwest II Reply at 2-3.

1639 *See* para. 449, *supra* (discussing our review of intrastate toll rates and access charges in the local market price squeeze analysis).

1640 *See, e.g., Verizon Pennsylvania Order,* 16 FCC Rcd at 17487-88, para. 127

such performance assurance mechanisms, the Commission previously has stated that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.[1641] The nine state PAPs, in combination with the respective commission's active oversight of its PAP, and these commissions' stated intent to undertake comprehensive reviews to determine whether modifications are necessary, provide additional assurance the local market in the five application states will remain open.[1642]

454. In prior section 271 orders, the Commission has generally reviewed plans modeled after either the New York or the Texas plans.[1643] However, the Commission has also approved plans that are not modeled on either of those two plans.[1644] In this case, the Colorado PAP was designed principally by a Special Master for the Colorado Commission with input from Qwest and other parties.[1645] The Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming PAPs, on the other hand, were developed in a multi-state review

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[1641] *Ameritech Michigan Order,* 12 FCC Rcd at 20748-50, paras. 393-398. We note that in all of the previous applications that the Commission has granted to date, the applicant was subject to an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long-distance market. These mechanisms are generally administered by state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the Commission's authority to preserve checklist compliance pursuant to section 271(d)(6).

[1642] The Wyoming Commission did not endorse the Wyoming PAP because of what it deemed to be several shortcomings in the PAP. As discussed later in this section, we find that the shortcomings identified by the Wyoming Commission do not diminish the assurances provided by the Wyoming PAP. Qwest II Application, App. E, Qwest Performance Assurance Plans, Tab 1, Montana Performance Assurance Plan at 22-25 (Montana PAP), Qwest II Application, App. E, Tab 2, Utah Performance Assurance Plan at 19-20 (Utah PAP), Qwest II Application, App. E, Tab 3, Washington Performance Assurance Plan at 19-20 (Washington PAP); Qwest II Application, App. E, Tab 4, Wyoming Performance Assurance Plan at 19-20 (Wyoming PAP); Qwest I Application, Appendix E, Qwest Performance Assurance Plans, Tab 1, Colorado Performance Assurance Plan at 22-25 (Colorado PAP); Qwest I Application, App. E, Qwest Performance Assurance Plans, Tab 2, Idaho Performance Assurance Plan at 14, 19-20 (Idaho PAP); Qwest I Application, App. E, Qwest Performance Assurance Plans, Tab 3, Iowa Performance Assurance Plan at 14, 19-20 (Iowa PAP); Qwest I Application, App. E, Qwest Performance Assurance Plans, Tab 4, Nebraska Performance Assurance Plan at 14, 19-20 (Nebraska PAP): Qwest I Application, App., Qwest Performance Assurance Plans, Vol I Tab 5, North Dakota Performance Assurance Plan at 15, 21-22 (North Dakota PAP); Colorado Commission Qwest I Comments at 59; Colorado Commission Qwest I Reply at 48; Idaho Commission Qwest I Comments a 13-14; Iowa Board Qwest I Comments at 70; Montana Commission Qwest II Comments at 52-53; Nebraska Commission Qwest I Comments at 5 (citing Nebraska Commission QPAP Decision (http://www.nol.org/home/NPSC/C-1830APAP04-23-02.PDF) at 15-16); North Dakota Commission Qwest I Comments, Appendix at 236-39; Washington Commission Qwest II Comments at 29-31; Wyoming Commission Qwest II Comments at 17.

[1643] *See, e.g., Verizon Connecticut Order,* 16 FCC Rcd at 14181, para. 76; *Verizon Massachusetts Order,* 16 FCC Rcd at 9120, para. 238; *SWBT* Texas *Order,* 15 FCC Rcd at 18560, para. 421; *Bell Atlantic New York Order,* 15 FCC Rcd at 4166-67, para. 433.

[1644] *See Verizon Pennsylvania Order,* 16 FCC Rcd at 17488-89, paras. 128-129.

[1645] Qwest I Application App. A, Tab 35, Declaration of Mark S. Reynolds-Colorado (Qwest I Reynolds-Colorado Decl.) at paras. 2-4.

process that began with the SBC Texas PAP.[1646] Following the multi-state review process, the state commissions in each of these states separately received comment from parties and held either hearings or oral arguments on their PAPs.[1647] We note that eight of the nine state commissions have approved the PAP proposed in their states, which will go into effect with approval of this application. While the Wyoming Commission did not endorse the Wyoming PAP,[1648] finding several shortcomings, we note that the Wyoming PAP is similar in all relevant respects to the other PAPs filed in the current application.[1649] For the reasons discussed below, we find that the shortcomings identified by the Wyoming Commission do not diminish the assurances provided by the Wyoming PAP. Moreover, we note that the Wyoming Commission has deferred to this Commission to determine the form the Wyoming PAP should take.[1650] We also note that Qwest has offered the Wyoming PAP to all competitors as part of its SGAT.[1651] There is nothing to suggest that the Wyoming Commission will not implement and enforce the Wyoming PAP.

455. We conclude that the nine application states' respective PAPs provide incentives to foster post-entry checklist compliance. As in prior section 271 orders, our conclusions are based on a review of several key elements in the performance remedy plan: total liability at risk in the plan; performance measurement and standards definitions; structure of the plan; self-executing nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements.[1652] The structure of these plans is similar to tiered plans that the

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1646 Qwest II Application App. A, Tab **33,** Declaration of Mark S. Reynolds on the Performance Assurance Plans (Qwest II Reynolds-PAP Decl.) at paras. **4-16;** Qwest I Application App. A, Tab **36,** Declaration of Mark S. Reynolds-Multistate (Qwest I Reynolds-Multistate Decl.) at paras. 4-6.

1647 Qwest II Reynolds-PAP Decl. at paras. **7-16;** Qwest I Reynolds-Colorado Decl. at paras. 3-5; Qwest I Reynolds-Multistate Decl. at para. **6.**

1648 We note that even though the Wyoming Commission rejected the PAP, they recommend approval of Qwest's section **271** application in Wyoming. Wyoming Commission Qwest III Comments at **6;** Wyoming Commission Qwest II Commentsat **11-13, 17.**

1649 Qwest II Reply at 112 (discussing similarities between the cap in the Wyoming PAP and the caps in the Montana, Iowa and Nebraska PAPs); Qwest II Reynolds-PAP Decl. at paras. **23-27** (discussing the similarities in the review provisions in the Wyoming PAP, Nebraska PAP, and SWBT's Texas PAP), paras. **42-46** (discussing similarities between the billing metric penalties in the Wyoming PAP and the Colorado PAP and SWBT Texas PAP); paras. **57-58** (discussing similarities between the limitations provision in the Wyoming PAP and the corresponding sections of the Colorado, Nebraska and Washington PAPs). The de-escalation provision in the Wyoming PAP is identical or similar to the corresponding provision in the Idaho, Iowa, Montana, North Dakota, Nebraska, Washington, and Utah PAP. Idaho PAP section 6.2.1; Iowa PAP section **6.2.1;** Montana PAP section 6.2.1; Nebraska PAP section **6.2.1;** North Dakota PAP section 6.2.1; Utah PAP section **6.2.1;** Washington PAP **6.2.1;** Wyoming PAP section **6.2.1**

1650 Wyoming Commission Qwest III Comments at **6;** Wyoming Commission Qwest II Comments at **17.**

1651 Qwest II Application, App. B, Statement of Generally Available Terms and Conditions, Ex. K.

1652 ***See, e.g.***, ***Verizon Massachusetts Order,*** 16 FCC Rcd at **9121-24,** paras. **240-47; SWBT** ***Kansas/Oklahoma Order,*** 16 FCC Rcd at 6377-81, paras. 273-78.

Commission has approved.[1653] In general, the Tier 1 payments accrue to competitive LECs and Tier 2 payments accrue to a state fund.[1654] The PAPs vary in the amount at risk, but are in line with those the Commission has considered before.[1655] The amount of credits and payments due to competitive LECs under these PAPs increase with the duration of a failure to meet performance standards.[1656] The PAPs include provisions for continuing review of the PAP by the state

[1653] *See, e.g.*, SBC Texas Application, Dysart Affidavit, Attach. H. In all of the PAPs, Qwest is in conformance with benchmark measures when the monthly performance equals or exceeds the benchmark. For parity standards, the Colorado PAP uses a statistical methodology using a modified z-test and permutation testing. In addition, the Colorado PAP uses predetermined variance factors to determine conforming performance for some Tier 1 measurements. These predetermined variance factors are based on a modified z-test statistical methodology. For parity standards, the PAPs in place in Montana, Iowa, Idaho, Nebraska, North Dakota, Utah, Washington, and Wyoming use a modified z-test or permutation test depending upon the number of observations. Qwest I Reynolds-Colorado Decl. at paras. 18-22; Qwest I Reynolds-Multistate Decl. at paras. 9-10; Qwest II Reynolds-PAP Decl. at paras. 48-53. Colorado PAP sections 2-5; Idaho PAP sections 2-5; Iowa PAP sections 2-5; Montana PAP sections 2-7; Nebraska PAP sections 2-5; North Dakota PAP sections 2-5; Utah PAP sections 2-7, Washington PAP sections 2-7, Wyoming PAP sections 2-7; Colorado Commission Qwest I Comments at 55.

[1654] Qwest I Reynolds-Colorado Decl. at paras. 6, 19-20; Qwest I Reynolds-Multistate Decl. at paras. 9, 20-23; Qwest II Reynolds-PAP Decl. at paras. 39-47; Colorado PAP sections 2, 7 and 8; Idaho PAP sections 2, 6, and 7; Iowa PAP section 2, 6, and 7; Montana PAP sections 2, 6, and 7; Nebraska PAP section 2, 6, and 7; North Dakota PAP sections 2, 6, and 7; Nebraska PAP sections 2, 6, and 7; Utah PAP sections 2, 6, and 7; Washington PAP sections 2, 6, and 7; Wyoming PAP sections 2, 6, and 7. The North Dakota Commission reports that the North Dakota Legislature must approve a budget allocation for the North Dakota Commission to utilize Tier payments made by Qwest for the North Dakota Commission to monitor Qwest's performance. A proposal has been put forth for this budget allocation. The North Dakota Commission believes that if the legislation is adopted with the proposed emergency clause, the fund could become available before the usual effective date for adopted legislation (August 1, 2003). Letter from Anthony T. Clark, Susan E. Wefald, and Leo M. Reinbold, Commissioners, North Dakota Commission, to Ms. Donch, Secretary, Federal Communications Commission, WC Docket No. 02-314 at 1 (dated Oct. 31,2002). Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Ms. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 at 1-2 (dated Oct. 31a 2002).

[1655] The Colorado PAP has an annual cap of $100 million (36 percent of Qwest's ARMIS net return in Colorado) and provides an opportunity for the Colorado Commission to open a proceeding to review the cap if necessary. The Idaho, Montana, North Dakota, Utah, Washingtan, and Wyoming PAPs each have a cap that places 36 percent of Qwest's net return in these states at risk. The Nebraska and Iowa PAPs each have procedural caps of 24 percent which can be increased to 44 percent of Qwest's ARMIS net return in each of these states. The Utah PAP may be increased to a maximum cap of 48 percent, and the Montana and Wyoming PAP can be increased upon Commission action. Qwest II Reynolds-PAP Decl. at paras. 25-27; Qwest I Reynolds-Colorado Decl. at para. 8; Qwest I Reynolds-Multistate Decl. at para 13; Colorado PAP section 11; Idaho PAP section 12; Iowa PAP section 12; Montana PAP section 12; Nebraska PAP section 12; North Dakota PAP section 12; Utah PAP section 12, Washington PAP section 12, Wyoming PAP section 12. In comparison, the BellSouth Louisiana PAP has a $59 million procedural cap or 20 percent of BellSouth's net revenue. *BellSouth GALA Order* 17 FCC Rcd at 9184, para. 296.

[1656] Each PAP has a provision for Tier 1 payments to escalate for continuing non-conformance. Payments in the Colorado PAP are also affected by the severity of a missed standard. Qwest II Reynolds-PAP Decl. at paras. 39-46; Qwest I Reynolds-Colorado Decl. at paras. 18-20; Qwest I Reynolds-Multistate Decl. at paras. 20-23; Colorado PAP sections 7-9; Idaho PAP section 6; Iowa PAP sections 6; Montana PAP section 6; Nebraska PAP section 6; North Dakota PAP section 6; Utah PAP section 6; Washington PAP section 6; Wyoming PAP section 6.

commission.[1657] We also note that the PAPs include provisions for audits and that impose penalties on Qwest for submitting incomplete or revised reports and/or reports found to require revision.[1658]

456. As the Commission has stated in prior orders, the PAP is not the only means of ensuring that a BOC continues to provide nondiscriminatory service to competing carriers.[1659] In addition to the monetary payments at stake under each plan, we believe Qwest faces other consequences if it fails to sustain an acceptable level of service to competing carriers, including enforcement provisions in interconnection agreements, federal enforcement action pursuant to section 271(d)(6), and remedies associated with antitrust and other legal actions.

457. We disagree with commenters that argue that the PAPs will not deter backsliding due to a variety of deficiencies: (1) omission of critical measures (*e.g.*, service order accuracy and functional acknowledgements);[1660] (2) limits on the ability of the state commission to modify the PAP;[1661] (3) limitations on the ability of competitive LECs in Idaho and Iowa to seek remedies in other forums;[1662] (4) unreliable and inaccurate data;[1663] and (5) the lack of an approved PAP in Wyoming.[1664] As we have noted above, states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. We address the issues raised in the comments in turn.

458. First, we find that the PAPs under review here are comprehensive. We further note that state commissions have the ability to incorporate new measures into their PAPs at

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1657 Colorado PAP section 18; Idaho PAP section 16; Iowa PAP section 16; Montana PAP section 16; Nebraska PAP section 16; North Dakota PAP section 16; Utah PAP section 16; Washington PAP section 16; Wyoming PAP section 16.

1658 Qwest II Reynolds-PAP Decl. at para. 21; Qwest I Reynolds-Colorado Decl. at para. 26; Qwest I Reynolds-Multistate Decl. at paras. 33-34; Colorado PAP section 13-14; Idaho PAP sections 14-15; Iowa PAP sections 14-15; Montana PAP sections 14-15; Nebraska PAP sections 14-15; North Dakota PAP sections 14-15; Utah PAP sections 14-15; Washington PAP sections 14-15; Wyoming PAP sections 14-15.

1659 *See Bell Atlantic New York Order*, 15 FCC Rcd at 4165, para. 430; SWBT *Teras Order*, 15 FCC Rcd at 18560, para. 421; *Verizon Pennsylvania Order* 16 FCC Rcd at 17489, para. 130.

1660 AT&T Qwest II Comments at 157; AT&T Qwest I Comments at 144; AT&T Qwest II Finnegan Decl. at paras. 204-05; AT&T Qwest I Finnegan Decl. at paras. 223-24; Eschelon Qwest II Comments 12-13.

1661 AT&T Qwest II Comments at 157; AT&T Qwest I Comments at 145-6; AT&T Qwest II Finnegan Decl. at paras. 234-42 (specifically the Montana and Washington PAPs); AT&T Qwest I FiMegan Decl. at paras. 236-SO; Touch America Qwest II Comments at 34 (general comment about the PAPs); Touch America Qwest I Comments at 30.

1662 AT&T Qwest I Comments at 145; AT&T Qwest I Finnegan Decl. at paras. 225-35.

1663 AT&T Qwest II Comments at 157; AT&T Qwest I Comments at 114; AT&T Qwest II Finnegan Decl. at paras. 201-03; AT&T Qwest I FiMegan Decl. at paras. 220-01.

1664 AT&T Qwest 11 Comments at 157-58; AT&T Qwest II FiMegan Decl. at paras. 206-33

future reviews to the extent "critical measures" need to be added to the plans."" Furthermore, we believe the multi-state collaborative process will continue post-section 271 approval and will likely address these issues.[1666] We note that competitive LECs have been involved in the development of these plans,[1667] and we anticipate that they will provide input in those forums which will review the plans in the future. Qwest has proposed a service order accuracy performance measure;[1668] we anticipate that a collaboratively developed service order accuracy measure will ultimately be included in the PAPs.[1669]

459. Second, we find that the current language in the PAPs does not unduly limit the state commissions' ability to change their respective PAPs.[1670] As the Commission has noted previously, the ability of state commissions to modify or update measurements is an important feature because it allows the PAP to reflect changes in the telecommunications industry and in individual states.[1671] Touch America contends that the Commission should clarify that the

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1665 Qwest II Reynolds-PAP Decl. at paras. 32, 35; Qwest II Reply at 115-16; Qwest I Reply at 117-18; Colorado PAP section 18; Idaho PAP section 16; Iowa PAP section 16; Montana PAP section 16; Nebraska PAP section 16; North Dakota PAP section 16; Utah PAP section 16; Washington PAP section 16; Wyoming PAP section 16. OneEighty requests clarification of the penalties for network outages under Qwest's Performance Assurance Plan. Specifically, OneEighty believes that Qwest's Performance Assurance Plan penalty for outages should be revised to reflect whether a "per occurrence payment" requires a payment "per line" or "per global outage." We find that this issue can be more appropriately dealt with during the six-month review process rather than within the context of a section 271 application. OneEighty Qwest III Comments at 17-18; OneEighty Qwest II Comments at 16-17; OneEighty Qwest I Comments at 6-7.

1666 Letter from Melissa Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148, Attach. at 1-11 (dated July 17,2002) (Qwest July 17b *Ex Parte* Letter).

1667 Qwest II Reynolds-PAP Decl. at paras. 4-16; Qwest I Reynolds-Colorado Decl. at paras. 3-5; Qwest I Reynolds-Multistate Decl. at paras. 4-6.

1668 Qwest Aug. 20m *Ex Parte* Letter at 1-2.

1669 See *e.g.* Eschelon Qwest III Comments at 34-37; Nebraska Commission Qwest 111 Comments at 2; North Dakota Commission Qwest III Comments at 1; Wyoming Commission Qwest III Comments at 3-4.

1670 Qwest II Reynolds-PAP Decl. at para. 33 (noting that the SWBT Texas PAP requires "mutual agreement" of SBC and the competitive LEC before an existing measurement can be changed); Qwest II Reply at 113 (Qwest argues nothing in the Wyoming PAP precludes the Wyoming Commission from reviewing the PAP), 115-116 (arguing that the Montana and Washington PAPs do not impede the ability of the Washington or Montana Commission to enforce and supervise the PAP); Colorado PAP section 18; Idaho PAP section 16; Iowa PAP section 16; Nebraska PAP section 16; North Dakota PAP section 16. The Wyoming Commission reads the review provision in the Wyoming PAP as potentially limiting their ability to change the PAP and permitting Qwest to argue that changes to the PAP outside of the six-month process would not be incorporated into agreements between Qwest and competitive LECs. We read the Wyoming PAP review provision, however, to permit the Wyoming Commission to change the PAP and require that agreements between Qwest and competitive LECs would incorporate changes in the PAP. AT&T Qwest II Comments at 158-59 (focusing on the review provisions in the Washington PAP and Montana PAP); Wyoming Commission Qwest II Comments at 12.

1671 *SWBT Texas Order,* 15 FCC Rcd at 18563, para. 425.

Commission or state regulatory authority maintain change control over any part of the PAP, regardless of whether Qwest agrees with the change or not.[1672] AT&T contends that the Iowa Board will be limited in its ability to modify the PAP in place in Iowa,[1673] and that the Washington and Montana PAPs explicitly permit Qwest to challenge the authority of the state to make any changes to the plan.'"' While the Iowa PAP allows Qwest to appeal changes to the PAP, the PAP explicitly envisions a process allowing for changes to the PAP.[1675] The Montana Commission plans to review and consider the sections of the PAP which cause AT&T concern about the Montana PAP.[1676] The Washington Commission argues they approved the language which raises concern for AT&T to ensure that a court would not conclude that Qwest has waived its right to challenge the Washington Commission's jurisdiction to modify the PAP.'"' With regard to Touch America's complaint, the Commission has found before that PAPs are administered by state commissions and derive from authority the states have under state law or under the federal Act.[1678]

460. Third, we find that the competitive LECs have the ability to seek remedies other than through the PAPs adopted by state commissions. AT&T contends that the Iowa and Idaho PAPs foreclose competitive LECs from pursuing non-contractual remedies.[1679] With regard to the Iowa PAP, the Iowa Board disagrees with AT&T's interpretation, instead finding that Qwest's modifications to the PAP in response to comments by AT&T and Liberty would not foreclose competitive LECs from non-contractual legal and regulatory remedies.[1680] With regard to the Idaho PAP, the Idaho Commission asserts that Qwest has conceded that competitive LECs are not precluded by the PAP from the recovery of non-contractual remedies. Only those remedies that would duplicate those available under a contractual claim are precluded.'"' As we

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1672 Touch America Qwest II Comments at 34.

1673 AT&T Qwest I Comments at 146; AT&T Qwest I Finnegan Decl. at paras. 236-50; AT&T Qwest I Reply at 71 n.210.

1674 AT&T Qwest II Comments at 158-59; AT&T Qwest II Finnegan Decl. at paras. 234-47; AT&T Qwest I Reply at 71 n.210.

1675 Iowa PAP section 16; Qwest I Reply at 119.

1676 Letter from Amy L. Alvarez, District Manager, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-189, Attach. at 2 (dated August 23,2002).

1677 Washington Commission Qwest II Comments at 30-31.

1678 *Verizon New York Order*, 15 FCC Rcd at 4164, n.1316.

1679 AT&T Qwest I Comments at 145; AT&T Qwest I Finnegan Decl. at paras. 225-35; AT&T Qwest 1 Reply at 71 n.210.

1680 Qwest I Application App. C, Vol. I, Tab 9, Iowa Board Conditional Statement Regarding Qwest Performance Assurance Plan at 32-36.

1681 Idaho Commission Qwest I Comments at 13; Qwest I Reply at 118-19.

have noted above, states have latitude to create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement.

461. Fourth, AT&T argues that the public interest cannot be met because there is no performance plan in place in Wyoming,"" and the Wyoming Commission found that the Wyoming PAP was non-compliant with its orders in five areas (the overall cap,[1683] the limitations on remedies,[1684] the review process,[1685] the de-escalation of payments,[1686] and the cap on payments for billing measurements).[1687] We conclude these concerns do not warrant rejection of this application.

462. We find the five provisions at issue in the Wyoming PAP to be reasonable, and that this PAP provides us with assurances of Qwest's future compliance with its section 271 obligations. The provisions at issue are consistent with some provisions in the Texas PAP, and are similar or identical to provisions in the other PAPs filed in the instant application. We also note that one of the provisions in which we find reassurance is the review provision in the Wyoming PAP. We read the review provision as permitting the Wyoming Commission to initiate a proceeding on its own motion at any time, to review and evaluate the PAP, to change the PAP, and to add measures and provisions to assist it in monitoring and enforcing the specific needs of consumers in Wyoming.[1688] Moreover, to the extent the PAP is offered as an attachment

[1682] AT&T Qwest II Comments at 157.

[1683] The Wyoming Commission finds the cap on Tier 1 and Tier 2 payments to be unfair, complex, and administratively burdensome. In addition, the Wyoming Commission disagrees with the limitations and procedures for changing the caps. Wyoming Commission Qwest II Comments at 11, 14; AT&T Qwest II Finnegan Decl. at paras. 218-23.

[1684] The Wyoming Commission disagrees with the limitations on remedies section, which substitutes the PAP for service quality rules, and the limitations on competitive LECs to file suits to seek additional damages for poor Qwest performance. Wyoming Commission Qwest II Comments at 12.

[1685] The Wyoming Commission requested that Qwest delete the phrase, "consistent with any independent authority under law" in the description of the Wyoming Commission's involvement in ordering changes to the PAP. In addition, the Wyoming Commission was concerned language in this section could imply that changes made outside of the six month review process would not modify the PAP. Wyoming Commission Qwest II Comments at 12; AT&T Qwest II Finnegan Decl. at paras. 224-33.

[1686] The Wyoming Commission ordered that the amount of a payment for nonconforming performance by Qwest should stay at the level to which it escalated prior to Qwest's provision of conforming performance ("sticky duration"). Wyoming Commission Qwest II Comments at 13.

[1687] The Wyoming Commission disagrees with the provision which carves out an exception for three billing measurements and places a $30,000 measurement cap on each of these measures. Wyoming Commission Qwest II Comments at 13; AT&T Qwest II Finnegan Decl. at para. 223.

[1688] Wyoming Commission Qwest II Comments at 12. Section 16.1 of the Wyoming proposed PAP states that, "Every six months, beginning six months after the effective date of Section 271 approval by the FCC for the state of Wyoming, Qwest or CLECs may request the Commission to initiate a proceeding, or the Commission may initiate a proceeding on its own motion at any time, to review and evaluate the QPAP and, after notice and hearing and in accordance with the Wyoming Administrative Procedures Act and consistent with other rights of the parties, the (continued.. ..)

to Qwest's interconnection agreements, the Wyoming Commission has the authority to *take* action to change the PAP. Thus, we find that the review provision found in the **PAP** filed as part of this application will permit the Wyoming Commission to have active oversight of the **PAP** and allow it to undertake comprehensive reviews to determine whether modifications are necessary.

463. We address the other provisions at issue in the Wyoming **PAP** in turn. While the Wyoming Commission has expressed concern about the existence of an overall cap on liability under the plan,[1689] as well as a monthly cap on payments for billing measures, we do not find that these caps would substantially reduce the effectiveness of the **PAP.** Indeed, we recognize that we have approved **PAPs** with caps on several prior occasions.[1690] The Wyoming Commission is also concerned with the language in the Wyoming **PAP** which limits remedies available to competitive LECs. We note that the language in the Wyoming **PAP** is the same as the language in the Nebraska PAP.[1691] Further, the Wyoming Commission objected to the provision in the Wyoming **PAP** that would allow penalties to de-escalate after a month of good performance.[1692] Again, the record does not support a finding that this provision is unreasonable or would diminish the effectiveness of the plan, and we note that the other **PAPs** filed in these applications have identical or similar provisions.[1693]

(Continued from previous page)
Commission thereafter may make changes to the QPAP consistent with any independent authority under law. Qwest and CLEC agree that no new performance measurement shall be added to this QPAP that has not been subject to observation as a diagnostic measurement for a period of **6** months unless ordered otherwise by the Commission, after notice and hearing. Any changes made at the six-month review pursuant to this section shall apply to and modify this agreement between Qwest and CLEC."

1689 Wyoming Commission Qwest II Comments at 11,13-14

1690 *See, e.g., BellSouth Georgia/Louisiana Order,* 17 FCC Rcd at **9184,** para. **296.** Qwest II Reynolds-PAP Decl. at paras. **23-27** (discussing similarities between the overall cap in the Wyoming PAP and the caps in the Montana, Iowa and Nebraska PAPs), paras. **42-46** (discussing similarities between the billing metric penalties in the Wyoming PAP and the Colorado PAP, and the SWBT Texas PAP). We note that this billing measures cap provision creates a total potential liability of up to **$90,000** per competitive LEC per month, and thus creates a larger potential liability than similar PAPs in the instant application (*e.g.*, Iowa, North Dakota, Utah, and Washington). Iowa PAP section **6.2.2;** North Dakota section **6.2.2;** Utah PAP section **6.2.2;** Washington PAP section **6.2.2,** Wyoming PAP section **6.2.2** See *also* SWTB Texas PAP, Sections **8** and **13.**

1691 Wyoming PAP sections **13.6,** 13.6.1 and **13.62;** Nebraska PAP, sections **13.6, 13.6.1** and 13.6.2. Qwest II Reynolds-PAP Decl. at paras. 57-58 (discussing similarities between the limitations provision in the Wyoming PAP and the corresponding sections of the Colorado, Nebraska and Washington PAPs).

1692 In the Wyoming PAP, the escalation of payments for consecutive months on non-conforming service is matched month for month with de-escalation of payments for every month of conforming services. Consider the following example: Qwest misses a performance standard from January to April, meets the performance standard in May, and misses the performance standard in June. Qwest will make payments that escalate from January to April. Qwest will make no payment in May, but Qwest's payment for poor performance in June will be made as if Qwest had failed to provide compliant performance for three consecutive months. (Wyoming PAP section **6.2.2).**

1693 We agree with Qwest that the de-escalation structure in the Qwest PAP provides a greater incentive for the RBOC to provide compliant performance than other plans that have been submitted in section **271** applications that have been approved by this Commission. Qwest II Reynolds-PAP Decl. at paras. **39-46.**

464. We recognize that states may create plans that ultimately vary in their strengths and weaknesses for tools for post-section 271 authority monitoring and enforcement; thus we defer to the Wyoming Commission to determine the form of the provisions necessary in Wyoming. We conclude that the Wyoming Commission has requested modifications to the Wyoming PAP, and that these modifications can be sought within the Wyoming PAP's review provision. With the guidance provided in this order, we expect the Wyoming Commission will adopt a PAP. We recommend that the Wyoming Commission take action to adopt a PAP as soon as possible.

465. Finally, we disagree with AT&T's contention that the PAPs will be ineffective at deterring poor performance. AT&T contends that the PAPs will be ineffective at deterring poor performance because Qwest's data are inaccurate and unreliable.[1694] The PAPs filed in this application have provisions for late, inaccurate, or incomplete performance reports.[1695] Moreover, we take further comfort in the proposals by the ROC to support an ongoing multi-state collaborative to address post-section 271-related issues (including an audit program).[1696] We find that, at least for purposes of this application, Qwest's performance data are generally reliable and reflective of Qwest's wholesale performance.[1697]

C. Unfiled Interconnection Agreements

466. Notwithstanding our concern about discrimination in interconnection agreements and potential violations of the Act as a result, we find that Qwest's previous failure to file certain interconnection agreements with the application states does not warrant a denial of this application. As discussed below, we conclude that concerns about any potential ongoing checklist violation (or discrimination) are met by Qwest's submission of agreements to the commissions of the application states pursuant to section 252 and by each state acting on Qwest's submission of those agreements. Although this record does not demonstrate ongoing discrimination, parties remain free to present other evidence of ongoing discrimination, for example, through state commission enforcement processes or to this Commission in the context of a section 208 complaint proceeding. Further, to the extent any past discrimination existed, we anticipate that any violations of the statute or our rules will be addressed expeditiously through federal and state complaint and investigation proceedings. To this end, we note that a number of state commissions have already begun investigations of these agreements.

1694 AT&T Qwest II Comments at 157; AT&T Qwest I Comments at 114; AT&T Qwest II Finnegan Decl. at paras. 201-03; AT&T Qwest I Finnegan Decl. at paras. 220-02.

1695 Qwest II Reynolds-PAP Decl. at paras. 59-60; Qwest I Reply at 116-17; Colorado PAP Sections 13-14; Idaho PAP Sections 14-15; Iowa PAP Sections 14-15; Montana PAP sections 14-15; Nebraska PAP Sections 14-15; North Dakota PAP Sections 14-15; Utah PAP sections 14-15; Washington PAP sections 14-15; Wyoming PAP sections 14-15.

1696 Qwest I Reply at 28-29; Letter from Melissa Newman, Vice President Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-189, Attach. (dated July 18,2002) at 2-3 (Qwest July 18b *Ex Parte* Letter); Iowa Board Qwest I Reply at 8-9.

1697 Iowa Board Qwest 1 Reply at 33-34. See *supra,* Section II.A for further discussion.

1. Background

461. *Regulatory Proceedings and Qwest Responses.* This issue first arose when the Minnesota Department of Commerce filed with the Minnesota Public Utilities Commission (Minnesota Commission) a complaint against Qwest on February 14,2002, citing eleven agreements that it argues should have been filed with *the* Minnesota Commission for approval.[1698] The Minnesota Commission docketed this complaint and assigned it to an administrative law judge.[1699]

468. In response to the investigation in Minnesota, Qwest filed letters with the state commissions of eight of the nine application states explaining that, while it did not consider the eleven agreements at issue in Minnesota to be interconnection agreements that must be filed under section 252, it was submitting copies of those agreements involving competitive LECs operating in that particular state.[1700] Qwest provided the same information to the Wyoming Commission in a motion to deny an AT&T request for investigation.""[1701] In addition, in seven of the eight letters, Qwest contended that, although it did not believe that the attached agreements it was submitting were section 252 interconnection agreements, should the state commission determine otherwise, "then those agreements may be approved as interconnection agreements" in that state.[1702]

[1698] AT&T Qwest I Comments at 18, Attach. 2 *(Second Amended Verified Complaint, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Minnesota Public Utilities Commission,* Docket No. P-421/C-02-197 (June 2002)). According to the second amended complaint, the Minnesota Department's investigation began on June 21,2001, when it sent an information request to Qwest asking that it provide all unfiled agreements with competitive LECs entered into by Qwest over the last five years. *See id* at 5.

[1699] On September 20,2002, the administrative law judge released a recommended order finding twenty five violations in twelve agreements. On November 1, 2002, the Minnesota Commission adopted the recommended order. *See* In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, Minnesota Public Utilities Commission, Docket No. P-421/C-02-197 (November I, 2002). The Minnesota Commission held hearings on penalties on November 19,2002.

[1700] *See* Letter from Peter Rohrbach, Counsel, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed November 15,2002) (Qwest Nov. 15e *Ex Parte* Letter) (attaching letters to the commissions of Montana, Utah and Washington; attaching a motion to deny an AT&T request for investigation in which Qwest provided the same information to the Wyoming Commission); Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148 (dated Aug. 26,2002) (Qwest Aug. 26a *Ex Parte* Letter) (attaching letters, minus attachments, to the commissions of the five Qwest I application states).

[1701] *See* Qwest Nov. 15e *Ex Parte* Letter (attaching a motion to deny an AT&T request for investigation in which Qwest provided the same information to the Wyoming Commission).

[1702] *See, e.g.,* Qwest Nov. 15e *Ex Parte* Letter; Qwest Aug. 26a *Ex Parte* Letter. We note that the Colorado Commission letter was in response to a staff audit request for documents and the Iowa Board had already begun its investigation of this matter. *See id* (letters to the Colorado Commission and the Iowa Board).

469. On April **23,2002** Qwest filed a petition for declaratory ruling with the Commission seeking a ruling on which types of negotiated contractual arrangements between incumbent LECs and competitive LECs are subject to the mandatory filing and state commission approval requirements of section 252(a)(1).[1703] Prior to the Commission's ruling on Qwest's petition for declaratory ruling, Qwest informed all the state commissions in its region of its new policy of filing all "contracts, agreements or letters of understanding" between Qwest and competitive LECs that "create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis."[1704] Moreover, Qwest announced the formation of a committee consisting of six senior managers involved with wholesale agreements to ensure that its new policy is applied and that any Commission decision **is** implemented fully and **completely**.[1705]

470. ***Qwest Supplemental Proposal.*** During the pendency of its original section 271 application, Qwest presented a proposal that it argued would alleviate the concerns expressed by commenters regarding Qwest's failure to file some interconnection agreements with the appropriate state **commissions.**[1706] Among other things, Qwest reiterated its May 2002 proposal made to state commissions in its region (*i.e.*, filing all future contracts that create obligations in connection with sections 251(b) or (c) and creating a senior committee to enforce compliance

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[1703] ***Petition for Declaratory Ruling of Qwest Communications International Inc.***, WC Docket No. 02-89, at 3 (April 23,2002) ***(Qwest Section 252 Petition).*** The Commission issued a public notice for this proceeding on April 29,2002. ***Qwest Communications International, Inc. Petition for Declaraiory Ruling On the Scope of the Duly io File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1),*** Public Notice, WC Docket No. 02-89, DA 02-976 (April 29,2002). The record closed on June 20,2002. ***Qwest Communications International, Inc. Petition for Declaratory Ruling On the Scope of the Duly to File and Obiain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)***, Public Notice, WC Docket 02-89, DA 02-1363 (June 11,2002) (Order granting extension of date by which to file reply comments). AT&T, Focal and Pac-West Telecomm (filing jointly), Mpower, New Edge, PageData, Touch America, and WorldCom, **as** well as the Iowa Board, the Minnesota Department of Commerce, and the New Mexico Attorney General and Iowa Office of Consumer Advocate (filing jointly) submitted initial comments. Reply comments were filed by ALTS, Association of Communications Enterprises, AT&T, the Minnesota Department of Commerce, PageData, Qwest, Verizon, VoiceStream Wireless and WorldCom.

[1704] ***See, e.g.,*** Letter from Peter A. Rohrbach, Mace J. Rosenstein, Yaron Dori, Attorneys for Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148 (filed Aug. 13, 2002) (attaching letters to the commissions of the application states that were inadvertently omitted from the Larry Brotherson Reply Declaration submitted in support of Qwest's reply) (Qwest Aug. 13 Erratum).

[1705] Qwest III Reply at 59 ("[I]n May 2002, Qwest instituted new management review procedures for contracts with CLECs and applied a standard under which it has been filing all new contracts, agreements, and letters of understanding negotiated with CLECs that create obligations in connection with Sections 251(b) or (c), no matter the nature or scope of such obligations."); Qwest II Reply at 140-142; Qwest I Reply at 130-132; see also Qwest III Reply Declarations, Tab 16, Reply Decl. Of Larry B. Brotherson (Qwest III Brotherson Reply Decl. at para.7; Qwest I Brotherson Decl. At paras. 7-8.

[1706] Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 02-148 and 02-189, at 1 (dated August 20,2002) (Qwest Aug. 201 *Ex Parte* Letter on Unfiled Agreements).

with the above-mentioned policy).[1707] Pursuant to its proposal, on August 21 and August 22, 2002, Qwest submitted all previously unfiled agreements, insofar as the agreements contain "provisions creating on-going obligations that relate to Section 251(b) or (c) which have not been terminated or superseded by agreement, commission order, or otherwise[,]" with the state commissions of the applicable states where it had pending 271 applications, except in the state of Iowa, In Iowa, Qwest had made filings on July 29,2002 in compliance with previous orders **of** the Iowa Board.[1708] Qwest asked the respective commissions to approve the agreements "to the extent any active provisions of such agreements relate to Section 251(b) or (c)" and make the agreements available to other competitive LECs under section 252(i).[1709] Qwest posted these agreements on its web site and made each agreement available on an "opt-in" basis to competitive LECs operating in the state in which the specific agreement applies.[1710] In addition, Qwest has sent competitive LECs operating in its region an advisory notice that the competitive LECs can look to Qwest's web site for the previously unfiled agreements.[1711]

471. On August 21,2002, the Commission requested comments on Qwest's supplemental proposal.[1712] The state commissions of Colorado, Idaho, Montana, Nebraska, North Dakota, Oregon and Washington acknowledged that Qwest had filed agreements with them pursuant to Qwest's August 20,2002 *ex parte* letter. No state commission withdrew support from Qwest's application on the basis of unfiled agreements.[1713] AT&T argues that Qwest's

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[1707] Qwest Aug. 201 *Ex Parte* Letter on Unfiled Agreements at 2; Qwest August 27 Ex ***Parte*** Letter on Unfiled Agreements at 13; Qwest II Reply at 141.

[1708] Qwest Aug. 201 *Ex* ***Parte*** Letter on Unfiled Agreements; Letter from Peter Rohrbach, Counsel, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 02-148, 02-189 at 2 (dated September 5b, 2002) (Qwest September 5b *Ex* ***Parte*** Letter); Qwest **11** Reply at 142. ***See also*** Qwest III Application, Addendum 13 at 1.

[1709] Qwest II Reply at 142; Qwest Aug. 201 *Ex* ***Parte*** Letter on Unfiled Agreements. According to Qwest, to reduce confusion, Qwest stated that it was marking those terms and provisions in the agreements that "Qwest believes relate to Section 251(b) or (c) services, and have **not** been terminated or superseded..."

[1710] Qwest Nov. 15e *Ex* ***Parte*** Letter on Unfiled Agreements at 2; Qwest September 5 *Ex* ***Parte*** Letter at 2. ***See*** also Qwest Aug. 201 Ex ***Parte*** Letter on Unfiled Agreements at 4. Qwest states that "[s]hould a state commission later conclude that a particular agreement did not have to be filed as a matter of law under Section 252, Qwest nevertheless will honor 'opt-in' contracts made with CLECs prior to that decision." Qwest Aug. 201 *Ex* ***Parte*** Letter on Unfiled Agreements at 3; Qwest II Reply at 143-144.

[1711] Qwest Nov. 15e *Ex* ***Parte*** Letter (attaching notice to competitive LECs); Qwest Aug. 201 Ex ***Parte*** Letter on Unfiled Agreements at 4; Qwest II Reply at 144.

[1712] ***Comments Requested in Connection with Qwest's Section 271 Application for Colorado, Idaho. Iowa, Nebraska and North*** *Dakota,* Public Notice, DA 02-2065 (Aug. 21,2002). Supplemental comments were filed on August 28,2002, by AT&T, Touch America, and WorldCom; the state commissions of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Oregon, and Washington; and the Minnesota Department of Commerce. Supplemental replies were filed on August 30,2002, by Qwest, AT&T, Touch America, the Iowa Board, and the Nebraska Commission.

[1713] ***See*** Colorado Supplemental Qwest I Comments at 1; Idaho Supplemental Qwest I Comments at 1 (stating that Qwest's filing of agreements with it should not affect the Commission's consideration of Qwest's section 271 (continued....)

proposed filing standard is underinclusive[1714] and, in any event, Qwest did not adhere to its own standard set forth in its August 20,2002 *ex parte* letter because it failed to file at least nine agreements for state commission approval.[1715] The parties also argue that Qwest's act of filing previously unfiled agreements with state commissions does not address the deficiencies in the record from both the nonparticipation of certain competitive LECs and KPMG's reliance on information and performance data from competitive LECs that had unfiled agreements with Qwest.[1716] In reply, Qwest disputes the parties' assertions that it has not complied with its own standard, set forth in its August 20,2002 *ex parte* letter, by failing to post on its website certain agreements and contends that the standard it has implemented is, in fact, over-inclusive.[1717] Finally, Qwest argues that its performance measurement results demonstrate that Qwest has not discriminated in favor of carriers that had entered into previously unfiled agreements with it[1718]

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application); Iowa Board Supplemental Qwest I Comments at 5; Montana Commission Supplemental Qwest I Comments at 1-2 (stating that Qwest filed seven agreements on August 22 that will be reviewed under the Montana Commission's approval process for agreements and amendments); Nebraska Supplemental Qwest I Reply at 1; North Dakota Supplemental Qwest I Comments at 2-3 (stating that the issue being examined by the Commission in this comment period has remedies that are better implemented outside of the section 271 process and that the record did not warrant a denial recommendation on Qwest's section 271 application); Oregon Commission Supplemental Qwest I Comments at 1 (stating that any impropriety related to failure to file the contracts in question was not significant enough to cause delay in making an affirmative 271 recommendation); Washington Commission Supplemental Qwest I Comments at 2 (stating that the unfiled agreements should be dealt with separately from the 271 process); Utah Qwest II Comments (supporting Qwest's section 271 application); Washington Commission Qwest 11 Comments at 32 (stating that they were not persuaded "that the unfiled agreements or ongoing investigations have affected whether the local market is open to competition"); Wyoming Commission Qwest II Comments at 16 (declining to make a public interest investigation into the unfiled agreements).

[1714] AT&T Supplemental Qwest I Comments at 24-25, 36 (arguing that Qwest's proposal contains filing exceptions for "settlements" and "bankruptcy" that have no basis in the statute). AT&T also contends that Qwest has not provided any explanation of how it applied its new standard to determine whether particular unfiled agreements create ongoing obligations related to section 251(b) or (c). Id. at 28. In its comments, WorldCom similarly questions Qwest's decision not to make settlement agreements available and notes that many of the agreements posted on Qwest's web site are termed "settlement agreements." WorldCom Supplemental Qwest I Comments at 11.

[1715] AT&T Supplemental Comments at 31-34. See *also id.*, Wilson Supplemental Qwest I Decl. at para. 11. WorldCom also argues that Qwest has not filed an agreement that allegedly guarantees the execution of a separate oral agreement. WorldCom Supplemental Qwest I Comments at 12-13.

[1716] AT&T Supplemental Qwest I Comments at 38-46; WorldCom Supplemental Qwest I Comments at 16-21; Touch America Supplemental Qwest I Comments at 5-6.

[1717] Qwest I Supplemental Reply at 25-30 (arguing that the agreements cited by AT&T in its supplemental comments have been either posted on its website in accordance with its interim opt-in plan, terminated, contain Minnesota-specific provisions, or have been filed as amendments to interconnection agreements). See also Qwest Sept. 5b *Ex Parte* Letter on Unfiled Agreements at 3-4. Qwest also contends that its exclusion of settlements of historical disputes is consistent with both Commission precedent and the positions of other parties to the state proceedings. Qwest I Supplemental Reply at 29-30.

[1718] Qwest I Supplemental Reply at 34-38. See also Qwest Aug. 27 *Ex* Parte Letter on Unfiled Agreements

and that both state commissions and the Department of Justice concluded that the collaborative section 271 process was unimpaired by the nonparticipation of certain competitive LECs.[1719]

472. ***Declaratory Order.*** On October 4,2002, after Qwest withdrew its initial 271 applications, the Commission released a memorandum opinion and order granting in part and denying in part Qwest's petition.[1720] In the Declaratory Order, we found that an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing panty, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).[1721] We found that, unless the information is generally available to carriers, agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements.[1722] We stated that settlement agreements that simply provide for backward-looking consideration that do not affect an incumbent LEC's ongoing obligations relating to section 251 need not be filed.[1723] In addition, we found that forms completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement do not constitute either an amendment to that interconnection agreement or a new interconnection agreement that must be filed under section 252(a)(1).[1724] We also found that agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court or trustee and do not otherwise change the terms and conditions of the underlying interconnection agreement are not interconnection agreements or amendments to interconnection agreements that must be filed under section 252(a)(1).[1725] Further, we stated our belief that the state commissions should be responsible for applying, in the first instance, the statutory interpretation set forth in the Declaratory Order.[1726]

473. ***State Proceedings.*** State commissions in the Qwest region are at various stages in their investigations of this issue. The status of **the** nine application states' proceedings are detailed below.

[1719] **Qwest I Supplemental Reply at 38-40. Qwest also notes that the state commissions in Qwest's region conducted over 300 days of workshops during which each checklist issue was fully explored. *Id.* at 41.**

[1720] ***Qwest Communications international, Inc. Petition for Declaratory Ruling On the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1), Memorandum Opinion and Order,* WC Docket No. 02-89, FCC 02-276 (October 4,2002) (Declaratory Order).**

[1721] ***Id.* at para. 8.**

[1722] ***Id.* at para. 9.**

[1723] ***Id.* at para. 12**

[1724] ***Id.* at para. 13.**

[1725] **Id. at para. 14.**

[1726] ***id* at para. 7.**

474. ***Colorado.*** The Colorado Commission reviewed sixteen contracts Qwest filed on August 21 and 22, 2002.[1727] On October 16,2002, the Colorado Commission adopted an order opening a docket and setting a procedural schedule for a formal investigation into Qwest unfiled agreements.[1728] On October 18,2002, the Colorado Commission derived a provisional definition of an interconnection agreement to review the sixteen contracts.[1729] The Commission found that all sixteen agreements filed by Qwest met its definitional requirement of an interconnection agreement.[1730] On November 13,2002, the Colorado Commission approved two of the sixteen previously unfiled interconnection agreements, rejected twelve Qwest interconnection agreements "due to provisions that violate the public policy" and rejected two agreements "as incomplete."[1731] In its comments in this proceeding, the Colorado Commission urges the Commission to grant the Qwest 271 application, "at least insofar as it applies to Colorado, without further delay."[1732] The Colorado Commission will address the issue of any past discrimination in a separate proceeding.[1733]

475. In its Qwest I comments, the Colorado Commission addressed both the KPMG OSS test data issue, and the argument that the regulatory process has been compromised by the

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[1727] Colorado Commission Qwest III Comments at 3; Qwest III Brothenon Reply Decl., Att. A at 1.

[1728] ***In the Matter of the Investigation into Unfiled Agreements Executed by Qwest Corporation,*** Docket No. 02I-572T, Decision No. C0.-1214, Adopted Date October 16,2002.

[1729] See Letter from Hance Haney, Executive Director – Federal Regulatory. Qwest, to Marlene Donch, Secretary, Federal Communications Commission, WC Docket 02-314, 1-2 (filed November 18, 2002); ***Order Denying Certain Amendments lo Interconnection Agreements and Granting Certain Amendments.*** Before the Public Utilities Commission of the State of Colorado, Docket Nos. 96A-287T, 97T-507, 98T-042, 98T-519, 99T-040, 99T-067, 99T-598, 00T-064, 00T-277, 01T-013, 01T-019, Decision No. C02-1295 at 5 (adopted Nov. 13,2002) (Colorado Commission Order).

[1730] ***Id.*** at 6.

[1731] ***Order Denying Certain Amendments to Interconnection Agreements and Grunting Certain Amendments,*** Before the Public Utilities Commission of the State of Colorado, Docket Nos 96A-287T, 97T-507, 98T-042, 98T-519, 99T-040, 99T-067, 99T-598, 00T-064, 00T-277, 01T-013, 01T-019. Decision No. C02-1295 at 7 (adopted Nov. 13,2002) (Colorado Commission Unfiled Agreements Order). The Colorado Commission found that twelve of the denied agreements "all contain confidential provisions that are an essential element of the respective agreements, or redact essential financial information from the filed agreement." *Id.* at 10. The Colorado Commission concluded that "[b]ecause the confidentiality clauses are bound inextricably to the whole. these agreements must be denied in whole." ***Id.*** at 10-11. Furthermore, the Colorado Commission found that "7 of these I2 agreements also contain an arrangement between Qwest and the representative CLEC that the CLEC will withdraw from the US WEST/Qwest merger proceeding or the Qwest § 271 proceeding." *Id.* at I I. Finally, with respect to the *two* other agreements that were denied as incomplete, the Colorado Commission found that "[w]ithout the entire agreement and all attachments before us, we cannot make a finding that the requirements of Rule 5.7.2 have been met." *Id.* at 13.

[1732] Colorado Commission Qwest 111 Addendum to Reply at 2.

[1733] In the Maner of the Investigation into Unfiled Agreements Executed by Qwest Corporation, Order Opening Docket and Setting Procedural Schedule, Public Utilities Commission of the State of Colorado, Docket No. 02I-572T (Adopted October 16,2002).

nonparticipation of some competitive LECs, as raised by AT&T at a May workshop."" With respect to the first issue, according to the Colorado Commission, it solicited any information about the unfiled agreements upon which it might conclude that it should delay its determination of Qwest's OSS compliance.[1735] However, no competitive LEC submitted any information and, as a result of its inquiry, the Colorado Commission concluded "that there was nothing in the record to support a finding that the OSS test data are corrupted."[1736] The Colorado Commission also considered the argument that nonparticipation tainted the process, but determined that further delay in the section 271 process was unwarranted, and that any violations of the law could be litigated in a separate docket.[1737] In reaching this conclusion, the Colorado Commission noted that Qwest voluntarily "made available copies of all contracts, agreements, and letters of understanding with competitive LECs creating forward-looking obligations, to meet the requirements of § 252(a)(1)."[1738]

476. ***Idaho.*** Qwest filed six contracts with the Idaho Commission on August 21, 2002.[1739] In addition, the Idaho Commission consolidated an additional amendment to an interconnection agreement with the applications for approval of the previous six contracts.[1740] On November 19,2002, the Idaho Commission adopted an order approving all seven agreements,[1741] and striking the confidentiality provisions from those agreements.[1742] The Idaho Commission determined during the pendency of the prior section 271 application that it would not open an independent investigation into unfiled agreements because insufficient facts were presented to justify an investigation, and noted that the matter was pending before the Commission.[1743]

[1734] Colorado Commission Qwest I Comments at 39-40, 63-65.

[1735] ***Id.*** at 40.

[1736] ***Id.*** at 40-41; see *also* Colorado Commission Qwest I Reply at 45

[1737] Colorado Commission Qwest I Comments at 64-65; Colorado Commission Qwest I Reply at 45-46.

[1738] Colorado Commission Qwest I Comments at 64; Colorado Commission Qwest I Reply at 45-46.

[1739] Qwest 111 Brotherson Reply Decl., Att. A at 2; Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed November 21,2002) (Qwest Nov. 21a *Ex Parte* Letter) attachment at 3.

[1740] Qwest III Brotherson Reply Decl., Att. A at 2

[1741] In the Matter of the Application of Qwest Corporation for Approval of Amendments to Interconnection Agreements for the State of Idaho Pursuant to 47 U.S.C. § 252(e), Idaho Public Utilities Commission, Case No QWE-T-02-17, Order No. 29154 (November 19,2002) (Idaho Commission Unfiled Agreements Order).

[1742] ***Id.***

[1743] Idaho Commission Qwest III Comments at 1 (incorporating its Qwest I filings); Idaho Commission Qwest I Comments at 13. We note that other states in Qwest's region are investigating this issue. For example, in June, the staff of the Arizona Corporation Commission ("Arizona Commission") released a draft recommendation defining "interconnection agreements" for the purposes of section 252 and determined that 25 of 100 previously unfiled agreements should have been filed with the Arizona Commission. ***See*** AT&T Qwest 1 Comments, Attach. 4 (*Qwest* (continued...)

477. ***Iowa.*** The Iowa Board has issued a final order regarding the unfiled agreements.[1744] In a May 29,2002 order making tentative findings, the Iowa Board defined an interconnection agreement that must be filed pursuant to section 252(a)(1) as "a negotiated or arbitrated contractual arrangement between an ILEC and a CLEC that is binding; relates to interconnection, services, or network elements, pursuant to § 251, or defines or affects the prospective interconnection relationship between two LECs."[1745] The Iowa Board then analyzed three Qwest-provided agreements involving competitive LECs operating in Iowa that were previously identified by the Minnesota Department of Commerce in that agency's complaint against Qwest.[1746] The Iowa Board concluded that Qwest had violated section 252, as well as a state rule, by failing to file the agreements with the Board.[1747] It ordered Qwest to submit within *60* days any remaining unfiled interconnection agreements, as defined by the Iowa Board, involving competitive LECs operating in Iowa and informed Qwest that it would impose civil penalties for future violations.[1748] That order became final on June 18,2002, subsequent to the initial filing of the section 271 applications for Colorado, Idaho, Iowa, Nebraska and North Dakota on June 11,2002. Pursuant to the now-finalized ***Iowa Board Section 252 Order,*** Qwest filed **14** agreements (including the three agreements already reviewed) that met the standard for

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Corporation's Compliance with Section 252(e) of the TelecommunicationsAct of 1996, Staff Report and Recommendation, Docket No. RT-OOOOOF-02-0271, at 1, 7-17 (June 7,2002)). Staff issued a supplemental report on August 14,2002, recommending that the Arizona Commission open a sub-docket to the state section 271 docket to address allegations that Qwest interfered with the section 271 proceeding. ***See*** WorldCom Supplemental Qwest I Comments, Attach. C ***(Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996,*** Supplemental Staff Report and Recommendation, Docket No. RT-00000F-02-0271, at 11 (Aug. 14,2002)). The Oregon Public Utility Commission declined to reopen the record in its section 271 proceeding "to consider the evidence of Qwest improprieties" because the allegations raised by the parties are not Oregon-specific; other jurisdictions in the Qwest region have chosen not to delay the conclusion of their section 271 proceedings; and the Department of Justice has recommended that the Commission grant Qwest section 271 authority despite the proffered information. See Qwest Aug. 22 Ex ***Parte*** Letter on Unfiled Agreements, Attach. 9 ***(Investigation into the Entry of Qwest Corporation, f/k/a US West Communications, Inc., into In-Region, InterLATA Services under Section 271 of the TelecommunicationsAct of 1996***, Final Recommendation Report of the Commission, Docket No. UM 823, at 19 (Aug. 19,2002)).

[1744] The Iowa Board opened a separate (non-section 271) docket to consider a complaint letter filed by AT&T against Qwest on February 27,2002. ***See*** AT&T Comments, Attach. 3 ***(AT&T Corporation v. Qwest Corporation,*** Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing, IUB Docket No. FCU-02-2, at 2-3 (May 29,2002) ***(Iowa Board Section 252 Order)).***

[1745] ***Iowa Board Section 252 Order*** at ***8***

[1746] ***Id*** at 2. These three agreements consist of two McLeod agreements that amended terms of existing interconnection agreements by establishing final rates following closure of the Qwest/US WEST merger and modifying dispute resolution procedures, as well as one Covad agreement that included provisions addressing performance standards for ordering and provisioning. See ***Iowa Board Section 252 Order*** at 9-15.

[1747] ***Iowa Board Section 252 Order*** at **16;** Qwest I Iowa Board Comments at 72. We note that all three agreements remain in effect, See Letter from Peter A. Rohrbach, Counsel for Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189, at 1-2 (filed Aug. 13,2002) (Qwest Aug. **13** *Ex* ***Parte*** Letter on Unfiled Agreements).

[1748] ***Iowa Board Section 252 Order*** at **16;** Iowa Board Qwest I Comments at 72

an interconnection agreement set forth by the Iowa Board.[1749] The Iowa Board approved those 14 agreements on August 27 and 30, 2002.[1750] Qwest also submitted an additional 19 agreements that it asserted did not have to be filed because they are not encompassed within the Iowa Board's definition of an interconnection agreement; rather, it was submitting them in the interests of full disclosure and so that the Iowa Board may examine Qwest's evaluations of the Iowa Board's standards to each of the competitive LEC agreements.[1751] The Iowa Board subsequently agreed with Qwest, determining that these 19 agreements were not negotiated interconnection agreements under section 251 and therefore did not need to be published.[1752]

478. According to the Iowa Board, no party presented evidence that would indicate that, even with the absence of certain competitive LECs, the section 271 process in Iowa was not complete or exhaustive with respect to the checklist items.[1753] In denying motions filed by AT&T and the Iowa Office of Consumer Advocate to "import the unfiled agreements into the [section 271] public interest proceedings," the Iowa Board concluded that it had already accomplished the goal of the public interest inquiry (to identify and correct problems, beyond the competitive checklist) through its separate proceeding on unfiled agreements.[1754]

479. *Montana.* Qwest filed seven contracts with the Montana Commission on August 22, 2002.[1755] The Montana Commission approved four and denied three of those agreements at a meeting on November 19, 2002.[1756]

[1749] ***See*** Iowa Board Comments Regarding Late-Filed Interconnection Agreements of Qwest Communications International, Inc. at 2 (Aug. 28, 2002) (Iowa Board Qwest I Supplemental Comments).

[1750] ***Id*** at 4; Iowa Board Reply Comments Regarding Late-Filed Interconnection Agreements of Qwest Communications International, Inc. at 1 (Iowa Board Qwest I Supplemental Reply).

[1751] Iowa Board Qwest I Supplemental Comments at 3.

[1752] *Id.* at 4.

[1753] Iowa Board Qwest III Comments at 1 (incorporating its Qwest I filings); Iowa Board Qwest I Reply at 29-30.

[1754] Iowa Board Qwest I Reply at 29 (citing ***Iowa Board Section 252 Order). See also*** Letter from Hance Haney, Executive Director, Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 02-148, 02-189 (Qwest Aug. 22 ***Ex Porte*** Letter on Unfiled Agreements), Attach. 3 (Order to Consider Unfiled Agreements, IUB Docket Nos. INU-00-2 and SPU-00-11 (June 7,2002) (denying AT&T and the Iowa Office of Consumer Advocate's motions)).

[1755] Qwest III Brotherson Reply Decl., Att. A at 2-3; Qwest Nov. 21a *Ex* ***Parte*** Letter Attachment at 3. ***See also*** Montana Commission Qwest III Comments at 1 (incorporating its Qwest II filings); Montana Commission Supplemental Qwest I Comments at 1 (responding to the Public Notice requesting comment on Qwest's Aug. 20 *Ex* ***Parte).***

[1756] Qwest Nov. 21a ***Ex Parte*** Letter Attachment at 3. ***See*** In the Matter of the Application of Mid-Rivers Telephone Cooperative and Qwest Corporation, Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of their Wireline Interconnection Agreement, Final Order on Newly Submitted Interconnection Agreement, Docket No. D97.2.19, Order No. 5981a (Dec. 18,2002); In the Matter of the Application of Covad Communications and Qwest Corporation, Pursuant to Section 252(e) of the Telecommunications Act of 1996 for (continued.. ..)

480. *Nebraska.* Qwest filed ten contracts with the Nebraska Commission on August 21, 2002.[1757] The Nebraska Commission approved those ten contracts on September 24, 2002.[1758] In its supplemental reply in the initial section 271 proceeding, the Nebraska Commission indicated that competitive LEC concerns about any prior discrimination by Qwest can be appropriately addressed by filing a formal complaint with it. The Nebraska Commission noted

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Approval of their Wireline Interconnection Agreement, Final Order on Newly Submitted Interconnection Agreement, Docket No. D99.3.68, Order No. 6175a (Dec. 18,2002); In the Matter of the Application of DSLnet and Qwest Corporation, Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of their Wireline Interconnection Agreement, Final Order on Newly Submitted Interconnection Agreement, Docket No. D2000.11.196, Order No. 6334a (Dec. 18,2002); In the Matter of the Application of McLeodUSA Telecommunications Services, Inc. and Qwest Corporation, Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of their Wireline Opt-In Agreement, Final Order on Newly Submitted Interconnection Agreements, Docket No. D2001.1.7, Order No. 6338a (Dec. 18,2002) (collectively, Montana Unfiled Agreements Orders).

[1757] Qwest Nov.21a *Ex Parte* Letter Attachment at *3*.

[1758] Nebraska Commission Qwest III Comments at 1-2; Qwest III Brotherson Reply Decl., Att. A at *3*. ***See*** In the Matter of the Application of Qwest Corporation of Denver, Colorado and TCG-Omaha of Denver, Colorado, seeking approval of an unbundled network element, unbundled loop, subloop unbundling, unbundled dark fiber and network interface device amendment to their interconnection agreement previously approved in Application No. C-1379, Nebraska Public Service Commission, Application No. C-2783 (September 24,2002); In the Matter of the Application of Qwest Corporation of Denver, Colorado seeking approval of a billing settlement agreement with McLeodUSA, Inc.., of Sioux Falls, South Dakota, Nebraska Public Service Commission, Application No. C-2785 (September 24,2002); In the Matter of the Application of Qwest Corporation of Denver, Colorado seeking approval of an escalation procedure and business solutions agreement with McLeodUSA, Inc.., of Sioux Falls, South Dakota, Nebraska Public Service Commission, Application No. C-2786 (September 24,2002); In the Matter of the Application of Qwest Corporation of Denver, Colorado seeking approval of a billing settlement agreement with MCI WorldCom Network Services, Inc. of Englewood, Colorado, Nebraska Public Service Commission, Application No. C-2787 (September 24,2002); In the Matter of the Application of Qwest Corporation of Denver, Colorado seeking approval of a business escalation agreement with MCI WorldCom Network Services, Inc. of Englewood, Colorado, Nebraska Public Service Commission, Application No. C-2788 (September 24. 2002); In the Matter of the Application of Qwest Corporation of Denver, Colorado seeking approval of a settlement agreement with McLeodUSA, Inc.., of Sioux Falls, South Dakota, Nebraska Public Service Commission, Application No. C-2789 (September 24,2002); In the Matter of the Application of Qwest Corporation of Denver, Colorado seeking approval of a facility decommissioning agreement for unbundled loop services with Covad Communications Company, of Santa Clara, California, Nebraska Public Service Commission, Application No. C-2790 (September 24, 2002); In the Matter of the Application of Qwest Corporation of Denver, Colorado seeking approval of a billing and settlement agreement and release with Aliant Midwest, Inc., d/b/a Alltel of Lincoln, Nebraska, Nebraska Public Service Commission, Application No. C-2791 (September 24,2002); In the Matter of the Application of Qwest Corporation of Denver, Colorado seeking approval of a service level agreement for unbundled loop service with Covad Communications Company, of Santa Clara, California, Nebraska Public Service Commission, Application No. C-2792 (September 24,2002); In the Matter of the Application of Qwest Corporation of Denver, Colorado seeking approval of a confidential billing settlement agreement with Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. of Minneapolis, Minnesota, Nebraska Public Service Commission, Application No. C-2793 (September 24,2002); In the Matter of the Application of Qwest Corporation of Denver, Colorado seeking approval of a facility decommissioning agreement with Alltel Communications, Inc. of Lincoln, Nebraska, Nebraska Public Service Commission, Application No. C-2794 (September 24,2002).

that when it made its initial recommendation to the Commission on July 3,2002, it fully recognized AT&T's concern regarding competitive LEC nonparticipation.[1759]

481. ***Norih Dakota.*** On October 10,2002, the North Dakota Commission approved three agreements filed by Qwest on August 21, 2002.[1760] The North Dakota Commission held an informal hearing on June 5,2002 to consider a motion filed by AT&T to reopen North Dakota's section 271 Compliance Investigation.[1761] In denying AT&T's motion, the North Dakota Commission indicated that such complaints would be more appropriately considered in a separate docket under the provisions of sections 251 and 252, and in accordance with future guidance from the Commission, and not in the North Dakota Commission's section 271 Compliance Investigation.[1762]

482. *Utah.* Qwest filed eleven contracts with Utah Commission on August 21, 2002.[1763] The ninety day statutory period for regulatory review expired on November 19,2002 and the agreements are approved interconnection agreements by operation of law.[1764]

483. ***Washington.*** The Washington Commission approved the sixteen agreements Qwest filed with the Washington Commission on August 22, 2002.[1765] The Washington

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[1759] Nebraska Supplemental Qwest I Reply at 1 (also stating that its section 271 proceeding was "thorough and exhaustive" and Qwest's filing of previously unfiled agreements has not altered the Nebraska Commission's support for Qwest's application).

[1760] North Dakota Commission Qwest III Comments at I; Qwest III Brothenon Reply Decl., Att. A at 3; McLeodUSA Telecommunications Services, Inc./Qwest Corporation Interconnection Agreement Amendments Application, State of North Dakota Public Service Commission, Case No. PU-2067-02-445 (October 10, 2002) (North Dakota Commission Unfiled Agreements Order).

[1761] North Dakota Commission Qwest 1 Comments, App. A at 268.

[1762] ***Id. See also*** Qwest Aug. 22 *Ex* ***Parte*** Letter on Unfiled Agreements, Attach. 6 ***(US West Communications, Inc. Section 271 Compliance Investigation***, Transcript of Special Meeting, Case No. PU-314-97-193, at 2-6 (June 6, 2002)).

[1763] Qwest III Brothenon Reply Decl., Att. A at **3;** Qwest Nov. 21a *Ex Parte* Letter Attachment at **4.** ***See also*** North Dakota Qwest III Comments at 1 (reaffirming its prior opinion that "Qwest has met the legal standards contained in Section 271(c)(1)(A) and (B), the 14-point competitive checklist, the public interest standard, and Section 272.")

[1764] Qwest III Brotberson Reply Decl., Att. A at 3

[1765] In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 between Integra Telecom of Washington, Inc., f/k/a OGC Telecomm, Ltd., d/b/a Integra Telecom and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-980380 (October 9,2002); In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 between Covad Communications Company and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-980312 (September 25,2002); In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 between Ernest Communications, Inc. and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-980396 (October 9,2002); In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 between Eschelon (continued....)

Commission declined to conduct a section 271 public interest investigation because they were not persuaded that "the unfiled agreements or ongoing investigations have affected whether the local market is open to competition."[1766]

484. ***Wyoming.*** The Wyoming Commission approved the **four** agreements Qwest filed on August **21,** 2002.[1767] In its comments, the Wyoming Commission stated that there has been no evidence that any unfiled agreement "in Wyoming or elsewhere has had any specific adverse

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Telecom of Washington, Inc., f/k/a American Telephone & Technology, Inc. and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-990385 (September 25,2002); In the Matter of the Request for Approval **of** Negotiated Agreement Under the Telecommunications Act of 1996 between Fairpoint Communications Solutions Corp., f/k/a Fairport Communications Corp. and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-990343 (October 23,2002); In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act **of** 1996 between Global Crossing Local Services, Inc., f/k/a Frontier Local Services, Inc. and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-970368 (October 9,2002); In the Matter **of** the **Request** for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 between AT&T Communications of the Pacific Northwest, Inc. and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-960309 (September 25,2002); In the Matter **of** the Request **for** Approval of Negotiated Agreement Under the Telecommunications Act of 1996 between MCI WorldCom Communications, Inc., f/k/a MFS Intelenet, Inc. and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-960323 (October 9,2002); In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 between McLeodUSA Telecommunications Services, Inc. and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-993007 (September 25,2002); In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of **1996** between SBC Telecom, Inc. and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-023004 (September 25,2002); In the Matter of the Request for Approval of Negotiated Agreement Under the Telecommunications Act of 1996 between **XO** Washington, Inc., f/k/a Nextlink Washington, L.L.C. and Qwest Corporation, f/k/a US West Communications, Inc., Washington Utilities and Transportation Commission, Docket No. UT-960356 (October 9, 2002) (collectively Washington Commission Unfiled Agreements Orders); Qwest III Brotherson Reply Decl., Att. A at 3-4.

[1766] Washington Commission Qwest III Comments at **2** (incorporating its Qwest II filings); Washington Commission Qwest II Comments at 32, *citing* 40th Supplemental Order, para. 9. The Washington Utilities and Transportation Commission stated that it was not persuaded that the "unfiled agreements or ongoing investigations have affected whether the local market is open to competition" and affirmed its earlier decision that no party demonstrated that interconnection agreements should have been filed or are discriminatory, or that it should delay or cease its review of Qwest's section 271 compliance. ***See*** Qwest Aug. 22 *Ex* ***Parte*** Letter on Unfiled Agreements, Attach. 2 ***(Investigation Into US West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*** and ***US West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996,*** 40th Supplemental Order Denying Petition for Reconsideration, Docket Nos. UT-003022, UT-003040 (July 15,2002)).

[1767] In the Matter of the Contract filing of Qwest For Authority to Enter into Negotiated Interconnection Agreements with McLeod USA, Inc. and Covad Communications Company, Public Service Commission of Wyoming, Docket Nos. 70000-TK-02-822, 70023-TK-02-48, 70071-TK-02-3 (November 14,2002) (Wyoming Commission Unfiled Agreements Order); Qwest Nov. 21a *Ex* ***Parte*** **Letter** attachment at 4. ***See also*** Wyoming Commission Qwest III Comments at 4; Qwest III Brotherson Reply Decl., Att. A at 4.

effect on Wyoming."[1768] The Wyoming Commission declined to make a section 271 public interest investigation into the unfiled agreements for several reasons: (1) there was no allegation of actual harm or wrongdoing in Wyoming; (2) the matter of what constitutes an interconnection agreement was before the Wyoming Commission; and (3) the question of harm to Wyoming was already before the Wyoming Commission in two other proceedings.[1769]

485. *Commenters.* Some commenters argue that Qwest's practice of not filing with the states certain carrier-to-carrier agreements requires a denial or a delay in approving Qwest's joint application for the following reasons: (1) the terms of these agreements violate the nondiscrimination requirements of several checklist items;[1770] (2) Qwest's failure to file interconnection agreements for state approval is a violation of section 252 and is against the public interest;[1771] (3) the regulatory process has been compromised by nonparticipation provisions included in some of the agreements;[1772] and (4) the KPMG ROC *OSS* test has "no real world value" because the results included carriers that received preferential treatment from Qwest.[1773] The Department of Justice takes no position on whether Qwest's failure to file the agreements violated section 251 or 252 but it labels the allegations "serious," and urges the Commission to give the matter its "careful attention."[1774] At the same time, the Department of

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1168 Wyoming Commission Qwest III Comments at 4

1769 Wyoming Commission Qwest II Comments at 16.

1770 AT&T Qwest III Comments at 40; AT&T Qwest II Comments at 18-19; AT&T Qwest I Comments at 15-17 (arguing that Qwest cannot demonstrate compliance with checklist items 1, 2, 3, 7, 9, 10, 12, and 14); AT&T Qwest I Reply at 10-13. AT&T also argues that Qwest's failure to file some agreements with the appropriate state commissions violates Commission rule 1.17 and thus is another independent basis for denying Qwest's application. AT&T Qwest I Reply at 15-16. 47 C.F.R. § 1.17 reads in relevant part, "No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading, report or other written statement submitted *to* the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission."

1771 See, *e.g.*, AT&T Qwest III Comments at 83-86; AT&T Qwest II Comments at 135-136; AT&T Qwest I Comments at 120-22; PageData Qwest III Comments at 3; Touch America Qwest III Comments at 20; Touch America Qwest II Comments at 28-29; Touch America Qwest I Comments at 24-25; WorldCom Qwest 111 Comments at 21, 24; Letter from Amy L. Alvarez, District Manager, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 at 2, n.1 (filed Dec. 11,2002). In addition, McLeod does not take a position on the lawfulness of Qwest's failure to file some agreements (some of which were agreements with McLeod) but does argue that Qwest's application is not in the public interest because Qwest has failed to abide by the terms of the agreements. McLeod Qwest I Reply at 4-5

1772 AT&T Qwest III Comments at 40-41; AT&T Qwest II Comments at 134-136; AT&T Qwest I Comments at 121; AT&T Qwest III Reply at 18-19, 45-46; AT&T Qwest II Reply at 9, 73-76; AT&T Qwest I Reply at 13-15, 67-71; Touch America Qwest III Comments at 19; Touch America Qwest II Comments at 24-25; Touch America Qwest I Comments at 24.

1773 See. *e.g.*, AT&T Qwest III Comments at 41; AT&T Qwest II Comments at 48; AT&T Qwest I Comments at 28-30; AT&T Qwest III Reply at 18; AT&T Qwest II Reply at 14-16; AT&T Qwest I Reply at 14; CompTel Qwest I Comments at 13-15; Touch America Qwest III Comments at 21-22.

1774 Department of Justice Qwest 111 Evaluation at 2, n.2 (stating that although the allegations were serious, the Department "did not find that they necessarily implicated its analysis of whether the local exchange markets *are* at (continued.. ..)

Justice states that it is not apparent that the remedy for such prior violations, if any, lies in this proceeding rather than in effective enforcement through separate dockets in which such matters are directly under investigation.[1775] Indeed, the Department of Justice notes that the Commission's Declaratory Order "did not preclude continuing or future state enforcement action related to these issues."[1776]

2. Discussion

486. While we are troubled by Qwest's previous failure to file certain agreements with the states, we find that this previous failure does not warrant a denial of this application. We conclude that concerns about any potential ongoing checklist violation (or discrimination) are met by Qwest's submission of agreements to the commissions of the application states pursuant to section 252 and by each state acting on Qwest's submission of those agreements.[1777] The possibility of noncompliance with section 252 on a going-forward basis, therefore, was eliminated by each state commission's approval or rejection of those agreements. In addition, we find that commenters have provided no evidence that the records developed by the state commissions are wanting because certain competitive LECs did not participate. We also find that no commenter offered persuasive evidence that the KPMG OSS test data were compromised as a result of unfiled agreements. We address each of these conclusions in turn below.[1778]

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the time of application fully and irreversibly open to competition, or that resolution and remedy of the possible Section 251 or 252 violations were required to be addressed in the pending Section 271 docket."); Department of Justice Qwest II Evaluation at 3, n.6 (restating that "the Department defers to the Commission's assessment of whether Qwest's earlier failure to file those agreements violated Sections 251 or 252"); Department of Justice Qwest I Evaluation at 3 (noting that should the Commission find a violation, sanctions may be appropriate and could include suspension or revocation of section 271 authority).

1715 Department of Justice Qwest I Evaluation at 3. See also Department of Justice Qwest III Evaluation at 2, n.2.

1776 Department of Justice Qwest III Evaluation at n.5

1777 Qwest Nov. 21a *Ex Parte* Letter, Attachment at 1-4; Qwest Aug. 201 *Ex Parte* Letter on Unfiled Agreements; Colorado Commission Unfiled Agreement Order; Idaho Commission Unfiled Agreements Order, Iowa Board Section 252 Order; Montana Commission Unfiled Agreements Orders; Nebraska Commission Unfiled Agreements Orders; North Dakota Commission Unfiled Agreements Order; Washington Commission Unfiled Agreements Orders; Wyoming Commission Unfiled Agreements Order.

1778 We reject AT&T's argument, raised in its reply in the Qwest I and II proceedings, that Qwest's application violates Commission rule 1.17. 47 C.F.R. § 1.17. See AT&T Qwest II Reply at 20; AT&T Qwest I Reply at 15-16; see also Touch America Qwest III Comments at 22-23. We disagree that Qwest made any "willful material omission'' by not including in its application the content of the unfiled agreements it entered into with cenaio competitive LECs. Qwest has consistently asserted in pleadings made before the Commission and state commissions that the agreements under investigation in Minnesota and other states are not, in its view, interconnection agreements. Moreover, we cannot conclude that this omission was material when Qwest filed its application. Prior to October 4,2002, the Commission had not expressly defined the statutory term "interconnection agreement.'' The state commissions that expressly considered the unfiled agreements issue determined that it was not a section 271 matter. See, *e.g.*, Colorado Commission Qwest I Reply at 45 (stating that the "allegation of illicit agreements is potentially a serious issue, but it is not a serious § 271 issue"); Iowa Board Qwest I Reply at 29; North Dakota Commission Qwest I Comments, App. A at 268. Similarly, we reject McLeod's assertion that Qwest's alleged (continued....)

487. ***Discrimination in Violation of Section** 271.* We reject arguments that Qwest does not meet the nondiscrimination requirements found in the competitive checklist because of the existence of the unfiled agreements.[1779] The existence of unfiled agreements creates some possibility that there may be discrimination, if the particular agreement at issue is an interconnection agreement and if the competitive LEC thereby receives favorable terms and conditions not available to other competitive LECs. We acknowledge the seriousness of these allegations and the impact these agreements may have on competition. We likewise acknowledge the controversy presented by the record as it has developed in the states and at this Commission. Qwest's filings with the nine state commissions prior to the filing of the instant section 271 application coupled with all nine state commissions' disposition of those filed agreements eliminate the possibility of ongoing discrimination.[1780] With respect to agreements

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nonperformance of its unfiled agreements demonstrates that granting Qwest section 271 authority is against the public interest. The remedy for any such alleged nonperformance is best addressed in an enforcement or civil litigation context.

[1119] ***See, e.g.***, AT&T Qwest III Comments at 40; AT&T Qwest II Comments at 25, 134; AT&T Qwest I Comments at 16; PageData Qwest III Comments at 3; Touch America Qwest III Comments at 20; WorldCom Qwest III Comments at 21, 24.

[1780] Qwest Nov. 21a *Ex **Parte*** Letter, Attachment at 1-4; Qwest Aug. 201 *Ex* Parte Letter on Unfiled Agreements; Colorado Commission Unfiled Agreement Order; Idaho Commission Unfiled Agreements Order, Iowa Board Section 252 Order; Montana Commission Unfiled Agreements Orders; Nebraska Commission Unfiled Agreements Orders; North Dakota Commission Unfiled Agreements Order; Washington Commission Unfiled Agreements Orders; Wyoming Commission Unfiled Agreements Order. Moreover, we reject the commenters' argument that Qwest has not filed all previously unfiled agreements with the state commissions. Qwest has explained persuasively that the agreements cited by the commenters either were filed, expired, terminated, superseded, did not contain ongoing section 251(b) or (c) obligations, did not concern a section 211 application state, or simply provide for backward-looking consideration that do not affect an incumbent LEC's ongoing obligations relating to section 251. See, *e.g.*, Letter from Peter Rohrbach, Qwest Counsel, to Marlene H. Dortch, Secretary, Federal Comunications Commission, WC Docket No. 02-314 (filed Dec. 20,2002); Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 18,2002) (attaching updated matrix in response to AT&T Dec. 11 matrix); Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 18,2002) (attaching consolidated matrix); Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 10, 2002) (Qwest Dec.10b *Ex **Parte*** Letter); Letter from Todd L. Lundy, Associate General Counsel, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, Att. A and Att. B, WC Docket No. 02-314 (filed December 6a, 2002) (Qwest Dec. 6a ***Ex Parte*** Letter); Qwest III Reply at 59 ("Qwest already has been applying a policy of making filings under Section 252 that fully encompasses the standard announced by the Commission. . . . Qwest has filed all new contracts entered into with CLECs since the spring that meet this standard. In addition, Qwest has filed all currently effective provisions on other previously unfiled contracts with CLECs involving the nine states here insofar as such provisions involve ongoing current obligations under Sections 251(b) or (c)."); Qwest III Reply at 59-61; Qwest III Brotherson Decl. at para. I8 (stating that neither the Arch nor the Paging Network agreement cited by PageData contains currently effective terms); Qwest II Brotherson Decl. at para. 15 ("Qwest has not failed to file any agreement insofar as that agreement contains currently effective obligations related to Section 251(b) or (c)"); and attachment B (agreement matrix); Letter from Hance Haney, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 at 1-2 (filed Nov. 14,2002) (Qwest Nov. 14e *Ex* Parte Letter); Declaratory Order. ***See*** also Brotherson Decl. at para. 20 (while "Qwest marked the effective provisions that it believed relate to Section 251(b) and (c), Qwest submitted the entire contracts to state commissions, which were, of course, free to disagree with Qwest's (continued.. ..)

that a state commission has approved, competitive LECs are permitted to opt-in to those agreements.[1781] With respect to agreements that were rejected by a state, we find that there is no discrimination on a going-foxward basis because the section 251 provisions therein are void as to the original parties. We find that there is no ongoing discrimination in light of all nine state commissions' disposition of these agreements.

488. Under the framework set forth in the Act, competitive carriers only are entitled to avail themselves of terms and conditions of ***interconnection agreements*** through the operation of section 252(i). Where a state commission has determined that the agreements filed by Qwest on or before August 22,2002 were not interconnection agreements, then no discrimination within the meaning of sections 251,252, or 271 has occurred because sections 251 and 252 have not been triggered with respect to those agreements. Where a state commission has determined that any previously unfiled agreement is an interconnection agreement, that determination also definitively eliminated any discrimination on a going-forward basis because competitors then were able to opt-in to any such agreement.

489. In addition, as discussed above, the Colorado Commission rejected twelve interconnection agreements "due to provisions that violate the public policy" and rejected two additional interconnection agreements "as incomplete" and the Montana Commission rejected three agreements.[1782] We find that the determinations of the Colorado Commission and the Montana Commission have similarly eliminated any discrimination on a going-forward basis because the section 251 provisions therein are void as to the original parties.[1783] Thus, any possible discriminatory effect of these agreements does not exist on a going-forward basis. The

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determinations . . . [t]he provisions that Qwest did not mark in its submissions to state commissions and did not post on its website were only those that are no longer in effect (because they have expired or been terminated or superseded) or in no way relate to Section 251(b) and (c)"). Qwest I Supplemental Reply at 25-28; Qwest Sept. 5b *Ex Parte* Letter on Unfiled Agreements at 3-4. ***See also Declaratory Order,*** WC Docket No. 02-89, FCC 02-276 (October 4, 2002).

[1781] See Qwest Aug. 201 *Ex Parte* Letter. We note that Qwest's plan applied only to the nine states where it has section 271 applications currently pending before us. We do not address this limitation as our review of checklist compliance concerns only the nine states in the instant joint application.

[1782] ***Colorado Commission Order*** at 7; Qwest Nov. 21a *Ex Parte* Letter Attachment at 3. In addition, the Idaho Commission approved Qwest's previously unfiled agreements as interconnection agreements but found that the confidentiality provisions shall not be a part of those agreements. Idaho Commission Unfiled Agreements Order at 7. See Qwest Aug. 201 *Ex Parte* Letter on Unfiled Agreements. We note that Qwest's plan applied only to the nine states where it has section 271 applications currently pending before us. We do not comment on this limitation as our review of checklist compliance concerns only the nine states in the instant joint application.

[1783] Letter from Mana L. Jennings-Fader, Commission Counsel, Colorado Public Utilities Commission, to Marlene H. Donch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed November 26,2002) (Colorado Commission November 26 *Ex Parte* Letter); Qwest Nov. 21a *Ex Parte* Letter Attachment at 3 ("The Commission did not approve three of the agreements and as a result, the provisions of those agreements relating to ongoing obligations pursuant to Section 251(b) or (c) are not in effect in Montana."). Likewise, the confidentiality provisions in the Idaho agreements are void as to the original parties. Idaho Commission Unfiled Agreements Order at 7 ("The Commission Staff and Qwest agree that the confidentiality and withdrawal provisions do not need to be a part of any of the six ageements Qwest filed on August 21,2002, subject to Commission review and approval").

Colorado Commission will address the issue of any past discrimination in a separate proceeding.""

490. *Section 252(a) violation.* Based on the record before **us,** we reject the argument that Qwest currently violates section 252(a) and that approval of Qwest's joint application would be against the public interest.[1785] To the extent that any violation of 252(a) existed,[1786] we find that Qwest's filing of these agreements in the relevant states and each state commission's approval **or** rejection of those agreements cured any violation on a going-forward basis. **As** explained above, Qwest's filing pursuant to its proposal effectively eliminates the possibility of ongoing noncompliance with section 252. Under these circumstances, we disagree that approving the joint application is against the public interest.

491. In addition, we reject the commenters' assertion that Qwest has not filed all previously unfiled agreements with the state commissions.[1787] Qwest demonstrated that the agreements mentioned by the parties either were filed, expired, terminated, superseded, did not contain ongoing section 251(b) **or** (c) obligations, did not concern a section 271 application state, or simply provide for backward-looking consideration that do not affect an incumbent LEC's

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[1784] In the Matter of the Investigation into Unfiled Agreements Executed by Qwest Corporation, Order Opening Docket and Setting Procedural Schedule, Public Utilities Commission of the State ***of*** Colorado, Docket No. 021-572T (Adopted October 16,2002).

[1785] Our conclusion is supported by the Department of Justice in its evaluation (noting that "it is not apparent that the remedy for such prior [section 251 or 252] violations, if any, lies in these proceedings rather than in effective enforcement through dockets in which such matters are directly under investigation."). ***See*** Department of Justice Qwest I Evaluation at 3.

[1786] We note that in the Iowa ***Board Section*** 252 ***Order,*** the Iowa Board found that Qwest had violated section 252 by not filing these agreements with it earlier. The Iowa Board articulated its standard of what is **an** interconnection agreement for the first time in its May 2002 order. In this same order, **Iowa** Board established a 60-day "amnesty period" for Qwest to come into compliance with the order by filing previously negotiated agreements with it. ***See Iowa Board Section 252 Order*** at 16.

[1787] ***See, e.g.,*** Letter from Mark Schneider, AT&T Counsel, to Marlene. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 19, 2002); **Letter** from Amy Alvarez, District Manager, Federal Government Affairs, AT&T, to Marlene H. Dortch. Secretary. Federal Communications Commission, WC Docket No. 02-314 (tiled Dec. 11, 2002) (AT&T Dec. 11 *Ex Parte* Lener) (attaching matrix); Letter from Mark D. Schneider, Counsel, AT&T, to Marlene H. Dortch. Secretary. Federal Communications Commission, WC Docket No. 02-314 (filed Nov. 7,2002) (AT&T Nov. 7 ***E*** *Parte* Lener on unfiled agreements) (attaching matrix); AT&T Qwest III Comments at 48; AT&T Qwest III Reply at 18-22;PageData Qwest III Comments at 2 (claiming that Qwest failed to file two contracts as interconnection agreements in Idaho although it submitted those contracts in Iowa); WorldCom Qwest III Comments at 21-25: AT&T Supplemental Qwest I Comments at 31-34; AT&T Qwest **III** Comments Attachment 2 (agreement matrix); AT&T Qwest II Comments at 18 n.13; AT&T Qwest II Reply at 10; WorldCom Supplemental Qwest I Comments at 12-13;Letter from Lori Wright, Associate Counsel, WorldCom, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-314 at 13 (filed November 6,2002) (WorldCom November 6 ***Ex Parte*** Letter). ***See*** also AT&T Qwest III Comments at 46, n. 152 (claims that Qwest is limiting the provisions that a competitive LEC can pick and choose on the web site).

ongoing obligations relating to section 251.[1788] We find its response to be persuasive.[1789] We reject commenters' argument that Qwest has failed to file an oral agreement between Qwest and

[1788] *See, e.g.*, Letter from Peter Rohrbach, Qwest Counsel, to Marlene H. Dortch, Secretary, Federal Comunications Commission, WC Docket No. 02-314 (filed Dec. 20,2002); Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 18,2002) (attaching updated matrix in response to AT&T Dec. 11 matrix); Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest. to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 18, 2002) (attaching consolidated matrix); Qwest Dec.10b *Ex Parte* Letter; Qwest Dec. 6a *Ex Parte* Letter; Qwest III Reply at 59 ("Qwest already has been applying a policy of making filings under Section 252 that fully encompasses the standard announced by the Commission. . . . Qwest has filed all new contracts entered into with CLECs since the spring that meet this standard. In addition, Qwest has filed all currently effective provisions on other previously unfiled contracts with CLECs involving the nine states here insofar as such provisions involve ongoing current obligations under Sections 251(b) or (c)."); Qwest III Reply at 59-61; Qwest III Brotherson Decl. at para. 18 (stating that neither the Arch nor the Paging Network agreement cited by PageData contains currently effective terms); Qwest II Brotherson Decl. at para. 15 ("Qwest has not failed to file any agreement insofar as that agreement contains currently effective obligations related to Section 251(b) or (c)"); and attachment B (agreement matrix); Qwest Nov. 14e *Ex Parte* Letter; Declaratory Order. *See also* Brotherson Decl. at para. 20 (while "Qwest marked the effective provisions that it believed relate to Section 251(b) and (c), Qwest submitted the entire contracts to state commissions, which were, of course, free to disagree with Qwest's determinations. . .[t]he provisions that Qwest did not mark in its submissions to state commissions and did not post on its website were only those that are no longer in effect (because they have expired or been terminated or superseded) or in no way relate to Section 251(b) and (c)"). Qwest I Supplemental Reply at 25-28; Qwest Sept. 5b *Ex Parte* Letter on Unfiled Agreements at 3-4. *See also Declaratory Order,* WC Docket No. 02-89, FCC 02-276 (October 4,2002).

[1189] We have reviewed twelve agreements that AT&T alleges should have been filed with the state commissions under section 252. *See* Letter from Amy Alvarez, District Manager, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314, (filed Dec. 11,2002) (AT&T Dec. 11 *Ex Parte* Letter); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 13,2002) (attaching confidential agreements). Based on the record before us, and on our review of the 12 agreements, we conclude that all but one of the 12 agreements cited by AT&T need not be filed with state commissions under the standards enunciated in the Commission's declaratory ruling. *See e.g.,* Allegiance Operator Service Agreement (dated June 19,2000) (actually filed); Eschelon Letter from Qwest Requesting Daily Usage Information (dated Nov. 15,2000) (terminated); McLeod Purchase Agreement (dated Oct. 26,2000) (terminated); Allegiance Confidential Billing Settlement Agreement (dated Dec. 24,2001) (superseded); Eschelon Settlement Agreement Letter (dated Feb. 22,2002) (superseded); Global Crossing Settlement Agreement and Release (dated Sept. 18,2000) (superseded); MCI WorldCom Confidential Billing Settlement Agreement (dated Dec. 14,2000) (superseded); McLeod Confidential Settlement Document (dated Apr. 25,2000) (superseded); McLeod Amendment to Confidential Billing Settlement Agreement (dated Oct. 26, 2000) (superseded); NextLink Confidential Billing Settlement Agreement (dated May 12,2000) (superseded); Allegiance Directory Assistance Agreement with US West DEX, (dated December 20, 1999) (not 251-related). The remaining agreement, Qwest/Allegiance Internetwork Calling Name Delivery Service Agreement, does not appear on its face to fall within the scope of the filing requirement exceptions set forth in the Commission's declaratory ruling, and accordingly, it likely should have been filed with the states. *See* Declaratory Order at para.13. However, we find that the terms in this agreement are available through SGATs in the two relevant states, Colorado and Washington. *See* Colorado SGAT § 9.17, Washington SGAT § 9.17. *See also* Letter from Hance Haney, Executive Director – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission. WC Docket No. 02-314 (filed December 18, 2002) (attaching updated agreement matrix). While the failure to file this agreement in Washington and Colorado could subject Qwest to federal and/or state enforcement action, the terms of this agreement are in fact available to (continued.. ..)

McLeod with each application state.[1790] First, we note that the existence of the agreement is in dispute.[1791] States are best equipped to resolve fact-specific issues as they arise, such as whether or not an oral agreement exists.[1792] None of the nine application states have concluded that an oral agreement exists. We further note that, "on September 16,2002, Qwest and McLeod agreed to terminate the written contract and any and all amendments without addressing whether any such oral agreement ever existed."[1793]

492. ***Competitive LEC Nonparticipation.*** The Commission rejects commenters' arguments that Qwest's application is not in the public interest because the nonparticipation of **some** competitive LECs in state section 271 proceedings allegedly undermined the regulatory process. The Colorado Commission, Iowa Board and Wyoming Commission have explicitly found that they were not presented with any evidence that could lead them to conclude that the record was incomplete or flawed, nor did the commissions of any of the other application states find the concerns raised by the unfiled agreements sufficiently severe or urgent to recommend denying or delaying approval of Qwest's application.[1794] Given that there is no persuasive

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other competitive LECs, and thus no ongoing discrimination exists that would warrant denial of this section 271 application. ***See also*** AT&T v. FCC, 220 F.3d 607,633 (D.C. Cir. 2000).

[1790] ***See, e.g.,*** AT&T Qwest III Comments at 42-46

[1791] Qwest maintains that the agreement never existed. Qwest III Comments at 61 n.68. On the other hand, the Minnesota Commission, which is not one of the application states in the instant proceeding, found that the oral agreement did exist. In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, Minnesota Public Utilities Commission, Docket No. P-421/C-02-197 (November 1, 2002).

[1792] ***See SWBT Kansas/Oklahoma Order,*** 16 FCC Rcd at 6355, para. 230 ("As we have found in past section 271 proceedings, the section 271 process simply could not function if we were required to resolve every interpretive dispute about the precise content of an incumbent LEC's obligations to its competitors, including fact-intensive interpretive disputes."). ***See also SWBT Kansas/Oklahoma Order*** 16 FCC Rcd at 6246, para. 19 ("[T]here will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors – disputes that our rules have not yet addressed and that do not involve per *se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.") ***(citing American Tel. and Tel. Co. v. FCC***, 220 F.3d 607, 631 (D.C. Cir. 2000); ***SWBT Texas Order*** at 15 FCC Rcd at 18366-18367, paras. 25-26. We also note that commenters discussed various other fact-specific findings by the Minnesota Commission, the New Mexico Commission and *the* Arizona Commission staff. ***See, e.g.,*** WorldCom Qwest III Comments at 32-35. None of those states are one of the nine application states in the instant application.

[1793] Qwest Ill Reply Decl. at 61, n. 68 ***(citing*** Qwest III Brotherson Decl., Att. B). We also reject AT&T's argument that because the oral agreement allegedly entered into by Qwest and McLeod created ongoing obligations, "any payment made by Qwest to end that agreement would simply reflect the net present value of that forward-looking obligation." We find that the state commissions are the appropriate bodies to determine whether or not so-called "settlement agreements" exist and have ongoing obligations that may be subject to section 252(i). Declaratory Order at para. 7 (finding that the state commissions should be responsible for applying, in the first instance, the statutory interpretation set forth in the Declaratory Order).

[1794] Indeed, when presented with this argument during its section 271 proceeding, the Colorado Commission concluded that "[a]t the end of the day, no SGAT provisions would be worded differently, prices would not be (continued.. ..)

evidence of specific harm in our record, we cannot conclude that *the* nonparticipation of some competitive LECs renders Qwest's application contrary to the public interest.[1795] In its supplemental comments in the initial section 271 proceeding, AT&T offers anecdotal hearsay concerning the lack of participation by certain carriers in workshops held in *the* Qwest region.[1796] Such hearsay offers an insufficient basis for us to determine that the nonparticipation of certain competitive LECs in certain state proceedings "damaged" the record filed before us.[1797]

493. ***Tainted Data in OSS Test.*** We reject the commenters' assertion that the KPMG test is of no "real world" value because the results were based on input from competitive LECs that received preferential treatment from Qwest.[1798] We note that both the steering and executive committees of the ROC considered and rejected reopening the test for this reason,[1799] and several of the application states also reviewed and rejected this allegation.[1800] Additionally, commenters

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adjusted, and impasse resolutions would not be modified. Such certainty is the incremental benefit of holding open, exhaustive § 271 proceedings." Colorado Commission Comments at 65. Similarly, the Iowa Board determined that "no evidence was presented that would indicate the 271 process was not complete and exhaustive with respect to checklist items, even with the absence of certain CLECs." Iowa Board Qwest I Reply at 29-30.

1795 We note that our conclusion is consistent with that of the Department of Justice. Department of Justice Qwest III Evaluation at 2, n. 3 (incorporating its Qwest I and Qwest II Evaluations by reference); Department of Justice Qwest I Evaluation at 5 (concluding that "the fact that certain CLECs did not participate does not appear to have had a significant impact on the result").

1796 AT&T Supplemental Qwest I Comments, Wilson Supplemental Qwest I Decl. at paras. 27-37

1797 We disagree with AT&T's claim that it has identified in this record specific harms to our review caused by the unfiled agreements. AT&T Supplemental Qwest I Comments at 44-45. In its supplemental declaration, AT&T declarant Wilson explains which provisions from various unfiled agreements AT&T would have sought to have included in the SGAT had those agreements been known during the state workshops. AT&T Supplemental Qwest I Comments, Wilson Supplemental Qwest I Decl. at paras. 38-40. That AT&T would have sought the inclusion of certain additional terms in the SGAT, and possibly obtained them, does nothing to undermine our findings about Qwest's checklist compliance on the record established in this proceeding.

1798 See AT&T Qwest II Comments at 31; AT&T Qwest II Reply at 24; AT&T Qwest I Comments at 30; AT&T Qwest I Reply at 20; WorldCom Qwest I Comments at iv.

1799 *See, e.g.,* AT&T Qwest I Comments, AT&T Qwest I Finnegan/Connolly Menezes Joint Decl., Attach. 6 (Executive Committee Decision on Impasse Appeal Regarding KPMG Consulting's Further Evaluation of CLECs with Unfiled Agreements) (finding, among other things, that the sections of the OSS Final Report involving any reliance on input from these competitive LEC have been identified and that state commissions have initiated a review of the unfiled agreements).

1800 The Colorado Commission, for example, determined that there was "nothing in the record to support a finding that the OSS test data are corrupted." Colorado Commission Qwest I Comments at 41. In response to arguments about the unavailability of carrier-specific data with which to make comparisons about discrimination between competitive LECs, the Colorado Commission responds that any competitive LEC could have compared its own, individualized performance data to the aggregated competitive LEC data to determine whether it had been disadvantaged but that no competitive LEC did this simple comparison. Colorado Commission Qwest I Comments at 41. See *also* Iowa Board Qwest I Reply at 30. Furthermore, in both its May and June reports, KPMG notes that the "vast majority" of the evaluation criteria contained in the Final Report do not use any competitive LEC participation as a data point for drawing conclusions in the Final Report. See AT&T Qwest I Comments, AT&T Qwest I Finnegan/Connolly/Menezes Joint Decl., Att. 2, 3.

have presented no evidence of corrupted data in our record. In general, we have relied on KPMG's findings as one factor among many, and most often have relied on actual commercial evidence. In the few instances where we rely substantially on KPMG's findings,"" we note that KPMG's findings were based on its own observations of Qwest's **OSS** designs or its observations of and data from HP, the "pseudo-CLEC," and were not based primarily on findings relating to one of the allegedly "tainted" competing LECs.[1802]

494. Our conclusions are further supported by the evaluation of the Department of Justice, which states, that it "agrees that accurate benchmarks of performance attained are critical, but arguably any enhanced performance caused by the allegedly preferential treatment will have resulted in higher benchmarks for Qwest to maintain."[1803] Based on the exhaustive efforts of the ROC and the participating state commissions in formulating and conducting the ROC **OSS** test, combined with insufficient contrary evidence in our record, the Commission rejects the argument that the ROC **OSS** test data are tainted.

495. ***Complete-us-Filed Rule.*** We waive the complete-as-filed requirement on our own motion pursuant to section **1.3** of the Commission's rules[1804] to the limited extent necessary to consider the nine application states' disposition of Qwest's submission of previously unfiled agreements for their review and, if appropriate, approval under section 252(e). The Commission maintains this procedural requirement to ensure that interested parties have a fair opportunity to comment on the BOC's application, the Attorney General and the state commission can fulfill their statutory consultative roles, and the Commission has adequate time to evaluate the record.[1805] The Commission can waive its procedural rules, however, if "special circumstances

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[1801] ***See, e.g.,*** Sections IV.A.1.b.(i) (Pre-Ordering Functionality); IV.A.1.b.(iii) (Pre-Ordering and Ordering Integration); and IV.A.1.b.(iv) (Access to Loop Qualification), ***supra.*** In each of these areas, we have reasonable assurance that our reliance on the KPMG report is unaffected by whether certain competitive LECs received "preferential" treatment from Qwest. For example, when we cite tu the report in finding compliance with the Commission's requirements for pre-ordering functionality, and pre-ordering and ordering integration, virtually all of the KPMG conclusions that we rely on were not based on competitive LEC-provided data. On the contrary, virtually all of Test 12.0 was based on KPMG's observation of Qwest's OSS and data provided by HP. Similarly, our conclusion that competitors have nondiscriminatory access to loop qualification information is based in part on KPMG's findings in Test 12.7. Although some of Test 12.7's conclusions were based on KPMG's observations about Qwest's interaction with competitive LECs, we did not look to those tests. Instead, we relied on the test results regarding Qwest's database design and the operation of its mechanized loop qualification tools. These test results, by their very design, would not be negatively affected by tainted competitive LEC data, were they to exist.

[1802] See AT&T Qwest I Comments, AT&T Qwest I Finnegan/Connolly/Menezes Joint Decl., Attach. 3

[1803] Department of Justice Qwest III Evaluation at 2, n.3 (incorporating its Qwest I and Qwest II Evaluations by reference); Department of Justice Qwest I Evaluation at 4-5.

[1804] 47 C.F.R. § 1.3.

[1805] ***See Verizon Rhode Island Order,*** 17 FCC Rcd at 3305-06, para. 7; ***Ameritech Michigan Order,*** 12 FCC Rcd at 20572-73, paras. 52-54.

warrant a deviation from the general rule and such deviation will **serve** the public interest."[1806] We conclude, based on the circumstances presented here, that special circumstances warrant a waiver of our rule, and that such waiver will serve the public interest.

496. We conclude that the special circumstances before us here warrant a deviation from the general **rules** for consideration of late-filed information or developments that take place during the application review period.[1807] In particular, as we discuss below, we find that the interests our normal procedural requirements are designed to protect are not affected by our consideration of the nine application states' disposition of Qwest's submission of previously unfiled agreements. In addition, we conclude that consideration of the state dispositions will serve the public interest.

497. We disagree with AT&T that **we** do not have the discretion to waive our procedural rule and, as we discuss below, we disagree with AT&T's analysis of the factors we have considered in previous section 271 orders.[1808] It is important to note that the Commission has not established a set of factors that must be met in order for the Commission to waive this procedural rule. Indeed, by the very term "special circumstances" it is understood that the facts surrounding new information provided in any given application would be unique. Consequently, it is within our discretion, taking into account any special circumstances, not to afford greater weight to a particular factor used by the Commission in a previous section 271 order.

498. We determine that the state actions with respect to the unfiled agreements are important to consider and are positive ones that will promote competition and serve the public interest by allowing competitors to opt-in to previously unfiled agreements under section 252(i) because the states have approved them as interconnection agreements.[1809] Furthermore, considering the nine states' disposition of Qwest's filing of interconnection agreements places a limited additional analytical burden on commenters and the Commission because the analysis of the interconnection agreements was performed by the state commissions. The concrete and limited nature of the actions taken by each state in either approving or rejecting each interconnection agreement has permitted the Commission staff to evaluate those actions within the 90-day statutory period.[1810] The Department of Justice did not comment on the states' disposition of the agreements, but stated that ""the Department defers to the Commission's assessment of whether Qwest's earlier failure to file those agreements violated Sections 251 or 252."[1811] We find that there has been adequate opportunity for comment on this new information.

1806 *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *see also* 47 U.S.C. § 154(j); 47 C.F.R. § 1.3.

1807 **Verizon Rhode Island Order at 3306.**

1808 **AT&T Supplemental Comments at 16-23**

1809 ***See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6249, para. 24**

1810 **Verizon Rhode Island Order at 3308.**

1811 **Department of Justice Qwest III Evaluation at 2, n.3 (incorporating its Qwest I and Qwest II Evaluations by reference); Department of Justice Qwest II Evaluation at 3, n. 6.**

Indeed, Qwest filed the interconnection agreements with each application state prior to filing the instant section 271 application, giving interested parties ample opportunity to comment on this issue in the instant section 271 proceeding and in the state proceedings."" Because the Commission and cornmenters have had sufficient time and information to evaluate the impact of these filings on Qwest's application, we see no need to restart the 90-day clock.

499. Additionally, in prior cases we have found cause to grant a waiver of the complete-as-filed rule where the new information is responsive to criticisms in the record, as compared to new information that "consists of additional arguments or information" as to why the applicant should not be required to take further action.[1813] Qwest responded to criticism in the Qwest I and Qwest II record by taking positive action to file agreements at a time when there was no Commission guidance on the definition of the statutory term "interconnection agreement."[1814] This is very different from the situation in which late-filed material consists of additional arguments or information as to why Qwest should not be required to file these agreements with the state commissions. These factors, as the Commission has found previously, can support grant of a waiver."" For these reasons, we find that the circumstances present in this instance warrant waiver of our procedural requirements, and allow consideration of the disposition of Qwest's previously unfiled agreements by the nine application states.

D. Alleged Violations of Section 271

500. ***Comments.*** We reject commenters' arguments that alleged current violations of section 271 require a finding that Qwest's application is not in the public interest and thus must

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[1812] Qwest Nov. 21a Ex ***Parte*** Lener, Attachment at 1-4; Qwest Aug. 201 Ex ***Parte*** Letter on Unfiled Agreements; Colorado Commission Unfiled Agreement Order; Idaho Commission Unfiled Agreements Order, Iowa Board Section 252 Order; Montana Commission Unfiled Agreements Orders; Nebraska Commission Unfiled Agreements Orders; North Dakota Commission Unfiled Agreements Order; Washington Commission Unfiled Agreements Orders; Wyoming Commission Unfiled Agreements Order.

[1813] ***Verizon Rhode Island Order,*** 17 FCC Rcd at 3308-09, para. 12

[1814] Qwest made the filings in the nine states on August 21 and 22,2002. Qwest III Application, Addendum 13 at 1. On October 4,2002, the Commission issued a declaratory order finding that an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1). ***Declaratory Order,*** WC Docket No. 02-89, FCC 02-276 (October 4,2002). Qwest filed the instant section 271 application on September 30,2002.

[1815] ***Verizon Rhode Island Order,*** 17 FCC Rcd at 3308-09, para. 12

be denied.[1816] These arguments concern issues that are the subject of two complaints by Touch America pending before the Commission's Enforcement Bureau.[1817]

501. Qwest has recently disclosed several instances of provisioning long distance service without having authorization under section **271.** Specifically, Qwest identified a March 2002 agreement with Cable & Wireless Plc (Cable & Wireless) where Qwest provides over 120 private line services, of which four are in-region interLATA private line services.[1818] Qwest states that it neither has received nor will accept any payments from Cable & Wireless for the four in-region interLATA private lines. Qwest asserts that it **has** terminated the four in-region interLATA private lines.[1819] Qwest also identified two leases of in-region interLATA dark fiber that Qwest did not divest prior to consummation of the merger.[1820] According to Qwest, it has terminated both leases, sold the dark fiber that was the subject of the two leases to the customer, and entered into a standard agreement to maintain the fiber for the customer. Qwest explains that it has credited the customer for all amounts paid under the lease since the date of the merger, plus interest.[1821]

[1816] ***See, e.g.,*** AT&T Qwest III Comments at 83-84; Touch America Qwest III Comments at 14-17. ***See also*** Letter from Jay Wilson Preston, President, Ronan Telephone Company, to Michael **K.** Powell, Chairman, Federal Communications Commission, et al., WC Docket Nos. 02-314, 02-189, 02-148 (filed Dec. 18,2002). *But* ***see*** Letter from Rick Hays, State President – Montana, Qwest, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 19,2002).

[1817] ***Touch America, Inc. v.*** Qwest ***Communications International Inc., et al.,*** File No. EB-02-MD-004 (February **11,** 2002) (revised and refiled March 1, 2002) (alleging that Qwest's divestiture of its in-region interLATA assets and customers to Touch America was a sham, and that Qwest provides in-region interLATA service in violation of section 271 and its merger conditions); ***Touch America, Inc. v. Qwest Communicaiions International Inc., et al.***, File No. EB-02-MD-003 (February 8,2002) (arguing that Qwest's provision of "lit capacity IRUs" are prohibited in-region, interLATA services in violation of section 271). ***See,*** *e.g.,* AT&T Qwest I Comments at 125-28; CompTel Qwest I Comments at 7-12; Touch America Qwest I Comments at 12-14, 22-23; AT&T Qwest I Reply at 67; Touch America Qwest 1 Reply at 3-6; Letter from C. Frederick Beckner III, AT&T Counsel, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed December 6,2002) (AT&T Dec. 6 *Ex* ***Parte*** Letter); Letter from Randall B. Lowe, Counsel for Touch America, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed December 6,2002) (Touch America Dec. 6 *Ex* ***Parte*** Letter).

[1818] Letter from Sharon J. Devine, Associate General Counsel, Qwest, to Anthony Dale, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, and Michelle Carey, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, CC Docket No. 99-272, WC Docket No. 02-314 (filed December 3,2002) (Qwest December 3 *Ex* ***Parte*** Letter).

[1819] Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed December 11, 2002) ("Qwest has ceased providing all four of these private line services. Two were terminated on December 9 and the remaining **two** were terminated on December 10."); Qwest December 3 *Ex* ***Parte*** Letter at 1-2.

[1820] ***Id***

[1821] ***Id.***

502. In response to Qwest's disclosure, AT&T and Touch America request that the Commission deny the instant application.[1822] AT&T maintains that the disclosed instances involve the transportation of communications across LATA boundaries in violation of section 271.[1823] Moreover, AT&T argues that Qwest does not have adequate internal controls in place to ensure compliance with the Act and the Commission's rules.[1824]

503. We recognize that potential violations of federal telecommunications law could be relevant to the section 271 inquiry.[1825] However, based on the limited circumstances established in this record, we do not find that the allegations concerning Qwest's compliance with section 271 relate to openness of the local telecommunications markets to competition.[1826] Instead, we defer any enforcement action pending the Enforcement Bureau's investigation of this matter. Therefore, we reject the argument of AT&T and Touch America that we should deny or delay this application based on allegations concerning Qwest's compliance with 271. We note, however, that regardless of what enforcement action we may take in the future concerning these or similar allegations, BOCs are prohibited from providing long distance service in any in-region state prior to receiving section 271 approval from the Commission for that particular state, and they must implement adequate controls to prevent such service from taking place.

E. Other Issues

504. A number of commenters argue that Qwest's application is not in the public interest because of prior judgments against Qwest.[1827] The actions by Qwest which precipitated these judgments have already been addressed by either this Commission or a state

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[1822] AT&T Dec. 6 *Ex Parte* Letter at 1-3; Touch America Dec. 6 *Ex Parte* Letter at 1-5; Letter from Randall B. Lowe, Touch America Counsel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed Dec. 13,2002) (attaching letter).

[1823] *Id.* at 1-2.

[1824] *Id.* at 3. *But* see Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed December 11,2002) (describing a recently added step to Qwest's prior internal controls).

[1825] *See Verizon New Hampshire/Delaware Order,* 17 FCC Rcd at 18754-75, para. 168; see also *Verizon New Jersey Order,* 17 FCC Rcd at 12368, para. 190.

[1826] *See BellSouth Multistate Order,* 17 FCC Rcd at 17763-65, paras. 299-301; see also *Verizon New Jersey Order,* 17 FCC Rcd at 12368, para. 190.

[1827] AT&T notes the following prior judgments: Minnesota Administrative Law Judge finding that Qwest had violated its Interconnection Agreement with AT&T by its refusal to conduct AT&T's UNE-P test; Commission conclusion that teaming arrangement between U S West and Ameritech was unlawful; Commission conclusion that U S West's nationwide component of nonlocal directory assistance was unlawful; Commission conclusion that U S West's provision of a calling card platform that permitted its local subscribers to place long distance calls originating inside or outside of its local service area violated section 271; Qwest had used a local service freeze in Iowa and PIC freezes in Colorado prior to the merger with US WEST. Qwest II Comments at 136-40, 145-46; AT&T Qwest I Comments at 122-125. *See* also Touch America Qwest II Comments at 2-3; Touch America Qwest I Comments at 2, 18-19.

commission.[1828] Accordingly, we need not revisit these issues here. Isolated instances of misconduct over the course of the past several years do not warrant a denial of this application.

505. AT&T contends that Qwest improperly used service freezes in Iowa and Washington to stifle competition by limiting the ability of customers to switch service providers.[1829] and that Qwest used preferred interexchange carrier freezes in Colorado to stifle competition in the same manner.[1830] We note that the Iowa Board and Colorado Commission have ordered Qwest to cease these practices. In addition, we note AT&T has taken appropriate action by filing a complaint with the Washington Commission, and the Washington Commission is reviewing this complaint.[1831] Based on the record before us, we are unable to find that the alleged conduct raises public interest concerns necessitating denial of its section 271 application. Any future complaint should be filed with the state commission or this Commission, as appropriate.'"'

506. The Payphone Associations contend that the application **is** not in the public interest because Qwest has not complied with the "new services test" as clarified in the ***New Services Order***.[1833] They argue that, with the exception of Colorado, Qwest has failed to comply with its obligations to file with the states rates for pay telephone access lines (PALs) that comply with the new services test, and to **file** at the state and federal level a cost-based rate for fraud protection.[1834] The Payphone Associations contend that Qwest has sought to stifle competition in the pay telephone market and has failed to comply with Commission orders designed to open these markets to competition.[1835] In response, Qwest states that it believes its retail rates in the

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[1828] Iowa Board Qwest I Reply at **32.** See ***AT&T Corporation, et. al v. US WEST Communications, Inc., and Qwest Corporation,*** Memorandum Opinion and Order, 13 FCC Rcd **21438 (1998); *Petition of US WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of US WEST Communications Inc. for Forbearance***, Memorandum Opinion and Order, **14** FCC Rcd **16252 (1999): *AT&T Corporation v. U S WEST Communications, Inc.; MCI Telecommunications Corporation, Inc. v. U S WEST Communications, Inc.***, Memorandum Opinion and Order, **16** FCC Rcd **3574** (2001).

[1829] AT&T Qwest I Comments at **13**I; Iowa Board Qwest I Comments at **71.**

[1830] AT&T Qwest II Comments at 145-46; AT&T Qwest I Comments at **130-31.** Qwest had used local service freezes in Iowa and PIC freezes in Colorado prior to the merger with US WEST.

[1831] Qwest II Application, App. C, Recommendations of the Washington Utilities and Transportation Commission, Book 2, Vol 1, Tab **20,** Washington Commission 39th Supplemental Order at **91-92.**

[1832] **See *Verizon Pennsylvania Order,*** at **17490,** para. **133.**

[1833] Payphone Associations Qwest II Comments at I, ***5-6;*** (citing ***Wisconsin Public Service Commission,*** Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd **2051 (2002) *(New Services Order));*** Qwest I Comments at **2, 9** (citing same). These comments have been tiled on behalf of the Arizona Payphone Association, Colorado Payphone Association, Minnesota Independent Payphone Association and Northwest Public Communications Council.

[1834] Payphone Associations Qwest II Comments at **2-3;** Payphone Associations Qwest I Comments at **2-3,** n.3

[1835] Payphone Associations Qwest II Comments at **2;** Payphone Associations Qwest I Comments at **2-3.**

application states are reasonable and, in any event, its compliance with the Commission's payphone pricing requirements is beyond the scope of this proceeding.[1836]

507. Qwest has an obligation to comply with the Commission's rules for pricing of payphone lines. We are concerned by the allegation that Qwest has been in violation of these rules over a period of five years, and that its current rates may not comply with the Commission's recent ***New Services Order.*** We agree with Qwest, however, that questions regarding whether its payphone rates comply with our rules cannot, and should not, be decided in the context of this section 271 application.[1837] We note that on October 8,2002, several of the payphone associations began the process of filing a complaint on this issue with the Commission's Enforcement Bureau.[1838] The issues raised by the Payphone Associations are better addressed through our enforcement complaint processes, or by the state commissions in the first instance.

VIII. MOTIONS ON EFFECTIVE DATE OF ENTRY

508. Finally, on July 12,2002 and July 22, 2002, Qwest filed motions requesting that the Commission take no action to delay the date on which Qwest may begin providing in-region interLATA service in the event that the Commission grants Qwest's instant 271 applications.[1839] In granting previous applications, the Commission's policy has been to order the effective date of the approval ten days from the date of the order.'"" Qwest requests that the Commission alter this policy for this application and authorize Qwest to begin providing service upon the date of the approval of the instant application, if granted. In support of its motion, Qwest generally provides no affirmative reasons for changing the Commission's policy, other than to argue that no party "could suggest any legitimate reason for delaying" benefits to consumers.[1841]

509. We deny Qwest's motions. Qwest has provided no specific reason for deviating from the Commission's standard, consistently-followed practice of authorizing a BOC to begin providing in-region interLATA service approximately ten days from the date of the approval order. We agree with AT&T that the Commission's policy serves the purpose of providing

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1836 Qwest I Reply at 91, n.83; Qwest Aug. 15 Pricing *Ex Parte* Letter, Attach. at **15** (08/15/02c).

1837 See, *e.g., Verizon New Jersey Order,* 17 FCC Rcd at 12368, para. 190 (rejecting allegations unrelated to the openness of local telecommunications markets).

1838 Payphone Associations Qwest III Comments at Attach

1839 Motion of Qwest, WC Docket No. 02-189 (dated July 12,2002) ("*Qwest II Morion"); Motion of Qwest, WC* Docket No. 02-148 (dated July 22,2002) ("*Qwest* I *Morion").*

1840 ***See, e.g., SWBT Texas Order,*** 15 FCC Rcd at 18568, para. 439 (approving SWBT to begin providing in-region interLATA service 10 days after the effective date of the approval).

1841 ***Qwesr II Morion*** at 2; ***Qwesr I Morion*** at 2. Moreover, Qwest expressly refrains from addressing why the Commission's policy in past section 271 decisions is flawed. ***Id.*** ("Without commenting on the appropriateness of such action in [past 271 decisions], Qwest submits that no grounds for delay are present here.").

parties an adequate opportunity to seek a stay[1842] and, accordingly, we order that the effective date of this Order shall be January 2,2003.

IX. SECTION 271(d)(6) ENFORCEMENT AUTHORITY

510. Section 271(d)(6) of the Act requires Qwest to continue to satisfy the "conditions required for . . . approval" of its section 271 application after the Commission approves its application.[1843] Thus, the Commission has a responsibility not only to ensure that Qwest is in compliance with section 271 today, but also that it remains in compliance in the future. As the Commission has already described the post-approval enforcement framework and its section 271(d)(6) enforcement powers in detail in prior orders, it is unnecessary to do so again here.[1844]

511. Working in concert with the Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming Commissions, we intend to closely monitor Qwest's post-approval compliance for these states to ensure that Qwest does not "cease [] to meet any of the conditions required for [section 271] approval."[1845] We stand ready to exercise our various statutory enforcement powers quickly and decisively in appropriate circumstances to ensure that the local market remains open in these states. We are prepared to use our authority under section 271(d)(6) if evidence shows market opening conditions have not been maintained.

512. We require Qwest to report to the Commission all nine states carrier-to-carrier performance metrics results and PAP monthly reports beginning with the first full month after the effective date of this Order, and for each month thereafter for one year unless extended by the Commission. These results and reports will allow us to review, on an ongoing basis, Qwest's performance to ensure continued compliance with the statutory requirements. We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into these nine states.[1846]

1842 Opposition to Qwest's Motion, WC Docket No. 02-148 (dated August 5, 2002) ("*AT&T Motion*").

1843 47 U.S.C. § 271(d)(6)

1844 *SWBT Kansas/Oklahoma Order,* 16 FCC Rcd at 6382-84, paras. 283-85; *SWBT Texas Order,* 15 FCC Rcd at 18567-68, paras. 434-36; *Bell Atlantic New York Order,* 15 FCC Rcd at 4174, paras. 446-53.

1845 47 U.S.C. § 271(d)(6)(A)

1846 See, *e.g., Bell Atlantic-New York, Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,* File No. EB-00-IH-0085, Order, 15 FCC Rcd 5413 (2000) (adopting consent decree between the Commission and Bell Atlantic that included provisions for Bell Atlantic to make a voluntary payment of $3,000,000 to the United States Treasury, with additional payments if Bell Atlantic failed to meet specified performance standards and weekly reporting requirements to gauge Bell Atlantic's performance in correcting the problems associated with its electronic ordering systems).

X. CONCLUSION

513. For the reasons discussed above, we grant Qwest's joint application for authorization under section 271 of the Act to provide in-region, interLATA services in the states of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming.

XI. ORDERING CLAUSES

514. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 271, Qwest's joint application to provide in-region, interLATA service in the states of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming, filed on September 30, 2002, IS GRANTED.

515. IT IS FURTHER ORDERED that this Order SHALL BECOME EFFECTIVE January 2, 2003.

516. IT IS FURTHER ORDERED that the Motions filed by Qwest on July 12, 2002 and July 22, 2002 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary