5/22/02
Qwests Openings
Sect. 272 - trackA

Thru -
5/22/02 - Qwests
Opening on Performance

Reported under the ROC Created Performance Metrics;
05/03/02 - Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan;
05/07/02 - Transcripts of Hearing held on April 22, 23, 24, 25, 29 and 30, 2002;
05/09/02 - Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan;
05/09/02 - Staff's Late-Filed Exhibit 5;
05/13/02 - Notice of Appearance of Additional Counsel on behalf of Intervenor Black Hills FiberCom;
05/13/02 - Qwest's Exhibit 80;
05/14/02 - AT&T's Motion to Reopen Proceedings;
05/17/02 - Staff's Exhibit 6;
05/17/02 - Additional Statement of Supplemental Authority Regarding Qwest's Performance Assurance Plan;
05/22/02 - Qwest's Overview Post-Hearing Brief and Index to Briefing Materials;
05/22/02 - Qwest's Opening Post-Hearing Brief on Paper Workshop Issues (Checklist Items 3, 7, 8, 9, 10 and 12;
05/22/02 - Qwest's Post-Hearing Brief on Workship 1: Checklist Item 1 (Interconnection, Collocation); Checklist Item 11 (LNP): Checklist Item 13 (Reciprocal Compensation); and Checklist Item 14 (Resale);
05/22/02 - Qwest's Opening Post-Hearing Brief on Emerging Services (Line Sharing, Subloop Unbundling, Packet Switching and Dark Fiber);
05/22/02 - Qwest's Opening Post-Hearing Brief on Workshop Three, Group 4 Issues - Unbundled Network Elements Report (Checklist Items 2, 4, 5 and 6);
05/22/02 - Qwest's Opening Post-Hearing Brief on General Terms and Conditions, Section 272, and Track A;
05/22/02 - Qwest's Post-Hearing Brief in Support of the QPAP;
05/22/02 - Qwest's Opening Post-Hearing Brief on the Public Interest;
05/22/02 - Qwest's Opening Post-Hearing Brief on Performance (PIDs, Actual Performance and Data Reconciliation);
05/22/02 - Qwest's Additional Exhibits;
05/22/02 - Index of Exhibits;
05/22/02 - Qwest's Exhibits 81, 81A, 82, 82A, 83, 84 and 85;
05/22/02 - AT&T's Additional Statement of Supplemental Authority;
05/24/02 - Qwest's Opposition to AT&T's Motion to Reopen Proceedings;
05/30/02 - AT&T's Reply to Qwest's Opposition to AT&T's Motion to Reopen Proceedings;
06/04/02 - AT&T's Additional Statement of Supplemental Authority;
06/04/02 - Touch America's Petition to Intervene and Motion to Reopen Issues;
06/10/02 - Qwest's January 2002 through April 2002 Performance Data as Reported under the ROC Created Performance Metrics;
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06/13/02 - Notice of Filings of Affidavits of Todd Lundy and Dan Hult;
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06/13/02 - Affidavit of Todd Lundy;
06/13/02 - Affidavit of Dan Hult;
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06/19/02 - Order for and Notice of Procedural Schedule and Hearing;
06/25/02 - Qwest's Motion to Amend the Scheduling Order for Review of the ROC OSS Test;
06/27/02 - Order Denying Motion to Reopen Record; Order Denying Petition to Intervene; Order Extending Briefing Schedule;
06/27/02 - Order Amending Briefing Schedule;
07/01/02 - Staff's Brief;

BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996	)	DOCKET TC 01-165

QWEST CORPORATION'S OPENING POST- HEARING BRIEF ON GENERAL TERMS AND CONDITIONS, SECTION 272, AND TRACK A

May 21, 2002

PUBLIC VERSION

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QWEST CORPORATION'S OPENING POST-HEARING BRIEF ON GENERAL TERMS AND CONDITIONS, SECTION 272, AND TRACK A

I. INTRODUCTION

Qwest Corporation ("Qwest") submits this brief to demonstrate that the general terms and conditions provisions of its SGAT are reasonable and that it has complied with the requirements of 47 U.S.C. §§ 271(c)(1)(A) and 272 in the state of South Dakota.

The general terms and conditions provisions of Qwest's SGAT, although not tied to a specific checklist item, should be endorsed by the Public Utilities Commission (the "Commission") as balanced and appropriate protections of the interests addressed. As set forth below, some of the concerns raised by Midcontinent Communications ("Midco") and Black Hills FiberCom L.L.C. ("FiberCom") are already resolved in the SGAT and Qwest agrees the statute of limitation provision should be modified to incorporate South Dakota law. To the extent Midco or FiberCom raise additional issues, Qwest respectfully submits the recommendations of the Multi-state Facilitator and Staff should be adopted, and no modifications to the consensus language to the SGAT are necessary.

Section 272 of the Telecommunications Act of 1996 ("Act"), 47 U.S.C. § 272, requires Qwest to show that it will provide in-region InterLATA service through an affiliate that is separate from the Bell Operating Company ("BOC"). As demonstrated below, Qwest has presented undisputed evidence showing that it has set up a separate affiliate, Qwest Communications Corporation, Inc. ("QCC") to provide in-region InterLATA service after 271 approval, and that both Qwest and its 272 affiliate comply with all of the specific separation requirements of section 272.

The Track A requirement of the Act, 47 U.S.C. § 271(c)(1)(A), requires Qwest to demonstrate that it has signed binding interconnection agreements with at least one facilities-based, UNE-based, or resale-based competitor that is providing telephone exchange service to a more than *de minimis* number of business and residential customers in South Dakota. There can be no dispute that Qwest has met this standard: Qwest presented undisputed evidence that it has signed multiple interconnection agreements with active CLECs in South Dakota, and at least two of these CLECs have submitted sworn data request responses conceding that they are collectively serving tens of thousands of business and residential lines using their own freestanding networks and services resold from Qwest. And while (as we explain below) the Federal Communications Commission ("FCC") has made clear that Track A does not impose any minimum CLEC market share requirements (other than the easily cleared *de minimis* standard), it is noteworthy that CLECs have achieved a far larger market share in South Dakota than they did in most every other state for which a section 271 application was granted.

Qwest respectfully asks the Commission to find that Qwest has met all the requirements that the FCC has established.

II. THE GENERAL TERMS AND CONDITIONS PROVISIONS OF QWEST'S SGAT ARE BALANCED AND APPROPRIATE

The general terms and conditions provisions of Qwest's South Dakota SGAT are in many respects the standard provisions, sometimes referred to as "boilerplate," that protect each party's rights under the contract. "General terms and conditions" is not a checklist item and is not a prerequisite for 271 approval. Qwest has agreed, however, to address the issues surrounding the general terms and conditions provisions of its SGAT as a separate and distinct matter. For almost a year, Qwest has worked with CLECs to reach consensus on the general terms and conditions provisions that are included in the South Dakota SGAT as well as the SGATs that Qwest files in other states.

Through various state proceedings, including the seven state collaborative proceeding ("Multi-state Proceeding") and other negotiations, Qwest and CLECs resolved numerous issues regarding the general terms and conditions provisions. For those minority of issues that remained unresolved at the conclusion of the Multi-state Proceeding, Qwest and CLECs created an extensive record, narrowed and specifically defined the impasse issue, and submitted their positions to the respected facilitator in the Multi-state Proceeding ("Multi-state Facilitator") for proposed resolution.

Although the Multi-state Facilitator's proposed resolution of each impasse issue is not always consistent with the position or language that Qwest advocated, Qwest agreed soon after receiving the proposed resolution of each impasse issue to incorporate it in the SGAT. These proposed resolutions have subsequently been endorsed with no recommended changes by the South Dakota Commission Staff ("Staff") and have also been widely endorsed by commissions participating in the Multi-state Proceeding.

Accordingly, Qwest has incorporated in the latest version of the general terms and conditions provisions of its South Dakota SGAT the parties' consensus agreements from other workshops, the language recommended by the Multi-state Facilitator and Staff, and the language ordered by commissions participating in the Multi-state Proceeding. These general terms and conditions provisions are also contained in the KMC Agreement, Qwest's interconnection agreement with KMC Telecom V, Inc.[1] Thus, the language in the South Dakota SGAT and the

[1] Rebuttal Affidavit of Larry B. Brotherson re: General Terms and Conditions, filed on April 2, 2002 ("Brotherson Rebuttal re General Terms and Conditions") (Qwest Ex. 56) Ex. LBB-GTC-1 (KMC Telecom V, Inc.

KMC Agreement reflects numerous Qwest compromises and consensus provisions that were painstakingly negotiated with CLECs. Importantly, it reflects the conclusions of Staff, the Multi-state Facilitator, and numerous commissions concerning the resolution of those issues that were disputed. Against this backdrop, the general terms and conditions provisions of Qwest's SGAT, although not a checklist item, should be endorsed by the Commission as balanced and appropriate protections of the interests addressed.

In the testimony of Larry B. Brotherson, Qwest sets forth at length the reasons why the recommendations of the Multi-state Facilitator and Staff are appropriate and should be approved by the Commission.[2] Only two parties, Midco and FiberCom address general terms and conditions issues in record testimony and evidence.[3] Neither Midco nor FiberCom take issue with the vast majority of the general terms and conditions provisions or the recommendations of the Multi-state Facilitator and Staff. As set forth below, to the extent Midco or FiberCom raise an issue, Qwest respectfully submits that the concern has been resolved or that the recommendation of the Multi-state Facilitator and Staff should be adopted as the most appropriate resolution of the issue.

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interconnection agreement dated October 23, 2001) ("KMS Agreement").

[2] *Id.*

[3] AT&T did not submit any testimony or evidence of record addressing general terms and conditions issues. Having foregone the opportunity to submit evidence concerning general terms and condition issues (and to subject that evidence to cross-examination), AT&T is precluded from submitting such evidence, if any, now. Accordingly, Qwest does not address here positions that AT&T has taken elsewhere regarding general terms and conditions issues. Suffice it to say that Staff and the Multi-state Facilitator thoroughly considered the general terms and conditions impasse issues. To the extent AT&T's position on these issues is adopted in part or in whole by the Multi-state Facilitator and Staff, Qwest has incorporated that result in the South Dakota SGAT because Qwest has incorporated *all* of the Multi-state Facilitator's recommendations concerning the general terms and conditions impasse issues. To the extent AT&T's position is rejected in whole or in part by the Multi-state Facilitator and Staff, the Multi-state Facilitator's and Staff's resolution is appropriate and should be adopted by the Commission.

A. A New Section 1.7.2 Is Unnecessary and a Source of Potential Confusion and Delay.

Midco proposes adding a new section 1.7.2 that would specifically obligate Qwest to offer new products and services on substantially the same rates, terms and conditions as existing products and services when the new and existing products and services are "comparable." In this regard, Midco supports the language that AT&T urged the Multi-state Facilitator to adopt. The argument that a new section of the SGAT is necessary to prevent Qwest from imposing unreasonable rates, terms, and conditions on new products and services was thoroughly considered and rejected by the Multi-state Facilitator. It is also rejected by Staff.[4].

As the Multi-state Facilitator explained, section 1.7.2 is unnecessary and, further, a potential source of uncertainty and delay:

> There are already established standards and methods for resolving disputes related to the terms and conditions that Qwest may apply to offerings under its SGAT. Those standards are adequate to assure that such terms and conditions comport with Qwest's obligations under the Act and FCC requirements. Those methods are also sufficient to allow for resolution of disputes in a timely and effective manner. AT&T's proposed SGAT section would introduce substantial uncertainty over the applicability of those standards and those methods. AT&T indicated that comparability to other SGAT offerings should be the primary focus of disputes about terms and conditions for products or services added to the SGAT. Such comparability would, at best, be a secondary evidentiary indicator of compliance with statutory and regulatory standards; never should it replace those standards as the test for resolving disputes.[5]

1. The SGAT and KMC Agreement already contain sufficient standards and obligations concerning rates, terms and conditions.

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4 Direct Testimony of Marlon Griffing, Ph.D., filed on March 18, 2002 ("Griffing Direct") (Staff Ex. 1) at [illegible].

5 Multi-state General Terms and Conditions, Section 272 and Track A Report (September 21, 2001) ("Multi-state GTC Report") at 23-24.

The Multi-state Facilitator's and Staff's recommendation should be followed here because Midco's concerns are already properly accommodated in other sections of the SGAT that contain safeguards concerning rates, terms and conditions for new products and services. For example, section 5.1.6 protects CLECs by reaffirming Qwest's obligation to price new products and services in accordance with all applicable laws and regulations. Section 5.1.6 states in relevant part:

> All services and capabilities currently provided hereunder (including resold Telecommunications Services, Unbundled Network Elements, UNE combinations and ancillary services) and all new and additional services or Unbundled Network Elements to be provided hereunder, shall be priced in accordance with all applicable provisions of the Act and the rules and orders of the Federal Communications Commission and orders of the Commission.

By this provision, Qwest is already contractually obligated to offer new products and services in accordance with all applicable law and regulations. Thus, any new products and services that Qwest offers must be priced according to the governing body of law and regulation and must be justified accordingly. Given this provision, section 1.7.2 is unnecessary.

This obligation to price products and services in accordance with applicable law also renders moot Midco's claims regarding the altering of existing products and services to create new products and services with a higher price. "Comparable" or slightly different products will necessarily be priced according to the governing law. Qwest cannot arbitrarily price such new products and services. Further, Qwest cannot remove features it is obligated under law to provide.[6] Thus, Midco's concern that Qwest may "eliminate unique features that may be necessary for a CLEC offering" is unfounded.[7]

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[6] See Brotherson Rebuttal re: General Terms and Conditions (Qwest Ex. 56) at 10; Tr. 4/24/02 (Brotherson) at 100-101.

[7] Direct Testimony of W. Thomas Simmons, filed on March 18, 2002 ("Simmons Direct") (Midco Ex. 38) at

Another SGAT protection addressing rates, terms and conditions for new products and services is section 1.7.1.2, which provides for a true-up of rates, terms, and conditions governing new products in the event a CLEC wishes to negotiate an amendment with different rates, terms and conditions than defined by Qwest for such new product. Section 1.7.1.2 states in relevant part:

> If CLEC wishes to negotiate an amendment with different terms and conditions than defined by Qwest for such new product, CLEC agrees to abide by those terms and conditions on an interim basis by executing the Interim Advice Adoption Letter (the form of which is attached hereto as Exhibit M) based upon the terms and conditions available on Qwest's wholesale website that Qwest has identified as pertaining to the new product. The Interim Advice Adoption Letter will terminate when the final amendment is approved. The rates and to the extent practicable, other terms and conditions contained in the final amendment will relate back to the date the Interim Advice Adoption Letter was executed. No new product offering or accompanying Interim Advice Adoption Letter will be construed to limit or add to any rates, terms or conditions existing in this Agreement.

As AT&T recognized during workshops in other states, this provision ensures that final rates, terms, and conditions of a new product or service relate back to the extent practicable to the date the Interim Advice Adoption Letter was executed.[8]

2. The proposed Section 1.7.2 would promote confusion and delay.

Besides being appropriate because of the existing SGAT protections, the Multi-state Facilitator's and Staff's recommendations are appropriate because AT&T's section 1.7.2 would promote confusion and delay. Nowhere in section 1.7.2 are the terms "comparable products and services" or "substantially the same rates, terms and conditions." Because these terms are neither defined nor susceptible of easy definition, the parties will surely dispute what is

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"comparable" and what is "substantially the same." Given this ambiguity, dispute resolution proceedings would be invoked, resulting in needless delay and expense.[8]

Further, the proposed section 1.7.2 adds an unnecessary layer of analysis in resolving rate, term and condition disputes. According to section 1.7.2, the first inquiry in any dispute is whether the new product or service is "comparable" to an existing product or service. Regardless of the answer to that inquiry, a second inquiry must be undertaken to determine whether the rates are appropriate. For example, if the products or services are "comparable," the parties must examine whether the prices are "substantially similar." If the products are not comparable, the parties must examine whether the price is appropriate and reasonable. In either scenario, the appropriateness of the price must be examined. The two-step inquiry introduced by section 1.7.2 is confusing, burdensome, and completely unnecessary. Rather than examining whether new products and services are comparable to existing products and services and then examining the appropriateness of the rates, terms and conditions, the focus should be on the appropriateness of the rates, terms and conditions in the first instance.[9]

3. No CLEC objected to the Multi-state Facilitator's recommendation.

During the Multi-state Proceeding, every party was afforded an opportunity to comment upon or contest the recommendations set forth by the Multi-state Facilitator. While AT&T contested numerous issues, it did not dispute the Multi-state Facilitator's recommendation that

[8] Brotherson Rebuttal re: General Terms and Conditions (Qwest Ex. 56) at 11.

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

AT&T's proposed section 1.7.2 be rejected,[10] nor did any other CLEC dispute the recommendation.

4. Every commission to address the proposed new section 1.7.2 has rejected it.

As set forth in the Rebuttal Testimony of Larry Brotherson (Qwest Ex. 56) at pages 14-15, without exception, every commission that has ruled on this issue has rejected the proposed section 1.7.2. In Colorado, the Hearing Commissioner, calling section 1.7.2 "an affront too far to the nature of a firm" and "overreach[ing] in its attempts to seize what would otherwise be Qwest's efficiencies and innovations," found that AT&T's proposed section 1.7.2 was unnecessary and added an extra layer of uncertainty to the process.[11] Likewise, the Iowa Utilities Board found that "the situation has already been adequately addressed in another SGAT section. New section 1.7.2, proposed by AT&T is rejected."[12] In Montana, Nebraska and North Dakota, the state commissions fully adopted the Multi-state Facilitator's recommendation and rejected section 1.7.2.[13] In New Mexico, the commission adopted the Multi-state Facilitator's recommendation and specifically noted that AT&T did not contest the Multi-state Facilitator's

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10 AT&T's Comments on Liberty Consulting Groups' Report Regarding General Terms and Conditions, October 5, 2001.

11 Resolution of Volume VIA Impasse Issues, *In the Matter of the Investigation Into US West Communications, Inc.'s Compliance With § 271(c) of the Telecommunications Act of 1996*, Decision No. R01-1193, Docket Number 97I-198T (Colo. PUC Nov. 20, 2001) ("Colorado GTC Order") at 4-7.

12 Conditional Statement Regarding General Terms and Conditions and Order Regarding Change Management Process Comments, *In Re: US West Communications, Inc., n/k/a Qwest Corporation*, Docket Nos. INU-00-2, SPU-00-11 (Iowa Util. Board March 12, 2002) ("Iowa GTC Order") at 7.

13 Final Report on SGAT General Terms & Conditions and Responses to Comments Received on Preliminary Report, *In the Matter of the Investigation Into Qwest Corporation's Compliance With Section 271 of the Telecommunications Act of 1996*, Docket No. D2000.5.70 (Montana PSC Dec. 20, 2001) ("Montana GTC Order") at 8; SGAT Approved In Part (Group 5 Report), *In the Matter of Qwest Corporation Seeking Approval of Its Revised Statement of Generally Available Terms (SGAT) Pursuant to Section 252(f) of the 1996 Telecommunications Act*, Application No. C-2537 (Nebraska PSC Jan. 2, 2002) ("Nebraska GTC Order") ¶¶ 16-20; Interim Consultative Report on Group 5 Issues, *US West Communications, Inc. Section 271 Compliance Investigation*, Case No. PU-314-97-193 (North Dakota PSC Feb. 27, 2002) ("North Dakota Order") at 14.

proposed resolution.[14] Similarly, the Utah Commission endorsed Qwest's arguments and rejected section 1.7.2.[15] In Washington, the Commission rejected Section 1.7.2, accepting the Washington ALJ's conclusion "[w]e are not convinced that AT&T's proposed SGAT language would have the desired effect of avoiding delays in the availability of new products, and therefore, we do not require Qwest to include the language."[16]

For all of the reasons set forth above, Midco's concerns are already properly safeguarded in the SGAT. Accordingly, a new section 1.7.2 should be rejected.[17]

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[14] Order Regarding SGAT General Terms and Conditions, *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Utility Case No. 3269 (New Mexico PRC Dec. 18, 2001) ("New Mexico GTC Order") ¶¶ 8-10.

[15] Report and Order, *In the Matter of the Application of Qwest Corporation (f/k/a US West Communications, Inc.) for Approval of Compliance With 47 U.S.C. § 271(d)(2)(B)*, Docket No. 00-049-08 (Utah PSC Jan. 28, 2002) ("Utah GTC Order") at 5-6.

[16] Twentieth Supplemental Order; Initial Order (Workshop Four): Checklist Item No. 4, Emerging Services, General Terms and Conditions, Public Interest, Track A, and Section 272, *In the Matter of the Investigation Into US West Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of US West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022; UT-003040 (Washington Utilities and Transportation Commission Nov. 14, 2001) ("Washington 20th Supp. Order") ¶ 302, *affirmed in part and reversed in part* Twenty-Eighth Supplemental Order; Commission Order Addressing Workshop Four Issues: Checklist Item No. 4 (Loops), Emerging Services, General Terms and Conditions, Public Interest, Track A, and Sections 272, *In the Matter of the Investigation Into US West Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996; In the Matter of US West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022; UT-003040 (Washington Utilities and Transportation Commission March 2002) ("Washington 28th Supp. Order") ¶ 16.

[17] In its discussion of a new section 1.7.2, Midco expresses a concern about the timing of new products based on an experience with Qwest's "SmartPak" service offering. Midco also expresses a concern about what NXX's are included in the SmartPak service offering. *See* Simmons Direct (Midco Ex. 38) at 10-12. Qwest addresses Midco's comments about the "Smartpak" offering in its brief concerning Checklist Item 14, Resale. As set forth in that brief and Qwest's record evidence, it appears there was a simple misunderstanding about when the new NXX's were available. Midco was sent notice of the SmartPak service offering. Further, Midco's complaints regarding access to this offering were resolved. Although Midco has been reselling Qwest services for a number of years, Midco expresses concern over only one experience, which has been resolved. Finally, advance, written notice of new Qwest retail product and service offerings is provided to reseller CLECs in South Dakota. Accordingly, Qwest believes that Section 6 (Resale) of the SGAT and the KMC Agreement, in addition to Qwest's non-discrimination obligations, address Midco's concerns. See Qwest's brief on Checklist Item 14, Resale.

B. The Commission Should Retain the Discretion to Address Retail Service Quality Issues Under South Dakota Statutes and Administrative Rules.

Midco submits that "a provision should be included in the SGAT which would transfer state commission levied sanctions against the retail provider to the wholesale provider if violation of service standards are due to poor provisioning of service by the wholesale provider."[18] Again, the Multi-state Facilitator and Staff considered and rejected this same argument.[19] Again, the concern identified by Midco is already properly protected. After analyzing the issue, the Multi-state Facilitator concluded that no language should be added to the SGAT because the Commission is best positioned to address liability for service quality in the context of its proceedings to establish or enforce service quality standards:

> The problem with this [Midco's] approach is that it may not be consistent with each state's policy regarding such assessments. For example, a commission could legitimately seek to penalize a CLEC whose failure to demand proper performance from its wholesale supplier (or perhaps even to be watchful enough to know that its end users were getting poor service due to the actions of Qwest as a vendor) contributed to the poor service that the commission may find cause to penalize. . . The superior way to deal with CLEC concerns about such "vicarious" liability is for them to make arguments in proceedings that either establish such standards and assessments in the first place, or in cases that are opened to enforce them. This approach . . . is better designed to give commissions the ability to impose their view of what customer-protection demands in their individual jurisdictions.[20]

The Multi-state Facilitator's and Staff's resolution is appropriate because it preserves the Commission's authority to address retail service violations under South Dakota statutes and administrative rules and is, as the Multi-state Facilitator put it, "the superior way" to deal with CLEC concerns about liability for service quality violations. If Midco's position were adopted,

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18 Simmons Direct (Midco Ex. 38) at 12-13.

19 Multi-state GTC Report at 35; Griffing Direct (Staff Ex. 1) at 112.

20 Multi-state GTC Report at 35.

the Commission's ability to impose retail service related penalties would be frustra[illegible] and limited. To ensure that the Commission's discretion is not limited, the Multi-state Facilitator's and Staff's resolution should be adopted.

As Mr. Brotherson explains, liability for service quality violations may not be as clear cut as Midco's position supposes.[21] During Commission proceedings addressing service quality violations, the parties will set forth their views of liability based on the precise issue presented, the governing law and the evidence. It is in the context of such proceedings that liability is best determined and apportioned by the Commission.[22] While Midco argues for vague language requiring a blanket shifting of liability to the wholesale provider "if violation of service standards are due to poor provisioning of service by the wholesale service provider," Midco offers no response to the fact that the violation may be attributed to other factors as well. Further, Midco fails to identify a single reason why the concern it raises will not be properly addressed substantively and procedurally by the Commission during proceedings that concern the service quality violation at issue.

Again, every commission to consider this issue has adopted the Multi-state Facilitator's recommendation, which is Staff's recommendation here. Specifically, the commissions of Iowa, Montana, Nebraska, New Mexico, North Dakota, and Utah have fully adopted the Multi-state Facilitator's resolution.[23] Because this Commission is in a superior position to address liability for service quality based upon the particular issue, the governing standard, and the evidence presented, and because Midco identifies no reason why this Commission will not responsibly

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21 See Tr. 4/24/02 (Brotherson) at 101-105.

22 *Id.*

23 Iowa GTC Order at 31; Montana GTC Order at 18; Nebraska GTC Order ¶ 63; New Mexico GTC Order ¶¶ 8-10; North Dakota Order at 22; and Utah GTC Order at 14.

address and apportion liability, the recommendation of the Multi-state Facilitator a Staff should be adopted.

C. Qwest Did Not Use Confidential Midco Customer Information in Its Mailing Advertising Dedicated Internet Access.

1. Background.

In its direct testimony of Mr. Simmons, Midco expressed a concern about whether a mailing (that Mr. Simmons stated a Midco customer received from Qwest) "implied" that Qwest had improperly used Midco customer records.[24] Because Mr. Simmons did not provide any details sufficient for Qwest to investigate and respond and because Midco had never raised the issue in its regular contacts with Qwest's account team, Qwest asked Midco for the underlying information and details so that it could investigate and respond.[25] In response, Midco provided Qwest with a copy of the specific mailing at issue (an advertisement for Qwest's Dedicated Internet Access service), including the address label. The address label was addressed to "Midco Comm (Reseller M07) not to a customer of Midco's.[26] The advertisement itself was addressed to Midco's Telecommunications Manager, not to a customer of Midco's.[27] Qwest investigated the issue and responded to it in the Supplemental Affidavit of Larry B. Brotherson.[28] As Mr. Brotherson sets forth, Midco did not provide Qwest with any information that the mailing went

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24 Simmons Direct (Midco Ex. 38) at 13 (stating a Midco customer "received a mailing addressed to 'Midco Resold Customer'").

25 Brotherson Rebuttal re: General Terms and Conditions (Qwest Ex. 56) at 53.

26 Supplemental Affidavit of Larry B. Brotherson re: General Terms and Conditions, filed on April 16, 2002 ("Brotherson Supplemental re: General Terms and Conditions") (Qwest Ex. 57) at 2. *See also* Midco Ex. 15.

27 *Id.* The advertisement itself is Exhibit LBB-GTC-3 to Brotherson Supplemental re: General Terms and Conditions. The photocopy of the outside of the envelope addressed to Midco and the letter addressed "Dear Telecommunications Manager" are Qwest Exhibit 58. *See* Tr. 4/24/02 (Brotherson) at 95.

28 Brotherson Supplemental re: General Terms and Conditions (Qwest Ex. 57) at 3.

to a customer of Midco's. Qwest's investigation showed that the advertisement was sent to a mailing list that was created through legitimate marketing sources and not through any use of Qwest wholesale customer data.'' [29]

2. Confidential Midco customer information was not used to create the mailing list for the Dedicated Internet Access promotion.

The brochure that Midco received was a mass mailing that was sent to business customers throughout South Dakota. The brochure advertised a time-specific promotion for Qwest Dedicated Internet Access ("Qwest DIA"), which provides an advanced OC-192 broadband IP backbone for high-speed internet connectivity. The promotion required a customer to sign up for the service between March 6, 2001 and May 31, 2001 to receive Qwest DIA for $799 a month. Qwest DIA offers a customer dedicated internet access T1 port, a Cisco 1720 router, on-site installation, and 24 X 7 hardware maintenance agreement.[30]

This Qwest DIA promotion was a joint promotion between Qwest and Cisco directed at business customers. The data used to create the mailing list for this promotion was a combination of data from Qwest's business retail, Cisco and Harte-Hanks Direct Marketing, a third-party marketing company with whom Qwest contracted. These three databases were combined and the duplicate information was removed to create the mailing list for the Qwest DIA promotion at issue.[31] Because of its expertise and marketing database, Harte-Hanks was selected to help create the mailing list, generate interest in the product, and generate inquiries to

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[29] *Id.* at 2-4.

[30] *Id.* at 2.

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

Qwest's call centers and web-site. Cisco provided marketing information and mailing lists because the promotion included a Cisco 1720 router as part of the service offering.[32]

Qwest utilized its retail customer information to help create the promotional list.[33] Qwest obtained its retail business customer information from Qwest's database of retail business customers. The Qwest retail business customer list that contributed to this mailing list does not contain any customers identified as "Midco resold customer."[34]

3. If a Midco customer received the Dedicated Internet Access promotion, the customer address was obtained through proper marketing means.

Although the only mailing in the record is addressed to "Midco Comm" and not to a customer of Midco's, if a Midco resold customer also happens to purchase retail services directly from Qwest, that customer is a retail customer of Qwest and will be on the list of Qwest retail customers. Accordingly, it is impossible to state that a Midco customer did not receive the Qwest DIA mailing.[35] Further, the customer could be on the commercially available mailing list offered by Harte-Hanks. Finally, the customer could be on the Cisco list. In sum, if this mailing went to any customers of Midco, the customer addresses were obtained through legitimate marketing mailing lists and not through any use of Qwest wholesale customer data.[36]

Midco itself is both a retail customer of Qwest as well as a wholesale customer of Qwest. As a result, it is not surprising that Midco received the promotional brochure advertising Qwest DIA services. Midco is a business that could require 1) reliable high-speed internet connectivity

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32 *Id.* at 3.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

over an OC-192 broadband IP network, 2) network connectivity, 3) web hosting, 4) web-centric consulting, certified technical expertise, 5) 24 X 7 system monitoring and hardware support, 6) guaranteed 99.9% internet access "up-time," 7) single point of contact, 8) bandwidth and scalability, 9) DS1 internet access, 10) a Cisco 1720 router, 11) on-site installation and 12) 24 X 7 hardware maintenance agreement.[37]

4. Midco's evidence does not support the conclusions it suggests, nor does Midco claim any current issue.

Qwest takes Midco's testimony and proffered evidence seriously.[38] Qwest supplemented the prefiled testimony of Larry Brotherson in order to set forth the scope of its investigation of the mailing and the conclusions it reached.[39] Midco has not challenged Mr. Brotherson's testimony concerning Qwest's investigation of the mailing that Midco provided to Qwest, nor has Midco taken issue with Qwest's evidence that it did not use confidential Midco customer information to create the mailing list.[40] Indeed, in the exhibit Midco offered as a summary of its testimony, Midco characterizes the mailing at issue as a "questionable mailing that *may have been* an example of data mining confidential information."[41] In this regard, Midco's summary emphasizes that Midco itself does not regard its evidence as establishing that Qwest misused Midco's confidential information. As Midco's witness, Mr. Simmons, describes it in his testimony, the mailing caused concern that Midco's customers "*may have been* specifically

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37 *Id.* at 1.

38 *Id.*

39 *Id.* at 1-2.

40 Tr. 4/24/02 (Brotherson) at 105-107 (no cross examination of Mr. Brotherson concerning the investigation he conducted and the conclusion he reached from the investigation).

41 Summary, W. Thomas Simmons, April 29, 2002 (Midco Ex. 39) at 3 (emphasis added).

targeted."[42] To Midco, the evidence "*also implied*" that its customers records were reviewed by Qwest sales personnel."[43]

During cross examination, Mr. Simmons acknowledged that the only copy of any mailing Midco offered as evidence was the mailing addressed to Midco.[44] Although Mr. Simmons stated that Midco employees had also received the mailing, he could not recall whether they received the mailing at Midco's address or their residential addresses.[45] And, although Mr. Simmons reiterated his understanding that one of Midco's customers had received the mailing that said "Midco resold customer," he provided no information concerning the basis for this understanding, nor any other information upon which the statement could be investigated.[46] Accordingly, Qwest submits that Midco's proffered evidence does not support the "implication" that Midco suggests.

Not only does Midco's evidence fall short of establishing the very serious "implication" that Midco suggests, but Midco does not claim any recurring or current issue or problem. On this Mr. Simmons is quite clear, testifying that "since this particular episode," Midco knows "of

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42 Simmons Direct (Midco Ex. 38) at 13 (emphasis added).

43 *Id.*

44 Tr. 4/30/02 (Simmons) at 42.

45 *Id.* at 49.

46 In this regard, it should be noted that after Midco first raised the issue in Mr. Simmon's direct testimony, Qwest asked Midco for the underlying details so that Qwest could investigate and respond. The information that Midco provided was the mailing addressed to Midco. *See* Brotherson Supplemental re: General Terms and Conditions (Qwest Ex. 57) at 2. Midco also readily states that at the time it learned of the mailing, it was not particularly concerned. Although Mr. Simmons mentioned the mailing during a lunch with Qwest representative Larry Toll, he acknowledges that he did not provide a copy of the mailing to Qwest. Tr. 4/30/02 (Simmons) at 9-10, 43. It is undisputed that Midco did not raise the mailing as an issue with Qwest's account team, although it routinely raised matters of concern with Qwest's account team.

no cases where data has been mined, where we've seen any evidence of data mining or any type of crosses of information."[47]

Against this backdrop, Qwest respectfully submits that neither Midco's evidence nor its characterization of its evidence,[48] justifies any conclusion that Qwest misused Midco's confidential customer information in a DIA mailing. For all the reasons set forth above, Qwest submits that the Commission should close this issue with a finding that (1) the evidence does not support a finding that Qwest misused Midco's confidential customer information in a DIA mailing; and (2) Midco asserts no other instance or issue concerning Qwest's use of confidential information.

D. The Dispute Resolution Provisions of the SGAT and KMC Agreement Were Carefully Negotiated, Have Not Been Disputed Elsewhere and Do Not Require Modification Here.

FiberCom did not submit any prefiled testimony concerning any general terms and conditions provision of the SGAT or KMC Agreement.[49] During its cross-examination of Qwest witness Larry Brotherson, however, FiberCom asked questions concerning four aspects of SGAT section 5.18, Dispute Resolution: (1) Whether section 5.18.3 compelled arbitration of the dispute if the other party did not agree to arbitrate; (2) Whether section 5.18.3 appropriately compelled arbitration in Denver if the parties did not agree upon another location; (3) the scope

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[47] Tr. 4/30/02 (Simmons) at 49-50.

[48] In this regard, Qwest emphasizes that Midco does not allege that its evidence shows that Qwest misused confidential information in the mailing at issue, only that its evidence "implies" Qwest "may have" misused confidential information. *See* Summary of W. Thomas Simmons, April 29, 2002 (Midco Ex. 39) at 3 ("Questionable mailing that may have been an example of data mining confidential information."). *See also* Simmons Direct (Midco Ex. 38) at 13 ("Midcontinent did become concerned when a Midcontinent customer received a mailing addressed to 'Midco Resold Customer,' which caused concern that our customers may have been specifically targeted. It also implied that at the very least, our customers records were reviewed by Qwest sales personnel.").

[49] Direct Testimony of Kyle D. White, filed on March 18, 2002 ("White Direct") (FiberCom Ex. 1).

of discovery available in arbitration under section 5.18.3.2; and (4) the applicable statute of limitations under section 5.18.5.[50] To the extent that its cross-examination of Qwest suggests that FiberCom will argue that certain dispute resolution provisions require modifications, Qwest respectfully submits that only one modification is appropriate and should be endorsed by the Commission. Qwest agrees that section 5.18.5, which sets forth the applicable statute of limitations, should be modified to state "or as otherwise provided under South Dakota law."[51] With this modification, section 5.18.5 will appropriately incorporate South Dakota law governing the statute of limitations for contract actions.

Qwest disagrees that any other modification is necessary to the dispute resolution provisions of the SGAT. These provisions were thoroughly reviewed and negotiated during the Multi-state Proceeding and proceedings in other states.[52] The resulting language is compromise, consensus language that appropriately addresses the issue raised. No CLEC has heretofore disputed this language, no commission has questioned it, and Staff does not question it. Moreover, to the extent FiberCom desires "better" or "clearer" language, FiberCom is free to request different wording when it negotiates its interconnection agreement with Qwest.[53]

FiberCom is not compelled to accept the wording of section 5.18.3, but Qwest submits that FiberCom misconstrues this provision to require the parties to submit a dispute to arbitration if one of the parties requests arbitration. First, as Mr. Brotherson repeatedly explained, the plain wording of section 5.18.3 simply provides that either party may request arbitration. It does not

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50 Tr. 4/30/02 (Brotherson) at 107-119. During his summary of testimony, FiberCom witness Kyle White briefly raised without elaboration dispute resolution as an issue. Tr. 4/30/02 (White) at 63.

51 Tr. 4/30/02 (Brotherson) at 119.

52 See Tr. 4/30/02 (Brotherson) at 115-116.

53 Id.

state that a request for arbitration compels arbitration over the objection of the other party.[54] Not only does the plain wording of section 5.18.3 not compel arbitration over the objection of a party, but section 5.18.1 provides that "each party reserves its rights to resort to the Commission or to a court, agency or regulatory authority of competent jurisdiction." Thus, section 5.18.1 unambiguously reserves a party's rights to engage in other forms of dispute resolution. While FiberCom apparently seeks to establish that section 5.18.1 "controls" or "overrides" section 5.18.3, section 5.18.1 does not "override" section 5.18.3 because section 5.18.3 does not mandate arbitration if a party objects to arbitration. Accordingly, Qwest submits that the existing SGAT language appropriately addresses the concern Mideo raises and does not require modification.

Likewise, Qwest believes the existing language in section 5.18.3 concerning the location of the arbitration is appropriate. Again, no other CLEC has raised a concern about this consensus language. Mr. Rutherson testified he could not recall a single instance where the parties had not chosen an agreeable location,[55] nor has FiberCom suggested any basis for believing this consensus language is inappropriate to address the issue of the location of arbitration.

Finally, FiberCom appears to question why the consensus section 5.18.3.2 limits the discovery that is available to the parties in arbitration. It is important to point out that FiberCom may misconstrue the language at issue. Section 5.18.3.2 provides "for the exchange of documents deemed necessary by the arbitrator to an understanding and determination of the dispute." Further, it calls upon the parties to attempt to agree on a discovery plan in good faith. Finally, it provides that the arbitrator shall resolve any disputes regarding the need, scope,

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54 Id. at 118-119

55 Id. at 117

nature and timing of discovery. Accordingly, it is unclear what, if any, concerns FiberCom may have regarding the scope of discovery in arbitration, as this section 5.18.3.2 reasonably addresses the exchange of documents and calls upon the arbitrator to settle any disputes over this discovery. As Mr. [illegible] testified, expedited procedures and treatment of discovery are available only when businesses elect to arbitrate a dispute. If a party chooses instead to go to the Commission or court for resolution of the dispute, the party will be subject to the Commission's or court's discovery rules.[9] Again, FiberCom has not identified any basis for modifying section 5.18.3.2. Qwest respectfully submits no modifications are appropriate.

* * *

In conclusion, Qwest respectfully submits the recommendations of the Multi-state Facilitator and Staff concerning the general terms and conditions provision of the SGAT should be adopted. No modifications to the consensus language in the SGAT beyond the modification to the statute of limitations provision are appropriate or necessary.

III. QWEST SATISFIES ALL OF THE SECTION 272 REQUIREMENTS

To receive section 271 interLATA relief, a BOC must demonstrate that, upon commencing in-region interLATA service, "the requested authorization will be carried out in accordance with the requirements of section 272."[10] Section 272 defines the specific structure and business relationship that the BOC must establish for and with its affiliate that will be providing interLATA services following FCC approval.

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9 [illegible]

10 [illegible]

Sections 272(a) and (b) require this affiliate to be "separate" from the BOC. Specifically, section 272(b) requires the separate affiliate to operate independently; maintain separate books, records and accounts in accordance with FCC rules; have separate officers, directors and employees; not to permit a creditor to have recourse to the BOC's assets in case of default and to conduct all transactions with the BOC at arm's length and reduce any such transactions to writing and make them available for public inspection. 47 U.S.C. §§ 272(b)(1)-(5). Section 272(c) requires the BOC to account for transactions with its 272 affiliate in accordance with FCC-approved accounting principles and prohibits the BOC from discriminating in favor of its section 272 affiliate in the provision of goods and services. *Id.* § 272(c). Section 272(d) requires a biennial audit of the BOC's compliance with section 272 by an independent auditor following receipt of interLATA authorization. *Id.* § 272(d)(1). Section 272(e) imposes certain non-discrimination and accounting requirements on the BOC concerning telephone exchange and exchange access. *Id.* § 272(e). Finally, section 272(g) permits joint marketing by the BOC and 272 affiliate following 271 approval, and exempts such joint marketing from the non-discrimination requirements described above. *Id.* § 272(g). Except for section 272(e), the requirements in section 272 sunset three years after the FCC approves a BOC's 271 application, unless the FCC extends that period. *Id.* § 272(f)(1).

A. QC's Showing of Compliance With Section 272.

In the affidavits of Judith L. Brunsting and Marie E. Schwartz and the rebuttal affidavit of Marie E. Schwartz, Qwest Corporation ("QC" or "the BOC") has demonstrated that it has established an affiliate, Qwest Communications Corporation ("the 272 affiliate" or "QCC"), that will comply with each of section 272's separation requirements. QC further showed that the

BOC and the 272 affiliate have adopted a wide range of internal training programs and accounting and other controls designed to make this commitment a reality — controls that are "reasonably designed to prevent, as well as detect and correct, any noncompliance with section 272."[58]

Ms. Brunsting and Ms. Schwartz also demonstrated that, before the merger of U S WEST, Inc., and Qwest Communications International Inc. ("QCI"), a prior section 272 affiliate had been established — U S WEST Long Distance, Inc. — that was also designed to comply with section 272. After the merger, QC transitioned from that affiliate (renamed Qwest Long Distance, Inc. ("Qwest LD"))[59] to QCC as its section 272 affiliate. This transition began in January 2001 and was completed in March 2001.

Ms. Brunsting, Senior Director for QCC, 272 Business Development, is responsible for implementing the section 272 compliance requirements for the 272 affiliate.[60] She has provided comprehensive testimony demonstrating that the 272 affiliate is prepared to offer service in compliance with section 272 once the BOC obtains 271 approval, and that in fact, the 272 affiliate is 272-compliant now. In particular, she has confirmed the following:

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[58] Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354 ¶ 398 (2000) ("*SBC Texas Order*"); Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 401 & n.1253 (1999), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) ("*Bell Atlantic New York Order*").

[59] In this brief, the term "Qwest LD" refers to this entity both before and after it was renamed.

[60] Affidavit of Judith L. Brunsting re: *Section 272 Compliance*, filed on Oct. 28, 2000 ("Brunsting Direct") (Qwest Ex. 61) at 1. Ms. Brunsting held the position of Director, Regulatory and Network, for Qwest LD, the prior Section 272 affiliate of QC, from 1997 until the position was transferred to QCC. *Id.*, Ex. JLB 272-1 (Qualifications of Judith L. Brunsting).

1. The 272 affiliate is a separate subsidiary. Both the 272 affiliate and the BOC are wholly owned indirect subsidiaries of QCI. Neither the 272 affiliate nor QC owns any stock in the other. Brunsting Direct (Qwest Ex. 61) at 6.

2. The 272 affiliate does not and will not jointly own with the BOC any telecommunications transmission and switching facilities, or the land and buildings on which such facilities are located. The 272 affiliate is not providing and will not provide operations, installation, or maintenance ("OI&M") services in connection with QC's switching and transmission facilities. Nor will it accept such services from QC or any of its affiliates. *Id.* at 8-9.

3. The 272 affiliate maintains a Chart of Accounts separate from that of the BOC, has a separate ledger system, and maintains separate accounting software which is kept at a separate geographic location. *Id.* at 9-12.

4. The 272 affiliate and the BOC do not and will not have overlapping officers, directors, or employees. *Id.* at 12-13. All services performed by one of these corporations for the other are documented by work orders or task orders, and the rates, terms, and conditions are available for public inspection. *Id.* at 14.

5. The 272 affiliate is separately capitalized by a non-BOC financial subsidiary of QCI. It has not requested and will not request any co-signature that would allow a creditor to obtain recourse to QC's assets. Its debt is non-recourse to the BOC, and its Services Agreement with QC provides that the 272 affiliate's contracts are non-recourse to QC. *Id.* at 17-18.

6. The 272 affiliate will account for all transactions with the BOC in accordance with the FCC's affiliate transaction rules, and such transactions are and will be posted on QCI's Internet site. *Id.* at 18-19.

7. The 272 affiliate will not commence joint marketing with the BOC until after the BOC receives 271 approval. It will comply with all of the joint marketing requirements of Section 272(g). *Id.* at 20-23.

8. The 272 affiliate informs employees about the guidelines to restrict the sharing of nonpublic information between it and the BOC and other BOC affiliates. *Id.* at 15-16. The 272 affiliate has also implemented a series of other controls designed to ensure compliance with the requirements of section 272, including internal controls and external audits, training programs and materials, a compliance advice telephone line, and color-coded employee badges. *Id.* at 11, 14, 24.

Ms. Schwartz, Director in FCC Regulatory Accounting for QC, the BOC, is responsible for ensuring the BOC's regulatory accounting compliance with section 272.[61] Ms. Schwartz has separately confirmed that the BOC, too, is prepared to satisfy each of the requirements of section 272 applicable to the BOC. Schwartz Direct (Qwest Ex. 59) at 3-6. She has corroborated Ms. Brunsting's testimony, and has described controls to establish section 272 compliance that include the following:

1. The BOC is monitoring asset transfers on a quarterly basis to ensure against joint ownership of network facilities. *Id.* at 12.

2. To ensure that QC will not perform OI&M functions for the 272 affiliate, approximately 50 network department leaders received extensive training. *Id.* at 12, 34. QC has implemented a number of additional training programs and procedures designed to ensure section 272 compliance, which are summarized below. *See id.* at 33-36, Ex. MES 272-16 & 17, and Brunsting Direct (Qwest Ex. 61), Ex. JLB 272-13.

3. The BOC requires the 272 affiliate to contact the BOC's Interexchange Carrier ("IXC") Sales Team representative to obtain services in the same non-discriminatory manner as every interexchange carrier. Schwartz Direct (Qwest Ex. 59) at 26, 31-32. New requests are then forwarded to QC's FCC/Regulatory Compliance Manager for review. Schwartz Direct (Qwest Ex. 59), Ex. MES 272-12. The BOC's Compliance Oversight Team, which is comprised of regulatory accounting, legal, and public policy experts, insures section 272 compliance including assessing the non-discrimination obligation concerning the requested service. Schwartz Direct (Qwest Ex. 59) at 21, 26.

4. On a monthly basis, the BOC reconciles its Internet postings of transactions with the 272 affiliate against its billing data. These reconciliations assure that posted information will accurately reflect the actual transactions. *Id.* at 24.

The only other testimony in this case concerning Qwest's compliance with section 272 was submitted by the South Dakota Staff.[62] The Staff agreed that Qwest should be found in

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[61] Affidavit of Marie E. Schwartz re: Section 272 Compliance, filed on Oct. 24, 2001 ("Schwartz Direct") (Qwest Ex. 59) at 1.

[62] *See* Griffing Direct (Staff Ex. 1) at 122-37, 4/30/02 Tr. (Griffing) at 139-41. AT&T did not introduce any evidence at the hearing with respect to Section 272. Midcontinent Communications referred to Section 272 in connection with a dispute with QC over a bill for resold services that it claims has not been resolved promptly. Simmons Direct (Midco Ex. 38) at 15-16. However, Midcontinent later acknowledged that this was not really a

compliance with all of the requirements of section 272.[63] While raising a question in his written testimony about three officers of QCC who are also officers of QCC's (and QC's) ultimate parent company, the Staff reviewed QC's response and concluded that there was no impediment to finding QC in compliance with section 272.[64]

B. QC's Prior Section 272 Proceedings.

QC has previously presented similar evidence of its compliance with section 272 in hearings conducted by or on behalf of all of the other states in QC's fourteen-state region. These proceedings involved virtually the same evidence regarding section 272 compliance as that presented in this case. Based on that similar record, seven of those thirteen commissions have now issued decisions regarding section 272. *Every one of these decisions* — in Nebraska,[65] New Mexico,[66] Washington,[67] Colorado,[68] Iowa,[69] Montana,[70] and North Dakota[71] — has found that QC and QCC meet the requirements of section 272.

Section 272 issue, since it was not concerned with QC's transactions with the 272 affiliate, and was therefore not classified "under the right topic" in its prefiled testimony. 4/30/02 Tr. ([illegible]) at 44-45.

63 *See* 4/30/02 Tr. (Griffing) at 139-41.

64 *Id.* at 140-41. Although Dr. Griffing noted that a Minnesota ALJ "seemed to agree" with his question about these three QCC officers, he noted that the ALJ's recommended decision was not a final one, that the FCC "does not comment on this," and that "I think you're okay" in recommending section 272 approval. *Id.* We address this issue below.

65 Section 272 Satisfied. *In the Matter of U S West Communications, Inc., Denver, Colorado, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify US West compliance with Section 271(c)*, Application No. C-1830 (Nebraska Pub. Serv. Comm'n, Sept. [illegible], 2001) ¶ [illegible] ("Nebraska 272 Order").

66 Order Regarding Section 272 Compliance, *In the Matter of Qwest Corporation's Section 271 Application and Motion for Alternative Procedure to Manage the Section 271 Process*, Utility Case No. 3269 (New Mexico Pub. Reg. Comm'n, Feb. 13, 2002) at 23 ("New Mexico 272 Order").

67 Washington 28th Supp. Order ¶ 273 (this order to be finalized after further consideration of QC-QCC merger and information presented on processes for disclosing [illegible] under Section 272(e)(1)).

68 Order on Staff Volume VII Regarding Section 272, Public Interest, and Track A, *In the Matter of the Investigation into U S West Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of*

Of the remaining six commissions in Qwest's region, three — Idaho, Wyoming, and Utah — are currently reviewing the recommended findings and conclusions of the Multi-state Facilitator. He found in September 2001 that "[t]he record demonstrates that Qwest has met each of the separate affiliate requirements established by section 272 of the Telecommunications Act of 1996."[72] The Utah Staff has issued a report recommending the same findings and conclusions as the Multi-state Facilitator.[73] No CLEC or other party to these multi-state proceedings took any exception to any of the section 272 findings or conclusions in the Multi-state Facilitator's Report. Referring to the then recent transition from Qwest LD to QCC as the new 272 affiliate described above, the Multi-state Facilitator concluded that the BOC had undertaken "substantial efforts" to ensure that QCC will comply with the requirements of section 272 and recommended independent third-party testing to "validat[e]" the effectiveness of these efforts with respect to the billing and posting of its affiliate transactions.[74]

1996, Docket No. 97I-198T, Decision No. R02-318-I (Colorado Pub. Utils. Comm'n, Mar. 15, 2002) at 4 ("Colorado Order").

[69] See Conditional Statement Regarding 47 U.S.C. § 272 Compliance, *In Re: U S WEST Communications, Inc. n/k/a Qwest Corporation*, Docket Nos. INU-00-2, SPU-00-11 (Iowa Utils. Bd., Apr. 4, 2002) at 28 ("Iowa 272 Order").

[70] Final Report on Qwest's Compliance with Section 272 and Response to Comments Received on Preliminary Report, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. D2000.5.70 (Montana Pub. Serv. Comm'n, May 8, 2002) ("Montana 272 Order").

[71] North Dakota Order (this report to be finalized after consideration of the results of independent testing by KPMG).

[72] *In the Matter of Investigation into U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996, Seven State Collaborative Section 271 Workshop*, Facilitator's Report on General Terms and Conditions, Section 272 and the Track A (Sept. 21, 2001) at 7 ("Multi-state Facilitator's Report").

[73] Staff Report on Group 5 Issues: General Terms and Conditions, Section 272, and Track A, In the Matter of the Application of QWEST CORPORATION for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B), Docket No. 00-049-08 (Utah Pub Serv. Comm'n, Sept. 21, 2001).

[74] Multi-state Facilitator's Report, at 54-55.

Pursuant to the Multi-state Facilitator's recommendations, QC thereafter retained KPMG, LLP ("KPMG") to conduct such independent testing of its affiliate transactions. That testing demonstrated that, except in twelve instances, both QC and the 272 affiliate complied in all material respects with the applicable FCC rules.[75] These few discrepancies actually involved a net *detriment* to the 272 affiliate — and therefore did not undermine the purpose of section 272, which is to prevent the BOC from *favoring or subsidizing* its own 272 affiliate.[76] While this report demonstrated that QC had effective controls in place, QC nonetheless corrected the few discrepancies identified in the KPMG report and strengthened its existing controls.[77] A subsequent KPMG examination determined that QC's "new controls and control enhancements . . . appear to strengthen the overall control environment with respect to 272 compliance" and "should minimize" discrepancies of the kind described in the KPMG report.[78] All five state commissions that have had the opportunity to address KPMG's independent testing (in Iowa, New Mexico, Washington, Montana, and Colorado) have found that it supports a finding that QC is in compliance with section 272.[79]

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75 *See* KPMG Report, attached to Rebuttal Affidavit of Marie E. Schwartz on Section 272 Compliance, filed on Apr. 2, 2002 ("Schwartz Rebuttal") (Qwest Ex. 60) as Ex. MES 272-21.

76 *See* Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719 ¶ 122 (2001).

77 4/24/02 Tr. (Schwartz) at 152-53. The measures Qwest took to strengthen its controls in the wake of the KPMG Report were described by Ms. Schwartz and Ms. Brunsting in affidavits accompanying Qwest's submission of the KPMG report to the state commissions participating in the multi-state proceedings. Copies of these are attached as exhibits to Ms. Schwartz's rebuttal testimony in this proceeding. *See* Schwartz Rebuttal (Qwest Ex. 60) at 1, Ex. MES 272-19 and MES 272-20.

78 Declaration of Philip J. Jacobsen, filed Dec. 19, 2001, at 31, attached to Schwartz Rebuttal (Qwest Ex. 60) as Ex. MES 272-23.

79 *See* Iowa 272 Order at 19-28; Colorado Order ¶¶ 8-14; Washington 28th Supp. Order ¶ 385; New Mexico 272 Order ¶¶ 20-21; Montana 272 Order at 15-18.

Three other state commissions outside of the Multi-state proceeding— in Arizona, Oregon, and Minnesota —have also not yet issued decisions on QC's compliance with section 272. However, the Arizona Staff recently issued a final report recommending that the Arizona Commission find that "Qwest meets the requirements of Section 272."[80] Oregon has not yet issued its decision. In Minnesota, an administrative law judge has issued a decision that recommends finding QC in compliance with the affiliate transaction requirements of Section 272(b)(2) following the KPMG Report, and notes that "QC has described controls to assure ongoing compliance with GAAP in future transactions."[81] It also finds QC in compliance with the section 272(b)(4) requirement that the creditors of the 272 affiliate do not have recourse to the assets of the BOC.[82]

With respect to other aspects of section 272, the Minnesota ALJ's decision stated that QC had not yet met its burden of demonstrating compliance but could do so by taking certain recommended actions.[83] As QC has demonstrated in its exceptions filed with the Minnesota Commission with respect to that recommended action,[84] these recommendations are premised upon what Qwest respectfully submits is a misguided view that the FCC's decision to permit shared services between a BOC and its 272 affiliate lacks "common sense."[85] They are thus

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80 Final Report on Qwest's Compliance with Section 272, *In the Matter of Qwest Corporation's Section 271 Application*, ACC Docket No. T-00000A-97-0238 (Arizona Corp. Comm'n, April 18, 2002) at 16 ("Arizona Staff Final Report").

81 Findings of Fact, Conclusions of Law and Recommendations, *In the Matter of a Commission Investigation into Qwest's Compliance with the Separate Affiliate Requirements of the Telecommunications Act of 1996 (Section 272)*, PUC Docket No. P-421/CI-01-1372 (March 14, 2002) at ¶ 57 ("Minnesota ALJ Order").

82 *Id.* at ¶ 73.

83 *Id.* at pages 40-42.

84 Exceptions of Qwest Corporation to ALJ Findings, Conclusions, and Recommendations, Minnesota PUC Docket No. P-421/CI-01-1372 (April 3, 2002).

85 *Minnesota ALJ Order* at ¶¶ 23, 79.

inconsistent with FCC precedent and go well beyond what the FCC has required of other BOCs that have received 271 approval. They are also at odds with the decisions issued by every other state commission and staff that has issued a decision on section 272.

As noted above, section 272 includes a variety of specific separation requirements. As demonstrated below, the extensive showings by Ms. Brunsting and Ms. Schwartz concerning the intention of both the 272 affiliate and the BOC to comply with each of the requirements of section 272 were modeled after, and are consistent with, those provided in support of the showings approved by the FCC in its earlier 271 approval orders, as well as with the FCC's *Accounting* and *Non-Accounting Safeguards Orders.*[86]

1. **Section 272(a): QCC is a "separate" affiliate.**

Section 272(a) requires the BOC to provide in-region interLATA long distance services through a "separate" long distance affiliate that meets the requirements of section 272(b). 47 U.S.C. §§ 272(a)(1)(A)-(B). QC has demonstrated that its 272 affiliate meets this requirement of being "separate" from the BOC. QCC is not a subsidiary of the BOC. The BOC owns no stock in the 272 affiliate; nor does the 272 affiliate own any stock in the BOC.[87] In previous 271 approval orders, the FCC has found that this showing satisfies section 272(a).[88] The Staff agrees that QC has demonstrated that it and QCC are separate entities.[89]

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86 Report and Order, *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd 17539 ("*Accounting Safeguards Order*"); First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*").

87 Schwartz Direct (Qwest I) [illegible]; Brunsting Direct [illegible].

88 *See* Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (D/B/A Verizon Long Distance), NYNEX Long Distance Company (D/B/A Verizon Enterprise*

2. Section 272(b)(1): QCC will "operate independently" from QC.

Section 272(b)(1) requires that the BOC and the 272 affiliate "operate independently." 47 U.S.C. § 272(b)(1). The FCC has provided that in order to satisfy this requirement, there must be no joint BOC-272 affiliate ownership of switching and transmission facilities or the land and buildings on which such facilities are located, no provision by the BOC (or other affiliate) of OI&M services with respect to the 272 affiliate's facilities, and no provision by the section 272 affiliate of OI&M services with respect to the BOC's facilities.[90]

Ms. Schwartz and Ms. Brunsting have demonstrated that QC and QCC do not and will not jointly own any telecommunications switching or transmission facilities, or the land or buildings where those facilities are located.[91] Each company independently owns its own network assets.[92] Each company maintains separate asset records on separate software systems that identify and support the assets owned.[93] The procedures established for the biennial audit

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Solutions) And Verizon Global Networks Inc., For Authorization To Provide In-Region, Interlata Services In Massachusetts, 16 FCC Rcd 8988 ¶ 228 & n. 738 (2001) ("*Verizon Massachusetts Order*"); *Memorandum Opinion and Order, Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance For Provision of In-Region, Interlata Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶¶ 258-259 (2001), *modified, Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) ("*SBC Kansas/Oklahoma Order*"); *Bell Atlantic New York Order* ¶¶ 404-405; Tr. 4/24/02 (Schwartz) at 139. *See* Arizona Staff Final Report ¶¶ 88-92; Nebraska Order ¶¶ 8, 24; Montana 272 Order at 4-7.

[89] *See* Griffing Direct (Staff Ex. 1) at 122-23.

[90] *Non-Accounting Safeguards Order*, 11 FCC Rcd. ¶ 158.

[91] Schwartz Direct (Qwest Ex. 59) at 11-12; Schwartz Rebuttal (Qwest Ex. 60) at 5; Brunsting Direct (Qwest Ex. 61) at 8; Tr. 4/24/02 (Schwartz) at 140, 160.

[92] Schwartz Direct (Qwest Ex. 59) at 11-12, Ex. MES 272-2 (Qwest Corporate Structure), Confidential MES 272-3C (BOC Chart of Accounts); Schwartz Rebuttal (Qwest Ex. 60) at 5; Brunsting Direct (Qwest Ex. 61) at 8-9, Ex. JLB 272-2 (QCC Articles of Incorporation); Tr. 4/24/02 (Schwartz) at 140, 160.

[93] Schwartz Direct (Qwest Ex. 59) at 13, Ex. MES 272-2 (Qwest Corporate Structure), Confidential MES 272-3C (BOC Chart of Accounts); Schwartz Rebuttal (Qwest Ex. 60) at 5; Brunsting Direct (Qwest Ex. 61) at 11-

include a specific review of compliance with these requirements.[94] QC and QCC also will comply with the FCC's requirement that a BOC and its 272 affiliate separate their respective OI&M functions.[95] Other Commissions have found, generally without need for discussion, that the BOC has demonstrated that the 272 affiliate is prepared to satisfy section 272(b)(1).[96] The Staff agrees.[97]

3. Section 272(b)(2): QCC has separate books and records that will be maintained in compliance with FCC rules.

Section 272(b)(2) provides that the 272 affiliate "shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate." 47 U.S.C. § 272(b)(2). The FCC further requires a section 272 affiliate to maintain its books, records and accounts pursuant to Generally Accepted Accounting Principles ("GAAP"), and separate from the BOC.[98]

QCC meets these requirements. It maintains a Chart of Accounts separate from that of the BOC, has a separate ledger system, and maintains separate accounting software which is kept

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12, Ex. JLB 272-2 (QCC Articles of Incorporation); Tr. 4/24/02 (Schwartz) at 160.

94 Schwartz Direct (Qwest Ex. 59), Ex. MES 272-14 (Biennial Audit Procedures).

95 Schwartz Direct (Qwest Ex. 59) at 12; Brunsting Direct (Qwest Ex. 61) at 8-9.

96 *See, e.g.*, Washington Initial Workshop 4 Order ¶ 503; Washington 28th Supp. Order ¶ 158; New Mexico 272 Order at 6; Colorado Order ¶ J; Nebraska Order ¶¶ 8-9, Iowa 272 Order at 5. *See generally* North Dakota Order.

97 Griffing Direct (Staff Ex. 1) at 122-23; Tr. 4/30/02 (Griffing) at 140-141.

98 Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599 ¶ 328 (1998) ("BellSouth-Louisiana II Order"). *See also* Accounting Safeguards Order ¶ 170.

at a separate geographic location.[99] It also follows GAAP.[100] Its separate books, records, and accounts are maintained in accordance with GAAP and consolidated into the financial statements of QCI, its ultimate parent.[101] The BOC also follows GAAP.[102]

As noted above, following the merger of QCI and U S WEST Inc., the merged entity decided to replace Qwest LD.[103] This decision required QC to overlay onto QCC the substantial controls necessary to assure compliance with the requirements of section 272. To carry out this transition as rapidly as possible, QC supplemented its own staff with accounting professionals under the direction of QC management to assist in reviewing all QC-QCC transactions.[104] During this transition, those personnel assisted the BOC in identifying and posting any services being provided between the BOC and the 272 affiliate, and these transactions were then billed with interest.[105] Since completion of this work in March 2001, billing has occurred regularly as specified in the affiliate agreements posted on the Internet.[106]

QC bills QCC properly, as its newly designated 272 affiliate, and charges interest for late payments.[107] During the establishment of and the transition to QCC as the 272 affiliate, the BOC

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99 Schwartz Direct (Qwest Ex. 59) at 12-13; Confidential Ex. MES 272-3C (BOC Chart of Accounts); Brunsting Direct (Qwest Ex. 61) at 9-12; Confidential Ex. JLB 272-5C (QCC Chart of Accounts); Confidential Ex. JLB 272-6C (QCC Consolidated Balance Sheet); Tr. 4/24/02 (Schwartz) at 140-41, 146; Tr. 4/24/02 (Brunsting) at 158, 160.

100 Brunsting Direct (Qwest Ex. 61) at 9-10; Tr. 4/24/02 (Brunsting) at 158, 160; Tr. 4/24/02 (Schwartz) at 140-41, 146.

101 Brunsting Direct (Qwest Ex. 61) at 11-13; Tr. 4/24/02 (Brunsting) at 158, 160; Tr. 4/24/02 (Schwartz) at 140-41, 146.

102 Schwartz Direct (Qwest Ex. 59) at 14; Ex. MES 272-5 (Report of Independent Public Accountants); Tr. 4/24/02 (Schwartz) at 146-48.

103 Brunsting Direct (Qwest Ex. 61) at 4; Schwartz Direct (Qwest Ex. 59) at 6.

104 Schwartz Direct (Qwest Ex. 59) at 15.

105 *Id.*

106 *Id.*

107 Schwartz Rebuttal (Qwest Ex. 60) at 22.

inadvertently failed to include an interest component in QCC's new Master Services Agreement, of the kind it had previously included for Qwest LD.[108] This agreement was changed in July 2001 to include an interest component,[109] and QCC has been billed interest retroactive to when the services were provided.[110]

As other Commissions have found, this showing demonstrates that QC and QCC comply with section 272(b)(2).[111] The Staff agrees.[112]

4. Section 272(b)(3): QC and QCC will have "separate officers, directors, and employees."

Section 272(b)(3) provides that the 272 affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate." 47 U.S.C. § 272(b)(3). The FCC has concluded that section 272(b)(3)'s separation requirement "simply dictates that the same person may not *simultaneously* serve as an officer, director, or employee of both a BOC and its section 272 affiliate."[113]

Ms. Brunsting has testified that the 272 affiliate has no officers, directors, or employees who also serve as officers, directors, or employees of the BOC.[114] Conversely, according to Ms. Schwartz's testimony, no BOC officer, director, or employee simultaneously serves as an officer,

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108 *Id.*

109 *Id.*

110 *Id.*

111 *See* Iowa 272 Order at 19-28; Colorado Order ¶ E-14; Washington 28th Supp. Order ¶ 241; New Mexico 272 Order ¶¶ 20-21; Montana 272 Order at 15-18. As noted above, the Minnesota ALJ agrees. Minnesota ALJ Order ¶ 37.

112 Griffing Direct (Staff Ex. 1) at 125-29.

113 *Non-Accounting Safeguards Order* ¶ 178 (emphasis added).

114 Brunsting Direct (Qwest Ex. 61) at 13; Tr. 4/24/02 (Brunsting) at 141, 160-61, 168-69.

director, or employee for the 272 affiliate.[115] This testimony was supported by a comparison of officer and director lists for each entity, and a comparison of the payroll registers for each entity using social security numbers.[116] A comparison between the BOC and the 272 affiliate's officer and director lists, and between their payroll registers, satisfies the FCC's test for section 272(b)(3) compliance.[117] Each of the other Commissions to specifically address the issue has found that QC and QCC comply with section 272(b)(3).[118]

The FCC has repeatedly rejected claims that it should read section 272 to prohibit "the sharing of administrative services."[119] However, when QC and QCC do provide services to one another, these transactions take place according to extensive procedural safeguards.[120] Any shared services are provided pursuant to a contract.[121] These are reduced to writing, posted on the Internet, and are otherwise compliant with section 272(b)(3).[122] The Master Services Agreement, which is the general agreement for services provided by the BOC to the 272 affiliate, states that "any persons provided by [the BOC] shall be solely the employees or agents of [the BOC] under its sole and exclusive direction and control."[123] The Services Agreement, which is

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115 Schwartz Direct (Qwest Ex. 59) at 16; Brunsting Direct (Qwest Ex. 61) at 12-16; Tr. 4/24/02 (Schwartz) at 141.

116 Schwartz Direct (Qwest Ex. 59) at 16-17, Ex. MES 272-6; Schwartz Rebuttal (Qwest Ex. 60) at 10-15; 4/24/02 Tr. at 151.

117 *Bell Atlantic New York* Order ¶ 409 & n.1261; *SBC Texas Order* ¶ 401 & n.1164.

118 Colorado Order ¶ F-1; Nebraska Order ¶¶ 13-27; Montana 272 Order at 26; North Dakota Order at 30; New Mexico 272 Order ¶ 23. *See also* Multi-state Facilitator's Report at 63-64.

119 *See, e.g.*, Third Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 14 FCC Rcd 16299 ¶¶ 18-19 (1999) ("*Third Order on Reconsideration*"); *Non-Accounting Safeguards Order* ¶ 182.

120 QC and QCC have also eliminated all employee loan arrangements between the entities. Schwartz Rebuttal (Qwest Ex. 60) at 16-17.

121 Schwartz Direct (Qwest Ex. 59) at 18.

122 Schwartz Direct (Qwest Ex. 59) at 18; Tr. 4/24/02 (Schwartz) at 166.

the general agreement for services provided by the 272 affiliate to the BOC, has an analogous provision stating that "any persons provided by QCC shall be solely the employees or agents of QCC under its sole and exclusive direction and control."[124]

Employees of the BOC and the 272 affiliate are also physically separated to the greatest extent practicable — either in separate buildings, or separate floors, or with different access points to the floor.[125] Where BOC and 272 affiliate employees occupy one building, plans are underway to install separate entry points as well.[126] The BOC and the 272 affiliate also provide each employee with a color-coded badge so that others can identify the entity for which that employee works.[127]

In addition to these physical separation policies, the BOC and the 272 affiliate have extensive controls to prevent the sharing of confidential information. Employees are required annually to review the Code of Conduct, which provides guidelines governing the relationship and business transactions between the various affiliates of QC.[128] The Code of Conduct states clearly that there are requirements governing the relationships between affiliates that regulate "information flow between entities,"[129] and in particular that "the long distance provider and designated 272 affiliate . . . must maintain separate employees, conduct business with each other

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123 Master Services Agreement, Article 4, included as Ex. MES 272-7, also available at http://www.qwest.com/about/policy/docs/qcc/MSA_qcc.html. ("Master Services Agreement"); Tr. 4/24/02 (Brunsting) at 191.

124 Services Agreement, Article 4, *available at* http://www.qwest.com/about/policy/docs/qcc/SA_qcc.html.

125 Schwartz Direct (Qwest Ex. 59) at 17-18; Schwartz Rebuttal (Qwest Ex. 60) at 15; Tr. 4/24/02 (Brunsting) at 174.

126 Tr. 4/24/02 (Schwartz) at 164.

127 Schwartz Direct (Qwest Ex. 59) at 18; Schwartz Rebuttal (Qwest Ex. 60) at 15; Brunsting Direct (Qwest Ex. 61) at 14; Tr. 4/24/02 (Brunsting) at 174.

128 *Id.*

129 Code of Conduct at 21, attached to Schwartz Rebuttal (Qwest Ex. 60) as Ex. MES 272-24. See also

at arm's length and post transactions [with the BOC] to the Internet."[130] The Code further directs employees to contact the Legal Affairs or Regulatory Accounting Department with any questions about these restrictions.[131]

Employees are also informed about the nature of these requirements in mandatory section 272 training.[132] QCC's mandatory training specifically instructs its employees that they cannot receive any information except "through the same…processes as other interexchange carriers."[133] BOC employees are similarly informed that they must "generally treat QCC like any other long distance carrier."[134] Both QC and QCC supplement the training of supervisors and higher level employees through staff meetings and other communications aimed at lower level employees as well.[135] Employees who violate these policies or guidelines are subject to disciplinary action up to and including termination from employment.[136]

Other state commissions to address the issue have found QC and QCC compliant with section 272(b)(3).[137] The South Dakota Staff has agreed.[138] The Staff noted in its prefiled testimony that certain officers of QCC are also officers of QCI, the ultimate parent of both QC

Schwartz Rebuttal (Qwest Ex. 60) at 15.

130 Code of Conduct at 21, attached to Schwartz Rebuttal (Qwest Ex. 60) as Ex. MES 272-24.

131 *Id.*

132 Schwartz Direct (Qwest Ex. 59) at 33; Tr. 4/24/02 (Schwartz) at 161.

133 Schwartz Rebuttal (Qwest Ex. 60) at 16. *See also* 272 training materials attached to Schwartz Direct (Qwest Ex. 59) as Ex. MES 272-16, at 10 (Section 272 Employee Training).

134 Schwartz Direct (Qwest Ex. 59), Ex. MES 272-16, (Section 272 Employee Training).

135 Tr. 4/24/02 (Schwartz) at 150.

136 Schwartz Direct (Qwest Ex. 59) at 17-18.

137 Colorado Order ¶ F-1; Nebraska Order ¶ 13; Montana 272 Order at 26; North Dakota Order at 39; New Mexico 272 Order ¶ 23. *See also* Multi-state Facilitator's Report at 63-64.

138 Griffing Direct (Staff Ex. 1) at 132-33.

and QCC.[139] Section 272(b)(3), however, does not bar overlaps except between the BOC and its 272 affiliate, and Congress knew how to include other affiliates of BOCs in the 1996 Act when it wanted to.[140] Here, the BOC itself has officers and directors entirely different from those of QCC. In light of these considerations, the Staff agreed at the hearing that there is no reason for the Commission to find QC non-compliant with section 272(b)(3) in this (or any other) respect.[141]

5. Section 272(b)(4): No recourse to QC's assets.

Section 272(b)(4) prohibits a 272 affiliate from obtaining credit under any arrangement that would permit a creditor to have recourse to BOC assets upon default. 42 U.S.C. § 272(b)(4). The BOC and the section 272 affiliate meet this requirement. They are separately capitalized,[142] and there are (and will be) no financial arrangements or co-signing of instruments that would allow creditors to have recourse to the BOC's assets upon default by the 272 affiliate.[143] Moreover, QC issues its own direct financial obligations, and its long-term debt is rated separately from QCI's other financial obligations.[144] In Minnesota, the only state where QC's showing of compliance with section 272(b)(4) has been challenged, the ALJ recommended that QC be found in compliance with this subsection.[145] In all other states in QC's region, no party has challenged QC's showing that it and its 272 affiliate comply with this provision.

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139 Tr. 4/24/02 (Brunsting) at 176-78.

140 *See, e.g.*, 47 U.S.C. §§ 271(a), 271(b), 271(d), 271(g), 273(a), 274(a), 275(a).

141 Tr. 4/30/02 (Griffing) at 139-141. *See also supra* n. 64.

142 *See* Schwartz Direct (Qwest Ex. 59) at 19; Brunsting Direct (Qwest Ex. 61) at 17.

143 Schwartz Direct (Qwest Ex. 59) at 19; Brunsting Direct (Qwest Ex. 61) at 17-18; Tr. 4/24/02 (Schwartz) at 142.

144 Schwartz Direct (Qwest Ex. 59) at 19.

145 *See* Minnesota ALJ Order at ¶ 73.

6. Section 272(b)(5): QC-QCC transactions will be conducted at arms-length and made publicly available.

Section 272(b)(5) requires that the BOC and the 272 affiliate conduct all transactions at arm's length, with any such transactions reduced to writing and made available for public inspection. 42 U.S.C. § 272(b)(5). As shown below, the BOC and the 272 affiliate comply with this requirement. The Staff has not identified section 272(b)(5) as a disputed issue.

The BOC provides two types of services to the 272 affiliate: tariffed services and non-tariffed services, i.e., those provided under separate contract.[146] As Ms. Schwartz has testified, tariffed services are already a matter of public record.[147] Where the BOC sells non-tariffed products or services to the 272 affiliate, a Master Services Agreement governs the transaction, and "work orders" memorialize the specific transaction in detail.[148] Conversely, where the 272 affiliate provides services to the BOC, a Services Agreement governs the transaction and "task orders" document detailed information about the specific services provided.[149] A QC Compliance Oversight Team comprised of regulatory, accounting, legal and public policy experts reviews all services between the BOC and the 272 affiliate to ensure compliance with section 272(b)(5) as well as compliance with the non-discrimination safeguards in section 272(c).[150]

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[146] Schwartz Direct (Qwest Ex. 59) at 20.

[147] *Id.*

[148] *Id. See also* Schwartz Direct (Qwest Ex. 59), Ex. MES 272-7 (MSA) (documenting general articles governing business between the BOC and the 272 affiliate); Brunsting Direct (Qwest Ex. 61) at 18-19.

[149] Schwartz Direct (Qwest Ex. 59) at 20-21; Brunsting Direct (Qwest Ex. 61) at 14.

[150] Schwartz Direct (Qwest Ex. 59) at 21; Schwartz Rebuttal (Qwest Ex. 60) at 21; 4/24/02 Tr. at 143. QCC is not a member of the Compliance Oversight Team. *See* Schwartz Direct (Qwest Ex. 59), Ex. MES 272-8 (Charter of Compliance Oversight Team).

As noted above, section 272(b)(5) also requires that the 272 affiliate make its transactions with QC "available for public inspection." 47 U.S.C. § 272(b)(5). In the *Accounting Safeguards Order*, the FCC implemented this provision by requiring a description of such transactions to be posted on the Internet within ten days of execution.[151] QC fulfills this requirement.[152] All existing work orders and task orders between the BOC and the 272 affiliate are available for review by any third party.[153] The BOC also maintains a listing of expired transactions for at least one year after the date of their termination.[154] Every commission to address the issue has found that Qwest satisfies this element of section 272(b)(5).[155] The Staff has agreed.[156]

QC's postings are also sufficiently detailed to satisfy the FCC's disclosure requirements.[157] Here, QC's Internet postings contain all of these FCC-required components: rates, terms, conditions, frequency, number and type of personnel, level of expertise, length of time required to complete the transaction, and special equipment used.[158] The New Mexico Commission, based upon the same evidence now before this Commission, has found that "Qwest's disclosures generally provide the same level of detail respecting the rates, terms and

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151 *Accounting Safeguards Order* ¶ 122.

152 Schwartz Direct (Qwest Ex. 59) at 21.

153 *Id.* at 22.

154 *Id.*

155 *See* Nebraska Order ¶ 16 (finding that QCC is currently posting transactions on a timely basis and that Qwest LD did so as well); Montana 272 Order at 30-31; North Dakota Order at 40-41; Colorado Order at ¶ G-4. *See also* Multi-state Facilitator's Report at 66-67

156 Griffing Direct (Staff Ex. 1) at 135.

157 Schwartz Direct (Qwest Ex. 59) at 23-24; Tr. 4/24/02 (Brunsting) at 161-62. *See also BellSouth Louisiana II Order* ¶ 337; *SBC Texas Order* ¶ 405 & n.1178.

158 *See* http://www.qwest.com/about/policy/docs/qcc/overview ("Current Task and Work Orders"); Brunsting Direct (Qwest Ex. 61) at 18-20.

conditions of its affiliate transactions that SBC and Verizon provide on their Websites."[159] The Washington Commission as well concluded that QC's web site disclosures are "comparable to the scope of information available on the other RBOC websites."[160]

The BOC will make volume and other confidential data available to IXCs pursuant to a confidentiality agreement.[161] The FCC has made clear that while certain information about transactions between a BOC and its 272 affiliate must be made available for public inspection, it will "continue to protect the confidential information" contained in those transactions.[162] To this end, the FCC has specifically allowed BOCs to rely on such agreements in order to protect the confidentiality of competitively sensitive information.[163] QC has demonstrated that its Internet postings comply with the FCC's public disclosure requirements, and that its willingness to provide access to additional confidential information at its principal place of business is fully consistent with FCC requirements.[164] Other commissions to address the question have agreed that QC complies with section 272(b)(5) in this respect.[165] The Staff has agreed.[166]

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159 New Mexico 272 Order ¶ 30.

160 Washington 28[th] Supp. Order ¶ 155.

161 Schwartz Direct (Qwest Ex. 59) at 22-23.

162 *Accounting Safeguards Order* ¶ 122.

163 As yet a further procedural safeguard, the BOC has implemented a process of monthly reconciliations of the BOC's Internet postings with its billing detail. Schwartz Direct (Qwest Ex. 59) at 24; 4/24/02 Tr. at 143. These reconciliations demonstrate that the BOC has accurately reflected the terms of its billings in its website postings. *See* Schwartz Direct (Qwest Ex. 59) at 24, Ex. MES 272-11 (Results of Monthly Reconciliation to Web Site). As Ms. Schwartz testified, QC also reconciles all QCC transactions with the FCC's Cost Allocation Manual. Schwartz Direct (Qwest Ex. 59) at 25.

164 *See* Schwartz Direct (Qwest Ex. 59) at 25. *See also Accounting Safeguards Order* ¶ 122.

165 *See* Montana 272 Order at 28-29; New Mexico 272 Order ¶¶ 30-31; Washington 28[th] Supp. Order ¶¶ 155, 157; Nebraska Order ¶¶ 15-16. *See also* Multi-state Facilitator's Report at 10, 66-67

7. **Section 272(c): QC will not discriminate in favor of QCC and has safeguards in place to prevent discrimination.**

Section 272(c)(1) prohibits the BOC from discriminating between the 272 affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards. 47 U.S.C. § 272(c)(1). QC has made clear that it understands its section 272(c)(1) obligations and has the necessary controls in place to assure that all services are provided on a non-discriminatory basis.[167] QCC has testified to the same understanding and commitment.[168] To obtain services from the BOC, QCC will have to contact its IXC Sales Executive Team representative at the BOC in the same manner as other IXCs.[169] As noted above, any services provided by QC to QCC are documented by detailed "work" orders made available for public inspection as required by 272(b)(5), and the services described in those orders are made available to unaffiliated parties at the same rates, terms and conditions.[170] This showing meets the FCC requirements,[171] and every Commission to consider the issue has found, based upon the same showing, that QC complies with section 272(c)(1).[172] The Staff has endorsed the Multi-state Facilitator's conclusion to the same effect.[173]

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[166] *See* Griffing Direct (Staff Ex. 1) at 134.

[167] Schwartz Direct (Qwest Ex. 59) at 4, 26-29; Schwartz Rebuttal (Qwest Ex. 60) at 21-22; 4/24/02 Tr. at 144. *See also* pages 34 - 38 *supra* (describing controls to assure nondiscriminatory provision of information).

[168] 4/24/02 Tr. at 159, 186-87.

[169] Schwartz Direct (Qwest Ex. 59) at 27.

[170] Schwartz Direct (Qwest Ex. 59) at 27; Tr. 4/24/02 (Schwartz) at 144.

[171] *See Non-Accounting Safeguards Order* ¶ 234; *SBC-Texas Order* ¶ 410.

[172] *See, e.g.*, Nebraska Order ¶¶ 17-18 ("QC charges QCC the same rates, terms and conditions for goods, services, facilities and information, that QC would charge any other carrier."); New Mexico 272 Order ¶¶ 39-41 (agreeing with the Multi-state Facilitator that 272(c)(1) is satisfied); Montana 272 Order at 19-21 (agreeing with Multi-state Facilitator that protections against discriminatory information sharing are in place). *See also* Multi-state Facilitator at 12 (finding that the record shows there are "adequate measures to assure that Qwest does not discriminate in favor of its 272 affiliate").

[173] Griffing Direct (Staff Ex. 1) at 136.

Section 272(c)(2) also requires that the BOC account for all transactions with its 272 affiliate in accordance with accounting principles designated or approved by the FCC. As noted above, QC follows the FCC's affiliate transaction rules.[174] All the Commissions that have addressed this question, including the Multi-state Facilitator, have found that QC also complies with section 272(c)(2).[175] The South Dakota Staff agrees.[176]

8. The BOC will satisfy section 272(d) — biennial audit.

Section 272(d) requires that, once the BOC receives section 271 authority, it must obtain and pay for a joint Federal/State audit every two years. The biennial audit acts as an additional control to ensure the BOC complies with the requirements in section 272. The FCC has placed substantial reliance on the existence of the biennial audit in consideration of section 271 applications.[177]

QC has submitted testimony demonstrating that it will comply with section 272(d). QC will pay for an independent auditor to determine whether the company has complied with the requirements of section 272 and the regulations promulgated under section 272.[178] The auditor will be able to verify that all transactions conducted between them are appropriate under the specific requirements of section 272. The Draft Biennial Audit procedures are attached to Ms. Schwartz's affidavit as Exhibit MES 272-14.

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174 Tr. 4/24/02 (Schwartz) at 148.

175 *See, e.g.*, Nebraska Order ¶¶ 17-18; New Mexico 272 Order ¶¶ 42-44; Montana 272 Order at 37-38.

176 *See* Griffing Direct (Staff Ex. 1) at 137.

177 *Bell Atlantic New York Order* ¶ 412; *SBC Texas Order* ¶ 406; *SBC Kansas/Oklahoma Order* ¶ 260.

9. The BOC complies with section 272(e).

Section 272(e) requires the BOC to fulfill requests from unaffiliated entities for telephone exchange service and exchange access within the same period, and under the same rates, terms, and conditions, as are applicable to its 272 affiliate, or to itself. 42 U.S.C. § 272(e). QC has demonstrated that it is prepared to comply with these requirements and that it has erected safeguards to that end.

Ms. Schwartz has testified that QC will not discriminate in favor of QCC in any way in the provision of telephone exchange service or exchange access service.[179] Instead, QCC will be required to obtain such services from QC pursuant to the same tariffed terms and conditions available to unaffiliated IXCs.[180] QCC will be billed at the same rates, terms and conditions, receiving no treatment more favorable than any other IXC.[181] QC has also committed that, after receiving 271 approval, it will make available data on its provisioning of these services to QCC pursuant to FCC requirements.[182] Such a commitment was accepted as sufficient in *Bell Atlantic New York*,[183] *SBC Texas*,[184] and *Verizon Massachusetts*.[185]

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179 Schwartz Direct (Qwest Ex. 59) at 30.

180 Schwartz Direct (Qwest Ex. 59) at 31; 4/24/02 (Schwartz) at 144-45, 151.

181 Schwartz Direct (Qwest Ex. 59) at 31-32.

182 *Id.*

183 Schwartz Rebuttal (Qwest Ex. 60) at 26.

184 *Bell Atlantic New York Order* ¶ 418 & n.1290, finding compliance with Section 272(e)(1) on the basis of evidence from Declaration of Susan C. Browning, Bell Atlantic New York Application ¶¶ 17-18 & Att. J.

185 *See, e.g., SBC Texas Order* ¶ 412 & n., finding compliance with 272(e)(1) on the basis of evidence from Affidavit of Kathleen M. Rehmer, SBC Texas Application ¶¶ 33-39 & Att. D.

186 *Verizon Massachusetts* ¶ 230 & n. 747 (2001), finding compliance with 272(e)(1) on the basis of evidence from Affidavit of Susan C. Browning, Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc. For Authorization to Provide In-Region InterLATA Services in Massachusetts, filed Sep. 21, 2001, ¶ 18 & Att. Q.

QC also has numerous safeguards in effect to ensure that its provision of access services will be non-discriminatory. These procedures include required processing of 272 affiliate requests through its IXC Sales Team representative at the BOC, as well as extensive training for staff members on all of section 272(e)'s requirements.[186] QC will be reporting its performance under section 272(e)(1) monthly on its website, and making the same information available at its headquarters during regular business hours, in addition to reports provided pursuant to the biennial audit.[187] Qwest has also conducted extensive training for its staff members on all of the requirements of section 272, including those in section 272(e).[188] Moreover, QC's compliance record will also be thoroughly reviewed as part of the biennial audit. Objective VIII of the Biennial Audit Procedures is specifically directed at the question of section 272(e)(1) compliance.[189]

Each of the states to consider QC's showing with respect to section 272(e) has found that QC complies with section 272(e)'s non-discrimination requirements. The Nebraska Commission also found that QC had "committed not to discriminate in favor of QCC in the provision of telephone exchange service or exchange access service."[190] The New Mexico Commission similarly found QC to be compliant with all four requirements of section 272(e) and noted that

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186 Schwartz Direct (Qwest Ex. 59) at 31-32; Tr. 4/24/02 (Schwartz) at 144-45.

187 Tr. 4/24/02 (Schwartz) at 145. There is currently no FCC requirement that such information on Section 272(e)(1) be made available in the BOC's principal place of business or made available on the Web. The FCC has considered (but never decided) the question of whether BOCs should make such information available at their business office or electronically and QC has decided to make such information available in both of these ways. *See* Further Notice of Proposed Rulemaking on 272(e)(1) at *Non-Accounting Safeguards Order* ¶ 370.

188 Schwartz Direct (Qwest Ex. 59) at 33-34. Qwest's training covers Section 272(e) and makes clear to employees that "QC is prohibited from providing any facilities, services, or information concerning its provision of exchange access to QCC unless such facilities, services, or information are made available to other providers of interLATA services under the same terms and conditions." *See* Ex. MES 272-16 (Section 272 Employee Training).

189 *See* Biennial Audit Procedures, attached to Schwartz Direct (Qwest Ex. 59) as Ex. MES 272-14, at 42-44.

190 Nebraska Order ¶ 20.

QC had "implemented practices and procedures that go toward preventing discrimination in favor of QCC in the provision of telephone exchange service or exchange access service."[191] Most recently, the Montana Commission has now issued its final report which finds QC to be in compliance with 272(e)(1) as well.[192] The Multi-state Facilitator has also endorsed QC's showing.[193] The Staff agrees.[194]

10. Section 272(g): The BOC is prepared to comply with the joint marketing requirements.

Section 272(g)(1) prohibits the 272 affiliate from marketing or selling telephone exchange services of the BOC unless the BOC permits other entities offering the same or similar service to do so. Section 272(g)(2) prohibits the BOC from marketing or selling in-region, interLATA services provided by the 272 affiliate within the state until the 272 affiliate is authorized to provide such services in the state. The BOC and the 272 affiliate have demonstrated their intention to comply with these requirements.[195]

* * *

As discussed above, the BOC has demonstrated compliance with the requirements of section 272. The Commission should recommend to the FCC that those requirements have been satisfied.

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191 New Mexico 272 Order ¶¶ 47-48.

192 Montana 272 Order ¶¶ at 34-35.

193 Multi-state Facilitator's Report at 12, 69-70.

194 Griffing Direct (Staff Ex. 1) at 136.

195 Schwartz Direct (Qwest Ex. 59) at 32-33; Brunsting Direct (Qwest Ex. 61) at 20-23; 4/24/01 Tr. (Schwartz)

IV. QWEST HAS SATISFIED ALL OF THE TRACK A REQUIREMENTS.

The Track A provision, 47 U.S.C. § 271(c)(1)(A), states as follows:

> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR. — A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 ... specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) ... but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

As both Qwest and Staff's witness agree,[196] the FCC has interpreted this language to require a BOC to demonstrate four things: (1) that it has one or more binding agreements with CLECs that have been approved under section 252 of the Act; (2) that it provides access and interconnection to unaffiliated competing providers of telephone exchange service; (3) that these competitors collectively provide telephone exchange service to residential and business subscribers; and (4) that these competing providers offer telephone exchange service either exclusively or predominantly over their own facilities (which include the UNEs they lease from Qwest) in combination with resale.[197] The FCC has made clear that there is no minimum CLEC market share that a BOC must prove; all that is required is that there be "at least one 'competing provider' [that] constitutes 'an actual commercial alternative' to the BOC'" somewhere in the

at 161-62.

[196] *See* Griffing Direct (Staff Ex. 1) at 137-38.

[197] *See* Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543, ¶¶ 62-104 (1997) ("*Ameritech Michigan Order*").

state, "which a BOC can do by demonstrating that the provider serves 'more than a *de minimis* number' of subscribers."[198]

In this proceeding, no intervenor specifically challenged Qwest's compliance with any of the four elements of Track A. CLECs are, by their own admission, providing a substantial amount of local competition in South Dakota. Indeed, one CLEC, FiberCom, has acknowledged that it alone is serving almost 40,000 residential and business access lines in South Dakota via facilities owned by FiberCom.[199] FiberCom's witness, Kyle White, also stated during the hearing that his company has become the dominant local exchange carrier in certain areas of the Black Hills, displacing Qwest.[200] Overall, Qwest estimates that CLECs are serving approximately 20 percent of the local market in the state.[201] This unrebutted evidence plainly demonstrates that Qwest has fully satisfied each of the Track A elements.

A. Qwest Has Entered into Multiple Binding Agreements That Have Been Approved Under Section 252.

The first element of Track A requires a BOC to demonstrate that it has "entered into one or more binding agreements that have been approved under section 252 . . . specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities."[202] Section 252 in turn lays out the procedures and standards by which

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198 *See* Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147 at ¶ 11(citations omitted) (rel. May 15, 2002) ("*BellSouth Georgia/Louisiana Order*").

199 *See* Black Hills FiberCom, L.L.C.'s Responses to Qwest Corporation's Data Requests for Black Hills FiberCom, filed April 19, 2002, at 1-2 ("FiberCom Data Request Response") (Qwest Ex. 3).

200 Tr. 4/30/02 (White) at 84:10-13.

201 Qwest Corporation's Affidavit of David L. Teitzel, Public Interest, filed on October 23, 2001 ("Teitzel Direct") (Qwest Ex. 1) at 20-30.

202 47 U.S.C. § 271(c)(1)(A).

state commissions arbitrate and approve ILEC–CLEC interconnection agreements. The FCC has affirmed that agreements approved by a state commission pursuant to section 252 are "binding" within the meaning of Track A if they define the obligations of each party — specifically, the "rates, terms, and conditions under which [the BOC] will provide access and interconnection to its network facilities."[203] The FCC has also made clear that individual agreements need not address every single one of the checklist items enumerated in section 271(c)(2) in order to count: "[W]e find nothing in section 271(c)(1)(A) that requires each interconnection agreement to include every possible checklist item, even those that a new entrant has not requested, in order to be a binding agreement for purposes of section 271(c)(1)(A)."[204]

In full compliance with these requirements, Qwest demonstrated that it had entered into 26 binding and approved wireline interconnection agreements in South Dakota as of August 31, 2001.[205] These agreements contain the terms, conditions, and prices applicable to the provision of network interconnection, access to unbundled network elements, ancillary network services, and telecommunications services available for resale in South Dakota. In addition to these bilateral agreements with individual carriers, Qwest has submitted (and will imminently update) a comprehensive Statement of Generally Available Terms and Conditions ("SGAT") pursuant to 47 U.S.C. § 252(f) that is available to *all* CLECs and contains the terms, conditions, and prices applicable to all aspects of interconnection, including every checklist item.[206] The FCC has acknowledged that an SGAT imposes binding legal obligations on a BOC just as bilateral

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203 *Ameritech Michigan Order* at ¶ 72.

204 *Id.*

205 *See* Rebuttal Affidavit of David L. Teitzel, Track A and Public Interest, filed on April 2, 2002 ("Teitzel Rebuttal") (Qwest Ex. 2), Exhibit A. Qwest has also concluded another 14 approved resale, wireless, and paging agreements. *See* Teitzel Direct (Qwest Ex. 1) at 10 n.14.

interconnection agreements do, and it has held that SGATs can be used to demonstrate compliance with section 271, even in a Track A application.[207]

During the hearing, no party challenged these showings or any other aspect of Qwest's compliance with this element of Track A. Qwest should therefore be deemed in full compliance with the first prong of 47 U.S.C. § 271(c)(1)(A).

B. Qwest Provides Access and Interconnection to Unaffiliated Competing Providers of Telephone Exchange Service.

The second element of Track A requires the BOC to demonstrate that it provides access and interconnection to "one or more unaffiliated competing providers of telephone exchange service."[208] According to the FCC, a CLEC qualifies as a "competing provider" as long as it is "actually . . . in the market and operational (*i.e.*, accepting requests for service and providing such service for a fee)"[209] and "serving more than a *de minimis* number of end-users."[210] These minimal requirements are intended to ensure that the CLEC is presently "an actual commercial alternative" in the market and not simply in the planning or testing stages.[211]

At the same time, the FCC has made clear that a CLEC need not achieve any particular market share, geographic scope, or order volume to qualify as a "competing provider" for

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206 Teitzel Direct (Qwest Ex. 1) at 10-11.

207 *See Bell Atlantic New York Order* ¶ 20 ("[T]he Commission must consult with the relevant state commission to verify that the BOC has one or more state approved interconnection agreements with a facilities-based competitor, or a statement of generally available terms and conditions (SGAT), and that either the agreement(s) or general statement satisfy the 'competitive checklist.'"). *See SBC Texas Order* ¶ 11(illustrating use of an SGAT — in this instance, an SBC SGAT known as T2A — to test compliance with the checklist requirements, rather than individual agreements).

208 47 U.S.C. § 271(c)(1)(A).

209 *Ameritech Michigan Order* ¶ 75. *See also BellSouth Georgia/Louisiana Order* ¶ 11.

210 *Id.* ¶ 78.

211 *Id.* ¶ 75.

purposes of Track A; the CLEC must simply be operational and serving a more than *de minimis* number of customers for a fee. *Simply put, neither Track A nor any other provision of section 271 turns on CLECs' individual or collective market shares, geographic coverage, or size.* The FCC's orders could not be more plain:

No market share tests. The FCC stated outright and early on that it "do[es] not read section 271(c)(1)(A) to require that a new entrant serve a specific market share in its service area to be considered a 'competing provider.'"[212] As the FCC has noted repeatedly, both houses of Congress specifically rejected language that would have put some kind of CLEC market share requirement in Track A.[213] In its recent order approving BellSouth's section 271 application for Vermont, the FCC held,

> The Commission has further held that a BOC must show that *at least one* "competing provider" constitutes "an actual commercial alternative to the BOC," which the BOC can do by demonstrating that the provider serves 'more than a *de minimis* number" of subscribers. The Commission has interpreted Track A not to require any particular level of market penetration, however, and the D.C. Circuit has affirmed that the Act "imposes no volume requirements for satisfaction of Track A."[214]

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212 *Id.* ¶ 77.

213 *See BellSouth Georgia/Louisiana Order* at App. D n.27 (same); Memorandum Opinion and Order, *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Vermont*, CC Docket No. 02-7, FCC 02-118 at App. D n.27 (rel. Apr. 17, 2002) ("*Verizon Vermont Order*"); Memorandum Opinion and Order, *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island*, 17 FCC Rcd 3300 at App. D n.27 (2002) ("*Verizon Rhode Island Order*"); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 (2001) at App. C n.27 ("*Verizon Pennsylvania Order*") ("Congress had considered and rejected language that would have imposed a 'market share' requirement in Track A."); Memorandum Opinion and Order, *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147 at App. D n.27 ("*Verizon Connecticut Order*") (same); *SBC Kansas/Oklahoma Order* at ¶ 34 n.78 (same); *Ameritech Michigan Order* ¶ 77 & n.170 (citing legislative history).

214 *Verizon Vermont Order* ¶ 10 (emphasis added) (citations omitted).

Similarly, FCC Chairman Michael Powell has emphasized that neither Track A, the public interest requirement, nor any other part of section 271 imposes any type of market share test:

> Some of the critics wish it was a market share test. And I won't even opine on whether that's good or bad, but I know that was expressly rejected by Congress. It doesn't say if there aren't more than 10% of people in the market don't approve them. That's just not what 271 says. And I know that's what a lot of people wish it said. But it doesn't.[215]

Track A merely requires that there be "at least one" CLEC in South Dakota that is "operational" and providing service "for a fee" to customers; it does *not* require that there be multiple CLECs that have achieved any particular share of the market in South Dakota overall.

No geographic scope tests. The FCC has declared unequivocally that it "do[es] not read section 271(c)(1)(A) to require any specified level of geographic penetration by a competing provider."[216] A CLEC qualifies as a "competing provider" for Track A as long as it provides service "'*somewhere* in the state'" — not necessarily throughout the state as a whole.[217] As the *Ameritech Michigan Order* notes, the plain language of Track A does not contain any requirement of ubiquity, and the legislative history makes clear that no such test was intended.[218] Objections that CLECs are active only in certain communities in South Dakota are therefore irrelevant.

No size or order volume tests. The FCC has also made clear that there are no CLEC size or scale tests in Track A or anywhere else in section 271. As the FCC has noted, the Senate specifically rejected language that would have required the BOC to prove that there are CLECs

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215 "Powell Defends Stance on Telecom Competition," *Communications Daily*, May 22, 2001.

216 *Ameritech Michigan Order* ¶ 76.

217 *Id.* (quoting H.R. Rep. No. 104-204, at 77 (1995)) (emphasis added by FCC).

218 *Id.*

in operation that are "'capable of providing a *substantial* number of business and residential customers'" with service.[219] Similarly, the House of Representatives rejected a version of Track A that would have demanded the presence of a CLEC capable of offering "service that is comparable in price, features, and scope" to that offered by the BOC.[220] Complaints that CLECs are too small, are unable to handle large volumes of customer orders, or are incapable of providing comparable service to Qwest are simply irrelevant for purposes of Track A.

Qwest demonstrated at the hearing that it provides access and interconnection to multiple competing providers of telephone exchange service, and no party attempted to rebut this showing. Confidential Exhibit DLT-4 provides a list of the unaffiliated CLECs active in South Dakota, with information regarding the type of facilities and services that each CLEC is purchasing from Qwest.[221] That chart shows exactly what UNEs, LIS trunks, resale, and other interconnection services and facilities each CLEC was purchasing as of August 31, 2001.[222] In sum, as of August 31, 2001, Qwest has provided 17,803 unbundled loops, 16,801 lines for resale,[223] and 7,049 interconnection trunks[224] to unaffiliated providers of telephone exchange service in South Dakota. No party has disputed these numbers. Thus, Qwest has satisfied the second prong of Track A.

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219 *Id.* ¶ 77 n.170 (quoting 141 Cong. Rec. S8319-26 (daily ed. June 14, 1995)) (emphasis added).

220 *Id.* (quoting H.R. Rep. No. 104-204, at 7 (1995)).

221 *See* Teitzel Direct (Qwest Ex. 1), Confidential Ex. DLT-4 (Active Contracts of Competitors in South Dakota as of August 31, 2001).

222 *Id.*

223 *See* Teitzel Direct (Qwest Ex. 1), Exhibit DLT-6 (South Dakota Business and Residential Lines Served by Competitors as of August 2001).

224 *See* Teitzel Direct (Qwest Ex. 1), Confidential Ex. DLT-8 (South Dakota Interconnection Trunks in Service).

C. Unaffiliated Competitors Are Collectively Providing Telephone Exchange Service to Both Residential and Business Subscribers.

Section 271(c)(1)(A) further requires that CLECs provide "telephone exchange service . . . *to residential and business subscribers*."[225] The FCC has made clear that the relevant question is whether the CLECs in a state are *collectively* serving both residential and business customers, not whether any single carrier is serving both groups.[226] Congress specifically amended the Act to "eliminat[e] the requirements that *one carrier* serve *both* residential and business customers, and allow[] instead, multiple carriers to serve such subscribers."[227] The FCC has reaffirmed this holding in all of its recent section 271 orders, most recently in its order granting BellSouth's applications for Georgia and Louisiana.[228] Therefore, as long as both residential and business customers are being served by some combination of CLECs in South Dakota, this requirement of Track A is satisfied. Moreover, the FCC has held that low levels of residential competition in particular are irrelevant for the purposes of Track A:

> We disagree with commenters who contend that the generally low levels of residential facilities-based competition in Vermont must result in a finding that Verizon does not meet the requirements of Track A. Sprint, for example, argues that the generally low levels of residential competition mean that the carriers described above are not "competing providers." Congress specifically declined to adopt a volume requirement, market share, or other similar test for BOC entry into long distance, and, as stated above, we find that each of the carriers described above is actively providing facilities-based service to more than a *de minimis* number of customers.[229]

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[225] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

[226] *See Ameritech Michigan Order* ¶ 82.

[227] *Ameritech Michigan Order* ¶ 84 (emphases added).

[228] *See BellSouth Georgia/Louisiana Order* at App. D ¶ 15; *see also Verizon Vermont Order* at App. D ¶ 15; *see also Verizon Connecticut Order* at App. D ¶ 15; *Verizon Massachusetts Order* at ¶ 223.

[229] *Verizon Vermont Order* ¶ 12.

Qwest witness David L. Teitzel demonstrated that South Dakota's CLECs provided 11,153 business and 5,648 residential access lines via resale, as of August 31, 2001.[230] This by itself demonstrates itself that both segments of the market are being served by competitors, and the intervenors failed to rebut this showing. Mr. Teitzel also reported that CLECs were serving 17,803 access lines in South Dakota via unbundled loops as of the same date.[231] These counts of unbundled loops and resold lines are actual quantities in service as tracked and reported by Qwest's wholesale billing systems, and there has been no dispute as to their accuracy. Even just these numbers are clearly more than *de minimis* when compared against Qwest's total access line base of 231,707[232] and would be sufficient by themselves to satisfy Track A.

A significant number (indeed, the largest number) of CLEC access lines in South Dakota are provisioned entirely over the CLECs' own free-standing networks, and hence bypass Qwest's network altogether. Because Qwest does not provide any facilities or services for these access lines individually, Qwest has no way of counting these bypass lines as it can resold lines and unbundled loops. Only the CLECs themselves know for certain how many access lines they service in this fashion.[233] In his opening testimony, Mr. Teitzel presented four different ways of estimating these full-facilities bypass lines based on pieces of evidence (the E911 database, interconnection (LIS) trunks, numbers of telephone numbers ported to CLECs, and CLEC white pages listings) that are available to Qwest. These various estimation methodologies suggested that CLECs were serving between 9,947[234] and 27,468[235] access lines in South Dakota entirely

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230 *See* Teitzel Direct (Qwest Ex. 1), Exhibit DLT-6.

231 *Id.*

232 *Id.*

233 *See* Tr. 4/22/02 (Teitzel) at 46:15-17.

234 *See* Teitzel Direct (Qwest Ex. 1) at 27.

CONTINUATION

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over their own free-standing networks.[236] When added to the actual numbers of unbundled loops and resold access lines reported above, these estimates yield CLEC market shares in South Dakota of 16.0 to 22.8%[237] — well over the amounts that existed in other states (such as Texas, Kansas, and Oklahoma) at the time the FCC granted those states section 271 applications. No party ever disputed these estimates.

Indeed, the data request responses that Qwest received after Mr. Teitzel's testimony was filed make clear that Mr. Teitzel's estimates of CLECs' full facilities bypass lines are actually far too low. Qwest was able to serve data requests only on the three CLECs that formally intervened in this proceeding: FiberCom, Midco, and AT&T. Qwest did not have the same opportunity to serve requests on some of the largest South Dakota CLECs, such as Dakota Telecommunications Group/McLeod, Northern Valley Communications, and Ionex. But the numbers from even this very limited sample of South Dakota CLECs are impressive.

In its response to Qwest's data request, FiberCom acknowledged that it was serving 26,035 residential access lines and 13,412 business access lines via facilities wholly owned by it in South Dakota as of April 19, 2002.[238] FiberCom also served 5 residential access lines and 225 business access lines via stand-alone unbundled loops as of the same date.[239] Midco acknowledged that it was serving **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** residential access lines and **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** business access lines via facilities wholly

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235 *Id.* at Confidential Exhibit DLT-10.

236 For a more detailed explanation of the estimation methodologies, see Teitzel Direct (Qwest Ex. 1) at 26-30.

237 *Id.*

238 *See* FiberCom Data Request Response (Qwest Ex. 3) at 1-2.

239 *Id.* at 2.

owned by it in South Dakota as of April 15, 2002.[240] Midco also served **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** residential access lines and **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** business access lines via resale, **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** residential access lines and **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** business access lines via stand-alone unbundled loops, and **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** business access lines via UNE-platform in South Dakota as of the same date.[241] Finally, AT&T also acknowledged that it was serving an additional number of access lines in South Dakota.[242]

In sum, just *two* South Dakota CLECs, FiberCom and Midco, are *actually* serving at least **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** residential access lines and **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** business access lines (far from *de minimis* numbers) via their own separate networks that bypass Qwest's network entirely. The total numbers for *all* CLECs in South Dakota are surely higher. None of this evidence is subject to dispute coming as it does from the CLECs themselves. Qwest has therefore satisfied the third prong of Track A.

D. Competitors Are Providing Telephone Exchange Service Either Exclusively over Their Own Telephone Exchange Service Facilities or Predominantly over Their Own Telephone Exchange Service Facilities in Combination with Resale.

The fourth element of the FCC's Track A test requires the BOC to show that the

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240 *See* Midcontinent's Response to Qwest's Data Requests of March 22, 2002, filed April 15, 2002, at 1 ("Midco Data Request Response") (Qwest Ex. 4).

241 *Id.* at 1-2.

242 *See* AT&T's Highly Confidential Response to Qwest's Data Request (Qwest Ex. 9).

competing providers offer telephone exchange service "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[243] The FCC has made clear that the UNEs a CLEC leases from the incumbent count as the CLEC's "own telephone exchange service facilities" in this context.[244] This element of Track A is satisfied even if only one CLEC in a state is offering service over its own facilities; it need not be the case that other CLECs (or all CLECs) use their own facilities as well.[245] Furthermore, the BOC need only show that CLECs are providing facilities-based service to business customers *or* residential customers, not both; as long as there is facilities-based competition for *one* class of customers, the FCC has held that Track A is satisfied if there is only resale-based competition for the other.

As noted above, Qwest was able to serve discovery on only three South Dakota CLECs, but even those few responses reveal just how much facilities-based competition exists in the state. Two of the CLECs, FiberCom and Midco, have acknowledged that they are serving **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** residential and business access lines in South Dakota via facilities entirely owned by those two CLECs.[246] That evidence alone plainly demonstrates that Qwest has satisfied the fourth prong of Track A

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243 47 U.S.C. § 271(c)(1)(A).

244 *Ameritech Michigan Order* ¶ 99.

245 *Id.* ¶ 104 (determining that because one CLEC was offering service exclusively over its own facilities, the BOCs' interconnection agreement with that CLEC satisfied the statutory requirement and made it unnecessary to examine whether additional interconnection agreements with other CLECs also satisfied the requirement).

246 *See* FiberCom Data Request Response (Qwest Ex. 3) at 1-2; Midco Data Request Response (Qwest Ex. 4) at 1-2.

for South Dakota, and no party has disputed it. Complete responses from all CLECs would surely reveal even more facilities-based competition.

Qwest's undisputed unbundled loop numbers, combined with these estimates of CLEC bypass lines, demonstrate that CLECs are serving large numbers of residential and business customers in this State both exclusively over their own facilities and in combination with resale. Accordingly, Qwest has satisfied all four prongs of the Track A requirements in South Dakota.

V. CONCLUSION

For all the foregoing reasons, Qwest respectfully asks the Public Utility Commission of South Dakota to find that the general terms and conditions provisions of Qwest's SGAT are balanced and appropriate protections of the interests addressed and that Qwest has satisfied all the requirements of 47 U.S.C. §§ 272 and 271(c)(1)(A) of the 1996 Act.

Dated this 21st day of May, 2002

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BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996	)))))	DOCKET TC 01-165

QWEST CORPORATION'S POST-HEARING BRIEF IN SUPPORT OF THE QPAP

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BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE INVESTIGATION INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996	)))))	DOCKET TC 01-165

QWEST CORPORATION'S POST-HEARING BRIEF IN SUPPORT OF THE QPAP

Qwest Corporation ("Qwest") respectfully submits this post-hearing brief in support of the Qwest performance assurance plan ("QPAP").

INTRODUCTION

In order to grant a section 271 authorization under the federal Telecommunications Act of 1996 (the "Act" or the "1996 Act"), the FCC must first conclude that a Bell Operating Company ("BOC") has satisfied the competitive checklist, which is intended to ensure that local markets in the state are open to competition.[1] That Act also requires the FCC to "fin[d]" that the "requested authorization is consistent with the public interest, convenience, and necessity."[2] The FCC has determined that one aspect of this federal public interest standard is whether there are adequate assurances that, once the BOC is granted section 271 approval, those local markets will remain open to competition. Where an applicant has proposed to enter into a performance assurance plan, the FCC has concluded that such a plan constitutes "probative evidence" that the

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[1] 47 U.S.C. §§ 271(c)(2)(B), (d)(3)(A).

[2] *Id.* § 271(d)(3)(C).

applicant will satisfy this aspect of the public interest standard.[3] This is the purpose of the QPAP proposed by Qwest in this proceeding.

This public interest analysis is thus a question of federal, not state, law. And the QPAP must accordingly be evaluated under that federal standard.[4] As the foregoing language of Section 271 of the 1996 Act also makes clear, it is the FCC that must "fin[d]" whether that federal standard is met in any particular case. The FCC has also held that "the states may not impose, with respect to BOC provision of intrastate interLATA service, requirements inconsistent with sections 271 and 272 and the Commission's rules under those provisions."[5]

The FCC has also established guidelines for determining whether the QPAP falls within its "zone of reasonableness" in assessing the plan's effectiveness.[6] First, it has identified five key characteristics of an acceptable performance assurance plan:

(1) Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;

(2) Clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;

(3) A reasonable structure that is designed to detect and sanction poor performance when it occurs;

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[3] Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 429 (1999) *aff'd sub nom. AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) ("Bell Atlantic New York Order"); Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147, ¶ 291 (May 15, 2002) ("Georgia/Louisiana Order").

[4] Indeed, unlike the checklist items (and the Track A showing) in section 271(c), the 1996 Act does not contemplate a statutory consultative role for state commissions under the public interest standard of section 271(d)(3)(C). *See* 47 U.S.C. § 271(d)(2)(B).

[5] *See* First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905 ¶ 47 (1996) ("Non-Accounting Safeguards Order").

[6] *Bell Atlantic New York Order* ¶ 433.

(4) A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and

(5) Reasonable assurances that the reported data are accurate.[7]

Second, in its various section 271 decisions to date evaluating such plans, the FCC has also provided further guidance about how plans may satisfy these criteria. In particular, as the Staff's witness recognized at the hearing in this case,[8] the FCC "has previously found that the enforcement mechanisms developed in [the Texas plan] . . . would be effective in practice."[9]

The FCC's "zone of reasonableness" standard means that "there is no one way to demonstrate assurance" that a plan is effective.[10] It thus gives BOCs flexibility in how to structure their plans, consistent with the FCC's guideposts. To be sure, the FCC "recognize[s] that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement."[11] This is a corollary of the fact that plans are submitted in different states and by different BOCs, and that they may vary from state to state and BOC to BOC. But the *converse* is not true: that provisions in plans repeatedly endorsed by the FCC as within its zone of

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7 *Id.*

8 Direct Testimony of Mark L. Stacy, *In the Matter of the Analysis into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996*, (March 18, 2002) ("Stacy Testimony") (Staff Ex. 3) at 14 (quoting Memorandum Opinion and Order, *In the Matter of Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 ¶ 128 n.5 (2001) ("Verizon Pennsylvania Order")). *See also* Tr. 4/30/02 (Stacy) at 222.

9 *Georgia/Louisiana Order* ¶ 294 n.1139.

10 Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc. For Authorization To Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 ¶ 240 (2001) ("Verizon Massachusetts Order").

11 *See* AT&T Witness John Finnegan's Verified Comments on Qwest's Performance Assurance Plan, *In the Matter of the Analysis into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996* (March 18, 2002) ("AT&T Comments") (AT&T Ex. 8) at 7 (quoting *Verizon Pennsylvania Order* ¶ 128); Stacy Testimony (Staff Ex. 3) at 14 (same).

reasonableness in other states (both urban and rural, and large and small) can be found *unreasonable* in the QPAP, simply because a state commission does not "agree[] with or see[] the wisdom of the FCC's decisions."[12]

At a minimum, since the FCC has found that the models that it has previously approved will be effective in practice, before rejecting those models any rational recommendation to the FCC must identify some factual basis in the record for concluding that competitive conditions in South Dakota justify doing so. As the Multi-state Facilitator concluded when comparing the QPAP to plans approved in Texas and elsewhere, for example, "no party . . . has argued that the question of payment limitations is materially different here because of unique factual circumstances."[13] As noted below, that is equally true in this case. Indeed, as the Staff's witness conceded with respect to that very question here, "I don't think there's anything specific about a smaller state that makes a cap less appropriate. . . . I would probably come to the same recommendation in New York as I did in South Dakota."[14] For these reasons, while the QPAP goes well beyond prior plan models in providing incentives for Qwest to continue to provide nondiscriminatory access to its facilities after section 271 approval, Qwest believes that this Commission's recommendation to the FCC on the QPAP should rely substantially on the FCC's prior guideposts.

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12 Transcript, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996* (April 30, 2002) ("Tr. 4/30/02") (Stacy) at 262 (statement of Commissioner Nelson).

13 Report on Qwest's Performance Assurance Plan, *In the Matter of the Investigation into US WEST Communications Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. D2000.5.70, Oct. 22, 2001 ("Multi-state Facilitator's Report") (Qwest Ex. 28), at 5.

14 Tr. 4/30/02 (Stacy) at 220.

In designing the QPAP, and in light of the FCC's foregoing decisions, Qwest began with a plan modeled closely along the lines of the plan previously approved by the FCC in its review of SBC's section 271 application for Texas. As noted below, *virtually all of the critical principles of the QPAP proposed by Qwest in South Dakota and at issue in this docket were derived from the Texas plan approved by the FCC (and approved in at least four other plans thereafter).* As the Staff's witness appeared to recognize at the hearing,[15] these principles therefore lie well within the FCC's controlling "zone of reasonableness"[16] standard for determining whether such plans are designed to ensure that "a BOC would continue to satisfy the requirements of section 271 after entering the long distance market."[17]

But in this case Qwest is not simply asking this Commission to endorse the Texas plan previously approved by the FCC. The plan currently before this Commission for review (and attached hereto as Qwest Exhibits 82 and 82A (redline)) has been significantly revised at least three times in response to CLEC and state commission staff comments, in a comprehensive review process that has now extended for almost two years. It has also now been revised further in an effort to address additional questions raised by the Commission, the Staff, and CLECs during the course of the hearings in South Dakota.

At the outset, Qwest agreed to subject its original proposal to an extensive review by CLECs and state staffs from this and ten other states, through the Regional Oversight

15 Tr. 4/30/02 (Stacy) at 222-23.

16 *See Bell Atlantic New York Order* ¶ 433.

17 *Id.* ¶ 429.

Committee ("ROC") Post Entry Performance Plan ("PEPP") collaborative conducted from October 2000 to May 2001. South Dakota CLECs had every opportunity to participate in that proceeding.[18] That review led to a number of compromises from the Texas plan by Qwest -- including changes to the statistical methodology crucial to the parity measurements upon which the plan is based, changes to the de-escalation features of the Texas plan, elimination of payment caps on virtually all individual performance measurements, increased payments for missed performance in collocation of CLEC facilities, reclassification of certain payment levels from medium to high, and addition of a per measure payment structure for regionwide measures.[19]

Subsequent to the ROC PEPP collaborative, nine of the commissions in Qwest's region engaged Mr. John Antonuk, as a third-party neutral Facilitator, to conduct a hearing to review the proposed QPAP. Various state commission staffs, CLECs, and public counsel all participated with Qwest in that multi-state proceeding. Mr. Antonuk, a recognized telecommunications expert; presided over seven days of testimony by and cross-examination of a variety of witnesses concerning each of the terms of the QPAP, and received pre-hearing comments and post-hearing briefs from the parties. He then issued in October 2001 a comprehensive, 87-page report on the QPAP, which endorsed

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18 Tr. 4/30/02 (White) at 103.

19 *See* Multi-state Facilitator's Report (Qwest Ex. 28) at 1. Thus, it is absurd to say that Qwest thereafter "walked away" from the ROC PEPP collaborative after agreeing to a seven-month process for compromise in efforts to resolve impasse issues. AT&T Comments (AT&T Ex. 8) at 3. When it became clear that the parties still could not resolve all of their differences over the many provisions of this complex plan, they proceeded to more formal hearings to resolve them. AT&T simply does not like the outcome of that resolution -- or simply wants to delay its implementation.

many aspects of Qwest's plan and sought further changes of others in response to the comments of CLECs and state staffs.[20]

Qwest has agreed to include all of Mr. Antonuk's recommended changes in its South Dakota QPAP.[21] In its rebuttal testimony, Qwest also agreed to make two other modifications: (1) updating the annual cap based on the most recently available ARMIS data, rather than relying each year on 1999 ARMIS data; and (2) revising the Tier 2 payment provisions to allow such payments to be used for any purpose allowed by the Commission under State law.[22]

Qwest has recently revised the QPAP even further in significant respects directly relevant to the issues in this proceeding. In March 2002, Qwest made substantial efforts to accommodate the remaining concerns, reflected in a Joint Stipulation entered into with the Utah Advocacy Staff.[23] During the course of the hearings in this case, Qwest also agreed to incorporate these additional modifications into its South Dakota QPAP.[24]

This Stipulation "attempt[s] to balance Staff's interest in allowing future changes in the PAP with Qwest's interest in having certainty regarding its obligations and potential liability under the PAP."[25] Its further modifications include the following:

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20 *See generally* Multi-state Facilitator's Report (Qwest Ex. 28). Qwest reflected these changes in a November 2001 revision to its multi-state QPAP, which Qwest has included in Qwest Exhibit 79 as part of the record of this proceeding.

21 Transcript, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996* (April 25, 2002) ("Tr. 4/25/02") (Reynolds) at 127-28.

22 *See* Tr. 4/25/02 (Reynolds) at 125-26; Rebuttal Affidavit of Mark S. Reynolds, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996*, (April 2, 2002) ("Reynolds Rebuttal Aff.") (Qwest Ex. 78) at 11, 23-24, 28.

23 Stipulation Between Advocacy Staff and Qwest Regarding Performance Assurance Plan, Docket No. 00-049-08 (Utah Public Service Commission, filed March 28, 2002) ("Joint Stipulation" or "Stipulation") (Qwest Ex. 79).

24 Tr. 4/25/02 (Reynolds) at 129.

25 Joint Stipulation (Qwest Ex. 79) at 6.

* A provision allowing the Commission to resolve disputes about adding, deleting, or modifying performance measures, subject to established judicial review mechanisms. The Joint Stipulation provides some protection to Qwest from unforeseen consequences from such changes, imposing a "collar" limiting the increase in payments arising from such changes to 10% in a given month.[26]

* An increase in the overall cap from 36% to 44%, as well as the establishment of a 24% procedural cap. To obtain relief from amounts over 24% up to 44%, Qwest has the burden of demonstrating to the this Commission its entitlement to relief pursuant to a public interest standard.[27]

* A provision allowing the Commission to eliminate the six-month cap on escalation of Tier I payments and further modifying the de-escalation feature of the Texas plan (as well as giving some protection to Qwest from the effects of eliminating the caps).[28]

* Clarification of the liquidated damages and offset provisions of the QPAP.[29]

These changes are reflected in the modified plan attached hereto, referred to in this brief as the "Revised QPAP." That modified plan also contains additional revisions, designed to expand the Commission's authority under the six-month review to include reclassification of performance measurements (as well as additions, deletions, or modifications of such measurements) and to address questions about the audit and other provisions of the QPAP raised during the hearing in this case.

We discuss below how this revised plan addresses each of the specific issues raised by AT&T, the Staff, and the two South Dakota CLECs at the hearing. As Mr. Reynolds noted in Qwest's rebuttal testimony, however, it is important to review the QPAP as a comprehensive and integrated whole, many of the features of which relate closely to many others. Qwest has agreed to make many of the foregoing changes to its plan over the course of this extensive review process only because it believed that doing

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26 *See* Sections 16.1 to 16.4.

27 *See* Sections 12.1 to 12.2.

28 *See* Sections 16.2 to 16.3.

29 *See* Sections 13.6 to 13.8.

so could advance resolution of the QPAP process, and only because in entering what AT&T has conceded to be "unplowed territory"[30] it believed it could rely upon the prior plan models approved by the FCC, affording some protection against the financial consequences of unforeseen difficulties in meeting the evolving standards under the plan. That belief was critical to Qwest.[31] Thus, as the Facilitator recognized, "we need[] to be careful not to support an improvement in what [a] party got without considering what had been given in return," lest "we risk disrupting important balances reflected" in the plan.[32] The FCC has counseled in its most recent section 271 order that such "balance [of] opposing concerns" is an appropriate aspect of performance assurance plans.[33]

ARGUMENT

Apart from the question of limits on liability, AT&T was the only CLEC at the hearing in this case that raised any significant issue about the QPAP. While Black Hills FiberCom, LLC ("FiberCom") did raise questions about the audit and six-month review provisions of the plan (both of which Qwest has now changed in the attached proposal), it agreed with "probably 80%" of the Multi-state Facilitator's recommendations, which Qwest has now incorporated.[34] Indeed, it characterized those recommendations as "a

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[30] Transcript, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996* (April 29, 2002) ("Tr. 4/29/02") (Finnegan) at 29.

[31] *See* Letter from R. Steven Davis, Sr. Vice President Policy and Law, Qwest Corporation, to Chairman, Wyoming Public Service Commission, (Feb. 18, 2002); Letter from Rick F. Hays, Montana Vice President, Qwest Corporation, to Chairman, Montana Public Service Commission, (Apr. 30, 2002).

[32] Multi-state Facilitator's Report (Qwest Ex. 28) at 2.

[33] *Georgia/Louisiana Order* ¶ 299.

[34] Tr. 4/30/02 (White) at 101-02; Direct Testimony of Kyle D. White, *In the Matter of the Analysis into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996* (March 18, 2002) ("White Testimony") (FiberCom Ex. 1) at 3.

great improvement."[35] Similarly, Midcontinent Communications ("Midcontinent") endorsed the principle of liquidated damages in the QPAP, "given the difficulty in measuring [damages] precisely" in this context, and had no specific additional recommendations other than to provide the Commission with final approval authority over the six month review.[36]

We address below the QPAP issues identified by AT&T and others, including the Staff, most of whose testimony related to the question of whether certain provisions of the QPAP provide sufficient incentive for Qwest to maintain its wholesale performance at acceptable levels.[37]

1. Annual Cap

Qwest's original QPAP placed at risk 36% of its annual net return in South Dakota, as calculated from 1999 ARMIS data.[38] In other words, Qwest proposed a cap

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35 Tr. 4/30/02 (White) at 102-03. The Commissioners also asked FiberCom about the dispute resolution and liquidated damages provisions of the QPAP. Tr. 4/30/02 (White) at 112-20. Qwest addresses those questions below.

36 Testimony of W. Tom Simmons, *In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996*, (March 18, 2002) ("Simmons Testimony") (Midcontinent Ex. 38) at 16-19. Mr. Simmons also raised questions about ensuring that CLECs are indemnified for payments under unidentified state service quality standards, but he did not demonstrate how missed performance under the QPAP would expose CLECs to any such liability in South Dakota. In any event, the Multi-state Facilitator rejected a similar argument, which Qwest demonstrated was inconsistent with the principle of liquidated damages (accepted by Midcontinent here) and likely to engender litigation about the causes for CLEC retail performance problems. *See* Multi-state Facilitator's Report (Qwest Ex. 28) at 33-34. Mr. Simmons also identified the importance of LIS trunks and rounding of performance results, but identified no specific need for revision to the QPAP in these areas, which the plan already addresses. *See* Reynolds Rebuttal Aff. (Qwest Ex. 78) at 23, 29.

37 While all witnesses obviously reflect the views of their sponsors, any evaluation of Mr. Stacy's views should begin with the fact that his firm, QSI, has received most of its revenues not from state commissions but from industry sources, including CLECs and -- "possibly" -- IXCs. Tr. 4/30/02 (Stacy) at 213-15.

38 The FCC's Automated Reporting Management Information System ("ARMIS") reports provide financial and operational data from telecommunications carriers. *See Bell Atlantic New York Order* ¶ 436 ("A 'Net Return' figure developed using ARMIS data, which represents total operating revenue less operating expenses and operating taxes, is a reasonable approximation of total profits derived from local exchange service."). *See* 47 C.F.R. §§ 32.4999 *et seq.*; Report and Order in CC Docket Nos. 00-199, 97-217, and 80-286. Further Notice of Proposed Rulemaking in CC Docket Nos. 00-199, 99-301, and 80-286.

on annual payments under the QPAP of $15 million, or 36% of Qwest's 1999 South Dakota profits from local service operations.

In order to address concerns raised by AT&T and FiberCom, Qwest has now agreed to a "procedural" cap pursuant to which, if it pays out as much as 24% of its net profits in any one year, it may seek relief from further payments by filing a petition with this Commission.[39] However, the Commission may thereafter increase the cap to as much as 44% of Qwest's net profits, if it finds that the public interest so warrants.[40] Under Qwest's revised plan, Qwest will have the burden of establishing in any such proceeding that it could not have remained under the existing cap through reasonable and prudent effort.[41]

This mechanism addresses AT&T's concerns about the purported inadequacy of the 36% "hard" cap. AT&T has endorsed both a 44% cap, and a flexible procedure (a "procedural cap") under which the state commission would determine if the BOC should make payments exceeding the cap.[42] To address FiberCom's additional concern about the continuing use of 1999 ARMIS data in calculating the cap,[43] Qwest has also agreed to

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2000 Biennial Regulatory Review -- Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2, 16 FCC Rcd 19911 (2001). In fact, the South Dakota ARMIS data filed by Qwest includes not just local exchange revenues, but all interstate and intrastate revenues derived by the BOC from its South Dakota operations, whether or not regulated.

39 Revised QPAP § 12.1-12.2.

40 *Id.* § 12.2.

41 *Id.*

42 AT&T noted that the Georgia plan has a 44% cap and that Louisiana has a 20% "procedural" cap and that "[t]hese measures are thus more than sufficient to ensure compliance with the established performance standards." AT&T's Exceptions to the Liberty Consulting Group's QPAP Report, *In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271 to the Telecommunications Act of 1996*, November 1, 2001 ("AT&T Exceptions") at 9-10 (quotation omitted). *See also* Tr. 4/29/02 (Finnegan) at 53-54; AT&T Comments (AT&T Ex. 8) at 31.

43 White Testimony (FiberCom Ex. 1) at 11.

update the plan annually with the most recently available ARMIS data.[44] The aff's witness, Mr. Stacy, was unable at the hearing to state his position as to whether Qwest's revised proposal is acceptable.[45] But to the extent the Staff takes the position that not even a 44% cap is adequate, its position is wholly without legal or record support.

In application after application, the FCC has approved an absolute limit on the BOC's annual liability under the plan.[46] Nor is there anything "arbitrary" about a 36% cap (much less a 44% cap).[47] The FCC has repeatedly found that placing 36% of the BOC's net local revenues at risk constitutes a "meaningful incentive" to maintain a "high level" of performance, because "it is primarily [the BOC's] local service profits that [it] would have a theoretical incentive to 'protect' by discriminating against competing local carriers."[48] For this reason, the FCC has squarely rejected the assertion that a 36% cap provides an inadequate incentive: "We . . . disagree with commenters that suggest that

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44 Revised QPAP § 12.1; *see also* Reynolds Rebuttal Aff. (Qwest Ex. 78) at 10-11.

45 Tr. 4/30/02 (Stacy) at 232.

46 *See Bell Atlantic New York Order* ¶ 435; Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354 ¶ 424 (2000) ("Texas Order"); Memorandum Opinion and Order, *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶ 274 (2001) (subsequent history omitted) ("Kansas/Oklahoma Order"); *Massachusetts Order* ¶ 241; Memorandum Opinion and Order, *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147 ¶ 76 (2001) ("Connecticut Order"); Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719 ¶¶ 128-29 & n.409 (2001) ("Arkansas/Missouri Order").

47 *See* Tr. 4/25/02 (Reynolds) at 140-41, 182; Tr. 4/30/02 (Stacy) at 261.

48 *See Bell Atlantic New York Order* ¶¶ 435-36; *Texas Order* ¶ 424 & n.1235; *Kansas/Oklahoma Order* ¶ 274; *Connecticut Order* ¶ 76; *Arkansas/Missouri Order* ¶¶ 128-29 & n.409.

this amount is insufficient and fails to provide adequate assurance of . . . compliance in the future."[49]

Mr. Stacy admitted that such a cap lies within the FCC's "zone of reasonableness."[50] And there is no contrary evidence in the record in this case, other than assertions that "more is better" that have no more demonstrated force in South Dakota than they have had anywhere else. Indeed, by using a percentage of net local profits rather than an absolute number, the FCC's measure necessarily reflects the same comparison of "costs" and "benefits" of meeting the plan's standards in every single state in which it has applied the cap -- large and small, urban and rural. Thus, Mr. Stacy admitted, "I don't think there's anything specific about a smaller state that makes a cap less appropriate. . . . I would probably come to the same recommendation in New York as I did in South Dakota."[51] In the absence of any basis for differentiating South Dakota from any other state, the Commission should reject any assertion that Qwest's newly revised annual cap mechanism provides inadequate financial incentive.

This is particularly true in light of the FCC's holding that liability under the QPAP need not be sufficient "*standing alone*, to completely counterbalance [the BOC's] incentive to discriminate,"[52] in light of other incentives. These include the risk of federal enforcement action (including the potential loss of long distance authorization).[53] Contrary to Mr. Stacy's suggestion,[54] that risk is no small matter. As FiberCom

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49 *See Kansas/Oklahoma Order* ¶ 274 (footnote omitted).

50 Tr. 4/30/02 (Stacy) at 223.

51 *Id.* at 220.

52 *Bell Atlantic New York Order* ¶ 435 (emphasis in original).

53 *See* 47 U.S.C. § 271(d)(6).

54 Tr. 4/30/02 (Stacy) at 255-56.

conceded, it would represent an "unmitigated disaster" for Qwest to lose long distance authorization.[55] The FCC has stated repeatedly that it will take violations of the conditions of its section 271 approval orders very seriously.[56] In its recent section 271 order for Georgia and Louisiana, the FCC confirmed its intent to exercise its enforcement authority "quickly and decisively."[57] And, as in other orders, it directed the BOC to file its PAP reports on a monthly basis with the FCC.[58]

In New York, for example, Bell Atlantic's section 271 application was granted in on December 22, 1999.[59] According to the FCC, its "performance in providing order acknowledgements, confirmation and rejection notices, and order completion notices for UNE-Platform local service orders deteriorated" from November 1999 into February 2000.[60] The FCC began investigating that performance in February 2000, *less than two months after its approval.* Only one month later, Bell Atlantic entered into a consent decree under which it paid the United States $3 million and agreed to make payments beginning at $4 million and increasing to $12 million if it failed to satisfy certain performance measures.[61] There is no basis for Qwest to believe, as Mr. Stacy suggests,[62] that the FCC would not exercise its authority with such alacrity here. Indeed, the FCC

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55 Tr. 4/30/02 (White) at 126.

56 *See, e.g., Bell Atlantic New York Order* ¶¶ 446-53; *Texas Order* ¶¶ 434-36.

57 *Georgia/Louisiana Order* ¶ 307.

58 *Id.* ¶ 308.

59 *Bell Atlantic New York Order.*

60 Consent Decree ¶ 7, *attached to* Order, *Bell Atlantic-New York Authorization under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 5413 (2000).

61 *Id.* ¶¶ 15-16.

62 Tr. 4/30/02 (Stacy) at 255-56.

expressly referred to this New York action in its recent section 271 approval order for Georgia and Louisiana last week.[63]

Ultimately, Mr. Stacy's effort to replace the FCC's analysis of "costs" and "benefits" with respect to annual caps on liability is, by his own admission, nothing short of an effort to impose an impossible burden of proof upon Qwest or, at the very least, to impose a burden "[w]hether or not it would be possible for Qwest to perform . . . an analysis" to satisfy that burden.[64] The same argument was made by in the multi-state hearing, in testimony by Dr. Griffing, a colleague from Mr. Stacy's firm, QSI, on behalf of the New Mexico Advocacy Staff.[65] The Multi-state Facilitator flatly rejected that argument, noting that Dr. Griffing himself admitted that no party had submitted evidence as to Qwest's "marginal cost" of compliance.[66] As Mr. Stacy has admitted here, the Multi-state Facilitator "found [such an analysis] to be impossible to perform."[67] Mr. Stacy similarly acknowledged that any such analysis would involve pure "speculation about future revenues," including "speculation about how much of the market Qwest could retain."[68] To premise the requirement of unlimited financial exposure on the lack

[63] *Georgia/Louisiana Order* ¶ 308 n.1180.

[64] Stacy Testimony (Staff Ex. 3) at 18; *see also id.* at 20 (referring to issues associated with the "ability to provide such an analysis"); Tr. 4/30/02 (Stacy) at 244 ("no question that it's difficult"), 246 ("maybe Qwest can't" perform such an analysis).

[65] Testimony of Marlon Griffing, *In the Matter of the Investigation into US West Communications Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Aug. 27, 2001 ("Tr. 8/27/01") (Qwest Ex. 80) at 115.

[66] Multi-state Facilitator's Report (Qwest Ex. 28) at 21. Mr. Stacy admitted that his hypothetical study would actually examine *total* costs rather than *marginal* costs. *See* Tr. 4/30/02 (Stacy) at 238-39.

[67] Stacy Testimony (Staff Ex. 3) at 18; *see* Multi-state Facilitator's Report (Qwest Ex. 28) at 21.

[68] Tr. 4/30/02 (Stacy) at 249.

of speculative evidence that is impossible to obtain would be consistent neither with the FCC's orders approving other plans nor with rational decisionmaking.[69]

Perhaps most important, Mr. Stacy's claim that "what Qwest pays is entirely under Qwest's control"[70] is simply untrue. As the Multi-state Facilitator recognized, Qwest should not be forced to decide whether to accept significant and unknowable exposure without some assurance that such exposure will not be unlimited.[71] In fact, while Qwest certainly believes and hopes that it can meet the QPAP's performance standards over an extended period of time, it has no evidence that proves that this will turn out to be true 100% of the time.[72] Given the parties' lack of real world experience with the Performance Indicator Definitions ("PIDs"), and the fact that new submeasurements or standards may well be introduced after the QPAP becomes effective, it is entirely possible that poorly designed PIDs will prevent Qwest from consistently meeting all of its obligations, *regardless of Qwest's desire to do so.*

In his discussion of the six-month limit on escalation, the Facilitator recognized as much:

> [I]t is not so clear that continuation of poor performance past six months means that there was a methodical calculation by Qwest that the continuing costs of compliance exceeded the continuing costs of violation. . . . There is no evidence in this record that would demonstrate with certainty that those levels of performance can be met and sustained at any

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69 Indeed, the New York Commission specifically rejected such an analysis as "flawed," and for the reasons stated above (relating to the existence of additional incentives) the FCC was not persuaded by it. *Bell Atlantic New York Order* ¶ 435 & n.1330.

70 Stacy Testimony (Staff Ex. 3) at 21.

71 Multi-state Facilitator's Report (Qwest Ex. 28) at 16.

72 For example, during a three-month test period in 2001, despite Qwest's exemplary efforts, it would have met only 93% of all of the plan's performance measurements. Affidavit of Mark S. Reynolds, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996* (October 24, 2001 ("Reynolds Aff.") (Qwest Ex. 77) at 23. And the payment amounts, even for a 93% compliance rate, would have been substantial. *Id.* at 24-25 (citing confidential data).

> cost that is within the realm of economic reason. There is certainly a common belief and expectation that they can; otherwise it is difficult to see why Qwest would have agreed to them. However, they generally relate to the provision of services about which there was relatively little experience when the measures were adopted.[73]

As noted above, the Revised QPAP establishes an appropriate "balance"[74] of these concerns with the ability of the Commission to override them based on its analysis of the record. Disregarding these concerns, in the absence of any record evidence justifying a departure from prior FCC-approved plans, would not simply affect Qwest. As Mr. Reynolds explained, and as Mr. Stacy conceded at least with respect to "the very short term," imposing unlimited liability on Qwest would raise its cost of capital in the absence of regulatory parity with other BOCs.[75] And as the Supreme Court has recently noted, the appropriate risk-adjusted cost of capital is one of three critical components of TELRIC.[76] Unnecessarily inflating that cost would thus increase the costs of Qwest's wholesale service, and create obvious pressures for increases in retail prices as well. It would thus disserve the public interest to ignore these established FCC guideposts.

2. Payment Triggers

Tier 1 payments under the QPAP are made to individual CLECs and are paid each month based on Qwest's performance as to each individual CLEC. In contrast, Tier 2 payments are based on aggregated CLEC performance results and are made to the State. Under the original QPAP filed in South Dakota, consistent with the Texas plan, Tier 2

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73 Multi-state Facilitator's Report (Qwest Ex. 28) at 44.

74 *Georgia/Louisiana Order* ¶ 299.

75 Tr. 4/25/02 (Reynolds) at 177-78; Tr. 4/30/02 (Stacy) at 224-25.

76 *Verizon Communications Inc. v. FCC*, No. 00-511, slip op. at 23-24 (U.S. May 13, 2002) (citing FCC rules).

payments based on statewide results were required when Qwest missed the performance standards for three consecutive months.[77]

However, Qwest has since agreed to two modifications of the QPAP that accelerate the application of the Tier 2 triggers.[78] First, pursuant to the recommendations of the Multi-state Facilitator, Qwest has agreed that Qwest will also make Tier 2 payments:

- For Tier 2 measures with Tier 1 counterparts, if Qwest misses the performance measure in any two out of three consecutive months in a 12-month period, with respect to the second consecutive month in which Qwest subsequently misses the performance measure.
- For Tier 2 measures without Tier 1 counterparts, if Qwest misses the performance measures in any two out of three consecutive months in a 12-month period, with respect to the very next month in which Qwest subsequently misses the performance measure.[79]

In addition, as in the Utah Stipulation, the Facilitator's two-out-of-three-consecutive-month trigger for Tier 2 payments described above is removed if Qwest's overall conforming performance level falls below 85% for any five months out of a 12-month period. In that event, Tier 2 payments will be triggered the very next month of noncompliance with measures that do not have Tier 1 counterparts and upon two months of subsequent noncompliance for measures that do have Tier 1 counterparts.[80]

These changes place the Tier 2 triggers well within the FCC's zone of reasonableness. As AT&T acknowledged, the FCC has approved *three*-month triggers for Tier 2 payments in the Texas, Oklahoma, Kansas, Arkansas, and Missouri

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77 For Tier 2 payments based on region-wide performance measurements, such as gateway measurements, Qwest eliminated the three consecutive month miss requirement. *See* Reynolds Aff. (Qwest Ex. 77) at 20.

78 *See* Revised QPAP §§ 9.1.2-9.1.3.

79 AT&T acknowledges that these one- and two-month triggers are "more generous" to the state than the three-month trigger provisions of the plans approved by the FCC. Tr. 4/29/02 (Finnegan) at 43-44.

performance plans.[81] In its recent order approving BellSouth's section 271 application for Georgia and Louisiana, the FCC expressly rejected AT&T's claim that a three-month trigger for such payments was insufficient.[82] Such triggers make sense in light of the basic differences between Tier 1 and Tier 2 payments. Tier 1 payments are intended in the first instance to compensate CLECs for nonconforming service. Because of their compensatory purpose, it is appropriate for Tier 1 payments to accrue immediately if Qwest's performance is below standard. Tier 2 payments, by contrast, are designed purely to provide an additional incentive to Qwest: they have payment levels at least three times higher than Tier 1 base payment levels, and almost half are duplicative of Tier 1 payments.[83] As such, it is appropriate that these payments are triggered only to incent Qwest to solve the problem once it has an opportunity to do so.

That necessarily requires some time lag. Performance results are not known until almost 30 days after the end of the month to which the data relates. If Qwest misses a performance measurement, it may not be aware of that fact until the end of the next month. And if the reason for the miss is recurring, Qwest likely will miss again the following month. Thus, a two-consecutive-month miss is a strong possibility before Qwest ever has a reasonable opportunity to take steps to fix the problem. Further, if correcting the problem requires adding new personnel, Qwest may not be able to meet performance standards until it has hired and trained additional employees, creating the likelihood of additional consecutive months of missed performance standards.

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[80] *See* Revised QPAP §§ 9.1.2-9.1.3.

[81] *See* Tr. 4/29/02 (Finnegan) at 43; section 9.2 of Texas, Oklahoma, Kansas, Arkansas, and Missouri PAPs.

[82] *BellSouth Georgia/Louisiana Order* ¶ 297.

[83] *Compare* QPAP Table 4 (Tier 2 payment levels) with QPAP Table 2 (Tier 1 payment levels).

In light of these reasons, the Multi-state Facilitator accepted a delay in the Tier 2 trigger, in making the recommendation for a two-out-of-three and additional one-to-two-month trigger described above and adopted by Qwest.[84] These further concessions by Qwest in shortening the three-month trigger that has been repeatedly (and, in its recent order, explicitly) approved by the FCC obviously lie within the FCC's zone of reasonableness.

3. Six Month Limit on Escalation

The original QPAP provided for escalated monthly Tier 1 payments to CLECs if Qwest misses performance measures in consecutive months but capped that escalation after six months. Mr. Stacy claimed that a limit on payment escalation after six months is inappropriate, for many of the same reasons he argued that an overall annual cap is not justified. In Mr. Stacy's view, there should be unending escalation of QPAP payments without a time limit in the event of continued misses, to serve as a greater deterrent.[85]

In light of these concerns, Sections 16.2 and 16.3 of the Revised QPAP now permit this Commission to lift the cap on escalation, if it concludes that doing so is in the public interest and that Qwest could have avoided the cap through reasonable and prudent efforts. However, for escalation beyond 12 months, Qwest would pay any incremental escalation portion to the state, rather than to CLECs.[86] This change preserves the incentives for Qwest to meet the performance measures but avoids the potential for misuse of escalation to overcompensate CLECs. Under Section 16.4 of the Revised QPAP, any additional escalation portion (above the six-month level) would also be

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84 Multi-state Facilitator's Report (Qwest Ex. 28) at 43.

85 *See* Stacy Testimony (Staff Ex. 3) at 26; *see also* AT&T Comments (AT&T Ex. 8) at 9-16.

86 *Id.* § 16.2.

subject to a 10% collar, in order to provide some limit on Qwest's unanticipated financial liability. The Utah Advocacy Staff has endorsed this revised escalation provision as providing an appropriate balance between the incentives for compliance and the opportunity for Qwest to demonstrate to the Commission that missed performance is due to unforeseen circumstances.

This revision lies well within the FCC's zone of reasonableness. As AT&T has conceded,[87] the approach of limiting escalation of Tier 1 payments to the six-month payment level has been repeatedly approved by the FCC (and state commissions) as an effective mechanism in every one of the Texas-based plans upon which Qwest modeled its original QPAP.[88] In contrast, unlimited escalation would lead to payments far beyond any reasonable approximation of the value of the service to a CLEC. For example, an analog, unbundled loop costs only approximately $20 per month. The base payment *for a single measurement* ranges from $25 to $150 (depending on whether it is designated low, medium, or high), effectively giving the CLEC one month or even several months of free service.[89] After six months, those payments balloon to $400 - $800, which is 20 to 40 times the cost of the original $20 service. And there is a very real possibility that Qwest would also be making Tier 2 payments ranging from $200 to $500 for the same occurrences, thus providing additional financial incentive to Qwest. As the matrix[90] below illustrates, the combined effect of Tier 1 payments at various levels of escalation

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87 Tr. 4/29/02 (Finnegan) at 38-39.

88 *See* pp. 10-11 of the Texas, Kansas, Oklahoma, Arkansas, and Missouri PAPs.

89 *See* Revised QPAP at Table 2.

90 *See* Reynolds Rebuttal Aff. (Qwest Ex. 78) at 18.

and Tier 2 payments is equivalent to the proceeds Qwest would receive from providing *multiple years* of service:

Number of Months	Tier 1 Payment	Tier 2 Payment	Total Financial Incentive	Equivalent Years of Service* ($20 monthly rate)
6	$800	$500	$1,300	7 yrs. 11 mos.
7	$900	$500	$1,400	8 yrs. 10 mos.
8	$1,000	$500	$1,500	9 yrs. 11 mos.
9	$1,100	$500	$1,600	11 yrs. 1 mo.
10	$1,200	$500	$1,700	12 yrs. 5 mos.
11	$1,300	$500	$1,800	14 yrs.
12	$1,400	$500	$1,900	15 yrs. 10 mos.

* Assumes a 10% discount rate

This matrix reflects payments on just one metric. A single CLEC order could involve multiple performance measurements in a month, both at service initiation (e.g., pre-ordering and provisioning) and during the life of the product (e.g., billing and maintenance/repair), which would generate yet more payments.

The Revised QPAP also permits the Commission to address, on a factual record, whether in the particular circumstances the Multi-state Facilitator's presumption is correct: that it is "speculative" to assume that continued non-compliance signifies that the QPAP has "insufficien[t] . . . inducements" or that Qwest has made a "methodical calculation" that it is cheaper to pay than to comply.[91] As he observed: "If non-compliance continues for half a year in the face of stiff financial consequences, one of the issues that would bear consideration is the achievability of the established benchmark

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91 Multi-state Facilitator's Report (Qwest Ex. 28) at 44-45.

itself."[92] As noted above, the Facilitator recognized that the parties have "relatively little experience" with the plan measures.[93] Nor are these measures set in stone. As Mr. Stacy conceded,[94] Qwest has agreed to add other submeasurements for new services now only diagnostic under the plan (e.g., EELs, line sharing, and subloops), and the plan contemplates the possible addition of new measurements during the six-month review process.[95]

The Revised QPAP would allow the Commission to address those factors. Given these reasons, it is sufficient at this stage to note that the Facilitator's considered judgment on this question, based on his review of the testimony in the multi-state proceeding, was far from "ludicrous," as Mr. Stacy insisted.[96] It was fully supported by the record in that proceeding, including testimony from QSI itself. In responding to the Facilitator's questions, Dr. Griffing admitted that he lacked any convincing evidence about the need for or the effectiveness of removing the cap on escalation.[97] In fact, he acknowledged that it would be "hard" for Qwest or anyone else to calculate "the exact profit margins, [and] the exact costs" necessary to make the type of economic decision about whether it is cheaper to pay the QPAP payments or to pay for more staff and equipment to bring the service into conformance.[98]

Moreover, overdeterrence presents just as many problems as underdeterrence. Dr. Griffing conceded that allowing CLEC payments to "get too high" would provide CLECs

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92 *Id.*

93 *Id.*

94 Tr. 4/30/02 (Stacy) at 251.

95 Revised QPAP § 16.1.

96 Stacy Testimony (Staff Ex. 3) at 24.

97 *See* Tr. 8/27/01 (Griffing) (Qwest Ex. 80) at 121-22.

with a corresponding "incentive to cause non-compliance" because they would "gain more from having failure than . . . [by] having Qwest comply."[99] Perhaps the best examples of measures that may be subject to this type of problem are those involving trouble reports, which affidavits from former Covad employees submitted by Verizon claim to have been the source of false reports outside of Qwest's region.[100] The OP-5, MR-7, and MR-8 performance measurements base conformance solely upon the rate of trouble reports as reported (and perhaps caused) by the CLECs themselves. Here again, creating opportunities for overpayment to CLECs is no better than creating inadequate incentives to Qwest, by threatening to convert the QPAP into a CLEC subsidy scheme that deters new entrants from investing in the very form of facilities-based competition that the 1996 Act is intended to foster.[101]

For these reasons, it is appropriate to provide Qwest with an opportunity to demonstrate to the Commission whether unending escalation is unnecessary in light of the many possible reasons for missing the QPAP's standards in any given case. And as a compromise from the six-month cap in the Texas plan, in this respect the Revised QPAP again is an appropriate "balance"[102] that lies well within the FCC's zone of

98 *Id.* at 121.

99 *Id.* at 119.

100 *See* note 187, *infra.*

101 *See* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 ¶ 110 (1999): "consumers benefit when carriers invest in their own facilities because such carriers can exercise greater control over their networks, thereby promoting the availability of new products that differentiate their services in terms of price and quality."

102 *Georgia/Louisiana Order* ¶ 299.

reasonableness. There is no record support for a "more is better" approach without the opportunity for Commission review, simply because that approach is an "easy" one.[103]

4. Stuck Duration

Mr. Stacy did not simply argue for unlimited payment escalation. He also believed that the QPAP payments should remain at escalated levels even after subsequent months of compliance (a concept referred to as "sticky duration," but probably more accurately referred to as *stuck* duration), on the premise that allowing payments to de-escalate "ignores the concept of economic incentives."[104] As noted above, this concept is built on speculation wholly without record support. But in this respect, the QPAP provides even greater incentives than the Texas plan approved by the FCC. That plan allows payments to return to the lowest payment level upon a single month of conforming performance. In the ROC PEPP collaborative, Qwest agreed to a provision whereby payments step down only one notch at a time for each conforming month of performance.[105]

As the Multi-state Facilitator noted, sticky duration is "wholly inappropriate" for two reasons:

> It is disingenuous because it would ignore entirely successful performance by Qwest however long Qwest provided it. The proposal is draconian because its new baseline payment levels, when multiplied by the still applicable escalation levels, could produce payments by Qwest that are an order of magnitude higher than those contemplated by the QPAP. . . .[106]

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103 Tr. 8/27/01 (Griffing) (Qwest Ex. 80) at 121.

104 Stacy Testimony (Staff Ex. 3) at 28.

105 Revised QPAP § 6.2.1. The Revised QPAP now permits accelerated de-escalation, but only in connection with eliminating the cap escalation as described above -- after payments have escalated nine months or more and only after three consecutive months of conforming performance. Revised QPAP § 16.3

106 Multi-state Facilitator's Report (Qwest Ex. 28) at 63.

For this reason, "stuck" duration has never been a part of a plan accepted by the FCC, and only one other state commission (Wyoming) has sought to modify the Facilitator's recommendation on this point.

5. Use of Tier 2 Payments

The original QPAP provided that Tier 2 payments could be used for any purpose relating to Qwest's service territory. AT&T argues that the use of Tier 2 payments should not be restricted to Qwest's territory, and it proposes to add language stating that the funds may be used for any purpose allowed by state law.[107] The Revised QPAP now addresses both concerns.[108]

6. 100% Cap

Only AT&T objects to Section 8.2.1.1 of the QPAP, which sets forth the way to calculate payments for misses of those performance measures that involve average intervals for multiple orders by a CLEC. This provision is designed to permit some sensitivity for severity of misses, while avoiding overpaying by multiplying the severity factor by all orders (including orders that do not involve misses).

Five of the seven commissions in Qwest's region that have addressed the 100% cap have rejected AT&T's position on it.[109] The remaining two, as Qwest has pointed

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107 AT&T Comments (AT&T Ex. 8) at 25.

108 *See* Revised QPAP § 7.5.

109 Arizona, Idaho, Montana, Nebraska, and Wyoming have all accepted Qwest's proposed 100% cap. *See* Recommended Opinion and Order of the Hearing Division on Qwest's Performance Assurance Plan, *In the Matter of the Investigation into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238 (Arizona Corp. Comm'n Apr. 4, 2002); Commission Decision on Qwest's Performance Assurance Plan, *In the Matter of U S WEST Communications, Inc.'s Motion for An Alternative Procedure to Manage Its Section 271 Application*, Case No. USW-T-00-3 (Idaho Public Utilities Comm'n, Mar. 7, 2002) at 8-9; Preliminary Report on Qwest's Performance Assurance Plan and Request for Comments on Findings, *In the Matter of the Investigation*

out in connection to these decisions, were based on the conclusion that this cap eliminates consideration of severity of missed performance[110] -- which, as described below, AT&T has conceded is incorrect. Most importantly, the FCC has approved a 100% cap (or even a 50% cap) in many other plans.[111]

The Multi-state Facilitator also examined this issue in considerable detail, and concluded that in the absence of any more acceptable CLEC counterproposal the 100% cap represents a reasonable "arithmetical compromise" between the need to conform to the plan's basic structure based on actual order volumes, and the goal of increasing payments for more severe misses.[112] At the hearing in this case, AT&T's own witness admitted that the 100% cap uses an averaging of results, and a multiple of all orders (not just missed ones), so as to build in a severity factor.[113]

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into Qwest Corporation's Compliance with Section 271 of the Telecommunications Act of 1996, Utility Division Docket No. D2000.5.70 (Montana Public Service Comm'n, Feb. 4, 2002) at 37-38; QPAP Approved as Amended, In the Matter of Qwest Corporation, filing its notice of intention to file its Section 271(c) application with the FCC and request for the Commission to verify compliance with Section 271(c), Application No. C-1830 (Nebraska Public Service Comm'n, April 23, 2002); First Order on Group 5A Issues, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms*, Docket No. 7000-TA-00-599 (Wyoming Public Service Comm'n, Jan. 30, 2001).

110 *See* Conditional Statement Regarding Qwest Performance Assurance Plan, *In Re: U S WEST Communications, Inc., n/k/a Qwest Corporation*, Docket Nos. INU-00-2, SPU-00-11 (Iowa Department of Commerce, May 7, 2002) at 122 (100% cap "removes a payment increase factor that would incorporate the severity of the misses"); Thirtieth Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan, Docket Nos. UT-003022, UT-003040, at 22 (Washington Utilities and Transportation Comm'n April 2002) (failure to recognize existence of "incentives to minimize any disparity"). The recent decision by the Washington Commission acknowledges that the QPAP's 100% cap provision is "within the FCC's zone of reasonableness." Thirty-Third Supplemental Order, Order Denying In Part, And Granting In Part, Qwest's Petition For Reconsideration Of The Thirtieth Supplemental Order, Commission Order Addressing Qwest's Performance Assurance Plan, Docket Nos. UT-003022, UT-003040, at 6 (Washington Utilities and Transportation Comm'n May 20, 2002). The Washington Commission nevertheless rejected the 100% cap, relying on the irrelevant fact that some PAPs that have not proposed a 100% cap have been approved by the FCC. *See id.*

111 *See* note 118, *infra*.

112 Multi-state Facilitator's Report (Qwest Ex. 28) at 69.

113 Tr. 4/29/02 (Finnegan) at 44-46.

Two examples provided by Mr. Reynolds show how the 100% cap addresses severity by increasing payments for more severe misses. As these examples show, wide variations in intervals (*i.e.*, severe misses) serve by reason of the averaging process dramatically to affect Qwest's per order payment obligations, particularly in light of the multiplication of the average by *all* orders (not just missed ones). AT&T's witness conceded that the QPAP payment calculations contained in both examples are accurate.[114]

First, assume that Qwest's average retail installation interval parity result[115] is 3 days, and that a CLEC has 10 orders, for which its average interval is 4.5 days. Then further assume that these 10 orders include two "misses," one severe (20 days) and one not (4 days), with the remaining orders meeting the retail standard (3 in 2 days and 5 in 3 days). Here, under the formula in Section 8.2.1.2, the payment calculation is as follows:

$$\frac{\text{4.5 day CLEC average} - \text{3 day Qwest average parity result}}{\text{3 day Qwest average}} = 50\%$$

$$50\% * 10 \text{ orders} * 800 = \$4{,}000$$

Because only two CLEC orders (the ones with 20-day and 4-day intervals) were actually above the average Qwest interval parity result, Qwest effectively paid an average of $2,000 per missed CLEC order ($4,000 / 2 orders). A payment of $2,000 per order is certainly a premium over the standard $800 per occurrence payment. That higher payment number is directly attributable to the severity of the 20-day miss and, as AT&T

[114] *Id.* at 48.

[115] The parity result is the interval for Qwest's retail customers, after statistical adjustments for small sample sizes and standard deviation.

concedes,[116] the fact that the formula requires multiplication by the total number of orders, not simply the two missed ones.

Indeed, if Qwest had missed the interval in this case by an even greater amount on any of these orders, the payments would continue to escalate, up to the 100% cap. For example, assume that the 20-day interval order used above were increased to a 26-day interval, and that the 4-day interval order were increased to a 13-day interval. The total days interval would increase by 15 days, for a new total of 60 days. This, in turn, would result in a CLEC average interval of 6 days (60 days / 10 orders). The new payment calculation would be as follows:

$$\frac{\text{6 day CLEC average} - \text{3 day Qwest average parity result}}{\text{3 day Qwest average}} = 100\%$$

$$100\% * 10 \text{ orders} * 800 = \$8,000$$

Once again, because only two CLEC orders (the ones with 26-day and 13-day intervals) were actually above the average Qwest interval, Qwest would have paid an average of $4,000 per missed CLEC order ($8,000 / 2 orders). Thus, the additional 6-day delay on one order and the additional 9-day delay for the other would result in significant payment escalation: $2,000 *more* per order. This example shows that there *is* sufficient severity built into a payment structure that is capped at 100%. And as noted above, no party provided any evidence that these payments are insufficient to compensate for any harm caused.

The 100% cap is a reasonable measure that was added to the Texas plan at the first six-month review and, as AT&T admits,[117] has been included in each of the

116 Tr. 4/29/02 (Finnegan) at 46.

subsequent SBC plans approved by the FCC.[118] As an "arithmetical compromise," it deals with severity of misses in a way that lies well within the FCC's zone of reasonableness.

7. Form of QPAP Payments

Section 11.2 of the QPAP provides that payments to CLECs will be made by bill credits, unless the monthly QPAP payment to a CLEC exceeds the amount the CLEC owes Qwest (in which case Qwest must pay the excess in cash). Mr. Reynolds explained why this provision was a necessary protection against CLECs' improper use of the QPAP as a financing mechanism.[119] Without addressing any of these points, AT&T asserts that all QPAP payments should be made in cash[120] -- an argument it never raised in its exceptions to the Facilitator's report endorsing Qwest's position on this issue.[121]

The FCC has not required cash payments. In fact, it has approved PAPs in New York, Connecticut, and Massachusetts that provide for payments to be made only in the form of bill credits.[122] Qwest's burgeoning accounts receivable from CLECs demonstrate that its concern about use of the QPAP as a financing device is not academic. On average, CLEC charges that are more than 30 days past due represent a significant

117 Tr. 4/29/02 (Finnegan) at 48-49.

118 *See* section 11.1.2.1 of the Texas, Oklahoma, Arkansas and Missouri PAPs; the Kansas PAP has an even lower cap, 50%. AT&T's reference to an FCC staff letter on this point hardly demonstrates otherwise. *See* AT&T Comments (AT&T Ex. 8) at 27. First, this letter involved a requested change from a quite different performance plan -- in a BOC-to-BOC merger. Second, as AT&T concedes, the letter actually approved the use of a 100% cap to conform to the provision in the Texas 271 plan analogous to this one. *See id.* Third, AT&T's argument that such "administrative efficiency" goals are inapplicable here is incorrect. As noted above, most states in Qwest's region have reached a similar judgment upholding this provision.

119 *See* Reynolds Aff. (Qwest Ex. 77) at 26-29.

120 *See* AT&T Comments (AT&T Ex. 8) at 30.

121 *See* AT&T Exceptions.

122 *See* § II(C)(2), (D)(2) of those plans.

percentage of current month billings, only about one-third of which involve billing disputes.[123] The Facilitator recognized this problem. In recommending that payments be made via bill credits, he stated that "it would be inappropriate to require Qwest to make payments to CLECs in cases where CLECs were not current in paying Qwest for the same kinds of services."[124] In light of the undisputed record evidence of this problem, there is no basis for adopting AT&T's new suggestion to depart from the bill credit approach repeatedly approved by the FCC.

8. Interest Rate

The original QPAP obligated Qwest to pay interest on late payments and underpayments at the one-year treasury rate and allowed Qwest to collect interest (as an offset against future payments) at the same rate for overpayments. AT&T complains that the one-year treasury rate is too low and proposes several other interest rates that could be used in its place. The Facilitator found:

> Short-term debt rates probably represent the best indicator of payments temporarily delayed through errors in billing or the pendency of disputes. The need for a reliable pub[l]ic benchmark leads to the conclusion that the QPAP interest rate should be the prime rate published daily by one of the numerous services or publications respected in the industry.[125]

Qwest has previously stated that it finds the Facilitator's rationale for use of the prime rate compelling and has substituted the prime rate for the treasury rate in Section 11.1 of the Revised QPAP.[126]

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123 *See* Reynolds Rebuttal Aff. (Qwest Ex. 78) at 28.

124 Multi-state Facilitator's Report (Qwest Ex. 28) at 76.

125 *Id.* at 73.

126 *See* Reynolds Rebuttal Aff. (Qwest Ex. 78) at 28.

9. Audits

Section 15.0, the audit provision of the original QPAP, was also modeled after the Texas plan, but was substantially more generous to CLECs. The Texas plan relies exclusively on CLEC-initiated audits, and limits these to one per CLEC per year.[127] In contrast, Qwest's original QPAP provided for three different kinds of audits. First, Qwest -- or, at its election, the Commission -- would provide for regular independent audits of the financial system for the QPAP (*i.e.*, whether the payments are accurate assuming the performance data is correct).[128] Second, Qwest would select an independent auditor "from among the national firms with experience in testing and auditing the ILEC OSS and/or performance measurements and metrics" to audit over two years those QPAP measures with a high risk of inaccuracy that were material.[129] Third, CLECs could request additional independent audits.[130] Because of the large number of measures, the substantial number of CLECs in Qwest's region, and the many states in which these very same processes could be audited, the original QPAP limited CLECs to two audits per year and two measurements per audit with no more than three audits simultaneously.[131] However, Qwest agreed to notify Commission staff and CLECs of the results of each audit.[132] To deter unwarranted audits, the plan required reimbursement by

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127 *See id.* at 30 n.78 (citing Texas PAP § 6.6).

128 QPAP § 15.1.

129 *Id.*

130 *See id.* § 15.2.

131 *See id.* § 15.4.

132 *See id.*

Qwest of the costs of any such CLEC-initiated audit only if it identified a material deficiency affecting results.[133]

As noted above, these provisions were substantially more generous to CLECs than the Texas plan approved by the FCC. However, in response to concerns from AT&T, Qwest has agreed to substitute in the Revised QPAP the audit provisions that implemented the Multi-state Facilitator's recommendations. Since AT&T did not challenge those recommendations,[134] and since as noted below those changes address all of AT&T's legitimate concerns, the Commission should reject AT&T's effort to use its objections as an excuse to smuggle into the audit provisions of the plan a host of other provisions unrelated to its concerns, and for which AT&T provides absolutely no justification.[135]

AT&T first believes that the Commission should select the auditor. The Revised QPAP permits the participating state commissions to do so.[136] AT&T also criticized the limit of two CLEC-initiated audits per year.[137] AT&T's witness agreed, however, that "you need to have some sort of limit on the number and types of audits."[138] And FiberCom's witness did not share AT&T's concern regarding the number of CLEC-initiated audits. He expressed confidence that Qwest and the CLECs could work out such issues through their "ongoing business relationship," and concluded that "the CLEC

[133] *See id.* § 15.3.

[134] *See* AT&T Exceptions.

[135] *See* Reynolds Rebuttal Aff. (Qwest Ex. 78) at 32.

[136] *See* QPAP § 15.1.

[137] *See id.* at 53.

[138] Tr. 4/29/02 (Finnegan) at 87.

common efforts to provide the assurances that Qwest's measurements remain liable. All stakeholders will suffer, should there be a need to participate in and respond to as many as 14 different ongoing testing programs . . . ."[144] AT&T's witness at the QPAP hearing also supported a joint auditing effort, stating that he saw a "benefit" to avoiding duplicative auditing efforts, particularly because "the processes and systems that Qwest uses to collect, analyze, and report data are pretty much 14-state wide. And they don't have separate processes for South Dakota data than they do for New Mexico data."[145]

Although, as AT&T's witness affirmed, there is a "benefit" to avoiding duplication through a joint auditing effort,[146] Section 15.5 of the Revised QPAP also allows the Commission the flexibility to conduct its own audits rather than participate in a multi-state audit plan. Section 15.5 prevents a performance measurement from being audited if that measurement has been audited within the past twelve months, including audits conducted in other states. This limit only applies, however, if the results of the previous audit are made available to the Commission, rendering a South Dakota audit unnecessary. Qwest believes that the Revised QPAP fairly addresses each of the concerns raised at the hearing with respect to the audit provisions of the plan.

10. Dispute Resolution

At the QPAP hearing, the Commission expressed concern that Qwest could unilaterally force CLECs to arbitrate disputes, and to do so in locations far from South Dakota, rather than resolve disagreements before the Commission.[147] As Mr. Reynolds

144 Multi-state Facilitator's Report (Qwest Ex. 28) at 79

145 Tr. 4/29/02 (Finnegan) at 77

146 Tr. 4/29/02 (Finnegan) at 77

147 Tr. 4/30/02 (White) at 114-116

noted,[148] this concern was actually addressed in Section 18.0 of the original QPAP. That section expressly provides that "[e]ach Party reserves its rights to resort to the Commission or to a court, agency, or regulatory authority of competent jurisdiction." Thus, nothing in the QPAP gives Qwest the right to prevent CLECs from resolving disagreements before the Commission. However, this point is made even clearer in the dispute resolution provision from the multi-state QPAP, which is incorporated in the Revised QPAP. This provides that disputes are to be resolved pursuant to section 5.18 of Qwest's SGAT filed in South Dakota. That in turn specifically provides that "[e]ach party reserves its rights to resort to the Commission or to a court, agency, or regulatory authority of competent jurisdiction."[149] It also states, "Nothing in this Section [5.18] is intended to divest or limit the jurisdiction and authority of the Commission . . . as provided by state and federal law."[150]

The QPAP dispute resolution provision mirrors the provisions in the SBC plan for Texas, in that both plans allow the parties to bring disagreements before the Commission or an arbitrator.[151] It thus permits the parties to choose their own forum to resolve disputes. AT&T noted that only certain provisions of the original QPAP were subject to this dispute resolution provision.[152] The Revised QPAP provision expressly covers any dispute "over the meaning of the provisions of the PAP and how they should be applied."[153] The dispute resolution provision, however, is limited to interpreting the

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[148] Reynolds Rebuttal Aff. (Qwest Ex. 78) at 33.

[149] SGAT § 5.18.1.

[150] *Id.* § 5.18.6; *see* Reynolds Rebuttal Aff. (Qwest Ex. 78) at 33.

[151] *See* Reynolds Rebuttal Aff. (Qwest Ex. 78) at 33.

[152] *See* AT&T Comments (AT&T Ex. 8) at 62.

[153] QPAP § 18.0.

existing QPAP provisions; it is not, and should not become, a backdoor for changes to the QPAP. Any need for such changes is appropriately addressed in the six-month review.

11. Six-Month Review

Section 16.1 provides for a review of the QPAP every six months to determine whether performance measurements should be added, deleted or modified and whether the applicable standards or classifications of the measurements should be altered. The original QPAP proposed by Qwest provided that "[c]hanges shall not be made without Qwest's agreement," except that disputes regarding the addition of new performance measurements were to be resolved by arbitration. This provision was modeled on the Texas plan and its progeny.[154] Thus, as the Multi-state Facilitator concluded,[155] it fell well within the FCC's zone of reasonableness.

Nonetheless, in response to concerns of CLECs and the Commission Staff over this provision, the Revised QPAP adopts a further compromise approach to the six-month review that Qwest has recently developed jointly with the Utah Advocacy Staff. Section 17.0 of that revision would continue to prevent the basic architecture of the plan from being changed at the six-month review, but this approach permits the Commission (subject to judicial review) to resolve any disputes concerning the addition, deletion, modification, or reclassification of the measurements.[156] In order to provide Qwest with some financial certainty with regard to changes made at the six-month review, however, this compromise includes a "collar" to limit Qwest's liability resulting from any changes

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[154] *See* Texas PAP § 6.4; *see also* section 6.4 of the Kansas, Oklahoma, Arkansas, and Missouri PAPs.

[155] *See* Multi-state Facilitator's Report (Qwest Ex. 29) at 60-61.

[156] Revised QPAP § 16.1.

arising out of the review to 10% of the total monthly payments that Qwest would have made in lieu of such changes.[157]

This is again an appropriate "balance"[158] that gives some permanence to the basic structure of the QPAP -- which is the premise for Qwest's proposal -- while allowing the plan to change and appropriately evolve. Again, it falls well within what the FCC has previously endorsed. The Texas plan requires "mutual agreement" to "[a]ny changes to existing performance measures and this remedy plan."[159] As noted above, the Revised QPAP provides that all disputes over the addition, deletion, modification, or reclassification of performance measures will be resolved by the Commission, subject to judicial review.

In its order approving the Texas plan, the FCC endorsed its six-month review mechanism as providing sufficient opportunity for modification and improvement.[160] The Multi-state Facilitator similarly recognized Qwest's legitimate need to have "a reasonable degree of certainty about the exposures to which it will be subjected."[161] As noted above, it also recognized the concomitant need to avoid unraveling an "agreement [that] was reached through compromise" and not "support an improvement to what [a] party got without considering what had been given in return. . . lest we risk disrupting important balances."[162] The Commission should not disregard such important principles.

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157 *Id.*

158 *Georgia/Louisiana Order* ¶ 299.

159 Texas PAP § 6.4. The Texas plan does permit Commission additions of new measurements and their classification.

160 *Texas Order* ¶ 425.

161 *See* Multi-state Facilitator's Report (Qwest Ex. 29) at 18. As AT&T's witness conceded at the QPAP hearing, the Colorado Special Master also concluded that the plan should not be subject to unilateral change by the Commission. Tr. 4/29/02 (Finnegan) at 64.

162 Multi-state Facilitator's Report (Qwest Ex. 29) at 3.

or the FCC-approved plans upon which they are based. The Revised QPAP strikes an appropriate balance by extending well beyond the Texas plan in permitting future adjustments to the performance measurements by the Commission.

12. Liquidated Damages

The issue here is whether the QPAP should be an alternative or cumulative remedy for *contractual* harm related to the same wholesale performance. In other words, if a CLEC elects the QPAP, should the CLEC be entitled to go to court (or another forum) to receive additional compensatory payments for Qwest's wholesale performance under a different contractual remedy, such as an interconnection agreement or service quality rules? As Section 13.5 of the Revised QPAP makes clear, this liquidated damages issue relates only to *contractual* harm. The Revised QPAP provisions do not purport to extinguish noncontractual remedies.[163]

Midcontinent agrees that the QPAP should address the question of compensating CLECs for contractual damages, and that it is appropriate to liquidate such damages.[164] Its only question is whether the QPAP adequately compensates CLECs if Qwest's poor performance causes the loss of a customer.[165] AT&T, by contrast, contends that the liquidated damages concept should be "stricken" altogether.[166]

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[163] Section 13.5 of the Revised QPAP states that "liquidated damages are a reasonable approximation of any contractual damages that may result from a non-conforming performance measurement. ... The application of the assessments and damages provided for herein is not intended to foreclose other noncontractual legal and noncontractual regulatory claims and remedies that may be available to a CLEC." Revised QPAP § 13.7, which is taken from the Iowa Stipulation (see Part 13 below, relating to offsets), also makes this distinction clear. That section states, "Qwest shall be entitled to seek an offset against any recovery by CLEC under any noncontractual theory of liability (including but not limited to tort and antitrust claims)."

[164] *See* Simmons Testimony (Midcontinent Ex. 1R) at 17.

[165] *Id.*

[166] AT&T Comments (AT&T Ex. 8) at 37-38.

Like traditional liquidated damages provisions, the QPAP establishes in advance what payments are appropriate compensation for damages due to Qwest's nonconformance.[167] This payment structure satisfies the FCC's express goal that a performance assurance plan contain "a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal."[168] CLECs are not required to opt into the QPAP. But if they elect to do so, they will receive payments from Qwest for nonconformance with the QPAP metrics *without ever having to claim, prove, or incur any harm.* Thus, to use Commissioner Sahr's example from the QPAP hearing, if a CLEC were due $500,000 in QPAP payments, it could collect the full amount even if it could only prove $300,000 in actual damages.[169] Similarly, as FiberCom conceded, the QPAP also includes self-executing payments in situations where the costs of contract litigation would otherwise exceed the value of any potential claim.[170]

Such a remedy is designed to address contractual remedies for Qwest's wholesale performance that is governed by the QPAP (leaving unliquidated any claims for services or performance not addressed by the QPAP). As Midcontinent essentially recognized in its testimony, this is nothing more than the logical implication of any liquidated damages provision, which requires the parties to agree in advance on an amount of damages that reasonably approximates the anticipated harm. It also ensures that CLECs cannot have

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167 AT&T's point that "until the damage at issue actually occurs, it is impossible to ascertain the extent of such damages," *see id.* at 37, misunderstands the purpose of liquidated damages, which (as Midcontinent recognizes) is precisely to address situations where quantification of harm is difficult and to set in advance a reasonable figure to approximate that harm.

168 *Bell Atlantic New York Order* ¶ 433.

169 Tr. 4/25/02 (Reynolds) at 186. As AT&T's witness recognized at the hearing, without such a liquidated damages provision, the CLEC would be limited to the damages that it could actually prove. Tr. 4/29/02 (Finnegan) at 57.

170 Tr. 4/30/02 (White) at 86.

their cake and eat it too by electing, on a case-by-case basis, to collect the liquidated damages amount when they can prove no harm and to pursue some higher amount when they do claim harm. As the Facilitator recognized, "it is not reasonable to allow CLECs to keep Tier 1 base payments and Tier 1 accelerated payments when it suited them, but to seek more when it did not."[171] He further observed,

> The QPAP represents a comprehensive payment structure for compensating CLECs for harm. They have the right to elect all of it or none of it. It would not be reasonable to allow them to select those portions of it that are on balance more favorable than other remedies, while choosing to take other remedies in cases where they are more favorable. Qwest has no right to do so; a proper sense of balance with respect to liquidated damages should require the same of CLECs.[172]

Any other approach would result in a pure windfall to CLECs.

Prior FCC-approved plans have recognized that PAP payments are appropriately treated as liquidated damages. The Texas plan and subsequent SBC plans expressly refer to Tier 1 payments as "liquidated damages."[173] As AT&T has recognized, the Texas plan also does "not allow the recovery of contractual type remedies."[174] Similarly, the Idaho Commission's recent QPAP decision accepted as "appropriate" the QPAP's election of remedies provisions, which, as it described, "limit[] recovery of damages based on contract theories of action," while permitting "recovery [under] non-contractual theories of liability."[175]

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171 Multi-state Facilitator's Report (Qwest Ex. 28) at 57.

172 *Id.*

173 *See* section 6.1 of the Texas, Kansas, Oklahoma, Arkansas, and Missouri PAPs.

174 AT&T Exceptions at 18.

175 Commission Decision on *Qwest's Performance Assurance Plan, In the Matter of U S WEST Communications, Inc.'s Motion for an Alternative Procedure to Manage its Section 271 Application*, Case No. USW-T-00-3, Idaho Pub. Utils. Comm'n, Mar. 7, 2002, at 6 ("Idaho QPAP Decision").

At the hearing, FiberCom suggested that this provision might bar a CLEC from seeking indemnification from Qwest for third-party claims -- e.g., if a customer sued a CLEC for loss of business opportunity from poor service, or for personal injury because of a failure of 911 service.[176] No provision of the QPAP addresses this question; in fact, Section 13.7 of the Revised QPAP expressly implements the Facilitator's recommendation that the QPAP "has nothing to do with compensation for physical property damage or personal injury."[177] Nor does the QPAP deprive CLECs of any opportunity for consequential damages arising from lost profits. These are addressed in (and barred by) Section 5.8.2 of the SGAT. That provision is fully consistent with South Dakota law, which bars any contract damages "not clearly ascertainable in both their nature and their origin."[178]

13. Offset

In order to prevent CLECs from obtaining double recoveries, Section 13.7 of the QPAP provides for an offset of Tier 1 payments against awards for noncontractual remedies that CLECs receive for the same underlying activity or omission. Section 13.9 provides for a similar offset against Tier 2 payments. AT&T acknowledges that double recovery is inappropriate, but is concerned that these provisions would give Qwest the right "unilaterally" to make offset determinations.[179]

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176 Tr. 4/30/02 (White) at 119.

177 Multi-state Facilitator's Report (Qwest Ex. 28) at 36.

178 S.D. Codified Laws § 21-2-1 (2001); *see also McKie v. Huntley*, 620 N.W.2d 599 (S.D. 2000) (reasonable certainty requirement); *Drier v. Perfection, Inc.*, 259 N.W.2d 496 (S.D. 1977) (same). As noted above, the FCC's standards also support such liquidated damages provisions, because they provide for a self-executing payment mechanism that avoids litigation and appeal on causation issues of this kind.

179 AT&T Comments (AT&T Ex. 8) at 44.

Qwest has explained that AT&T's characterization of these provisions is incorrect,[180] and the Facilitator agreed.[181] In order to clarify this point, however, Section 13.7 of the Revised QPAP includes the offset language developed jointly by Qwest with the Utah Advocacy Staff. This language makes very clear that Section 13.7 is not a self-help provision. It provides that Qwest may "seek" an offset against Tier 1 payments, and clarifies that Qwest has no right to make the offset determination itself. Similarly, Section 13.8 of the modified QPAP allows Qwest to place Tier 2 payments that it believes should be offset into a special interest bearing escrow account and then dispute the payments before the Commission. These modifications fully address AT&T's concerns, in a way that is consistent with the approach of the Texas plan that AT&T has already endorsed.[182]

14. Termination of the QPAP

AT&T contends that the QPAP should remain effective even if Qwest exits the interLATA market.[183] This position ignores the basic purpose of the QPAP. The QPAP is not intended, as AT&T suggests, to fulfill Qwest's obligations under section 251. A BOC offers a PAP to satisfy its half of section 271's quid pro quo: it is offered in exchange for interLATA relief. As the Multi-state Facilitator recognized, it would be inconsistent with the purpose of the PAP (and it would be unfair to Qwest) to continue to

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180 *See* Reynolds Rebuttal Affidavit at 49.

181 *See* Multi-state Facilitator's Report (Qwest Ex. 28) at 35-36.

182 AT&T Exceptions at 20-21. Section 6.2 of the Texas plan similarly acknowledges that SWBT may "see[k] to offset" payment against other damages a CLEC might recover, and that the propriety of an offset "will be determined in the related proceeding."

183 *See* AT&T Comments (AT&T Ex. 8) at 59.

enforce the QPAP if Qwest is no longer in the interLATA market.[184] Further, a regime of self-executing payments where CLECs need prove no harm to receive compensation is wholly inappropriate without the interLATA quid pro quo. Consequently, if Qwest is no longer in the interLATA market, CLECs should be required to prove harm before receiving compensation.

15. Force Majeure and Bad Faith

AT&T notes that the force majeure provision of the original QPAP did not reflect the additional refinements suggested by the Facilitator.[185] Section 13.3 of the Revised QPAP now includes those provisions. First, the SGAT's force majeure clause is incorporated into the QPAP to replace the prior standalone clause. Second, the force majeure exception applies only to benchmark measurements, not parity. Third, Qwest will provide notice of a force majeure event within 72 hours of the triggering event. Fourth, the forecasting obligation is limited to those explicitly required by the SGAT. Fifth, the force majeure or other excusing exception is limited to the duration of the triggering event.

AT&T also criticizes the CLEC bad faith provision in the QPAP.[186] The exception for bad faith acts or omissions by CLECs, however, is an essential part of the QPAP.[187] It has been included in prior FCC-approved plans,[188] and was approved by the

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184 *See* Multi-state Facilitator's Report (Qwest Ex. 28) at 75.

185 *See* AT&T Comments (AT&T Ex. 8) at 33.

186 *See id.* at 34.

187 One example of the potential for CLEC abuse was pointed out in a recent Verizon lawsuit against Covad alleging, among other things, that Covad fraudulently reported false trouble tickets to "obtain[] inflated PAP concessions from Verizon" and "[i]n a single year in New York and Pennsylvania alone, Covad received over $1.6 million in PAP price reductions *as a result of its false reporting practices*." *See Verizon Delaware Inc. v. Covad Communications Co.*, First Amended Complaint, Case No. [illegible], ¶ 95 (N.D. Cal. Dec. 18, 2001) (emphasis added). In addition, Verizon alleges that "Covad's false reports

Facilitator.[189] Dr. Griffing also recognized the very real possibility that CLECs could attempt to game the QPAP in order to receive additional payments.[190] Thus, it is unreasonable for AT&T to ask for this exception to be "stricken."[191]

16. Voluntary Nature of the QPAP

The QPAP states that "[n]othing . . . in any conclusion of non-conformance of Qwest's service performance with the standards defined in the PAP shall be construed to be, of itself, non-conformance with the [Telecommunications Act of 1996]."[192] AT&T contends that Qwest's non-conformance to the performance measurements in the QPAP should be viewed as non-conformance with section 271.[193] AT&T's proposal is unreasonable because it would mean these measurements are mandated by federal law. While the FCC has stated that the implementation of a PAP is "probative evidence" that the BOC will continue to meet its obligations after receiving 271 approval,[194] the FCC

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also infected Verizon's overall PAP reports" causing Verizon to "fail[] to achieve certain established performance metrics . . . [resulting in] PAP price concessions to other carriers." *Id.* ¶ 96. In support of its allegations, Verizon has obtained declarations from 36 former Covad employees. *See id.* Ex. F.

188 *See* sections 7.1 and 7.2 of the Texas, Kansas, Oklahoma, Arkansas, and Missouri PAPs. The Verizon plans contain an even broader exception, which does not even require "bad faith," simply that the CLEC action "negatively influences" the performance results for any metric. *See, e.g.*, New York PAP, Section J, Exceptions and Waiver Process, at 17-18 (including among other things, poor order quality, excessive missed appointments, incorrect dispatch identification, inappropriate X coding on orders where extended due dates are desired, and delays in rescheduling appointments).

189 *See* Multi-state Facilitator's Report (Qwest Ex. 28) at 38-39. The Facilitator recommended adding a sentence clarifying that this exception does not apply when Qwest could have reasonably been expected to deliver conforming performance based on foreseeable volumes and patterns of demand. The Revised QPAP includes such language.

190 *See* Tr. 8/27/01 (Griffing) (Qwest Ex. 80) at 119 (agreeing that if QPAP payments "get too high, CLECs will have an incentive to cause non-compliance, they'll gain [sic] the system somehow, save up all their orders, send them all in at once, take actions that they otherwise wouldn't do . . . [because] they'll gain more from having failure than they will [from] having Qwest comply."); *see also* Multi-state Facilitator's Report (Qwest Ex. 28) at 38 (recognizing "theoretically possible manipulative conduct" by CLECs).

191 AT&T Comments (AT&T Ex. 8) at 34.

192 QPAP § 17.0.

193 *See* AT&T Comments (AT&T Ex. 8) at 60.

194 *Kansas/Oklahoma Order* ¶ 269.

has *never* stated that conformance with a PAP standard is the *same* as conformance with section 271, or that non-conformance constitutes a violation of the Act.[195] Indeed, the parties may have agreed to standards that *exceed* the requirements of the 1996 Act. And in any event, the performance results themselves are merely numerical data, which do not reflect any legally relevant defenses such as force majeure events or bad faith actions by CLECs.

17. CLEC Requests for Raw Data

Qwest has agreed to make CLEC raw data available upon CLEC request. However, AT&T's proposal to set an arbitrary two-week deadline (and accompanying late payment) by which Qwest must provide the data is unreasonable. As Mr. Reynolds explained, the time needed to produce the raw data is dependent upon a number of factors, including ones beyond Qwest's control: the circumstances of the request, the timing of the request, the number of CLECs requesting data during the same time period, and most importantly, the extent of the data requested.[196] As the Multi-state Facilitator recognized, "Nothing in the QPAP limits [CLEC raw data requests] sufficiently to justify firm response deadlines."[197]

18. CLEC Data Protection

Pursuant to section 14.2 of the QPAP, Qwest would provide the Commission with CLEC data so that the Commission can analyze the QPAP results and evaluate whether

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[195] In light of the FCC's repeated statements that it has never required BOC applicants to demonstrate that they are subject to a PAP before granting 271 approval, *see, e.g.*, *Kansas/Oklahoma Order* ¶ 269, it is hard to imagine how non-conformance with a PAP standard could violate federal law.

[196] *See* Reynolds Rebuttal Aff. (Qwest Ex. 78) at 47. AT&T also has not demonstrated that the CLECs would suffer any harm if they do not receive the data within two weeks of their request.

[197] Multi-state Facilitator's Report (Qwest Ex. 28) at 83.

Qwest is performing adequately. AT&T argues that Qwest should not be permitted to provide the CLEC data to the Commission; rather, the Commission should approach the various CLECs directly for the QPAP results.[198] As Mr. Reynolds noted, such authorization is administratively difficult.[199] Moreover, because Qwest's compliance with the QPAP will be at issue, Qwest must be allowed to provide the information directly, without the concern of tampering.[200]

19. Late Reporting Fee

AT&T criticized the original QPAP's provision for late reporting fees of $500 per day because it differed from the Texas plan.[201] The Texas plan requires payments of $5,000 per day if no reports are filed, and $1,000 per day for each missing performance result if incomplete reports are filed.[202] The Revised QPAP provision (Section 14.3) now includes payments of $500 for each business day for which reports are 6 to 10 days late, $1,000 per day for reports that are 11 to 15 days late, and $2,000 per day for reports more than 15 days late.

This fee structure was devised by the Multi-state Facilitator, who concluded that the Texas approach warranted adjustment to take into account the fact that Qwest will be filing reports "on a 14-state consolidated basis."[203] The Facilitator recognized that if a report is late (or incomplete), it likely will be late not just in South Dakota, but thirteen

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198 *See* AT&T Comments (AT&T Ex. 8) at 48.

199 *See* Reynolds Rebuttal Aff. (Qwest Ex. 78) at 47

200 *See id.*

201 *See* AT&T Comments (AT&T Ex. 8) at 48-49. Despite raising this criticism, AT&T's own proposal also differs markedly from the Texas plan. *See id.* at 49.

202 *See* Texas PAP § 10.1.

203 Multi-state Facilitator's Report (Qwest Ex. 28) at 86.

other states as well. As a result, Qwest would pay $70,000 per day for late reports under the Texas plan.[204] This figure is unreasonable, particularly since Qwest already has an incentive to provide reports in a timely manner: as noted above, Section 11.1 of the Revised QPAP obligates Qwest to pay interest at the prime rate on late payments, and any late payments resulting from the late report will be subject to interest.

20. QPAP Recovery in Rates

AT&T argues that the QPAP should be amended to include language stating that Qwest may not recover payouts under the QPAP by increasing its rates.[205] Establishing such a prohibition is the province of federal and state rate regulation and goes well beyond the purpose of the QPAP.[206] The proposal also is entirely unnecessary because it would simply restate the FCC's already clearly articulated position.[207]

CONCLUSION

For the reasons stated above, the Commission should recommend that the FCC approve Qwest's QPAP as falling within the FCC's zone of reasonableness.

Dated this 21st day of May, 2002.

Respectfully submitted,

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204 *See id.* at 84-86.

205 *See* AT&T Comments (AT&T Ex. 8) at 63.

206 *See* Multi-state Facilitator's Report (Qwest Ex. 28) at 86.

207 *See Bell Atlantic New York Order* ¶ 443; *SBC Texas Order* ¶ 430.

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BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO	)	
QWEST CORPORATION'S COMPLIANCE	)	DOCKET TC 01-165
WITH SECTION 271 (C) OF THE	)	
TELECOMMUNICATIONS ACT OF 1996	)	

QWEST CORPORATION'S OPENING POST- HEARING BRIEF ON THE PUBLIC INTEREST

May 21, 2002

PUBLIC VERSION

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QWEST CORPORATION'S OPENING POST- HEARING BRIEF ON THE PUBLIC INTEREST

I. INTRODUCTION

Qwest Corporation ("Qwest") submits this brief to demonstrate that its application to provide interLATA service in South Dakota "is consistent with the public interest, convenience, and necessity," as required by 47 U.S.C. § 271(d)(3)(C). The Federal Communications Commission ("FCC") (which is the arbiter of the public interest test's meaning) has made clear that the public interest inquiry is not a free-ranging opportunity for parties to extract whatever regulatory concessions they wish from the BOC applicant. Rather, the inquiry asks whether the application promotes competition in the local and long distance markets, whether there are adequate assurances that the local market will remain open after entry, and whether there are any "unusual circumstances" in the state that would make BOC entry contrary to the public interest notwithstanding a clean bill of compliance with the competitive checklist.

Through its testimony, Qwest has demonstrated by a "preponderance of the evidence"[1] that it has satisfied the public interest requirement. Qwest has shown that there are no "unusual circumstances" in South Dakota that would overcome the checklist compliance's "strong indica[tion]" that Qwest's markets are now open, or the performance assurance plan's "probative evidence" that those markets will stay open after entry.[2] In so doing, Qwest made exactly the

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[1] *See* Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953 ¶ 48 (1999) ("*Bell Atlantic New York Order*"), *aff'd sub nom. AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000) ("[W]e reiterate that the BOC needs only to prove each element by 'a preponderance of the evidence,' which generally means 'the greater weight of the evidence, evidence which is more convincing than the evidence which is offered in opposition to it.'"). As the FCC has represented to the D.C. Circuit, "the burden of proof imposed on a BOC under section 271 does not require the BOC to produce evidence that eliminates all doubt in the record." Brief of Appellee, *Sprint Communications L.P. v. FCC*, No. 01-1076 (D.C. Cir. filed June 14, 2001).

[2] *Bell Atlantic New York Order* ¶¶ 423, 429.

type of showing that the FCC has required in its orders granting BOC applications for interLATA authority.

By contrast, the other parties in this docket have entered very little evidence into the record disputing Qwest's showing.[3] Qwest notes that only the Advocacy Staff took issue with Qwest's affirmative public interest case, and then only as regards a single one of the many pieces of evidence (a study by MIT economics professor Dr. Jerry Hausman that Qwest commissioned) that Qwest provided demonstrating that its entry into the interLATA market would benefit South Dakota consumers. In addition, the only alleged "unusual circumstance" in the record — the supposed impossibility of earning a positive margin in the residential market using a UNE platform — was thoroughly disproved on the facts at the hearing and shown to be irrelevant, given the availability of resale (with its built-in 15% wholesale discount) to allegedly "upside down" customers and the reality of massive facilities-based competition in the state.

Qwest therefore respectfully asks the Commission to find that Qwest's application to provide interLATA services in South Dakota is consistent with the public interest within the meaning of 47 U.S.C. § 271(d)(3)(C) and the FCC's orders interpreting that section.

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[3] For its part, AT&T never provided testimony on the public interest standard at all. Instead, AT&T prefiled "Verified Comments" (in essence, just a legal brief) on the subject, but it never had a witness adopt those "comments" as testimony at the hearing, which would have been necessary to enter those "comments" into the record and permit Qwest the opportunity to cross-examine their substance. Having foregone the opportunity to submit evidence concerning the public interest issues (and to subject that evidence to cross-examination at the hearing), AT&T is precluded from submitting such evidence, if any exists, now. Since AT&T's "Verified Comments" are not part of the formal record, Qwest does not address here the arguments contained therein; however, Qwest notes that Qwest witness David L. Teitzel has addressed every single one of those arguments in his Rebuttal Affidavit.

II. QWEST'S ENTRY INTO THE INTERLATA MARKET IN SOUTH DAKOTA IS CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY.

An applicant for section 271 authority must demonstrate that "the requested authorization is consistent with the public interest, convenience, and necessity."[4] The FCC has established that there are three parts to this test. First, the FCC determines whether granting the application "is consistent with promoting competition in the local and long distance telecommunications markets," giving substantial weight to Congress's presumption that when a BOC is in compliance with the competitive checklist, the local market is open and long-distance entry would benefit consumers.[5] Second, the FCC looks for assurances that the market will stay open after a section 271 application is granted. In this analysis, the FCC reviews the BOC's performance assurance plan (if the BOC has adopted one) and other available enforcement tools to be sure the BOC "would continue to satisfy the requirements of section 271 after entering the long distance market."[6] Finally, the FCC considers whether there are any remaining "unusual circumstances that would make entry contrary to the public interest under the particular circumstances of these applications."[7]

The FCC's orders make clear that the public interest inquiry is neither a standardless exercise nor an open invitation for CLECs to submit their wish lists. The FCC has repeatedly held that "compliance with the competitive checklist is, itself, a strong indicator that long

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[4] 47 U.S.C. § 271(d)(3)(C).

[5] Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶ 266 (2001), modified, *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) ("*SBC Kansas/Oklahoma Order*").

[6] *Id.* ¶ 269.

[7] *Id.* ¶ 267; *see also id.* ¶¶ 281-82.

with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company *with the requirements of subsection (c)*" of section 271.[11] Subsection (c) outlines the general requirements concerning the presence of competitors in the state (known as the Track A and Track B requirements), as well as the specific access and interconnection requirements of the fourteen-item competitive checklist.[12] The public interest standard, by contrast, is located in section 271*(d)*. Thus, while the state may have an important role in developing the factual record on which the FCC will make its decision, Congress has assigned the FCC *sole* responsibility for defining the public interest standard and determining whether it has been satisfied.[13]

Qwest addresses the three steps of the public interest inquiry in turn.

A. Qwest's Application Is Consistent with Promoting Competition in Both the Local and Long Distance Markets in South Dakota.

1. The Local Market.

Qwest's compliance with the elements of the Act's competitive checklist in South Dakota is the subject of other parts of this proceeding. Because checklist compliance "is, itself, a strong indicator that long distance entry is consistent with the public interest,"[14] a Commission finding

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[11] 47 U.S.C. § 271(d)(2)(B) (emphasis added).

[12] *See* 47 U.S.C. § 271(c).

[13] *See* 47 U.S.C. § 271(d)(3); *see also* Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543 ¶ 383 (1997) (while the FCC will consider the Department of Justice's proposed public interest standard, "section 271 ultimately obligates *the Commission* [the FCC] to decide which factors are relevant to our public interest inquiry, how to balance these factors, and whether BOC entry into a particular in-region, interLATA market is consistent with the public interest") (emphasis added).

[14] *Bell Atlantic New York Order* ¶ 422; *see also* Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354 ¶ 416 (2000) ("*SBC Texas Order*").

that Qwest has met the checklist requirements in South Dakota would carry significant probative weight.

However, nothing in the public interest test or elsewhere in the Act requires a BOC to prove that CLECs have in fact entered the market in any significant number or achieved any particular level of market penetration:

> Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here. Moreover, pursuant to section 271(c)(2)(B) [the competitive checklist], the Act provides for long distance entry even where there is no facilities-based competition satisfying section 271(c)(1)(A) [Track A]. This underscores Congress' desire to condition approval *solely on whether the applicant has opened the door for local entry* through full checklist compliance, *not on whether competing LECs actually take advantage of the opportunity to enter the market.*[15]

Accordingly, Qwest is not *required* to demonstrate that CLECs have actually entered its market in order to obtain section 271 approval. Nevertheless, the evidence presented in the South Dakota hearings *does* establish that CLECs are in fact walking through Qwest's open door and requesting (and receiving) interconnection. Any claim in this proceeding that South Dakota's local markets are closed to competition has to be evaluated against the very high level of actual CLEC entry in this state. As of August 31, 2001, Qwest had entered into a total of 26 wireline interconnection agreements (including opt-ins) with CLECs in the state; 9 wireless, paging, and EAS interconnection agreements; and 5 additional resale interconnection agreements (for a total of 40 approved interconnection agreements).[16] And as of that same date, there were also 31

[15] *Bell Atlantic New York Order* ¶ 427 (footnotes omitted) (emphasis added).

[16] *See* Rebuttal Affidavit of David L. Teitzel, Track A and Public Interest, filed on April 2, 2002 ("Teitzel Rebuttal") (Qwest Ex. 2) at 4-5; Qwest Corporation's Direct Affidavit of David L. Teitzel, Public Interest, filed on October 23, 2001 ("Teitzel Direct") (Qwest Ex. 1) at 10.

additional interconnection agreements pending between Qwest and CLECs in South Dakota.[17] Finally, at least 58 CLECs had been certified by the Commission as of October 24, 2001.[18]

Under these agreements, Qwest had completed 14 physical CLEC collocations and 1 virtual collocation as of August 31, 2001,[19] and some 6 CLECs were using 7,049 LIS trunks to interconnect with Qwest.[20] On this date, Qwest also was provisioning 1,392 stand-alone unbundled loops, as well as 16,411 UNE-P lines, to 11 different South Dakota CLECs.[21] And the CLECs are clearly using these interconnections and unbundled loops to provide service. As of August 31, 2001, a total of 62,685,701 minutes of use had been exchanged between CLECs and Qwest in South Dakota.[22]

Moreover, CLECs are using this interconnection to serve an increasingly large customer base. The four estimation methodologies discussed in Mr. Teitzel's affidavit suggest that CLECs have captured between 16.0% and 22.8% of the total market in South Dakota.[23] This CLEC share is far larger than what existed in Oklahoma (estimated 5.5 to 9.0 percent) and Kansas (estimated 9.0 to 12.6 percent) when SBC's section 271 applications for these states were filed with the FCC.[24] Indeed, CLEC market shares in South Dakota substantially exceed the shares that existed in Texas (8.0 percent)[25] even though South Dakota is a far smaller state with only 4

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17 *See* Teitzel Direct (Qwest Ex. 1) at 34.

18 *Id.* at Exhibit DLT-3.

19 *Id.* at 31.

20 *Id.* at Confidential Exhibit DLT-8.

21 *Id.* at Exhibit DLT-16.

22 *Id.*

23 *See* Teitzel Direct (Qwest Ex. 1) at 20-30.

24 *See SBC Kansas/Oklahoma Order* ¶¶ 4-5.

25 *See SBC Texas Order* ¶ 5 & n.7.

percent of the population of Texas.[26] And just two South Dakota CLECs, FiberCom and Midco, have acknowledged in this proceeding that they are serving almost **[CONFIDENTIAL DATA BEGINS: XXX CONFIDENTIAL DATA ENDS]** residential access lines via facilities owned by those CLECs, and the real number for all CLECs is surely higher.[27] These data clearly demonstrate that not only has Qwest opened the local market in South Dakota, but that actual competition has in fact been robust.

2. The Long Distance Market.

Just as the FCC (following Congress's intent) presumes that the local market is open if the BOC has complied with the competitive checklist, it also presumes 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."[28] Once a BOC proves that it has complied with the competitive checklist, it is "not require[d] . . . to make a substantial additional showing that its participation in the long distance market will produce public interest benefits."[29] The FCC takes that as given: "As a general matter, we believe that additional competition in telecommunications markets will enhance the public interest."[30]

Congress has also recognized the benefits to consumers of having BOCs enter the long distance market once their local markets are open, and the FCC has noted "Congress' desire to

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[26] As of April 2000, the total population of South Dakota was 754,844, versus 20,851,820 for Texas. *See* Teitzel Direct (Qwest Ex. 1) at Exhibit DLT-18 (United States Census Bureau, "Ranking Tables for States: Population in 2000 and Population Change from 1990 to 2000 (PHC-T-2)").

[27] *See* FiberCom Data Request Response (Qwest Ex. 3) at 1-2; Midco Data Request Response (Qwest Ex. 4) at 1-2.

[28] *Bell Atlantic New York Order* ¶ 428; *SBC Texas Order* ¶ 419; *SBC Kansas/Oklahoma Order* ¶ 268.

[29] *Bell Atlantic New York Order* ¶ 428 (emphasis in original).

[30] *Id.*

condition approval solely on whether the applicant has opened the door for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity" in such numbers as to make long distance entry somehow justified.[31] The D.C. Circuit has likewise cautioned against misreading section 271 to impose unnecessary bars against BOC entry:

> The Commission must be equally careful to ensure . . . that BOCs that satisfy the statute's requirements are not barred from long distance markets. Setting the bar for statutory compliance too high would inflict two quite serious harms . . . . First, it would dampen every BOC's incentive to cooperate closely with state regulators to open its local markets to full competition . . . Second, setting the bar too high would simultaneously deprive the ultimate beneficiaries of the 1996 Act — American consumers — of a valuable source of price-reducing competition in the long distance market.[32]

In his affidavit, Mr. Teitzel discussed studies by the Telecommunications Research Action Center ("TRAC") and Dr. Jerry Hausman of MIT confirming the FCC's findings that the benefits to consumers post-271 approval are substantial.[33] The TRAC study demonstrates that New York consumers will save up to $284 million annually on long distance telephone service as a result of BOC entry into the interLATA market in that state.[34] Dr. Hausman compared consumers' long distance bills in New York and Texas post-section 271 relief with two states where section 271 approval had not yet been granted, Pennsylvania and California. He concluded that there is "statistically significant evidence that BOC entry enabled the average customer to reap a 9-percent savings on her monthly interLATA bill in New York and a 23-

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[31] *Bell Atlantic New York Order* ¶ 427.

[32] *AT&T Corp. v. FCC*, 220 F.3d 607, 632-33 (D.C. Cir. 2000) (quotation marks and citations omitted) (third alteration in original).

[33] Teitzel Direct (Qwest Ex. 1) at 42.

[34] *See TRAC Estimates New York Consumers Save Up to $700 Million a Year on Local and Long Distance Calling*, Telecommunications Research Action Center, May 8, 2001.

percent savings in Texas."[35] There is every reason to think customers in South Dakota would realize proportional savings if Qwest were allowed to compete. (We discuss the Advocacy Staff's criticism of this study below.)

Permitting Qwest to enter the long distance market would increase customer choice and competition in the *local* market as well. Experience has shown that a BOC's imminent entry into the long distance market acts as a catalyst for CLECs to accelerate entry into local exchange markets. In particular, IXCs faced with the prospect of increased competition for their core long distance customers accelerate their local entry plans in a bid to retain those customers through bundled service packages. The data from New York bear this out. CLECs put their local entry plans into gear only once it became clear that Verizon's section 271 application would succeed. In the News Release announcing the FCC report entitled *Local Telephone Competition: Status as of December 31, 2000*, released May 21, 2001, the FCC concluded:

> CLECs captured 20% of the market in the State of New York — the most of any state. CLECs reported 2.8 million lines in New York, compared to 1.2 million lines the prior year — an increase of over 130% from the time the FCC granted Verizon's long distance application in New York in December 1999 to December 2000.[36]

Furthermore, data recently released by the New York State Public Service Commission reveal that the number of local exchange lines served by CLECs more than doubled from 1999 to 2000 (from 9.8 to 20.9 percent) following the grant of Verizon's section 271 application; and, for the first time since the New York PSC began collecting these statistics, more CLEC access lines

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[35] Jerry A. Hausman, Gregory K. Leonard, J. Gregory Sidak, *The Consumer-Welfare Benefits from Bell Company Entry into Long-Distance Telecommunications: Empirical Evidence from New York and Texas*, *available at* http://papers.ssrn.com/sol3/delivery.cfm/ SSRN_ID289851_code011106140.pdf?abstractid=289851 (Jan. 9, 2002), at 3 ("Hausman Study").

[36] News Release, *Federal Communications Commission Releases Latest Data on Local Telephone Competition*, Federal Communications Commission, May 21, 2001.

were dedicated to residential customers (52 percent) than to business customers (48 percent).[37] In total, New York consumers will save an estimated $700 million annually on long distance and local telephone service.[38] Similarly impressive statistics have been reported for Texas, where, as of May 2001, "CLECs have captured 12% of the market in Texas, gaining 644,980 end-user lines in the 6 months after the FCC granted SBC's section 271 application — an increase of over 60% in customer lines since June 2000."[39] Permitting Qwest to enter the interLATA market should have a similar effect in South Dakota, enabling customers to obtain expanded benefits of local competition. Indeed, WorldCom recently announced that it would begin offering a new UNE platform–based service in conjunction with Z-Tel called "the Neighborhood."[40] WorldCom says that it is going to roll that service out in 38 states immediately and will offer it in all 50 states, including South Dakota, by the end of this year.[41]

The parties opposing Qwest's section 271 application have attempted to discredit only one piece of the evidence discussed above: Dr. Hausman's study. In the live hearing, Dr. Marlon Griffing, testifying on behalf of the Staff, argued that the Hausman study is incomplete because it does not account for every potential variable that could affect the telecommunications market post-271 entry.[42] It is important to note at the outset that even if Dr. Griffing's criticisms were correct, they would ultimately be without significance. Mr. Teitzel submitted that evidence

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[37] *See 2000 Competitive Analysis: Analysis of Local Exchange Service Competition in New York State*, New York State Public Service Commission, December 31, 2000, at 3, 4.

[38] *See TRAC Estimates New York Consumers Save Up to $700 Million a Year on Local and Long Distance Calling*, Telecommunications Research Action Center, May 8, 2001.

[39] *See* News, *Federal Communications Commission Releases Latest Data on Local Telephone Competition*, Federal Communications Commission, May 21, 2001.

[40] *See* Tr. 4/22/02 (Teitzel) at 64:11-15.

[41] *Id.* at 64:15-19.

[42] *See* Tr. 4/30/02 (Griffing) at 147:3-53:2.

in an effort merely to identify and quantify the potential benefits that might flow to South Dakota consumers if Qwest is granted authority to offer long distance service in the state. However, as noted at the start of this section, nothing in section 271 or the FCC's orders interpreting that section *requires* a BOC to make an affirmative showing that its entry into the long distance market will benefit consumers in order to satisfy the public interest requirements of section 271. Indeed, the FCC itself *presumes* that consumers will benefit from a BOC's entry into the long distance market.[43]

Moreover, Dr. Griffing's specific criticisms of Dr. Hausman's study and methodology are off-base. Dr. Griffing himself admits that "[t]he Hausman study is a good study. It's technically sophisticated."[44] Dr. Griffing, however, claims that the study is flawed because Dr. Hausman did not acknowledge that consumers will benefit in part because the BOC's was obligated to open its local market before receiving section 271 approval.[45] In his words, "to say that BOC long distance entry affects benefits to consumers doesn't tell the whole story. I can tell you a story that it's checklist compliance that affects benefits to consumers."[46] But the cost savings that Mr. Teitzel was citing (*i.e.*, the $16.6 million figure cited in Mr. Teitzel's opening testimony[47]), was extrapolated from Dr. Hausman's conclusion that customers would save 9 to 23% on their *interLATA bills* following a BOC's entry into the long distance market.[48] Such savings depend

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43 *Bell Atlantic New York Order* ¶ 428.

44 *See* Tr. 4/30/02 (Griffing) at 150:11-12.

45 *Id.* at 149:9-21.

46 *Id.* at 149:16-19.

47 *See* Teitzel Direct (Qwest Ex. 1) at 42.

48 *See* Hausman Study at 1, 11 ("[W]e report empirical findings that BOC entry has produced substantial consumer-welfare benefits in New York and Texas in the form of lower prices *for long-distance service*." (emphasis added)).

only on the addition of the BOC as a competitor in the long distance market, and hence do not turn on checklist compliance, a point that Dr. Griffing conceded outright in the hearing:

> Q And whether or not there was checklist compliance in the local market, that would have no impact on the long distance business, per se; is that true?
>
> A Actually, he concluded — I would agree with him that if you introduce another competitor into the long distance market, there would be benefits to consumers.[49]

Finally, Dr. Hausman's study was only one of several pieces of evidence Mr. Teitzel provided illustrating the potential public interest benefits of Qwest's entry into the long distance market. Even if the Commission were to accept Dr. Griffing's claim that Dr. Hausman's study is flawed, the FCC statements, the TRAC findings, and the data from the New York Commission discussed above all still demonstrate that BOC entry into the interLATA market will likely benefit consumers. Other public information sources, including a recent study by the fiercely independent Consumer Federation of America ("CFA"), concur.[50] Although the CFA issued its study in strong opposition to BellSouth's interLATA market entry in Florida, the CFA's findings about the benefits being enjoyed by New York consumers are strikingly similar to the conclusions drawn by the FCC, TRAC, and Dr. Hausman.

In sum, Qwest has demonstrated that consumers in South Dakota will benefit from Qwest's entry into the long distance market, and no party has succeeded in rebutting that showing.

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49 Tr. 4/30/02 (Griffing) at 172:16-21.

50 *See* Consumer Federation of America, *The Consumer Cost of Permitting BellSouth to Sell Long Distance in Florida Before Requiring that It Open the Local Phone Market to Competition* (Oct. 2001), *available at* http://www.consumerfed.org/florida_competition_200110.pdf.

B. Qwest Has Provided Adequate Assurances That Its Local Exchange Market Will Remain Open to Competition After Section 271 Approval.

The FCC's public interest analysis also considers whether the BOC has provided adequate assurance that the local exchange market will remain open after the application is granted.[51] The FCC has consistently noted that, while it has "never required" a BOC to provide a performance assurance plan, if a BOC chooses to develop one, the plan will constitute "probative evidence" that the BOC will continue to meet its section 271 obligations and that its long distance entry is consistent with the public interest.[52] As discussed in greater detail in Qwest's separate performance assurance plan brief being filed simultaneously with this one, Qwest has developed a robust plan for South Dakota (the "QPAP") that, among other things, provides rigorous performance measurements, a sound statistical methodology, and self-executing payments to CLECs and to the State.

Moreover, the QPAP will not be the only safeguard against backsliding. The most significant assurance of future compliance beyond Qwest's Plan is the FCC's enforcement authority under section 271(d)(6).[53] If at any time after the FCC approves a 271 application, it determines that a BOC "has ceased to meet any of the conditions required for such approval," section 271(d)(6) provides the FCC enforcement remedies, including imposition of penalties, suspension or revocation of 271 approval, and an expedited complaint process.[54] Thus, there is

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[51] *See Bell Atlantic New York Order* ¶¶ 422-23; *SBC Texas Order* ¶¶ 416-17; Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419 (2001) at App. C ¶ 71 ("*Verizon Pennsylvania Order*").

[52] *Bell Atlantic New York Order* ¶ 429 ("Although the Commission strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval."); *SBC Texas Order* ¶ 420.

[53] *See* 47 U.S.C. § 271(d)(6). *See also Bell Atlantic New York Order* ¶ 429-430.

[54] 47 U.S.C. § 271(d)(6).

more than adequate assurance that Qwest's market will remain open, and this prong of the public interest inquiry has been met.

C. No Intervenor Has Demonstrated That There Are Any "Unusual Circumstances" That Would Make Long Distance Entry Contrary to the Public Interest.

The final piece of the public interest inquiry involves a determination that there are no "unusual circumstances" that would make section 271 approval inappropriate.[55] The FCC has stated that it "may review the local and long distance markets" in a state "to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of [the BOC's] application."[56] The FCC has *never* found such "unusual circumstances" to exist — indeed, it has never rejected a section 271 application on public interest grounds at *all* where the BOC has satisfied the competitive checklist.

An "unusual circumstance" is a set of facts that would justify denying a BOC's application *notwithstanding* that it has complied with the competitive checklist and provided assurances that it will continue to comply post-entry — that is, a circumstance sufficient to rebut the BOC's prima facie case that interLATA entry is justified. For this reason, it is not sufficient for the witnesses to merely assert that a problem exists without providing any sort of factual proof and then demand that Qwest disprove the allegation.[57]

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[55] *See Bell Atlantic New York Order* ¶ 423; Memorandum Opinion and Order, *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) And Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 ¶ 233 (2001) ("*Verizon Massachusetts Order*"); *Verizon Pennsylvania Order* at App. D ¶ 71; *Verizon Rhode Island Order* at App. D ¶ 71; *Verizon Vermont Order* at App. D ¶ 71; *BellSouth Georgia/Louisiana Order* at App. D ¶ 71.

[56] *Id.*

[57] *See* Liberty Consulting Group, Public Interest Report, *In the Matter of the Investigation into Qwest Corporation's Compliance with § 271 of the Telecommunications Act of 1996*, Seven State Collaborative Section 271 Workshops (Oct. 22, 2001) ("Multistate Facilitator's Public Interest Report"), at 2 ("[W]e think that it is

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The FCC has specifically identified several factors that CLECs have advanced that emphatically do *not* count as "unusual circumstances." These include (1) the low percentage of total access lines served by CLECs, (2) the concentration of competition in densely populated urban areas, (3) minimal competition for residential service, (4) modest facilities-based investment, and (5) prices for local exchange service at maximum permissible levels under the price caps.[58] The FCC has determined that such factors do not result from a "sin of omission or commission" on the part of the BOC and have no place in the public interest test.[59] If the BOC has complied with the competitive checklist, it should not be punished if "[f]actors beyond [its] control, such as individual competitive LEC entry strategies," result in low CLEC customer volumes.[60] In particular, the FCC has rejected the suggestion that a low level of residential competition might justify a public-interest denial of a section 271 application no less than *nine*

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appropriate to ask those who make public interest assertions to demonstrate the existence of the facts necessary to support their claimed reasons why the public interest would not be served by granting Qwest 271 authority."); Order on Staff Volume VII Regarding Section 272, the Public Interest, and Track A, *In the Matter of the Investigation into U S WEST Communications, Inc.'s Compliance with § 271(c) of the Telecommunications Act of 1996*, Docket No. 97I-198T, at 29-30 (Mar. 15, 2002) (quoting the Multistate Facilitator's Public Interest Report at 2); *See also* Conditional Statement Regarding Public Interest and Track A, Iowa Dept. of Commerce Utilities Board, *In Re: U S WEST Communications, Inc. n/k/a Qwest Corporation*, Docket Nos. INU-00-2, SPU-00-11, at 13 (January 25, 2002) ("Iowa Report") (affirming the Facilitator's analysis of the burden of proof); Report on the Public Interest, Public Service Commission of Utah, *In the Matter of the Application of QWEST CORPORATION, fka US WEST Communications, Inc., for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)*, Docket No. 00-049-08 (Feb. 20, 2002), at 6 (concluding that "parties asserting that unusual circumstances exist bear the burden of proof"); *See* First Order on Group 5A Issues, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of Its Statement of Generally Available Terms*, Docket No. 70000-TA-00-599 (Record No. 5924) (Jan. 30, 2001), at 7 ("Qwest does not, in our opinion, have the burden of raising and disproving every possible problem imaginable. Their burden is to provide the demonstrations required by the federal Act, but they need only to rebut any allegations by others as to special problems or circumstances which might warrant not granting the recommendation sought by Qwest here.").

58 *See Bell Atlantic New York Order* ¶ 426; *SBC Texas Order* ¶ 419.

59 *Bell Atlantic New York Order* ¶ 427.

60 *Verizon Massachusetts Order* ¶ 235; *SBC Kansas/Oklahoma Order* ¶ 268; *Verizon Pennsylvania Order* ¶ 126.

times in the last three years.[61] CLECs' complaints that they cannot realize a sufficient profit on their services are likewise irrelevant, since "incumbent LECs are not required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin."[62] Finally, anecdotes of "isolated instances" of service quality glitches or noncompliance do not affect the public interest inquiry at all.[63]

The only alleged "unusual circumstance" actually in the evidentiary record is Mr. Stacy's and Mr. Simmons's suggestion that Qwest's UNE-platform price is too high relative to the state-set 1FR rate to permit CLECs to earn a positive margin in the residential market.[64] That claim is not the type of "unusual circumstance" that could overcome the strong presumption that Qwest's checklist compliance makes its entry into long distance consistent with the public interest. As Mr. Teitzel pointed out in his rebuttal testimony, nothing in the 1996 Act requires a BOC to demonstrate that every method of competitive entry is equally profitable for CLECs in every circumstance no matter who they are serving or where.[65] Congress provided three different ways for competitors to enter the local market: facilities-based competition, UNE-based competition, and resale. As the FCC has held, Congress provided these three different avenues precisely because it "envisioned competitors entering the market through different entry mechanisms

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61 *See BellSouth Georgia/Louisiana Order* ¶ 282; *Verizon Vermont Order* ¶ 63; *Verizon Rhode Island Order* ¶ 104; *SBC Arkansas/Missouri Order* ¶ 126; *Verizon Pennsylvania Order* ¶ 126; *Verizon Massachusetts Order* ¶ 235; *SBC Kansas/Oklahoma Order* ¶ 268; *SBC Texas Order* ¶ 419; *Bell Atlantic New York Order* ¶ 426.

62 *SBC Kansas/Oklahoma Order* ¶ 65.

63 *Id.* ¶ 281. *See also Bell Atlantic New York Order* ¶ 50 (holding that "anecdotal" evidence of "isolated incidents" is insufficient to prove "that the BOC's policies, procedures, or capabilities preclude it from satisfying the requirements" of section 271).

64 *See* Stacy Test. (Staff Ex. 3) at 29-30; Simmons Test. (Midco Ex. 38) at 19-20.

65 *See* Teitzel Rebuttal (Qwest Ex. 2) at 25-26.

under different circumstances."[66] For this reason, that one mode of entry may be less profitable than another in a given situation is irrelevant for the purposes of section 271. Indeed, in its recent order approving Verizon's section 271 application for Vermont, the FCC rejected the argument that a section 271 application could be contrary to the public interest simply because the level of UNE-based competition, in particular, in the residential market was somehow too low:

> We disagree with commenters that low levels of facilities-based residential competition in Vermont indicate that it would be inconsistent with the public interest to grant this application. Given an affirmative showing that the competitive checklist has been satisfied, low customer volumes in *any one particular mode of entry* or in general do not necessarily undermine that showing.[67]

If CLECs find it difficult to profitably enter the residential market via the UNE platform, the Act permits them to use resale under 47 U.S.C. § 251(c)(4), which guarantees CLECs a positive margin in the market: resale allows CLECs to purchase the very same wholesale service as they would receive with a UNE platform but at a 15% avoided cost discount from the retail price, no matter how low those retail rates may be set.[68] In the *Verizon Vermont Order*, the FCC stated that

> UNEs are priced from the "bottom up," that is beginning with a BOC's costs plus a reasonable profit, whereas resale is priced from the "top down," that is, beginning with a BOC's retail rate and deducting avoided costs. Such differing price structures are evidence that Congress envisioned competitors entering the market through different entry mechanisms under different circumstances. *Such a*

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66 *Verizon Vermont Order* ¶ 69.

67 *Id.* ¶ 63 (emphasis added). In the *Verizon Vermont Order*, the FCC specifically rejected AT&T's and WorldCom's claim that Verizon's section 271 application was not in the public interest because of Verizon's UNE platform prices, finding that "it is appropriate to consider the effect of resale on whether a price squeeze exists" because "the Act contemplates the existence of subsidized local rates in high-cost areas and addresses such potential price squeezes through the availability of resale." *Id.* ¶ 69.

68 *See* Tr. 4/22/02 (Teitzel) at 142:3-9.

distinction ensures that resale provides a profit margin where, as is the case here, the costs of individual elements exceed the retail rate.[69]

Notably, the FCC just repeated this interpretation in the *BellSouth Georgia/Louisiana Order*.[70] In this proceeding, Mr. Simmons has acknowledged that a resold line is essentially the same as a UNE platform, just with a different statutory pricing scheme:

> A UNE-P is — with Qwest's permission to describe it from my standpoint, a resold product is a retail price minus the avoided cost. A UNE-P is built exactly backwards. It starts with all the elements from cost factors up totaling up the total amount but it behaves an awful lot like a resold product.[71]

Thus, resale under section 251(c)(4), with its separate statutory pricing scheme and its Commission-guaranteed 15% potential margin, is the answer to any CLEC that does not believe that residential rates in South Dakota are high enough to permit it to earn a profit using a UNE platform — including Midco counsel's hypothetical (and very unwise) CLEC who "isn't interested"[72] in providing any service other than basic, unadorned local calling. No matter where the retail price of the 1FR is set, a CLEC using resale would always pay a wholesale cost that is 15 percent lower.

Moreover, the witnesses' single-minded focus on UNE-based entry is also willfully blind to the realities of competition in the South Dakota residential market. It is easy to understand why Mr. Stacy and Mr. Simmons attempt to get this Commission to look at UNE-based competition alone: there is so much residential competition in South Dakota using facilities-based and resale-based strategies that the witnesses' claim that competition is impossible in the residential market is not credible. Facilities and resale-based CLECs are now actively serving

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69 *Verizon Vermont Order* ¶ 69 (emphasis added).

70 *BellSouth Georgia/Louisiana Order* ¶ 287 (same).

71 Tr. 4/30/02 (Simmons) at 47:2-10.

significant numbers of South Dakota residential local exchange customers; as noted above, just two South Dakota CLECs, FiberCom and Midco, have acknowledged in this proceeding that they are serving almost **[CONFIDENTIAL DATA BEGINS: XXXX CONFIDENTIAL DATA ENDS]** residential access lines via these means, and the total number for all CLECs is surely higher.[73] The suggestion that it is impossible to serve residential customers in South Dakota simply because UNE-based strategies yield less than desired profits bears no connection to the reality of the market in this state.

In any event, the witnesses' contention that it is impossible for CLECs to earn positive margins using UNE platforms to serve residential customers is thoroughly disproved by the evidence. The witnesses' suggestion that the UNE platform is "upside-down" in the residential market comes from the fact that they ignore the revenues (or savings) that the CLEC would receive beyond the 1FR charge for basic local service, such as switched access charges, vertical features (such as caller ID or call waiting), incremental toll, and the subscriber line charge. No prudent businessperson considering whether to enter the local market would ever ignore these potential sources of revenue. In a recent section 271 order, the FCC made clear that such additional revenues and savings *must* be included in the comparison:

> AT&T and WorldCom also fail to present other evidence that would be relevant in a residential-only price squeeze analysis, such as the incremental toll revenues that would be generated by winning the local, intrastate, and interstate toll business of customers that currently use other carriers for these services.[74]

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[72] *See* Tr. 4/22/02 (Teitzel) at 70:25-71:2.

[73] *See* Black Hills FiberCom, L.L.C.'s Responses to Qwest Corporation's Data Requests for Black Hills FiberCom (Qwest Ex. 3) at 1-2 ("FiberCom's Data Request Response"); Midcontinent's Response to Qwest's Data Requests of March 22, 2002, (Qwest Ex. 4) at 1-2 ("Midco Data Request Response").

[74] *Verizon Vermont Order* ¶ 71.

The FCC also held that any "price squeeze" analysis also must consider the "expected net access revenues and savings."[75]

In his rebuttal affidavit, Mr. Teitzel demonstrated that a CLEC using the UNE platform to serve an average Qwest residential customer in Sioux Falls, South Dakota must pay $22.16 for a UNE platform that, as Mr. Simmons conceded during the live hearing,[76] includes everything a CLEC needs to provide a full complement of local services and vertical features[77] He also showed that, if the CLEC is targeting the same customers as Qwest, it has the potential opportunity to earn $38.34 of revenue on average from each customer:[78]

Potential CLEC Revenue From Average Customer	
Flat-rated residential line	Rate Group 1: $18.15
End user Subscriber Line Charge (SLC)	$5.48
Avg. intraLATA long distance	$2.43
Avg. vertical features	$4.65
Avg. intrastate switched access	$4.44
Avg. interstate switched access	$3.19
Total:	**$38.34**

Subtracting the CLECs' cost for a UNE platform from their potential revenue yields a potential margin of $16.18, or 73%.[79] Actual margins, of course, will depend on how a CLEC chooses to

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75 *Id.*

76 *See* Tr. 4/30/02 (Simmons) at 26:25 to 27:7.

77 *See* South Dakota Track A/Public Interest Summary, David Teitzel, April 22, 2002 (Qwest Ex. 6) at 7.

78 *Id.*

79 *Id.* Suggesting that a CLEC must consider all of the revenue opportunities from all of the different services a customer might buy — apart from being prudent business practice — is no different from what Qwest is asked to do. Qwest's own costs for a residential access line are approximately $26. *See* Tr. 4/22/02 (Teitzel) at 145:18-146:16. The 1FR rate of $18.15 clearly does not cover Qwest's costs; Qwest generates the positive net margins by offering other features and services that generate additional revenue. If a CLEC chooses not to provide these additional services (or customers do not purchase them), the CLEC always has the option of providing basic local service through resale, which (as explained above) *guarantees* the potential for a positive margin.

price its services and what customers the CLEC targets. CLECs can generate much higher revenues via the UNE platform, for example, by targeting those customers most likely to purchase service with multiple additional vertical features. By way of illustration, Mr. Teitzel pointed out in his rebuttal affidavit that Qwest offers customers a package (called "CustomChoice") of a residential access line plus over 20 vertical features for $32.95 per month.[80] That service generates $48.49 in monthly revenue for Qwest.[81] CLECs can offer a similar package and earn similar revenues via the UNE platform without paying a single additional dime; there is no incremental UNE-platform charge for additional features.[82] While Qwest acknowledges that there was some confusion on this point at the hearing (largely because it was not clear that the two columns in Qwest Exhibit 6 represented a *CLEC*'s costs and potential revenues and did not compare CLECs' and Qwest's costs), Qwest believes that this data adequately demonstrates that CLECs are able to profitably enter the residential market via the UNE platform.

The only other evidence in the record regarding the supposed "price squeeze" was the price comparison that Mr. Simmons presented.[83] According to his chart, Midco's costs for a residential UNE-platform line are $26.50, while its revenues are only $23.95, causing the service to be "under water."[84] But this chart is woefully incomplete. First, Mr. Simmons conceded during cross-examination that Midco charges the same subscriber line charge that Qwest does:

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80 *See* Teitzel Rebuttal (Qwest Ex. 2) at 35.

81 *Id.*, as updated by Tr. 4/22/02 (Teitzel) at 34:10-12.

82 *Id.* Midco concedes this as well. *See* Tr. 4/30/02 (Simmons) at 38:11-18.

83 *See* Midcontinent Communications Testimony, Summary (Midco Ex. 39).

84 *Id.*

$5.48.[85] As Mr. Teitzel explained and Dr. Griffing on behalf of the Staff agreed,[86] the subscriber line charge is revenue to a local exchange carrier; it is not passed along to the federal government as a tax or contribution to the federal universal service fund. That revenue, which Mr. Simmons did not include in his comparison, would by itself bring Midco's revenues from a UNE platform above its costs, a point that Mr. Simmons conceded outright:

> Q Does that include the $5.48 subscriber line revenues we were discussing?
>
> A No.
>
> Q So if we were to add $5.48 to this column, for example, it would come out positive in your exhibit, just simply on the basis of —
>
> A On the UNE-P column?
>
> Q Yes.
>
> A Yes, it would.[87]

Second, Mr. Simmons also conceded that his comparison did not include any revenues from vertical feature revenues such as call waiting or caller ID:

> Q . . . Do you charge for vertical features, for custom calling features?
>
> A . . . The package that we offer may be four choice features for an additional 4.95.
>
> Q Okay. And do these figures that you provided us on Exhibit 39 show any revenue for vertical features?
>
> A It does not.[88]

Mr. Simmons also acknowledged that the revenue that Midco generates from these additional calling features is comparable to Qwest's:

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85 *See* Tr. 4/30/02 (Simmons) at 34:13-18.

86 *See* South Dakota Checklist Items/Public Interest Summary (Staff Ex. 4) at 10.

87 Tr. 4/30/02 (Simmons) at 39:17-25.

88 *Id.* at 36:23-37:6.

Q . . . [Y]ou say you provide a package of features at 4.95. Mr. Teitzel indicates that Qwest on average provides features to customers at 4.65. Would those be comparable numbers, in your estimation?

A Yes.[89]

Including this additional $4.65 to $4.95 in features revenue would drive the residential UNE-platform margin even further into positive territory.

Finally, it is not at all clear from Mr. Simmons' chart whether he has included all of the long distance toll revenues attributable to the local customer. Mr. Simmons acknowledged during the hearing that "long distance charges are not flat rated" and that "[s]ome customers will buy much more long distance."[90] Mr. Simmons testified that Midco charges 7.9 cents per minute for long distance,[91] and it is not clear whether this amount is reflected in the "billing" revenue listed in Midco Exhibit 39. Given that FiberCom's witness Kyle White acknowledged that a CLEC's margins on toll services are well in excess of 50 percent,[92] Mr. Simmons' possible failure to account for this revenue in his comparison is very significant. It is certainly possible that the revenue Midco generates from its long distance service would make a UNE-platform offering even more profitable.

In sum, Qwest has demonstrated that the parties' allegations of a UNE-platform "price squeeze" do not have any merit. CLECs are able to generate a profit in the residential market via the UNE platform and, even if they were not, they would still be able to enter the market and earn a guaranteed profit via resale. The parties have not established that there are "unusual circumstances" that would justify denying Qwest's section 271 application for South Dakota.

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89 *Id.* at 37:14-18.

90 *Id.* at 33:25.

91 *Id.*

92 Tr. 4/30/02 (White) at 87:10.

START

OF

RETAKE

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89 *Id.* at 37:14-18.

90 *Id.* at 33:25.

91 *Id.*

92 Tr. 4/30/02 (White) at 87:10.

III. CONCLUSION

For all the foregoing reasons, Qwest respectfully asks the Commission to find that Qwest's application to provide interLATA services in South Dakota is "consistent with the public interest, convenience, and necessity," within the meaning of 47 U.S.C. § 271(d)(3)(C) and the FCC orders interpreting that section.

Dated this 21st day of May, 2002

RESPECTFULLY SUBMITTED,

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END

OF

RETAKE

BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE ANALYSIS INTO QWEST CORPORATION'S COMPLIANCE WITH SECTION 271 (C)- OF THE TELECOMMUNICATIONS ACT OF 1996	))))	DOCKET TC 01-165

QWEST CORPORATION'S OPENING POST- HEARING BRIEF ON PERFORMANCE
(PIDs, Actual Performance and Data Reconciliation)

I. INTRODUCTION

Section 271 requires Qwest to open its markets to competition before the FCC can approve a Bell Operating Company's application for interLATA relief. Congress identified 14 different elements that BOC's such as Qwest must make available to CLECs before the markets would be considered open.[1] To establish that it is adequately providing each of the 14 items on the checklist, Qwest must demonstrate that:

> It has a concrete and specific legal obligation to further the [checklist] item upon request . . . and that it is currently furnishing or is ready to furnish the checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality.[2]

Qwest presented several witnesses regarding South Dakota interconnection agreements and its Statement of Generally Available Terms (SGAT) to establish the first

[1] 47 U.S.C. § 271(c)(2)(B).
[2] *Bell South Louisiana Order* at ¶ 54.

aspect of the FCC's test – the legal requirement. To establish the second requirement – providing each item on the checklist at an acceptable level of quality – Qwest presented both its commercial performance data and the ROC OSS test. The FCC has always held that a BOC's "performance towards competing carriers in an actual commercial environment is the best evidence of nondiscriminatory access to OSS and other network elements."[3]

Thus, commercial performance data is the most important evidence that Qwest is providing each aspect of the checklist to CLECs in South Dakota at an acceptable level of quality. When commercial volumes are low in South Dakota, the Commission may look to either regional performance results, the ROC OSS test, or both to determine whether Qwest satisfies the checklist item.

Qwest demonstrated through both South Dakota specific and regional performance data that Qwest is providing interconnection, UNEs, resale and other services on the checklist to CLECs at an exceptionally high level of quality. The Commission should formally find that Qwest meets each aspect of the checklist subject to successful passage of the ROC OSS test.

II. THE COMMISSION SHOULD EVALUATE QWEST'S COMMERCIAL PERFORMANCE UTILIZING THE FCC'S ESTABLISHED LEGAL FRAMEWORK.

Over the past several years, the FCC has created a well defined body of law on how it evaluates performance data in Section 271 applications. The FCC places tremendous emphasis on PIDs negotiated through an open process, such as occurred in the ROC. The FCC concluded that when "[performance] standards are developed through open proceedings with input from both the incumbent and competing carriers, these standards can represent informed and reliable attempts to objectively approximate whether competing carriers are

[3] *Verizon Pennsylvania Order* at Appendix C, ¶ 13.

being served by the incumbent in substantially the same time or manner or in a way that provides them a meaningful opportunity to compete."[4] The FCC held:

> Thus, to the extent there is no statistically significant difference between a BOC's provision of service to competing carriers and its own retail customers, the Commission generally need not look any further. Likewise, if a BOC's provision of service to competing carriers satisfies the performance benchmark, the analysis is usually done.[5]

The FCC, however, has no expectation that BOC's like Qwest meet the performance objective for each and every measure. Such an expectation would be impossible. Even when statistically significant differences in performance exist, the Commission may "conclude that such differences have little or no competitive significance in the marketplace."[6] Similarly, a steady improvement in performance over time indicates that problems are being resolved.[7] In such cases, "the Commission may conclude that the differences are not meaningful in terms of statutory compliance."[8] Accordingly, "a disparity in performance for one measure, by itself, may not provide a basis for finding noncompliance with the checklist."[9] Moreover, when "there are multiple performance measures associated with a particular checklist item, the Commission considers the performance demonstrated by all the measurements as a whole." Even where a BOC consistently misses the performance objective for an entire product category, the Commission may still conclude that Qwest satisfies the checklist item as a whole.[10]

Thus, the ultimate issue before this Commission is whether Qwest's overall

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[4] *Verizon Massachusetts Order* at ¶ 13.

[5] *Verizon Connecticut Order* at Appendix D-5, ¶ 8 (October 20, 2001).

[6] *Id.*

[7] *Verizon New York Order* at ¶ 59.

[8] *Verizon Connecticut Order* at Appendix D-5, ¶ 8.

[9] *Verizon Connecticut Order* at Appendix D-5, ¶ 9.

[10] *Verizon Pennsylvania Order* at ¶ 90. Verizon consistently missed its performance objectives for high

performance on a checklist item by checklist item basis is adequate. The Commission's role is to assess all of the PIDs for each checklist item in totality and decide whether Qwest's performance is adequate. To make this determination, the FCC has always studied the four most recent months of performance data.[11] Therefore, during the hearing Qwest presented its November 2001 to February 2002 performance data, which clearly demonstrates that its overall performance meets the FCC's Section 271 standards. Unlike other BOC's that have had 271 applications granted with substantial failures in certain areas of performance, Qwest's performance data consistently shows that Qwest meets the performance standards for each aspect of the competitive checklist, each product measured for each checklist item, and virtually every measure for each product on the checklist. At this point, even AT&T concedes that Qwest's reported performance data should be utilized to determine whether Qwest meets each aspect of the checklist.[12]

III. QWEST'S PERFORMANCE DATA IS "ACCURATE AND RELIABLE."

a. Liberty Consulting Audited and Reconciled Qwest's Performance Data and Found it "Accurate and Reliable."

Liberty Consulting, the independent third-party hired by the ROC to audit and reconcile Qwest's performance data, has twice concluded that Qwest's performance data is "accurate and reliable." Before reaching this conclusion, Liberty spent almost two years auditing Qwest's performance data,[13] and the last eight months reconciling various aspects of

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capacity loops.

[11] *See, e.g., In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, Memorandum, Opinion and Order, CC Docket No. 99-295 ("Bell Atlantic New York Order") at ¶¶ 69, 156, 219, 221, 223, 224, 284, 300, 301 and 323 (Dec. 1999).

[12] 4/29/02 Tr. (Finnegan) at 89-95, 98-99.

[13] 4/25/02 Tr. (Stright) at 8.

Qwest's data with that of interested CLECs.[14] Before reaching this conclusion, Liberty audited each of Qwest's performance measures.[15] As to each performance measure (PID), Liberty analyzed Qwest's process for collecting data, analyzed sample data sets, and performed independent calculations.[16] Before reaching this conclusion, Liberty reconciled over 10,000 orders, and evaluated hundreds of thousands of pages of documents.[17] Before reaching this conclusion, Liberty interviewed scores of Qwest and CLEC employees, considered numerous allegations of CLECs, in various circumstances demanded that Qwest conduct additional training, and used its professional judgment.[18] Given the substantial breadth of Liberty's work, its conclusion that Qwest's data is "accurate and reliable" should carry great weight with the Commission.

Despite all of this work, AT&T's complaint is that Liberty should have done more. AT&T's expectations are unrealistic. Neither AT&T, WorldCom, nor Covad presented any evidence that other BOCs have done more. To the contrary, in other BOC's applications the FCC's decisions show that AT&T had "data wars" with the applicant such as Verizon and SBC. In prior applications, AT&T argued that the BOC's performance data was inaccurate and unreliable.[19] Here, AT&T acknowledges that it has no intention of presenting its own performance data.[20] In fact, AT&T's only argument was that Liberty could have done more to verify the accuracy of Qwest's performance results. Given all of the work that Liberty described, this is hardly a basis to withhold judgment on Qwest's commercial data.

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[14] 4/25/02 Tr. (Stright) at 9.
[15] Qwest Exhibit 69.
[16] Qwest Exhibit 70.
[17] 4/25/02 Tr. (Stright) at 13-14.
[18] Washington April 22, 2002, Transcript at 6816-6823.
[19] *Verizon New York Order* at ¶¶ 300-310.
[20] 4/29/02 Tr. (Finnegan) at 98-102.

It is instructive, however, to evaluate all that Liberty did to verify that Qwest's performance data is accurate and reliable. Initially, Liberty audited each Qwest performance measure in PID version 3.0, as described in its 156 page audit report.[21] Liberty has since audited each PID added or modified to create PID version 4.0.[22] After all of this work, Liberty concluded that Qwest's data is accurate and reliable.[23]

Liberty, however, also managed the data reconciliation project. Data reconciliation started in September 2001 based upon the PIDs, products and states identified by CLECs. The CLECs, not Qwest, identified those areas where it had even a scintilla of evidence that Qwest's data was inaccurate. All CLECs involved in existing section 271 proceedings were notified of this data reconciliation opportunity. Three CLECs – AT&T, WorldCom and Covad – participated in this effort.

While reviewing over 10,000 orders, Liberty identified, coincidentally, 14 issues with Qwest's performance data. As Mr. Stright of Liberty described, seven of these issues were "process oriented" and the other seven involved "human error."

b. Qwest's Performance Data is now Free of the Seven Programming Errors Uncovered by Liberty in the Reconciliation.

The seven process errors, memorialized in Exception 1046 and Observations 1026, 1027, 1029, 1030, 1035 and 1038, were all rectified with programming changes.[24] In each instance, Liberty evaluated the code change, and evaluated data after the fact to ensure that the code change rectified the situation. Mr. Stright testified that in each instance, Qwest's

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[21] http://www.nrri.ohio-state.edu/oss/master/pid/sept/pmafinalreport.pdf.

[22] http://www.nrri.ohio-state.edu/oss/project/data_recon/april/Liberty_Data_Reconciliation_Report_final_draft.pdf.

[23] 4/25/02 Tr. (Stright) at 20.

[24] Qwest Exhibit 70.

performance data from November 2001 forward was free of these concerns.[25] Liberty has even acknowledged that in several instances Qwest had already discovered and rectified the concern before Liberty found the issue.[26] Thus, these seven Observations are a vestige of the past as the data before the Commission is free of these issues.

c. Qwest Has Rectified, and Liberty has Closed the Seven Observations Involving Small Percentages of Human Error.

The other seven Observations identified by Liberty in the reconciliation process concern slight incidences of human error. It is with respect to these Observations that the CLECs complain Liberty should have done more to validate the efficacy of Qwest's corrective action. Liberty has testified that the CLECs concerns were misguided.[27] A brief review of the issues raised in the Observations also makes this plain.

i. Liberty Validated Two Human Error Observations with an Evaluation of Data after Qwest Took Corrective Action.

Initially, two of the Observations concerning human error received the same post-remedy analysis as the programming changes. Observations 1034 and 1037 both involved historical errors that were short lived. Observation 1034 concerned an error in when Qwest submitted FOCs. This error was only found in May 2001 because Qwest was transitioning to a new FOC time for xDSL loops.[28] Similarly, Observation 1037 concerned an error in May 2001 when Qwest was transitioning to a new center (the QCCC) responsible for managing coordinated cutovers throughout the region.[29] In both instances, Liberty had data in its possession to establish that Qwest corrected the concerns many months ago.

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[25] 4/25/02 Tr. (Stright) at 17.
[26] *See, e.g.*, Washington Exhibit 1380 & Washington April 22, 2002, Transcript at 6838.
[27] Washington April 22, 2002, Transcript at 6814.
[28] Qwest Exhibit 70.
[29] Qwest Exhibit 70.

ii. Liberty Closed the Remaining Five Human Error Observations Based Liberty's Judgment that Qwest's Corrective Action would Cure the Slight Errors.

It is Observations 1028, 1031, 1032, 1033, and 1036 about which the CLECs truly complain. In each of these cases, Liberty closed the Observation upon a review of training materials, interviews with Qwest employees, and upon using its own professional judgment that Qwest's corrective action would cure the issue. These training materials were substantial as Exhibits 1381C through 1386C show. In at least two instances – Observations 1028 and 1031 – Liberty found Qwest's initial corrective action inadequate, and required Qwest to do more.[30]

During the reconciliation, Liberty identified every performance concern it found in the reconciliation no matter how small. The purpose of Qwest's reporting its performance data is to provide the Commission with substantial evidence of how it is performing in the marketplace. There will always be some amount of human error. This is expected and understood. At the same time, Qwest should do what is reasonable to limit the amount of error to that expected. Liberty found that Qwest has done what is required.[31]

Observation 1028 concerns the time Qwest reported for the mean time to restore unbundled analog loops. Liberty found that Qwest had recorded a time incorrectly in 6.5% of the approximately 100 trouble tickets it evaluated. In some instances, as Mr. Stright testified, the error made Qwest's data look worse and in some instances, it tended to make Qwest's data look better.[32] The process for recording times requires a technician to record

[30] 4/25/02 Tr. (Stright) at 17-19.
[31] Qwest Exhibit 70.
[32] 4/25/02 Tr. (Stright) at 19-20.

the time as he/she is performing the repair work. A "scrubber" then evaluates all of the technicians recorded times, adds them together, subtracts the "no access" time (the time the technician did not have access to the equipment needing repair), corrects any recording errors made by the technician, and then comes up with the overall "time to restore" the unbundled loop. Qwest retrained both the technicians and the scrubbers to ensure they understood how and when to record times. In addition, Qwest instituted a new audit procedure to ensure Qwest management reviewed a certain percentage of the trouble tickets.[33] Liberty found this retraining effort and additional audit procedure sufficient to cure this issue that had only a slight impact on Qwest's reported data

Observation 1031 concerns interconnection trunk provisioning. This Observation concerned situations when Qwest excluded an interconnection trunk from its performance data because it determined that the customer caused the missed due date. In reality, however, Liberty verified that the order was originally held for facility reasons by Qwest and, therefore, should have been identified in the data as a missed commitment.[34] AT&T argued that this Observation gave it the most concern. AT&T also argued that Liberty should have done more before closing this Observation because 8% of "orders" were affected. The facts show otherwise. AT&T did not present any evidence that this percentage applied to all orders by CLECs. The evidence makes plain that this Observation concerns interconnection trunks only, AT&T interconnection trunks disproportionately, and less than 0.5% of orders overall. Qwest's Response to this Observation makes this plain:

> Although Qwest's retraining efforts were completed in mid-February 2002, Qwest's historical results are accurate and reliable. This is true for several reasons. First, the concerns set forth in the Observation affected wholesale and retail results alike. Second, Qwest has performed an analysis of orders

[33] Qwest Exhibit 70.

[34] Qwest Exhibit 70 at 14.

from December 2001 and January 2002 and found [the] impact to be *de minimus* for interconnection trunks, unbundled analog loops, and unbundled 2-wire non-loaded loops, the three design services involved in the data reconciliation. Third, the impact of this issue upon AT&T is disproportionately large and not representative of CLEC community as a whole. This is due to AT&T's internal process of waiting beyond the original due date to complete final test and turn up of interconnection trunks. This issue was analyzed in detail by Liberty Consulting in its Arizona report. Thus, a disproportionate percentage of AT&T's interconnection trunk orders are properly identified at some point in the history of the order as containing a Customer Caused Miss. As stated above, this Observation resulted from two facts occurring simultaneously: (1) a Qwest caused facility delay; and (2) a customer caused miss at some point in the history of the order. Thus, to the extent that a disproportionate percentage of AT&T's orders were coded as "customer caused misses," it increased the likelihood that this issue would impact AT&T interconnection trunk orders.

Qwest has analyzed orders from January 2001 and found that AT&T was 1.41 times more likely than other CLECs to have a customer caused jeopardy code identified in the history of an interconnection trunk order Qwest. Similarly, in January 2002, AT&T was 1.89 times more likely than other CLECs to have a customer caused jeopardy code identified in the history of an interconnection trunk order Qwest. Thus, AT&T is almost twice as likely to experience a 1031 issue as the CLEC community at large. This data is also borne out by the fact that Qwest analyzed all . . . of WorldCom's interconnection trunk orders from the state of Colorado and did not find a single 1031 issue.

Qwest has analyzed all interconnection trunk, analog loop, and 2-wire non-loaded loop orders throughout the region from the months of December 2001 and January 2002. Qwest specifically analyzed all orders excluded from performance reporting for customer caused reasons. Qwest also analyzed Feature Group D orders, the specific service the ROC determined was the retail comparative to interconnection trunks.[35] Qwest found the following: (1) this issue effected 1 of the 44,155 (0.002%) analog loops that CLECs ordered in those two months; (2) this issue effected 5 of 2,805 (0.18%) of the 2-wire non-loaded loops that CLECs ordered in those two months; and (3) this issue effected 0 of the 574 interconnection trunks (0.00%) that CLECs ordered in those two months. As stated above, Qwest also analyzed Feature Group D trunks (the retail comparative to interconnection trunks) and found this issue effected 1 of the 1,176 (.01%) Feature Group D orders in those to months. These percentages are virtually identical to the 0.3% impact found when analyzing AT&T's unbundled loop orders, the service not impacted by the AT&T provisioning concern mentioned above.[36]

This data shows that in the months of December 2001 and January 2002, this issue did not impact the reliability or accuracy of Qwest's performance data for CLEC

[35] Unbundled analog and 2-wire non-loaded loops do not have retail comparables.

[36] http://www.nrri.ohio-state.edu/oss/master/observations/mar/o1031qwest._supp_resp.pdf.

interconnection trunk, analog loop, and 2-wire non-loaded orders anywhere in Qwest's region. Similarly, this issue did not impact the reliability or accuracy of performance data for the comparable Feature Group D orders (the retail comparable to interconnection trunk orders). This data is well within the zone of reasonableness identified by Liberty Consulting on several occasions throughout the reconciliation process. This shows why Liberty was comfortable closing Observation 1031 based on Qwest's retraining efforts and after validating that the Observation only affected orders that had a prior facility miss.

Observation 1032 concerns Qwest's failure, on occasion, to exclude unbundled loop orders from the average installation metric (OP-4) where the CLEC requested a longer than standard interval.[37] In the ROC, the parties allowed Qwest to exclude "[o]rders with customer requested due dates greater than the current standard interval" because this allows the Commission to evaluate how well Qwest is providing service when the standard interval is requested. Liberty found that Qwest did not exclude such orders all of the time.[38] This oversight by Qwest, however, made Qwest's OP-4 data look worse. Qwest retrained its affected employees, and Liberty closed the Observation. From a pragmatic stand-point, this Observation means that Qwest's OP-4 data for unbundled loops currently before the Commission is a conservative assessment of how Qwest is providing service to CLECs in South Dakota today. Even with this conservatism, however, Qwest consistently meets its OP-4, average due date, objectives.

Observation 1033 concerns instances when Qwest incorrectly recorded the "application date."[39] The application date for interconnection trunks and unbundled loops is

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[37] Qwest Exhibit 70 at 15.
[38] Qwest Exhibit 70.
[39] Qwest Exhibit 70.

dependant upon when the order is received. An interconnection trunk order must be received before 3:00pm or it is counted as applied for on the next business day. Unbundled loops must be received before 7:00pm or it is counted as applied for on the next business day.[40] There were times that Qwest inappropriately recorded the "application date" as the day it began working the order, even if it was received after 3:00pm or 7:00pm respectively. Although this technically violates Qwest's process, this tends to benefit the CLEC because the order is counted as received one day earlier.[41] Liberty closed this Observation by evaluating Qwest's training materials. This should not cause the Commission concern because this is relatively easy mistake to fix and the error, again, tends to help the CLEC.

Finally, Observation 1036 concerns "retermination" of interconnection trunks within the central office.[42] A retermination is disconnecting an existing trunk from one trunk port in the central office and reterminating it on a different trunk port in the same central office. Historically, Qwest did not have a consistent method of tracking such orders. Qwest determined and AT&T agreed that such orders should be excluded from the data as it is not provisioning a new trunk.[43] AT&T still complains about the impact of Qwest's inconsistent treatment on historical data. The unrefuted evidence shows that:

> This inconsistent treatment occurred on both the wholesale side and on comparative Feature Group D Orders. Qwest has performed an analysis and concluded that in calendar year 2001, Qwest improperly included 56 CLEC re-terminations of interconnection trunks in its reported data. This was from a total of 2,820 reported interconnection trunks. The reported data throughout the region showed that Qwest met 2,537 of 2,820 (89.96%) interconnection trunk orders and the data should have showed 2,481 of 2,764 (89.76%) interconnection trunk orders. On the retail side the impact was virtually identical. The reported data showed that Qwest met 4,134 of 4,447 (92.96%) interconnection trunk orders and the data should have showed 3,935 of 4,248 (92.63%) interconnection trunk orders. The delta impact is 0.2% for CLEC

[40] Qwest Exhibit 70.

[41] Washington April 22, 2002, Transcript at 6849.

[42] Qwest Exhibit 70.

[43] Qwest Exhibit 70.

data and 0.33% for comparative retail data. A copy of Qwest's analysis by state and regionally will be sent through a Data Request associated with Observation 1036. Thus, the impact on historical performance data is negligible and affects retail and wholesale data alike.[44]

Thus, retermination orders constitute a small fraction of the total volume of trunk orders received and have no impact on Qwest's data at all. Nonetheless, to ensure that this issue is rectified, Qwest implemented a code change that was effective in mid-March, and run retroactive to recalculate December 2001 performance data forward."[45] Thus, December 2001 data forward no longer contains this error. Liberty found that Qwest's efforts were adequate to cure this slight error.

In sum, Qwest's performance data has undergone incredible scrutiny over the last two years. Liberty has audited all aspects of Qwest's performance data and reconciled data where CLECs questioned its accuracy. In both circumstances, after the processes were complete Liberty found Qwest's performance data to be "accurate and reliable." The Commission should rely upon this conclusion, and evaluate Qwest's data now.

IV. QWEST'S COMMERCIAL PERFORMANCE DATA SATISFIES THE REQUIREMENTS OF SECTION 271.

The performance data presented at the hearing by Mr. Mike Williams concerned the "adequacy" of Qwest's performance. This was presented principally through Qwest's "Blue Charts."[46] As stated above, the FCC follows a three step test when evaluating performance data in 271 filings: (1) if Qwest meets the negotiated performance objective, the inquiry is over and the Commission need not perform any analysis; (2) if Qwest misses the negotiated performance objective, the performance miss must be competitively significant; and (3) even if the performance miss is competitively significantly, the FCC evaluates the checklist item

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[44] http://www.nrri.ohio-state.edu/oss/master/observations/mar/o1036qwest_resp.pdf.

[45] Qwest Exhibit 70.

as a whole to determine whether the miss(es) constitutes an overall miss of the checklist item. Qwest recommends that the Commission utilize this standard. No CLEC advocated any different standard.

Qwest's performance to CLECs in South Dakota and regionally over the last several months has been outstanding. This performance has carried over to all checklist items with reported data. Specifically:

1a. <u>Checklist Item 1 (Interconnection)</u>

Interconnection trunks allow the mutual exchange of traffic between Qwest and CLECs. Qwest has met the ROC's performance standards for provisioning, maintaining, and repairing interconnection trunks thereby keeping interconnection trunk blockage low. Qwest's November 2001 through February 2002 data shows:

- *Trunk Blockage.* Trunk blockage on CLEC interconnection trunks has been virtually non-existent, 0.08% or less, far below the ROC's 1% benchmark.

- *Trunk Installation Measurements*: In South Dakota, Qwest met 100% of its interconnection trunk installation commitments to CLECs, with an average interval between 9 and 19 days.[47] All of these installation measures have been at parity in each of the last four months. Overall, trunk installation quality has been excellent as well, as 100% of the newly installed trunks did not experience any trouble within 30 days.[48]

- *Trunk Maintenance and Repair Measurements*: Qwest achieved similar success in maintaining and repairing interconnection trunks. The trouble rate for

[46] Qwest Exhibits 73-74.
[47] *Id.* at 21, OP-3, OP-4.
[48] *Id.* at 21-22, OP-5, OP-5*.

interconnection trunks has been extremely low – 0.06% (6 in 10,000 trunks) or less each month.[49] Qwest cleared 100% of CLEC trouble reports within four hours.[50] The mean time to restore interconnection service for CLECs has been at parity, and well below the 4-hour objective.[51] These results demonstrate that Qwest is repairing interconnection trunks for CLECs on a nondiscriminatory basis.

- *Qwest's Blue Chart:* The South Dakota Blue Chart contains 11 metrics concerning interconnection.[52] Of those, 10 were at parity in at least three of the last four months, and as such show as dark blue. This clearly supports checklist satisfaction. The sole remaining measure – trouble rate (MR-8) – also met the ROC standard in three of the last four months, and, as described above, was less than 0.06% in each month. This is not competitively significant to CLECs in any way and no CLEC so alleged. The data unequivocally supports a finding that Qwest meets this aspect checklist item 1.

1b. <u>Checklist Item 1 (Collocation)</u>

Collocation allows CLECs to place equipment in Qwest central offices or other structures such as remote terminals.[53] The ROC set collocation installation intervals of 90 days when the collocation is forecasted, and 120-150 days when no forecast is provided (depending on whether major infrastructure modifications are necessary). The PIDs also set a 10-day benchmark for feasibility studies. Qwest has consistently met the ROC benchmarks

[49] *Id.* at 24, MR-8.
[50] *Id.* at 23, MR-5.
[51] *Id.*, MR-6.
[52] Qwest Exhibit 73.
[53] The ROC's collocation PIDs focus on central office collocations.

as the following data shows:

- *Collocation Provisioning*: Between November 2001 and February 2002, Qwest met 100% of its collocation commitments throughout the region.[54]
- *Qwest's Blue Charts*: The Regional Blue Chart contains 8 metrics concerning collocation.[55] Of those, all with data meet the ROC benchmarks. The data unequivocally supports a finding that Qwest meets this aspect of checklist item 1.

2a. <u>Checklist Item 2 (Pre-Order Information)</u>

Pre-Order information allows the CLEC to interface with its potential end-user customers, and then to track the orders through to the provisioning process. Qwest has consistently provided each of these pre-order functions to CLECs in conformance with the ROC standards. South Dakota performance data between November 2001 and February 2002 shows:

- *Gateway Availability/Change Management/Pre-Order Response Times/Timeouts/Firm Order Confirmations*: For all of these performance measures, Qwest consistently met either the ROC's parity or benchmark standard in each of the last four months.[56] This performance is outstanding and no-one is complaining about Qwest's performance in this area. This data shows that Qwest is providing CLECs with non-discriminatory access to its systems.

[54] Qwest Exhibit 72 at MGW-PERF-2RG at 33-34.
[55] Qwest Exhibit 74.
[56] Qwest Exhibit 72 at MGW-PERF-1SD at 28-56.

- *Qwest's Blue Charts*: The South Dakota Blue Chart contains 57 metrics concerning pre-order information.[57] Of those, 52 were at parity in at least three of the last four months, and the remaining five had no data at all. The data unequivocally supports a finding that Qwest meets this aspect of checklist item 2.

2b. <u>Checklist Item 2 (Flow-Through)</u>

The flow-through PIDs measure the percentage of time that CLEC Local Service Requests (LSRs) are converted into service orders and submitted to Qwest's back-end systems without manual intervention. The flow-through PIDs measure the overall percentage of orders that flow-through for all orders (PO-2A) and for orders designed to flow through (PO-2B). AT&T complains about Qwest's overall flow-through rate. Qwest's uses its regional data on this aspect of performance because South Dakota performance is comparably low.

- *Flow-Through Performance*: Qwest's overall flow-through rate continues to be diagnostic, or for informational purposes only, primarily because the FCC does not consider flow-through to be a "conclusive measure of nondiscriminatory access to ordering functions." Instead, the FCC considers it to be "one indicium among many" of Qwest's OSS.[58] The FCC recognizes that CLECs impact heavily the flow-through rates that a BOC can achieve. Efficient CLECs achieve high flow-though rates while other, less efficient CLECs have lower flow-through rates.[59] Exhibit 1354-C makes it absolutely plain that flow through rates are highly CLEC dependent with rates often

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[57] Qwest Exhibit 73 at 4-6.

[58] *Verizon Massachusetts Order* at ¶77.

[59] *Id.* at ¶¶78, 80.

varying between CLECs one-hundred fold. For these reasons, the FCC has focused less on actual flow-through rates than on whether the BOC's OSS are capable of flowing orders through.[60] As a result, the ROC collaborative established benchmarks for PO-2B – LSRs eligible for flow-through – effective January 2002.[61] Qwest's performance demonstrates that its systems allow CLECs to flow through orders at rates better than the ROC standards.

- *Qwest's Blue Charts*: The Regional Blue Chart contains 12 metrics concerning flow-through.[62] Of those, all 12 were above the ROC determined benchmark.[63] The data unequivocally supports a finding that Qwest meets this aspect of checklist item 2.

2c. <u>Checklist Item 2 (Billing)</u>

Qwest tracks how timely and completely it bills for services it provides to CLECs. Qwest usually provided bills to CLECs in conformance with the ROC standards. When Qwest missed the standard, it usually meant that Qwest was making a correction to improve its wholesale bills. Qwest's South Dakota performance data between November 2001 and February 2002 shows:

- Qwest provided CLECs with timely access to usage records; such records were provided to CLECs in less than 2.58 days, substantially faster than the

[60] *Id.* at ¶¶77, 80.

[61] In establishing the PO-2B benchmarks, the ROC Steering Committee chose to adopt benchmarks that were about six months accelerated over Qwest's proposed schedule of phased benchmark increases. Because Qwest's propose schedule accommodated a planned phase-out of non-fatal LSR rejections, Qwest had not been excluding such LSRs from PO-2 as the PID permits. However, with the accelerated schedule, Qwest has sought and obtained agreement from ROC parties to begin excluding non-fatal LSR rejections from PO-2. Overall, this will result in higher flow through percentages.

[62] Qwest Exhibit 73 at 7.

[63] Qwest Exhibit 74.

retail average of more than fourteen days.[64] Qwest also provided switched access usage records to CLECs in a timely manner, over 97.5% of the time, above the 95% benchmark.[65] Qwest also delivered nearly all bills – over 99% – to CLECs within the requisite 10-day period for three of four months.[66]

- Qwest did, however, complete three substantial projects affecting billing in late 2001 or early 2002. Once those corrections were made, BI-3A (billing accuracy), BI-4A (billing completeness), and PO-7 (billing completion notifications) have been at or near parity in recent months.[67] Thus, the billing issues identified by AT&T have been rectified.

2d. Checklist Item 2 (UNE Combinations)

The FCC in its *UNE Remand Order* required BOCs such as Qwest to provision UNE-Combinations to CLECs in substantially the same time and manner as it provides equivalent service to its retail customers. Qwest has met the ROC's performance standards for provisioning, maintaining, and repairing UNE-P (both UNE-P-POTS AND UNE-P-Centrex) in South Dakota. Qwest's November 2001 through February 2002 data shows:

- *Installation of UNE-P:* Qwest installed 85% of all its UNE-P orders in South Dakota without a technician dispatch. For UNE-P orders in that category, Qwest timely provisioned over 98% of its UNE-P-POTS orders and 96% of UNE-P-Centrex orders in average intervals of about 2.7 days and 4.6 days

[64] Qwest Exhibit 72 at MGW-PERF-1SD at 66, BI-1A.
[65] *Id.* at 66, BI-1B.
[66] *Id.* at67, BI-2.
[67] *Id.* at 56 (PO-7), 68 (BI-3A) and 69 (BI-4A).

respectively.[68] Qwest installation performance was equally strong when a technician dispatch was required.

- *Repair of UNE-P*: Qwest's repair of UNE-P lines has been even more impressive. The overall trouble rate for UNE-P-POTS and UNE-P-Centrex lines has almost always been less than 1%.[69] When troubles occurred, Qwest resolved them efficiently. When no technician dispatch was required to clear the trouble, Qwest cleared 100% of UNE-P-POTS out of service reports within 24-hours and over 94% of such UNE-P-Centrex troubles within 24 hours.[70] The mean time to restore both types of UNE-P service was less than 7 hours when no dispatch was required.[71]

- *Qwest's Blue Chart*: AT&T attempts to complain about Qwest's performance in this area. A close inspection of the data, however, shows that Qwest's performance is strong. The South Dakota Blue Chart contains 60 metrics concerning UNE- Combinations.[72] Of those, 50 were at parity in at least three of the last four months and 2 had no activity at all. Of the 8 measures not dark blue, two were at parity in virtually every month [OP-3B, OP-4A], two were identified because there was no comparable retail data [OP-6A], one was UNE-P-Centrex trouble rate where, like interconnection trunks, the trouble rate (MR-8) is so low it could not have a competitive impact upon the CLECs, and one had identical four-month averages for CLECs and retail customers alike. The

[68] Qwest Exhibit 72 at MGW-PERF-1SD at 72, 83, OP-3C, OP-4C.
[69] *Id.* at 79 & 90, MR-8, MR-8*.
[70] *Id.* at 78 & 89, MR-3C.
[71] *Id.*, MR-6C.
[72] Qwest Exhibit 73 at 10.

data supports a finding that Qwest meets this aspect of checklist item 2.

3. **<u>Checklist Item 3 (Poles, Ducts, Conduits, Rights of Way)</u>**

There are no performance measures associated with Checklist Item 3.

4. **<u>Checklist Item 4 (Unbundled Loops)</u>**

An unbundled loop is the physical facility that runs from Qwest's central office to the end-user's premises. Qwest tracks both installation and repair performance data for unbundled loops for eight different types of loops: (1) analog (voice) loops; (2) 2-wire non-loaded (DSL) loops; (3) ISDN Capable loops; (4) ADSL-Compatible loops; (5) 4-wire non-loaded loops; (6) DS1 Capable loops; (7) DS3 Capable loops; and (8) line shared loops. Qwest has consistently met the ROC's performance standards for provisioning, maintaining, and repairing unbundled loops. Qwest's November 2001 through February 2002 data shows:

- *Unbundled Loop Provisioning*: Qwest has consistently met a high percentage of its unbundled loop commitments to CLECs in South Dakota and regionally. Over the last four months, Qwest met: over 95% of analog loops in an average of 5.5 days; 90% of 2-wire-non-loaded loops in an average of 5 days; 100% of DS-1 capable loops in an average of 10 days; and 100% of ISDN Capable loops in an average of 4 days.[73]. Similarly, in the rare circumstances when installations were late, the delays were always at parity with equivalent retail delays. Qwest also met 100% of coordinated cuts for both analog loops and all other loops.[74]
- *Unbundled Loop Repair*: Unbundled loop repair has been equally impressive. Trouble rates have been low. Qwest has cleared a high percentage of troubles

[73] Qwest Exhibit 72 at MGW-PERF-1SD at 96, 101, 111, & 119. OP-3. OP-4.

on time, and, the need for repairs have been infrequent.

- *Qwest's Blue Chart*: The South Dakota Blue Chart contains 40 metrics with data in the unbundled loops area.[75] Of the 40 metrics, 38 met the ROC determined performance objective in at least three of the last four months. This clearly supports checklist satisfaction. The Blue Chart outlines the basis for the few performance misses. The Regional Blue Chart is equally impressive. The data unequivocally supports a finding that Qwest meets checklist item 4.

5. Checklist Item 5 (Unbundled Dedicated Interoffice Transport)

Unbundled dedicated interoffice transport (UDIT) is the transport of calls between two central offices. Qwest tracks both installation and repair performance data for both DS1 and above DS-1 UDITs. Qwest has consistently met the ROC's performance standards for provisioning, maintaining, and repairing dedicated transport. Given low volumes in South Dakota, Qwest's regional data from November 2001 through February 2002 data shows:

- *UDIT Installation*. For both DS1 and DS3 UDITs in both Zone 1 and Zone 2, Qwest usually met 100% of its CLEC installation commitments, with an average interval of about nine days or less.[76]
- *UDIT Repairs*. The overall trouble rate for UDIT facilities were low -- less than 3.0%.[77] When troubles did occur, Qwest almost always cleared the trouble within the 4-hour objective.[78]

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[74] *Id.* at 130, OP-13A.
[75] Qwest Exhibit 73 at 11-13.
[76] Qwest Exhibit 72 at MGW-PERF-2RG at 188-189 & 195-196, OP-3 & OP-4
[77] *Id.* at 194 & 201, MR-8 & MR-8*.
[78] *Id.* at 192-93 & 199-200, MR-5.

- *Qwest's Blue Chart*: The Regional Blue Chart contains 32 metrics concerning dedicated transport.[79] Of those, 31 met the ROC's parity objective in at least three of the last four months, and one other – Trouble Rate for DS-3 UDITs – was noted in light blue. Just as with interconnection trunks, this is outstanding performance that does not harm the CLEC in the least. No CLEC has alleged harm either. The data unequivocally supports a finding that Qwest meets checklist item 5.

6. Checklist Item 6 (Unbundled Switching)

Unbundled switching is provided and measured as part of UNE-P. It is not ordered on a stand-alone basis. Thus, there are no performance measures specific to Checklist Item 6.

7. Checklist Item 7 (911, Directory Assistance, Operator Services)

Checklist Item 7 concerns three different subjects: (1) 911/E911, (2) Directory Assistance, and (3) Operator Services. Most of the measures associated with this checklist item are database updates, and therefore are parity by design. This means that CLECs obtain non-discriminatory access by definition. Qwest has consistently met the ROC's performance objectives for this checklist item. Qwest's November 2001 through February 2002 data shows:

- *911/E911*: 911 performance is measured in two ways. First, Qwest measures the amount of time to update the 911 database. This measure is "parity by design."[80] Second, Qwest installs and repairs 911 trunks. In South Dakota, there was only one 911 trunk ordered in the last four months. Regionally,

[79] Qwest Exhibit 73 at 14.

however, Qwest's performance has been consistently strong with 100% commitments met in virtually every month.[81] On the repair side, throughout the region Qwest repaired virtually every trouble on a 911 trunk within the 4-hour objective.[82]

- *DA/OS*: As to operator services and directory assistance, Qwest measures the "speed of answer," which measures the average time required for Qwest's operator and directory assistance personnel to answer calls. These PIDs are also "parity by design."[83]
- *Qwest's Blue Chart*: The Regional Blue Chart contains 16 metrics concerning checklist item 7.[84] Of those, 15 were at parity in at least three of the last four months. In addition, there are 3 party-by-design measures. The only performance miss was trouble rate for 911, where the average trouble rate was always 0.6% or less. Just as with interconnection trunks, this is outstanding performance that does not cause competitive harm to CLECs. No CLEC has alleged harm either. The data unequivocally supports a finding that Qwest meets checklist item 7.

8. **Checklist Item 8 (White Page Listings)**

The only PIDs for white pages directory listings are "parity by design" because Qwest processes CLEC end user listings with the same or similar systems, databases, methods, procedures, and personnel used by Qwest for its own retail end user listings. Between

[80] Qwest Exhibit 72 at MGW-PERF-1SD at 198, DB-1A.
[81] Qwest Exhibit 72 at MGW-PERF-2RG at 207-08, OP-3.
[82] *Id.* at 211-12, MR-5.
[83] Qwest Exhibit 72 at MGW-PERF-1SD at 160, DA-1, OS-1.
[84] Qwest Exhibit 74 at 15.

November 2001 and February 2002, Qwest completed electronically processed updates to the directory listings database in an average of 0.09 seconds or less, with an accuracy rate of over 93.5%.[85] No CLEC has challenged this data. The data unequivocally supports a finding that Qwest meets checklist item 8.

9. Checklist Item 9 (Number Administration)

Qwest provides nondiscriminatory access to telephone numbers for assignment by CLECs to their customers. Between November 2001 and February 2002, Qwest loaded and tested 100% of CLEC NXX codes prior to the LERG effective date. This was true both in South Dakota and regionally.[86]. No CLEC has challenged this data. The data unequivocally supports a finding that Qwest meets checklist item 9.

10. Checklist Item 10 (Unbundled Signaling)

Qwest offers all CLECs access to, and routing over its call-related databases and associated signaling in the same manner that Qwest accesses those services itself. Qwest uses a queuing and routing system that treats all carriers alike. The sole performance measurement for this checklist item evaluates the time to update the line identification database ("LIDB"). This is also a "parity by design" measurement. No CLEC has challenged this data. The data unequivocally supports a finding that Qwest meets checklist item 10.

11. Checklist Item 11 (Number Portability)

Number portability allows customers to change carriers without changing telephone numbers. To provision number portability, Qwest must pre-set triggers for CLECs on a

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[85] Qwest Exhibit 72 at MGW-PERF-1SD at 161, DB-1C-1, DB-2C-1.

[86] Qwest Exhibit 72 at MGW-PERF-1SD at 163, NP-1A; MGW-PERF-2RG at 217, NP-1A.

timely basis. Qwest has consistently met the ROC's performance standards for number portability in South Dakota. Qwest's November 2001 through February 2002 data shows:

- *Number Porting Data:* Qwest set over 100% of LNP triggers prior to the scheduled start time for coordinated loop cutovers, exceeding the ROC's 95% benchmark. During the same period, Qwest set over 98% of LSA triggers prior to the scheduled start time for orders not requiring loop coordination. This again exceeded the ROC's 95% benchmark.[87]

- *South Dakota Blue Chart:* The South Dakota Blue Chart contains 5 metrics concerning number portability.[88] Of those, all 4 met the ROC determined performance objective in each of the last four months. The other measure had no data at all. This data unequivocally supports a finding that Qwest meets checklist item 11.

12. **<u>Checklist Item 12 (Dialing Parity)</u>**

There are no performance measures associated with Checklist Item 12.

13. **<u>Checklist Item 13 (Reciprocal Compensation)</u>**

Reciprocal compensation is made between carriers for terminating local calls on behalf of the other. Qwest has usually met the ROC's performance standards for number portability in South Dakota. Qwest's November 2001 through February 2002 data shows:

- *Reciprocal Compensation:* Qwest's bills for reciprocal compensation were 100% complete in each of the last four months. This verifies that Qwest's

[87] Qwest Exhibit 72 at MGW-PERF-1SD at 165, OP-8B & OP-8C.
[88] Qwest Exhibit 73 at 17.

corrective action has cured the issue. The data unequivocally supports a finding that Qwest meets checklist item 13.[89]

14. **Checklist Item 14 (Resale)**

Qwest provides resold services to CLECs in a nondiscriminatory manner. The PIDs for resale measure performance for twelve products: (1) residential lines, (2) business lines, (3) Centrex, (4) Centrex 21, (5) PBX, (6) Basic ISDN, (7) Qwest DSL, (8) Primary ISDN, (9) DS0, (10) DS1, (11) DS3 and higher, and (12) Frame Relay. The standard for resale performance is parity with retail service. Qwest is consistently achieving parity in the vast percentage of resale performance measurements in South Dakota. Given the small volumes for many of these services, Qwest will focus its discussion on residential POTS, business POTS, Centrex 21 services. Qwest's November 2001 through February 2002 data shows:

- *Resale Provisioning*: Qwest provisions a vast percentage of all resold orders without requiring a technician dispatch. For residential POTS, Qwest met over 98% of its CLEC installation commitments in an overall average installation interval of 2.5 days.[90]. For business POTS, Qwest usually met 100% of its CLEC installation commitments in an average installation interval of 2.64 days or less.[91] For Centrex 21, Qwest usually met 100% of its CLEC installation commitments in an average interval of 4 days.[92] When provisioning of these resold services required a technician dispatch, Qwest also performed well.
- *Resale Repair*. The trouble rate (MR-8) for each of these four has been

[89] Qwest Exhibit 72 at MGW-PERF-1SD at 167, BI-4B.
[90] Qwest Exhibit 72 at MGW-PERF-1SD at 170, OP-3C, OP-4C.
[91] *Id.* at 181, OP-3C, OP-4C.

extremely -- always less than 1.1% -- small once "no trouble found" reports are excluded. For resold residential POTS service, Qwest cleared an average of over 90% of all out-of-service situations in 24-hours, and 95% of all troubles within 48 hours.[93] For resold business POTS service, Qwest almost always cleared 100% of all out-of-service situations in 24-hours, and 100% of all troubles within 48-hours.[94] For resold Centrex 21 service, Qwest almost always cleared 100% of all out-of-service situations in 24 hours, and 100% of all troubles were cleared in 48-hours.[95] Finally, Qwest had only one trouble report for resold DSL service between November 2001 and February 2002, which was cleared in two minutes.[96]

- *Qwest's Blue Chart*: The South Dakota Blue Chart contains 87 metrics concerning resale.[97] Of those, 75 met the ROC performance standard in at least three of the last four months, 4 had no activity at all, and only 8 had performance that caused a lighter blue on the chart. It is worthy of note that two of these measurers were routinely at parity and three others would have been dark blue but for the misreported trouble reports by the CLEC. This clearly supports checklist satisfaction. The Blue Chart outlines the basis for the few performance misses. The CLECs did not complain about Qwest's performance in this area. The data unequivocally supports a finding that Qwest meets checklist item 14.

[92] *Id.* at 202-03, OP-3C, OP-4C.
[93] *Id.* at 173-177, MR-3 & MR-4.
[94] *Id.* at 184-188, MR-3 & MR-4.
[95] *Id.* at 206-210, MR-3 & MR-4.
[96] *Id.* at 290, MR-3D, MR-6D.
[97] Qwest Exhibit 73 at 19-22.

V. CONCLUSION

Liberty Consulting has repeatedly found Qwest's performance data to be "accurate and reliable." The Commission can therefore rely upon the performance data Qwest presented at the hearing. The data shows consistent strong performance across all aspects of the 14-point checklist. Qwest respectfully requests that the Commission find Qwest in compliance with all aspects of the 271 checklist contingent upon passage of the ROC OSS test.

Dated this 21st day of May, 2002.

RESPECTFULLY SUBMITTED,

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