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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into
U S WEST COMMUNICATIONS, INC.'s
Compliance with Section 271 of the
Telecommunications Act of 1996.

Docket No. UT-003022 and UT-003040

POST-WORKSHOP BRIEF OF COVAD
COMMUNICATIONS COMPANY ON
DISPUTED LOOPS, LINE SPLITTING,
EMERGING SERVICES AND PUBLIC
INTEREST ISSUES

Covad Communications Company ("Covad"), respectfully submits this post-workshop brief on the disputed loops, line splitting, emerging services and public interest issues. Because of the scope of the issues contained in this brief, each category of issues will be addressed *seriatim* in separate, but complete, sections for each category of issues. Notwithstanding this organizational structure, Covad provides below a general preliminary statement regarding the positions Qwest Corporation ("Qwest") has taken during the course of the Workshop 4 and in its Statement of Generally Available Terms and Conditions (the "SGAT"), relating thereto.

I. PRELIMINARY STATEMENT

At the heart of Qwest's objections to the requests made by CLECs during the Workshop 4 collaborative is the fundamental—albeit misguided—belief that the terms and conditions contained in the SGAT are "the end all, be all," of its *prima facie* checklist compliance case. Nothing could be further from the truth. This Commission cannot forward to the Federal Communications Commission (the "FCC") an endorsement of Qwest's application for Section 271 relief unless and until Qwest demonstrates that it satisfies (both on paper and in practice) the

1 competitive checklist¹ and that the Washington local services market is fully and irreversibly open²
2 to competition.

3 The plain objective of CLECs during Workshop 4 was to obtain terms and conditions
4 that will permit meaningful and sustained competitive entry in the State of Washington. CLECs,
5 such as Covad, seek only the ability to compete on fair and equal terms with Qwest and to
6 legitimately obtain those customers that desire a provider other than Qwest.

7 This Commission is fully empowered to take the steps necessary to open
8 Washington's local services market to competition. Under both the Telecommunications Act of
9 1996 (the "Act")³ and FCC rules⁴, the Commission is authorized to impose additional unbundling
10 obligations, as well as terms and conditions relating to product and service offerings to satisfy the
11 underlying objectives of the Act. Thus, whether imposed in connection with a Section 271 review or
12 some other proceeding, that authority—and the FCC's clear expectation that states will use that
13 authority where appropriate—provides this Commission with the legal basis upon which to ground
14 its rulings.

15 Covad urges the Commission to act now, and to take the steps necessary to ensure a
16 competitive local market in the State of Washington. Particularly in light of the turmoil in the CLEC
17 industry, a "stand back and wait" approach to the resolution of difficult issues is neither warranted
18 nor prudent. Thus, Covad recommends that the Commission resolve the impasse issues set forth
19 below in its favor.

20 ¹ See *In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone*
21 *Co., And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long*
22 *Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In Region,*
InterLATA Services in Texas, Mem. Op. and Order, CC Docket No. 00-65, ¶52 (Jun. 30, 2000)
23 ("SBC Texas 271 Order").

24 ² See *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271*
25 *of the Communications Act to Provide In-Region, InterLATA Service in the State of New York,*
26 Mem. Op. and Order, CC Docket No. 99-295, FCC 99-404 (Dec. 22, 1999), ¶423 ("BANY 271
Order").

³ 47 U.S.C § 251(d)(3).

⁴ 47 C.F.R § 51.317(d).

1 **II. DISPUTED UNBUNDLED LOOP ISSUES**

2 **A. INTRODUCTION**

3 Throughout the workshops on loops, Qwest assiduously refused to amend its SGAT
4 and its commercial practices to take pro-competitive, pro-entry positions in several key areas.
5 Indeed, even after a thorough development of the record on these issues, Qwest continued to provide
6 loops in quantities sufficient to satisfy barely 65% of Covad's demand. Then, after thwarting
7 meaningful market entry by Covad by denying it access to the basic facilities to provide xDSL
8 services to Washington residents, Qwest continued improperly and unlawfully to:

- 9 (1) refuse to build UNEs and facilities within its Washington service area, where
10 facilities are at exhaust, or even under the same terms and conditions for which it
11 would build for itself, its affiliates, its end user customers or other parties;
- 12 (2) require CLECs to pay for conditioning for loops under 18 kfeet or where
13 Qwest's own poor provisioning performance impairs or prevents the delivery of
14 xDSL service to a CLEC end user customer;
- 15 (3) fail and refuse to provide CLECs with accurate and reliable loop makeup
16 information;
- 17 (4) refuse to provide CLECs with direct access to LFACs;
- 18 (5) deliberately fail to perform the necessary MLT or cooperative testing (for
19 which CLECs pay) to ensure the delivery of a good loop;
- 20 (6) provide inadequate address validation procedures;
- 21 (7) fail to take the steps necessary to prevent its technicians from behaving in an
22 anti-competitive manner;
- 23 (8) impose inappropriate spectrum management terms and conditions on CLECs;
- 24 (9) elongate the interval for several types of loops as well as the repair interval
25 and the meantime to restore intervals; and
- 26 (10) refuse to redesignate interoffice facilities where distribution facilities are at
exhaust.

27 Qwest's SGAT, and its attendant commercial conduct, discloses its intent to maintain
28 its monopoly stranglehold over the local loops market in Washington State. The timely and adequate
29 provisioning of loops throughout Qwest's territory is one of the most important issues facing the

1 competitive, emerging services industry. Yet, despite the fact that the FCC ordered incumbent LECs
2 to provide CLECs with unbundled access to CLECs to loops, Qwest continues to impede the
3 deployment of Covad's business by making it difficult, if not impossible, to obtain loops in sufficient
4 quantities and quality to satisfy Covad's reasonable and reasonably foreseeable demand. It is
5 important that this Commission (and other state commissions in Qwest's territory) nip this
6 competitive disparity in the bud. Until Qwest resolves these deficiencies, this Commission should
7 not approve Qwest's § 271 application for a relief.

8 **B. LEGAL AND STATUTORY BACKGROUND FOR UNBUNDLED LOOPS**

9 A necessary prerequisite to the approval of Qwest's application to provide inter-
10 LATA long distance service is proof that Qwest has "fully implemented" the § 271 competitive
11 checklist, thereby presumptively opening its local telecommunications markets to competition.⁵
12 Qwest thus must provide "actual evidence demonstrating its present compliance with the statutory
13 conditions for entry,"⁶ which require, among other things, that Qwest provide nondiscriminatory
14 access to unbundled network elements,⁷ such as unbundled loops.

15 This Commission is charged with the critical function of determining to a reasonable
16 degree of certainty that Washington's local markets are open to competition.⁸ Because the FCC
17 relies heavily upon a state's rigorous factual investigation, review and analysis of Qwest's
18 compliance, or not, with a particular checklist item, this Commission's review of the record before it
19 may not be undertaken lightly. To the contrary, before approving Qwest's request for §271 relief,
20 this Commission must ensure that Qwest has provided sufficient evidence to prove, by a
21 preponderance of the evidence, that it has fully implemented⁹ Checklist Item 4. In this regard, the

22 ⁵ *In the Matter of the Implementation of the Local Competition Provisions in the*
23 *Telecommunications Act of 1996, First Report and Order*, CC Docket Nos. 96-978 & 95-185 (Rel.
24 Aug. 8, 1996), ¶ 3 ("*Local Competition Order*").

24 ⁶ *BANY 271 Order*, ¶ 37.

25 ⁷ 47 U.S.C. § 271(a)(2)(B)(ii).

25 ⁸ 47 U.S.C. § 271(d)(2)(B).

26 ⁹ *BANY 271 Order*, ¶ 44.

1 most probative evidence of checklist item satisfaction, or not, is evidence of Qwest's commercial
2 performance in provisioning loops, as well as performance measures providing evidence of quality
3 and timeliness of the performance under consideration.

4 The ultimate burden of proof on any and all checklist items lies with Qwest, even if
5 "no party files comments challenging compliance with a particular requirement."¹⁰ Because, as set
6 forth more fully below, Qwest has failed to prove that it has satisfied Checklist Item 4, this
7 Commission may not approve Qwest's § 271 application at this time.

8 **C. ARGUMENT**

9 1. Qwest Has Failed to Provide Any Evidence that It Is Providing Loops In Sufficient
10 Quantity Consistent with CLEC Demand.

11 Qwest must provide to CLECs, including Covad, "[l]ocal loop transmission from the
12 central office to the customer's premises, unbundled from local switching or other services."¹¹ The
13 FCC has defined the loop as "a transmission facility between a distribution frame, or its equivalent,
14 in an incumbent LEC central office, and the network interface device at the customer premises."¹²
15 Subsumed within the definition of a "loop" are "two-wire and four-wire loops that are conditioned to
16 transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level
17 signals."¹³ To satisfy its obligation under §271, therefore, Qwest must prove not only that it has a
18 concrete and specific legal obligation to furnish xDSL capable loops, but also that it is *providing*
19 *these loops to competitors consistent with their demand and at an acceptable level of quality.*¹⁴

20 _____
21 ¹⁰ *Id.*, ¶ 47.

22 ¹¹ 47 U.S.C. § 271(c)(2)(B)(iv).

23 ¹² *BANY 271 Order*, ¶ 268; *Local Competition Order*, 11 FCC Rcd at 15691.

24 ¹³ *Local Competition Order*, ¶ 380; *Implementation of the Local Competition Provisions of the*
25 *Telecommunications Act of 1996*, Mem. Op. And Order, CC Docket No. 96-98, FCC 99-238
26 (Rel. Nov. 5, 1999) ("*UNE Remand Order*"), ¶ 166-167.

¹⁴ *BANY 271 Order*, ¶ 269; *Application of BellSouth Corporation Pursuant to Section 271 of the*
Communications Act of 1934, As Amended, To Provide In-Region InterLATA Services in
Louisiana, Mem. Op. And Order, CC Docket No. 98-121, FCC 98-271, (Oct. 13, 1998), ¶ 54
 ("*BellSouth Second Louisiana Order*").

1 Coupled with these obligations is the further requirement that Qwest condition existing loop
2 facilities to permit CLECs such as Covad to provide services not currently provided and/or not
3 capable of being provided over a particular loop facility.¹⁵

4 The central thrust of Qwest's claim that it has satisfied its obligations under §271 is
5 the evidence it proffered regarding the volume of loops provided to CLECs in Washington.
6 Significantly, however, Qwest fails to provide any context that would permit this Commission to
7 evaluate intelligently that claim.¹⁶ Indeed, Qwest provides no information regarding whether the
8 volume of loops provisioned for CLECs is significant in comparison to the total volume of
9 unbundled loops in Washington, or how many loops were requested to be provisioned but which
10 Qwest either could not or would not provision due to a lack of, or incompatible, facilities.

11 Tellingly, Qwest ignores the difference between unbundled loop types, distinguishing
12 only between analog loops and all other unbundled loops (i.e., DS1, DS3, xDSL, etc.). Qwest thus
13 provided no evidence whatsoever of the volume of xDSL loops that have been provisioned in the
14 State of Washington. Moreover, to the extent that Qwest does rely only on the volume of loops
15 provisioned to support its checklist case, the "volume" argument is highly suspect when looking at
16 the category of "other" loops such as xDSL. As page 3 of Exhibit 938 shows, the volume of loops
17 "other" than analog loops (thus presumably including xDSL loops) has dropped steadily since
18 January 2001. Equally problematic for Qwest in light of its failure to provide this information is the
19 compelling evidence provided by Covad during the course of the workshops on Checklist Item 4. As
20 Covad pointed out in Exhibit 965-TC,¹⁷ in Washington alone, 37% of all of Covad's Washington
21 orders were placed in held status and, of those held orders, 26% were cancelled. Given that the
22 demand for DSL has enjoyed extraordinary growth in that same time period, *see Section VI*, below, it
23 is far from clear whether Qwest is provisioning xDSL loops consistent with competitors' demand.

24 ¹⁵ *BANY 271 Order*, ¶ 271.

25 ¹⁶ *See, e.g.*, Exhibit 885-T(Direct Testimony of Jean Liston, May 16, 2001); Exhibit 889 (JML-5)
and 938.

26 ¹⁷ *See* Exhibit 965-T(Direct Testimony of Minda Cutcher), pp. 10-11.

1 Because the key inquiry to Checklist Item 4 compliance is not just a question of
2 quantity, but whether that quantity is consistent with CLEC demand and of an acceptable level of
3 quality¹⁸, this evidence, or more correctly, the lack thereof, demonstrates that Qwest has failed to
4 satisfy Checklist Item 4. Qwest's application for § 271 relief thus cannot be granted at this time.

5 2. Qwest's New Build and Held Order Policies (WA Loop 1 and 8); SGAT §§ 9.1.2).

6 a. Qwest Is Under an Obligation to Build Facilities for CLECs.

7 In Section 9.1.2.1, Qwest sets forth its limited build policy—namely, that "if facilities
8 are not available, Qwest will build facilities dedicated to an end-user customer if Qwest would be
9 legally obligated to build such facilities to meet its Provider of Last Resort (POLR) obligation to
10 provide basic local service or its Eligible Telecommunications Carrier (ETC) obligation. . . ." Stated
11 in more pragmatic terms, Qwest commits to providing unbundled loops only where facilities are
12 available and will not build any new facilities to meet such demand unless required by its POLR or
13 ECT obligations. Qwest's argument to the contrary notwithstanding, its "build policy" falls far wide
14 of its obligations under controlling law.

15 The FCC has made clear that BOCs must construct facilities for CLECs under the
16 same terms and conditions as it would build for itself:

17 The duty to provide unbundled network elements on "terms and conditions that are
18 just, reasonable and nondiscriminatory" means, at a minimum, that whatever those
19 terms and conditions are, they must be offered equally to all requesting carriers, and
where applicable, they must *be equal to the terms and conditions under which the
incumbent LEC provisions such elements to itself.*¹⁹

20 Qwest ignores this plain requirement, agreeing instead only to build facilities for CLECs under the
21 extraordinarily limited circumstances enumerated in Section 9.1.2.1. Indeed, Qwest tacitly
22 acknowledged that it refuses to build under the same terms and conditions for wholesale and retail
23 customers when it failed to respond to a direct question on this point, thus necessarily violating its
24

25 ¹⁸BANY 271 Order, ¶ 269; BellSouth Second Louisiana Order, ¶ 54, SBC Texas 271 Order, ¶
247.

26 ¹⁹ Local Competition Order, ¶ 315.

1 parity obligation imposed under Section 251 of the Act.²⁰ Because Qwest's build policy violates
2 both the plain language of the Act as well as the FCC's orders implementing the Act, Section 9.1.2.1
3 (and accompanying sections) must be revised to require that Qwest construct facilities under the
4 same terms, conditions and circumstances for which it would build facilities for itself, its affiliates,
5 its retail end user customers and all other parties.

6 Qwest relies on the *Local Competition Order* in support of its argument that it is not
7 required to construct facilities for CLECs.²¹ Yet, Qwest conveniently overlooks two significant
8 points about the FCC's conclusions on the obligation to build as contained in that *Order*. First, the
9 prohibition on imposing an obligation to build facilities was strictly limited to interoffice *transport*
10 facilities specifically, and not unbundled loops, more generally.²² Second, the FCC clearly limited
11 its ruling to the category of small, rural LECs:

12 Rural Telephone Coalition contends that incumbent LECs should not be required to
13 construct new facilities to accommodate new entrants. We have considered the
14 economic impact of our rules in this section on small incumbent LECs. In this
15 section, for example, we expressly limit the provision of unbundled *interoffice*
facilities to existing incumbent LEC facilities. We also note that section 251(f) [rural
telephone companies] of the 1996 Act provide relief for certain small LECs from our
regulations under Section 251.²³

16 Qwest's reliance on the 8th Circuit's *Iowa Utilities Board* ruling in support of its
17 argument that it is under no obligation to construct facilities is misplaced.²⁴ As Qwest itself notes,
18 the reference to the existing network comes into play only where CLECs are requesting superior
19 service. Here, Covad is not requesting *superior* service, but more simply parity treatment where
20 facilities are constructed. Thus, the 8th Circuit's holding is inapplicable to the position Covad
21 advances here.

22 ²⁰ 47 U.S.C. § 251(c)(3) (Qwest must provide access to loops on "rates, terms and conditions that
23 are just reasonable and *nondiscriminatory*") (emphasis added).

24 ²¹ *Local Competition Order*, ¶¶ 443, 451.

25 ²² *Id.*, ¶ 451.

26 ²³ *Id.*

²⁴ See *Iowa Utils. Bd. V. FCC*, 120 F.3d 753, 812 (8th Cir. 1997), *aff'd in part, rev'd on other grounds, sub nom, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

1 More critically, as Judge Rendahl noted in her recommendations to the Commission
2 on this same issue in the UNE context, Qwest improperly limits its analysis of the "existing network"
3 just to existing facilities, rather than on the area that the network serves:

4 the incumbent LEC's "existing" network includes all points that it currently serves
5 via interoffice facilities, and it is not required to extent its network to new points,
6 based on competitors' requests. However, *the incumbent LEC is still required to*
7 *provide access to UNEs within its existing network even if it must construct*
8 *additional capacity within its existing network to make UNEs available to*
9 *competitors. Qwest implies that the term "existing network" only applies to actual*
10 *facilities that are in place, when in fact existing network applies to the "area" (end*
11 *offices, serving wire centers, tandem switches, interexchange carrier points of*
12 *presence, etc.) that Qwest's interoffice facilities serve. This same concept applies on*
13 *the loop side of Qwest's network where Qwest is obligated to construct additional*
14 *loops to reach customers' premises whenever local facilities have reached exhaust.*²⁷

15 Judge Rendahl thus properly concluded that Qwest must modify section 9.1.2 of the SGAT to
16 include that (1) Qwest will provide access to UNEs to any location currently served by Qwest's
17 network; (2) Qwest must construct new facilities to any location currently served by Qwest when
18 similar facilities to those locations have exhausted; and (3) where locations are outside of the area
19 currently served by Qwest's network, Qwest must construct facilities under the same terms and
20 conditions it would construct facilities for its own end user customers.²⁸

21 There is no principled reason to reach a different result in the context of Workshop 4
22 and Checklist Item 4. Thus, as was previously ordered in the UNE context, SGAT 9.1.2 must be
23 modified consistent with Judge Rendahl's prior conclusions.

24 b. Qwest's Held Order Policy Improperly Improves Its PID Performance
25 Without Any Improvement In Its Actual Performance. (Washington
26 Loop 8(a))

27 In May 2001, Qwest implemented a "new build policy," in which it states that it will
28 reject all orders where there are no facilities and Qwest has no plans to build any facilities to fill that
29 order.²⁵ As set forth more fully above, this "new build policy" simply is not an adequate response.

30 ²⁷ Thirteenth Supplemental Order, Initial Order (Workshop Three): Checklist Item No. 2,5, and
31 6, Docket Nos. UT-003022 and UT-003040, July 2001, ¶ 79.

32 ²⁸ *Id.*, ¶ 80

33 ²⁵ See Exhibit 922 (CLEC Notification of Network Build Policy, JML-37).

1 Qwest should not be permitted to stymie competition by refusing to build facilities within its existing
2 network to meet reasonable and anticipated CLEC demand.

3 Moreover, Qwest's new build policy has the negative effect of allowing Qwest to
4 "self-improve" its performance under the PIDs without ever actually improving its performance.
5 Under the policy, Qwest will reject orders if no facilities will be or are anticipated to be available.
6 Qwest thus automatically caps the total number of delay days on any given order.²⁶ In so doing,
7 Qwest circumvents its wholesale service performance obligations under the QPAP and, more
8 specifically, PID measures OP-6B ("measures the average number of business days that service is
9 delayed beyond the original due date provided to the customer for *facility reasons attributed to*
10 *Qwest*") (emphasis added)²⁷, and OP-15B ("reports the number of pending orders measured in the
11 numerator of OP-15A that were delayed for *Qwest facility reasons*") simply by rejecting all orders
12 that would go into held status due to a lack of facilities. Because this Commission may not find that
13 Qwest has satisfied Checklist Item 4 unless it is providing unbundled loops consistent with CLEC
14 demand²⁸, Qwest may not be permitted to demonstrate checklist compliance simply by excluding
15 orders that show it is not. Qwest thus should be ordered to revise its held order policy in order to
16 permit this Commission to accurately review and determine whether Qwest is providing unbundled
17 loops consistent with CLEC demand.

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21 ²⁶ Qwest appears to contend that any CLEC that failed to object to this policy in the CICMP
22 forum somehow precludes the objections raised in these Section 271 proceedings. As numerous
23 CLECs discussed during the prehearing conference on CICMP, because the CLEC participants
24 in CICMP typically are operational employees that review these policies for day to day impact
25 rather than whether it impacts Qwest compliance with the competitive checklist, a failure to
26 object to anything in CICMP is immaterial to whether Qwest passes Section 271 muster.

²⁷ Service Performance Indicator Definitions (PID), ROC 271 Working PID Version 3.0, May
31, 2001, attached hereto as Exhibit 1. Note that some excerpts from this document were
attached to Jean Liston's Direct Testimony as Exhibit 912.

²⁸ *BANY 271 Order*, ¶ 269; *BellSouth Second Louisiana Order*, ¶ 54; *SBC Texas 271 Order* ¶ 247.

1 3. Qwest Must Refund Conditioning Charges. (WA Loop 2).

2 a. Qwest Must Refund Conditioning Charges Where the Loop is Less
3 than 18K feet. (WA Loop 2(a)).

4 Covad concurs in WCOM's Post-Workshop Brief on WA Loop 2(a).

5 b. Qwest Must Refund Conditioning Charges Where Qwest's Conduct.
6 (WA Loop 2 (b)).

7 Covad concurs in AT&T's Post-Workshop Brief on WA Loop 2(b).

8 4. Qwest's Raw Loop Data Tool Fails to Provide CLECs With Meaningful Loop
9 Makeup Information. The Only Way to Remedy the Inadequacy of the Raw Loop
10 Data Tool Is To Provide Direct Access to LFACs. (Loops 3 and 5).

11 Historically, "because characteristics of a loop, such as its length and the presence of
12 various impediments to digital transmission, can hinder certain advanced services technologies,
13 carriers often seek to 'pre-qualify' a loop by accessing basic loop make-up information that will assist
14 carriers in ascertaining whether the loop, either with or without the removal of the impediments, can
15 support a particular advanced service."²⁹ Recognizing the critical role that "pre-qualification" thus
16 plays in facilitating CLEC entry into an incumbent's local markets, the FCC requires, as part of
17 ILEC's *prima facie* case, that an incumbent LEC provide CLECs with meaningful loop makeup
18 information:

19 Whether a prospective customer can be provided a particular advanced service often
20 depends upon the carrier having access to detailed information about available loops,
21 including the actual loop length and the presence of bridged taps, load coils, and
22 digital loop carrier equipment. As the Commission previously has explained, a
23 BOC's duty to provide nondiscriminatory access to OSS extends beyond the interface
24 components to encompass all of the processes and databases used by the BOC in
25 providing services to itself and its customers ... If new entrants are to have a
26 meaningful opportunity to compete, they must be able to determine during the pre-
 ordering process as quickly and efficiently as can the incumbent, whether or not a
 loop is capable of supporting xDSL-based services.³⁰

29 See *BANY 271 Order*, ¶ 140.

30 *BANY 271 Order*, ¶ 141.

1 Despite this unambiguous requirement, Qwest's RLDT fails to provide CLECs with any reliable and
2 accurate method by which to "quickly and efficiently" determine whether a particular loop is capable
3 of supporting xDSL service.

4 During the course of the Colorado FOC trial, Covad undertook a contemporaneous
5 analysis of the accuracy of the RLDT. Even a cursory review of some of the orders submitted by
6 Covad during the course of the FOC trial³¹ demonstrates that Qwest's RLDT suffers from numerous
7 and severe deficiencies:

- 8 (1) Covad was unable to pre-qualify 70 orders because the RLDT either did not
9 recognize or contain information for the end user's telephone number, or the RLDT
10 did not recognize a direct match even after that address had been validated against
11 Qwest's address validation data base;
- 12 (2) no distance was available for 14 orders;
- 13 (3) no MLT distance was provided on 27 orders;
- 14 (4) for 19 line shared orders, placed on Qwest's "jeopardy list" on May 7 and
15 May 14, 2001, the RLDT indicated no bridge tap or load coil was present when, in
16 fact, bridged tap and load coils were on the line³²; and
- 17 (5) 35% of the orders submitted resulted "in a no working telephone number
18 response" that materially impeded CLECs' ability to use the RLDT.³³

19 This itemization, standing alone, demonstrates that Qwest's RLDT fails to provide
20 CLECs with meaningful loop makeup information. Yet, this itemization does not even begin to
21 address the "false positive" scenario in which the information provided by the RLDT shows that an
22 order can be successfully placed and closed, and yet it cannot. In this regard, Covad provided Qwest
23 seventeen examples in which there was a non-loaded loop of 12,000 feet or less and, yet, an ADSL
24 order was cancelled.³⁴ Nor does this itemization include the problem of "false negatives", or the

25 ³¹ See Exhibit 2, attached hereto. This Exhibit was provided by Covad to Qwest via email on
26 June 7, 2001.

³² See Exhibit 3, attached hereto. This Exhibit was provided by Covad to Qwest via facsimile on
June 12, 2001.

³³ Exhibit 926-T (Rebuttal Testimony of Jean Liston), dated June 21, 2001, p. 17.

³⁴ See Exhibit 3.

1 situation, of which Covad provided Qwest several examples, where a CLEC can successfully close
2 an order even though the RLDT indicates otherwise (*e.g.*, ADSL orders closed where pair gain
3 purportedly on the line).³⁵ Finally, this itemization does not include those situations in which Covad
4 cannot pre-qualify at all a new Qwest voice customer who seeks data service from Covad until up to
5 thirty days after that customer has begun receiving voice service from Qwest.³⁶

6 Even as Qwest attempted to "nit pick" Covad's findings, challenging only eighteen
7 examples provided, Covad continued to unearth additional problems with the RLDT. More
8 specifically, Covad determined that, depending on the validation method used (*i.e.*, telephone
9 number versus address), more or less information is provided. For example, on one particular order,
10 the RLDT provided loop makeup information when the telephone number was used, but provided no
11 information when the validated address was used.³⁷ Even more egregiously, on yet another order,
12 the validated telephone number pulled up the wrong address, while the validated address indicated
13 that there was no working telephone number on the premises.³⁸ Equally problematic are orders in
14 which one address pulls up two telephone lines with the identical telephone number—an obvious
15 impossibility—but with *different* loop makeup information.³⁹

16 Moreover, there is no consistency within Qwest's RLDT. Where pair gain is on the
17 line for one PON, no MLT distance and no segment loop length are provided. Yet, on another PON,
18 even though pair gain is on the loop, the segment loop length is included.⁴⁰ Similarly, in one screen
19 shot for one particular loop segment, Qwest's RLDT suggests that the loop is non-loaded (as
20

21 ³⁵ *Id.*

22 ³⁶ See WA Loop 21 and Exhibit 926-T; see also AZ IWO 1119, dated May 16, 2001, attached
23 hereto as Exhibit 4.

24 ³⁷ See Exhibit 5, Tab A, attached hereto. Although Covad made this exhibit available to Qwest
25 on June 13, 2001, Qwest did not request a copy until July 6, 2001.

26 ³⁸ *Id.*, Tab B.

³⁹ *Id.*, Tab C.

⁴⁰ *Id.*, Tab D.

1 designated by the "nl" indicator in the make up description) even though load coils also are
2 apparently present on the loop.⁴¹

3 Notably, Qwest itself has recognized that the RLDT is unreliable. At the
4 commencement of the FOC trial, Qwest made clear that CLECs were required to use the RLDT prior
5 to placing an order. As the trial progressed, Covad noted that Ms. Liston no longer included in her
6 description of the FOC trial the requirement that CLECs utilize the RLDT. The explanation for Ms.
7 Liston's curious silence became evident when she was compelled to describe, for example, orders in
8 which Qwest was able to provision ADSL orders where pair gain was on the line.⁴²

9 Qwest likely will suggest that Covad overstates the deficiencies in the RLDT. Yet,
10 such is not the case. As stated above, Covad provided over 100 examples of flawed RLDT
11 information, but Qwest responded only to 18. Equally important is the fact that Qwest's responses to
12 Covad's exhibits documenting the problems with the RLDT in this proceeding come in the form of
13 conclusory arguments of counsel, not verified testimony or exhibits provided to the parties either
14 during the workshop or at any time prior to the due date of these impasse briefs. Covad thus
15 suggests that any information Qwest proffers allegedly disputing Covad's conclusions be struck to
16 the extent it was not provided to the Commission or the other parties to this proceeding prior to the
17 filing of Qwest's post-workshop brief.

18 It is painfully evident that Qwest's RLDT regularly fails to provide CLECs with
19 accurate and meaningful loop makeup information. Because such failure falls afoul of the FCC's
20 express mandate that incumbent LECs provide CLECs with the ability to quickly and efficiently pre-
21 qualify orders, this Commission must find that Qwest has failed to establish its compliance with
22 Checklist Item 4.

23 Qwest attempts to evade its obligations to provide comprehensive and accurate
24 information, arguing that its retail division is equally subject to any deficiency or inaccuracy in

25 ⁴¹ *Id.*, Tab E.

26 ⁴² Exhibit 910 (JML-25).

1 information (i.e., parity in receiving inadequate information).⁴³ Yet that claim is suspect, in light of
2 a particularly telling document—later hastily corrected—that demonstrates conclusively that Qwest
3 regularly provided itself with corrected loop makeup information that was not made available to
4 CLECs.

5 In Exhibit 899 (Employee Training of LFAC Updates, JML-15), Qwest instructed its
6 outside plant personnel to update outside plant information when they determined that the outside
7 plant differed from the information contained in LFACs. Critically, Qwest permitted its outside
8 plant personnel to update that information either through a *sales referral directly to Qwest's Megabit*
9 *retail division* or through a database update. While Qwest purportedly changed this policy,⁴⁴
10 although only after its continuing attempt to give its retail side a competitive advantage was detected
11 by CLECs and the Colorado Public Utilities Commission Staff, it does nothing to eliminate the well-
12 founded belief that Qwest uses its control over outside plant and essential facilities to give itself a
13 competitive advantage.

14 The only method by which to eliminate the advantage Qwest has given to itself by
15 providing exclusive LFACs updates to its Megabit Retail department for the past five years is to
16 provide CLECs with direct access to the LFACs database. Direct access to LFACs will permit this
17 Commission to ensure, consistent the FCC's express directive in the *UNE Remand Order*, that Qwest
18 "provide competitors with access to all of the same detailed information about the loop available to
19 [itself], and in the same time frame as any of [Qwest's] personnel could obtain it, so that a requesting
20 carrier could make an independent judgment at the pre-ordering stage about whether a requested end
21 user loop is capable of supporting the advanced services equipment the requesting carrier intends to
22 install."

23
24 ⁴³ See In the Matter of Joint Application by SBC Communications, Inc., Southwestern Bell Te.
25 Co. and Southwestern Bell Comm. Servs., Inc. d/b/a Southwestern Bell Long Distance for
26 Provision of In-Region, InterLATA Services in Kansas and Oklahoma, Mem. Op. and Order, CC
Docket No. 00-217, FCC 01-29 (Jan. 22, 2001), ¶ 126 ("*SWBT Kansas/Oklahoma Order*").

⁴⁴ See Colorado Exhibit 5 Qwest 73, attached hereto as Exhibit 6.

1 It is irrelevant, despite Qwest's contention to the contrary, that LFACs is not a
2 "searchable" database. As the FCC clarified in the *Verizon Massachusetts 271 Order*, the relevant
3 inquiry under the *UNE Remand Order* is not whether an ILEC's "retail arm or advanced services
4 affiliate has access to such underlying information but whether such information exists anywhere in
5 [the ILEC's] back office and can be accessed by any of [the ILEC's] personnel."⁴⁵ Thus because
6 Qwest's retail arm clearly does and can access LFACs, such access must be made equally available
7 to CLECs.

8 Moreover, Qwest's claim that direct access to LFACs must be denied on the grounds
9 that certain information contained in LFACs is proprietary is a sham. More particularly, Colorado
10 Exhibit 5 Qwest 73⁴⁶ includes the form that outside plant personnel are required to complete when
11 updating the LFACs database. This form requests that the Qwest employees provide information
12 regarding the type of cable, pair and termination, the length of each segment, the resistance on each
13 segment, and whether load coils or bridged taps are present. None of this information appropriately
14 may be claimed as confidential and/or proprietary and thus fails to provide a basis on which Qwest
15 may claim that LFACs contains confidential information to which CLECs should be denied access.

16 Equally problematic to Qwest's argument that CLECs have parity access to all loop
17 make up information is the uncontroverted evidence that Qwest does have a method by which it may
18 prequalify loops under circumstances in which a CLEC is not. As Covad pointed out in the prefiled
19 testimony of Ms. Cutcher, Covad cannot pre-qualify or place an order for DSL service for a new
20 Qwest customer until that customer has received its first Qwest telephone bill. Specifically, when
21 Covad receives a request for DSL service from a new Qwest end user, Qwest has informed Covad
22

23 ⁴⁵*In the Matter of Application of Verizon New England, Inc., Bell Atlantic Communications, Inc.*
24 *(d/b/a Verizon Long Distance), NYNEDX Long Distance Company (d/b/a Verizon Enterprise*
25 *Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA*
26 *Services in Massachusetts*, Mem. Op. and Order, CC Docket No. 01-8, FCC 01-130, 41454 & 58
(Apr. 16, 2001) ("*Verizon Massachusetts Order*"). ¶ 430.

⁴⁶ Attached hereto as Exhibit 6.

1 that information relating to that new end user will not be included in the pre-qualification tools until
2 after issuance of the first bill.⁴⁷

3 It is equally obvious that this impediment does not pose a problem when Qwest seeks
4 to "lock in" that DSL customer for itself. Covad learned in another jurisdiction that, rather than
5 waiting until the first month's voice billing is issued, Qwest contacts its new voice customers within
6 a week or two regarding their interest in DSL services.⁴⁸ Qwest uses its "loop qualification tool" to
7 pre-qualify that customer for DSL service and then locks that customer in before Covad even has an
8 opportunity to prequalify that customer. Given the plain time disparity between the ability of Qwest
9 and a CLEC to prequalify for DSL service a new Qwest voice customer, Qwest is in possession of
10 prequalification information to which CLECs do not have access.

11 Indeed, the problems do not stop there. Covad learned on August 16, 2001 that the
12 MegaBit database, which only Qwest uses because only Qwest provides MegaBit, contains a pop-up
13 screen that will update/fill in missing information for that prequalification tool. This screen and the
14 option to update the MegaBit information is not available in any of the other prequalification tools,
15 including the RLDT, that Qwest urges CLECs to use. Thus, due to mere happenstance, Covad
16 learned that Qwest accesses information that is neither evident nor apparent and, moreover, confined
17 to the prequalification tool that Qwest alone uses.

18 Qwest suggests that, instead of straightforward and efficient access to LFACs, that
19 CLECs check four or more prequalification tools (the RLDT, the batch wire center information that
20 comes in the form of a phone book devoid of dots or categories, the "facility check" tool and the

21 ⁴⁷ Exhibit 964-T; see also Exhibit 4 (IWO 1119). While Qwest has represented that it will "fix"
22 this problem, no confirmation has been provided by Qwest to Covad that such "fix" has been
23 implemented. See email from M. Cutcher (Covad) to S. Earley (Qwest), dated August 30, 2001,
24 attached hereto as Exhibit 7. Moreover, the "manual fix" Qwest has implemented until its
25 systems are corrected, simply does not resolve the problem. Because a CLEC cannot prequalify
26 a loop in the first instance, it is simply irrelevant whether that CLEC can go ahead and *fax* the
order in to Qwest. Needless to say, in addition to the problem created by the inability to
prequalify the loop, the issue raised by faxed LSRs is equally problematic because of the degree
of manual intervention and probability of human error in provisioning that order.

⁴⁸ See Exhibit 4 (IWO 1119).

1 ADSL tool) in order to obtain the same loop make up information as is contained in LFACs. The
2 suggestions is, at best, laughable. As Qwest is well aware, time is of the essence in any party's
3 ability to identify and obtain a customer. Suggesting that a CLEC go through a lengthy
4 prequalification process for each and every loop ordered is not only unrealistic but also places
5 CLECs at a distinct competitive disadvantage because of the length of time before it can inform that
6 user whether the service requested can actually be provided.

7 Put simply, Qwest has failed to show that it is equally subject to the inaccuracy and
8 unreliability of the RLDT in light of it's half-decade of direct access to and use of updated LFACs
9 information, ability to prequalify DSL customer long before a CLEC can do the same, and
10 undisclosed ability to update information on tool not used by CLECs. This Commission thus should
11 find no parity of access and, further, direct Qwest to provide direct access to LFACs in order to
12 remedy the competitive advantage it has given to itself since the passage of the Act.

13 5. Qwest Must Allow CLECs to Perform or Request Pre-Order MLT (WA Loop 14(b)).

14 The gravamen of Covad's request that Qwest perform a pre-order mechanized loop
15 test ("MLT") is simple: Covad seeks a test that will provide some assurance that the loop delivered
16 by Qwest to Covad does, in fact, have data continuity and is capable of supporting xDSL services.
17 In a nutshell, the MLT tests the actual loop over which a carrier seeks to provide service and
18 provides reliable information regarding the loop makeup. Looked at from this perspective, it is
19 obvious that Covad requests pre-order MLT (just as it seeks to run a data continuity test on line
20 shared circuits or cooperative tests on UNE loops) to ensure loop qualification and quality that
21 Qwest is either unwilling or unable to provide. Thus, Covad requests that this Commission order
22 Qwest to provide a pre-order MLT in order to permit DLECs, such as Covad, to compete with Qwest
23 for Washington customers.

24 In refusing to provide a pre-order MLT, Qwest disregards the fundamental purpose
25 of CLECs' request, asserting instead numerous objections to a pre-order MLT: (1) pre-order MLT is
26 invasive; (2) pre-order MLT may impact an customer that is currently the customer of Qwest or

1 another CLEC; (3) MLT is not available on the retail side; (4) MLTs are a repair function; and
2 (5) MLT is not provided by other ILECs. As set forth more fully below, all of these objections are
3 without merit.

4 Qwest's objections largely were addressed by Covad during the workshops on
5 Checklist Item 4. More specifically, Covad stated that it would only request a MLT for orders
6 placed by its own end user customers. By making this offer, Covad allayed any concerns Qwest may
7 have that an MLT would be run for another CLEC or Qwest's end user customer. Covad's offer
8 equally resolved Qwest's technical concern about how an MLT would be run since the loop must be
9 connected to a switch. Because the MLT would be run for Covad's soon-to-be end user customer but
10 before that customer's circuit was moved from the Qwest switch to Covad's DSLAM, there is no
11 technical impediment to performing the MLT.

12 Qwest's objection about the invasiveness of the test is equally without merit. As
13 Qwest itself admitted, when Qwest did its bulk loop prequalification, it used an MLT to populate the
14 RLDT. Qwest's decision to perform the test, at the alleged risk of purportedly disconnecting
15 hundreds of thousands of customers, demonstrates, in and of itself, that the MLT is not invasive.
16 More importantly, Qwest's purported concern over the invasiveness of the MLT is only raised when
17 CLECs request that Qwest perform the exact same function on their behalf. Qwest cannot "take or
18 leave" the invasiveness concern—it is either is a concern, which would have prevented Qwest from
19 running an MLT, or it is not, in which case, Qwest may not legitimately rely on the "invasiveness"
20 objection. Moreover, even to the extent that there is some potential for voice services exists, such
21 potential is extremely limited and can easily be worked around; as Mr. Zulevic of Covad testified,
22 the MLT takes only a few seconds and Covad would agree to perform that extraordinarily brief test
23 after hours.

24 Qwest's purported parity-based objections are also misplaced. Because it used the
25 MLT to populate one of the fields in the RLDT, Qwest has the capability to perform a pre-order
26 MLT and has utilized it on a pre-order basis. Simply because Qwest currently does not do so for its

1 Megabit retail arm or typically uses the MLT only in the repair context cannot alter this undisputed
2 fact. As the FCC made clear in the *SBC Kansas/Oklahoma Order*, "we require a BOC to
3 demonstrate for the first time that it provides access to . . . loop qualification information as part of
4 the pre-ordering functionality of OSS."⁴⁹ Thus, the pertinent inquiry, for purposes of determining
5 whether Qwest is obligated to make the MLT available to CLEC, is whether Qwest can access that
6 information for itself.⁵⁰ Because MLT information can be accessed pre-order by Qwest, such access
7 must be provided to CLECs.

8 Qwest "pooh poohs" the argument that MLT can provide useful loop makeup
9 information. As set forth more fully both above and below, however, neither the existence of the
10 RLDT nor the ability to order a loop with testing designed to ensure xDSL capability have resolved
11 the numerous prequalification and service installation issues Covad faces throughout the Qwest
12 region. Covad thus requires the ability to ensure, pre-order that the loop is xDSL capable. As Mr.
13 Zulevic testified in Colorado, the MLT provides more than just the MLT distance; it also provides
14 critical information regarding load coil and other electronics on the loop which are essential to the
15 determination as to whether a loop can support xDSL services.⁵¹ This requirement is nowhere more
16 evident than in the circumstance where it is apparent that a customer should be able to receive DSL
17 service because he, she or it lives within 18,000 feet of a central office, yet the RLDT indicates that
18 the customer does not qualify for DSL service.

19 The valuable information that the MLT provides to CLECs has been recognized by
20 Verizon. Consequently, as the FCC observed in the *Verizon Massachusetts Order*, Verizon "has
21 begun implementing access to manual loop qualification [including the MLT] as a pre-order function
22
23

24 _____
25 ⁴⁹ *SBC Kansas /Oklahoma Order*, ¶ 54.

26 ⁵⁰ *Id.*

⁵¹ See CO Workshop 5 Trans., May 25, 2001, pp. 253-54.

1 . . . with complete implementation expected in October 2001.⁵² Qwest's final objection also is
2 without merit.

3 During Workshop 4 and in this brief, Covad provided compelling evidence for the
4 imposition of the requirement that Qwest perform pre-order MLT. By contrast, Qwest relied on
5 unfounded objections. Accordingly, the Commission should find that Qwest is required to provide
6 pre-order MLT to CLECs.

7 6. Qwest Improperly Prohibits Covad from Pre-Qualifying and Placing Orders to
8 Provision xDSL Service for a New Qwest Voice End User Customer Until that
9 Customer Receives the First Month's Voice Bill from Qwest. (WA Loop 14).

10 In late April/early May, Qwest informed Covad that it could not pre-qualify or place
11 an order for the provision of xDSL service to a new Qwest voice customer until that customer
12 received the first month's voice bill. This prohibition plainly grants to Qwest a sustainable
13 competitive advantage over Covad because it gives Qwest up to a thirty day window in which to
14 lock in that potential xDSL customer without any other CLEC being able to compete for that same
15 customer. During the workshops on Checklist Item 4, Qwest conceded that the problem exists, that
16 it flows from a flaw within its own systems, and that it will be investigated, reviewed and corrected
17 during the ROC OSS testing. Accordingly, Covad agrees to defer this issue to the ROC OSS test.
18 If, however, Covad continues to experience this problem for either UNE loops or line shared loops
19 during or after the conclusion of the OSS testing, Covad reserves the right to reopen this issue.

20 7. Qwest Deliberately Impedes Covad's Ability to Provide xDSL Service to Its End
21 Users By Failing and Refusing to Comply With Its Agreement to Perform
22 Cooperative Testing. (WA Loop 15).

23 Historically and currently, Qwest regularly fails and refuses to deliver loops to Covad
24 that are capable of supporting xDSL services. As a consequence, all orders submitted by Covad
25 request the basic installation with cooperative testing option so that, at the time of provisioning, any
26 problems in loop quality can be detected, identified and resolved.⁵³

52 *Verizon Massachusetts Order*, ¶¶ 54 & 58.

53 Exhibit 965-T, pp. 6-8.

1 Despite Qwest's recognition of its seeming inability to provide adequate new service
2 quality and the need for cooperative testing, Qwest fails to perform acceptance testing on
3 approximately 35% of the loops delivered to Covad.⁵⁴ Compounding the problems created by
4 Qwest's deliberate failure to conduct cooperative testing are the facts that (1) Qwest bills Covad for
5 cooperative testing on every order it submits, even where testing was not performed, and will
6 continue to do so until Covad can opt into the SGAT sections relating to cooperative testing; and (2)
7 Qwest, until very recently, did not bother to track whether it did or, more likely, did not, perform
8 cooperative testing.

9 Qwest attempted to resolve this issue by offering a "back end" solution; namely, that
10 it will waive the nonrecurring charge for the basic installation with cooperative testing option for
11 those orders on which no cooperative testing was performed due to Qwest's fault. *See* SGAT
12 § 9.2.2.9.5.3. Although this may resolve some of the financial repercussions associated with Qwest's
13 failure to abide by its agreement (*i.e.*, Covad paying for something Qwest failed to provide), it
14 simply does not resolve the core issue giving rise to Covad's complaint and underlying its inability to
15 compete with Qwest—the failure to deliver a good loop. Indeed, in its recent Arbitration Decision,
16 the Texas Commission explicitly held that "proper provisioning is essential to providing equal
17 opportunity for competition in the xDSL market."⁵⁵

18 The obvious consequences flowing from Qwest's failure to perform cooperative
19 testing are the additional costs imposed on Covad when it must open a trouble ticket to resolve a
20 "trouble" that, in reality, was a Qwest deficiency in the provisioning process,⁵⁶ and the highly
21 foreseeable risk that Covad likely will lose the end user customer who attributes the inability to

22 ⁵⁴ Exhibit 968-C.

23 ⁵⁵ Petition of Covad Communications Company and Rhythms Links, Inc. against Southwestern
24 Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration Under the
25 Telecommunications Act of 1996 Regarding Rates, Terms and Conditions and Related
26 Arrangements for Line Sharing, Public Utility commission of Texas, Docket Nos. 22168 and
22469 (June 2001) ("*Texas Arbitration Decision*"), p. 135, attached hereto as Exhibit 8.

⁵⁶ *Id.* ("trouble tickets should be reserved for repair issues, not provisioning issues").

1 provide DSL service to Covad, not Qwest. The possibility is not mere speculation; "[d]elays in
2 provisioning serve to degrade the CLEC, and not the ILEC, in the mind of the customer at a time
3 when the customer is forming first impressions about the CLEC."⁵⁷

4 As Covad described previously, Covad has provided Qwest with a dedicated toll-free
5 number to facilitate the performance of cooperative testing. Once the outside technician purportedly
6 delivers the loop to Covad, the technician is obligated to call the dedicated number. If no Covad
7 employee picks up the call immediately, the technician is obligated, pursuant to the precise terms of
8 the agreement between Covad and Qwest relating to cooperative testing, to remain on hold for no
9 more than ten (10) minutes. If, at the conclusion of ten (10) minutes, the call is still not picked up,
10 the technician is then free to terminate the call, deem the circuit accepted, and post the completion
11 report.⁶²

12 Despite the apparent simplicity and ease of this process, Qwest's technicians rarely, if
13 ever, comply with it. Rather, as Covad described at the workshops, Covad's ACD logs, which track
14 the number of incoming calls, the length of the hold for each incoming call, and the average length
15 of the hold for all calls, show that no Qwest technician ever remained on hold for the entire ten
16 minute period, but instead often hung up immediately or remained on hold an average of three
17 minutes.⁵⁸

18 Qwest's failure and refusal to adhere to the agreement to perform cooperative testing
19 demonstrably and drastically impairs Covad's ability to compete effectively with Qwest for xDSL
20 users and no amount of money refunded for the failure to test remedies of the problem.. The FCC
21 has made clear that Qwest must provide unbundled xDSL capable loops to Covad at a "level of
22 quality . . . sufficiently high to permit [Covad] to compete meaningfully."⁵⁹ Stated more
23

24 ⁵⁷ *Id.*

25 ⁶² Exhibit 965-T, p.6

26 ⁵⁸ *Id.*

⁵⁹ *BANY 271 Order*, ¶ 335.

1 pragmatically, "[f]or effective competition to develop as envisioned by Congress, competitors must
2 have access to incumbent LEC facilities in a manner that allows them to provide the services they
3 seek to offer."⁶⁰ Here, not only does Qwest fail to provide loops of sufficient quality, but also it then
4 fails to take the contractually required steps necessary to correct the initial deficiency, to permit
5 Covad to provide the services it seeks to offer, and to give Covad the opportunity to compete in a
6 meaningful manner with Qwest.

7 Ironically, Covad should not be placed in the position of having to complain about
8 cooperative testing in the first place—Covad orders and pays for an xDSL capable loop. Yet, to
9 ensure the delivery of an xDSL capable loop, cooperative testing must be performed. Thus, Covad
10 in essence pays twice for the xDSL loop—once for the loop itself and yet another time when it is
11 required to pay for cooperative testing. As Staff to the Colorado Public Utilities Commission
12 recently noted in the context of delivery of a line-shared loop not capable of supporting ADSL
13 service, no CLEC should be required to pay for testing simply to ensure that it got what it paid for in
14 the first place:

15 Based upon the record, Staff finds that Qwest's failure to provision Covad's line
16 sharing orders in a sufficient manner has led to unnecessary cost to Covad and
17 Covad's loss of customer goodwill. At the Workshop, Covad stated that there is a
25% failure rate due to cross-connect problems. This is unacceptable.

18 At numerous places in the SGAT Qwest has adopted technical standards to specify
19 the performance characteristics of an offered service. Often these technical
20 publications adopt standards set by national standards setting bodies. *When Qwest*
21 *provides a service under the SGAT to a CLEC per technical standards, the CLEC*
22 *has a reasonable expectation that the service will perform as specified. Covad and*
23 *other CLECs compensate Qwest to provide a service, and Qwest should assure that it*
24 *is providing this service to the fullest extent possible. Therefore, in order to*
25 *reasonably guarantee that line sharing orders are provisioned properly, Staff*
26 *recommends that Qwest be required to provide all necessary testing to assure a*
reasonable level of quality assurance (including, if necessary, data continuity
testing).

27 Covad has offered to supply Qwest with the equipment it would need in order to run
28 the data continuity test. Staff finds that this is unnecessary because as a general
29 matter, Qwest should have the equipment to provide testing that meets the

30 ⁶⁰ *UNE Remand Order*, ¶ 13.

1 specifications set forth in its technical publications. As Covad recognized in the
2 Workshop, however, if Qwest or a CLEC changes technology, the same test set may
3 not work for both. Therefore, if different test sets are required, Staff recommends
4 that Covad (or any other CLEC) bring this matter to Qwest to modify the technical
5 publication using the change management process ("CMP"). In addition, as a short
6 term measure while the CMP goes forward, and at the CLEC's option, the CLEC may
7 provide Qwest with the equipment necessary to do the continuity test if the CLEC
8 changes technology. If Qwest changes technology, however, Qwest must provide the
9 necessary equipment to do the continuity test.⁶¹

10 Staff to the CPUC is not alone in its reasoning. The Texas Commission also found
11 that, if a loop that is delivered is not capable of supporting xDSL services, then "the loop was never
12 provisioned properly in the first place" and should be counted as a "provisioning delay" or "miss" in
13 its performance measure data.⁶²

14 Because Qwest neither provides a loop that Covad "reasonably should expect" to
15 perform as ordered, nor does it consistently provide the means to bring that loop up to the necessary
16 technical parameters, such failings clearly run counter to the FCC's "commit[ment] to removing
17 barriers to competition so that competing providers are able to compete effectively with incumbent
18 LECs and their affiliates in the provision of advanced services."⁶³ Accordingly, this Commission
19 should consider whether Qwest may properly charge CLECs for testing necessary to ensure that the
20 loop will perform as reasonably expected.

21 During the workshops on Checklist Item 4, Qwest conceded that cooperative testing
22 was a problem, that it flows from a flaw or deficiency within its own processes, and that it will be
23 investigated, reviewed and corrected during the ROC OSS testing. Accordingly, Covad agrees to

24 _____
25 ⁶¹ *In the Matter of Investigation into Qwest Communications, Inc.'s Compliance with § 271(c) of*
26 *the Telecommunications Act of 1996, Colorado Public Utilities Commission Docket No. 198T,*
Volume IIIA Impasse Issues; Commission Staff Report on Issues That Reached Impasse During
the Workshop Investigation Into Qwest's Compliance with Checklist Item No. 2 Regarding
Emerging Services, ¶¶ 114-117. (citations omitted), attached hereto as Exhibit 9.

⁶² *Texas Arbitration Decision*, p. 52.

⁶³ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First
Report and Order, CC Docket No. 98-147, FCC 99-48 (Mar. 1999), ¶ 3 ("*Advanced Services*
Order").

1 defer this issue to the ROC OSS test. If, however, Covad continues to experience this problem
2 during or after the conclusion of the OSS testing, Covad reserves the right to reopen this issue.

3 8. The Issue of Whether Qwest Fails to Provide Meaningful FOCs or to Deliver Loops
4 on Time Is Subject to Reopen. (WA Loop 5).

5 a. Qwest's FOC Performance.

6 During March-April 2001, Qwest implemented a two month xDSL UNE loop FOC
7 trial in the State of Colorado, which was intended and designed to improve Qwest's poor FOC and
8 xDSL UNE loop delivery performance. Solely for purposes of the trial, Qwest extended the FOC
9 interval to 72 hours in order to provide it additional time within which to do the work necessary to
10 permit it to provide CLECs with a meaningful xDSL UNE loop delivery due date. Stated more
11 simply, in exchange for an additional 48 hours to return a FOC to CLECs, Qwest represented that the
12 FOC returned would be more reliable and credible, and that a CLEC actually could count on an
13 xDSL UNE loop being delivered within the intervals specified. If the trial proved successful, Qwest
14 anticipated approaching the ROC (the "ROC"), and requesting that the FOC interval for xDSL UNE
15 loops be extended to 72 hours.

16 Qwest failed to demonstrate that its FOC performance improved in any meaningful
17 manner, providing Covad with a FOC within the 72 hour time period a meager 75% of the time.⁶⁴
18 Under the FCC's most recent orders granting Section 271 relief, such performance is insufficient to
19 establish checklist compliance:

20 '[A]lthough [Verizon] includes xDSL orders with other loop orders in the
21 denominator of the relevant metric, based upon our review of [Verizon's]
22 performance data, it appears that [Verizon] returns [xDSL confirmation notices]
23 within the stated interval almost all of the time.' For example, from September
24 through December 2000, respectively, for 'Loop/Pre-qualified Complex/LNP' orders,
Verizon timely returned 99.68, 99.82, 99.48, and 99.79 percent of confirmation
notices for flow-through orders within 2 hours; 97.35, 97.35, 97.27, and 97.88
percent of confirmation notices for orders of less than 10 lines within 24 hours; and

25 ⁶⁴ This data is contained in an email from Nancy Mirabella, dated June 19, 2001, sent to
26 all participants on the June 18, 2001 call regarding the FOC trial, or any participant in
Docket No. 198T that requested that the data be provided. See Exhibit 10, attached
hereto.

1 96.90, 99.73, 100.00, and 99.74 percent of confirmation notices for orders equal to or
2 more than 10 lines within 72 hours. Verizon likewise exceeded the 95 percent
3 benchmark for timely return of reject notices during this period. 'Pre-qualified
4 Complex' orders encompass orders for pre-qualified xDSL-capable loops, and
5 include specifically orders for pre-qualified 2-wire xDSL and 2-wire digital loops.
6 Verizon also appears to have exceeded the 95 percent benchmark for timely return of
confirmation and reject notices with respect to manually qualified, 2-wire xDSL loop
orders. For example, from September through December 2000, respectively, for "2
Wire xDSL Service" orders, Verizon timely returned 98.75, 98.67, 99.25, and 96.77
percent of confirmation notices, and 98.80, 98.92, 99.38, 97.75 percent of reject
notices, for orders of less than 10 lines within 72 hours.⁶⁵

7 Despite Qwest's poor PO-5 performance, Covad does not object to Qwest requesting
8 that the PO-5 interval for xDSL UNE loops be extended to 72 hours. As Covad has indicated
9 previously, it currently has an agreement with Qwest pursuant to which Qwest will return a FOC
10 within 72 hours. Consequently, a change in the PO-5 interval will not alter Covad's business and
11 contractual relationship with Qwest with respect to the agreed-upon FOC interval. However, such
12 change will benefit Covad, because its orders will be included in the PO-5 measurement if changed
13 to a 72 hour interval.

14 b. Qwest's Loop Delivery Performance. (WA Loop 5).

15 The FCC has made clear that the percentage of installation commitments met/missed
16 is one of the most probative indicators of whether an incumbent LEC, such as Qwest, is provisioning
17 loops in a nondiscriminatory fashion. Indeed, the question of whether Qwest has opened up its local
18 markets to meaningful competition⁶⁶ turns on Qwest's ability to demonstrate that there is no evidence
19 of "systemic performance disparities that have resulted in competitive harm or otherwise denied
20 competing carriers a meaningful opportunity to compete."⁶⁷

21 As Qwest acknowledged, CLECs, including Covad, raised regular and serious
22 concerns regarding Qwest's FOC and loop delivery performance. Consequently, Qwest
23 implemented the Colorado xDSL UNE loop FOC Trial in an effort to implement training,

24 _____
25 ⁶⁵ *Verizon Massachusetts Order*, n. 124 (internal citations omitted).

26 ⁶⁶ *BANY 271 Order*, ¶¶ 194, 195 and 270.

⁶⁷ *Verizon Massachusetts 271 Order*, ¶ 122 (citations omitted).

1 processes and procedures that would improve both its ability to provide a meaningful FOC and its
2 loop delivery performance.

3 Along with several other CLECs, Covad agreed to participate in the trial. Subsequent
4 to the conclusion of the trial, only Covad worked with Qwest to review the parties' data and to
5 attempt to reconcile their results. After extensive data reconciliation and discussions with Qwest,
6 Covad has agreed to withdraw at this time its data regarding, and testimony addressing, Qwest's loop
7 delivery performance during the Colorado xDSL FOC trial. Further, this issue may be deemed
8 closed. However, Covad specifically, expressly and unambiguously reserves its right, if appropriate
9 and/or necessary, to reopen this issue at the conclusion of the ROC's OSS testing.

10 Covad reserves its right to reopen this issue, not out of a desire to resuscitate closed
11 issues, but rather to ensure that Qwest's OP-3 (Installation Commitments Met) and OP-4 (Installation
12 Interval) performance be measured under accurate and realistic circumstances. As Ms. Liston
13 acknowledged during conference call on June 18, 2001 in Docket No. 198T, the trial was just that --
14 a limited time period during which Qwest changed its FOC instructions, processes and procedures to
15 determine whether such changes would facilitate delivery of a meaningful FOC.⁶⁸ Further OSS
16 testing should confirm whether Qwest can continue to adhere to such instructions, processes and
17 procedures on a statewide, permanent basis, and in the absence of a time limited, yet extraordinarily
18 intense and extensive effort, on the part of Qwest to prove the trial a success.⁶⁹

19 Covad also reserves its right to review the OSS test results, and possibly reopen this
20 issue, in light of the impact its assumptions regarding Qwest's loop delivery interval and OP-3
21 performance had on the results reported by Covad. Stated succinctly, at the time of the FOC trial,
22 Covad does not track the "completion date" provided by Qwest, but rather calculated the order close
23 date as that date on which Covad can verify the delivery of a loop capable of supporting xDSL
24

25 ⁶⁸ CO Trans, June 18, 2001, pp. 12-13.

26 ⁶⁹ See, e.g., CO Trans., June 18, 2001, p. 8.

1 services.⁷⁰ As a consequence, and to ensure even-handed treatment of Qwest, Covad assumed that
2 Qwest met the due date contained in the FOC 100% of the time and produced its data results
3 accordingly.

4 Despite the substantial benefits flowing to Qwest from that assumption, Qwest
5 objected to Covad's use of any type of assumption. In response, during the first round of data
6 reconciliation Covad offered as an alternative to track the completion date according to the date on
7 which cooperative testing was performed by Qwest.

8 From Covad's perspective, this data point provided an easy compromise between the
9 parties because cooperative testing performed during the loop provisioning process necessarily
10 occurs simultaneously on the day the loop is delivered. Qwest nonetheless refused to use the
11 cooperative testing date, despite its 100% reliability as a proxy for the completion date posted by
12 Qwest on its web site.⁷¹ Accordingly, because of Qwest's objections, Covad reverted to measuring
13 Qwest's loop delivery performance consistent with the due dates contained in the FOC.

14 It was only after the conclusion of the FOC trial that Covad determined that all orders
15 submitted via EDI were automatically populated with the due date contained in the PAP and the
16 standard interval guide for Covad's UNE loop orders throughout the Qwest region, rather than the
17 due date specifically identified for purposes of this trial. This fact necessarily impacted Covad's OP-
18 3/OP-4 results and, accordingly, Covad withdraws its xDSL FOC trial results at this time. Such
19 withdrawal does not indicate that Covad believes this issue is finally and fully resolved. To the
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21
22 ⁷⁰ Qwest suggests that there is something improper in Covad tracking a completion date that
23 differs from what Qwest defines as the "completion date". Yet, there is nothing improper about a
24 company tracking those data points that actually assist in its operations; namely, that date by
25 which Covad can guarantee that Qwest has finally provided a loop capable of supporting the
26 services Covad seeks to offer its end user customers.

⁷¹ Notably, during the second round of data reconciliation, one of Qwest's employees, with
responsibility for measuring and reporting Qwest's OP-3 results, inquired as to why Covad did
not simply measure the completion date in accordance with the cooperative testing date, rather
than making assumptions based on the due date contained in the FOC.

1 contrary, as stated above, Covad reserves its right to review Qwest's OP-3 performance at the
2 conclusion of the OSS testing, compare that data to its own, and challenge any data disparities.

3 9. Qwest Is Not Making Address Validation Adequately Available. (WA Loop 7).

4 Covad concurs in AT&T's Post-Workshop Brief on this issue.

5 10. Qwest Fails to Take the Steps Necessary to Prevent Its Technicians from Behaving in
6 an Anti-Competitive Manner. (WA Loop 9).

7 Perhaps the most flagrant example of Qwest's recalcitrance in opening up its local
8 markets to competition is its apparent inability to eliminate anti-competitive and discriminatory
9 behavior on the part of its technicians. Covad has provided Qwest, both at an account team level and
10 through these proceedings, with information regarding improper technician behavior throughout its
11 territory and in Washington specifically. This type of improper technician behavior both damages
12 Covad's relationship with its customers as well as impedes its ability to compete with Qwest. Yet,
13 Qwest has failed to take the steps necessary to ensure that this type of improper conduct ceases.

14 Qwest's response to this issue has focused solely on its paper policies and the claim
15 that such policies constitute effective deterrents to the ongoing improper conduct of its technicians.⁷²
16 More specifically, the heart of Qwest's claim that its technicians are trained in and required to
17 behave appropriately is grounded in its Code of Conduct (the "COC"). Relevant to the issues raised
18 by Covad, Qwest's COC contains a section on "asset protection", in which its employees are
19 instructed generally to comply with "complex[]" "antitrust and unfair competition laws," and to
20 "focus on the quality and value of [Qwest's] product and services" rather than "disparaging" those of
21 its competitors.⁷³

22 As an initial matter, the COC and its provisions relating to treatment of CLECs (or
23 comparable provisions incorporated into a similar US WEST policy) have been in place the entire
24 course of Covad's contractual and business relationship with Qwest. And it is during that same time

25 ⁷² Exhibits 932-936.

26 ⁷³ Exhibit 932.

1 period that each and every instance of inappropriate and improper technician conduct reported by
2 Covad to Qwest has occurred. Consequently, the COC and associated "reminder" documents have
3 already proven to be ineffective to deter and eliminate the anti-competitive conduct of Qwest's
4 employees.

5 Even assuming erroneously that the COC was recently implemented, the COC and
6 conveniently timed "reminders" are woefully deficient, on their faces, to effectively deter and
7 terminate the conduct of which Covad complains. It is beyond dispute that the average layperson
8 has minimal, if any, understanding of the purpose, structure and applicability of generically
9 described anti-trust and unfair competition laws or of the term "disparagement." Nor would the
10 average layperson perceive "asset protection" to include refraining from making negative comments
11 about competitors or ensuring non-discriminatory treatment of competitors. It is clear, therefore,
12 that the manner by which Qwest identifies in the COC its obligations under the Act is designed
13 neither to inform its employees of the scope and nature of those obligations, nor to ensure
14 compliance with those obligations.

15 More problematic, even where Qwest incorporates information in its COC or other
16 "reminder" documents⁷⁴ that would substantively address the improper conduct of its technicians,
17 such language conflicts with or is confused by verbiage that permits ongoing improper technician
18 conduct. For example, even as Qwest instructs its competitors not to "disparage" CLECs, Qwest
19 encourages its technicians to promote its own services when interacting with a CLEC's end user
20 customer. Such encouragement necessarily translates into incidents, such as one which was reported
21 by Covad to Qwest, where the Qwest technician informed Covad's end user customer that if he went
22 with Qwest he would have Megabit service within seven days whereas he would have to wait
23 "forever" if he went with Covad.⁷⁵

24
25 ⁷⁴ Exhibits 932-936.

26 ⁷⁵ This incident is described on the Qwest incident form that was provided by Covad to Qwest in
response to formal and informal discovery requests in Washington, Colorado and Washington.

1 Similarly, Qwest informs its employees in the COC that they must provide non-
2 discriminatory service to CLEC. Qwest then apparently limits that requirement to a purported
3 prohibition on improperly using CLECs' proprietary network information. By limiting the non-
4 discrimination directive to misappropriation of proprietary information, Qwest tacitly permits
5 incidents, such as one that occurred in Phoenix, Arizona, in which a Qwest technician stole Covad's
6 copper pairs for use by a Qwest customer.⁷⁶

7 The fact that Qwest has a policy in place to investigate COC violations generally,
8 either at its own initiative or in response to CLEC complaint, does not alter the conclusion that
9 Qwest has failed to implement the policies and procedures necessary to deter anti-competitive
10 conduct on the part of its technicians. More specifically, Qwest provided no evidence showing that it
11 had investigated a single COC violation in Washington that pertained to the disparagement or
12 discriminatory treatment of CLECs. Further, by placing sole responsibility for investigation into a
13 particular incident with the individual's manager,⁷⁷ without providing that manager with (1) any
14 meaningful guidelines regarding Qwest's obligations under the Act; (2) a specific process for
15 investigation; and (3) guidelines regarding appropriate discipline, there is no guarantee that any
16 substantive, effective or meaningful investigation will occur.

17 Covad's concerns have proven well-founded. Even after all of the "forceful"
18 reminders provided by Qwest to its employees, on-going incidents of anti-competitive and improper
19 behavior abound. For example, (1) in June, 2001, a Qwest employee(s) stole several pieces of
20 equipment from Covad's collocation spaces in three Qwest Colorado COs;⁷⁸ (2) in August 2001, a
21 Qwest technician at Covad's end user's premises, *while acting as a point of contact on behalf of*
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23

24 ⁷⁶ *Id.*

25 ⁷⁷ *See Exhibit 935.*

26 ⁷⁸ *Exhibit 973.*

1 *Covad with its end user customer*, took the opportunity to solicit that end user customer's business,
2 providing the customer with a DSL brochure and encouraging him to switch to Qwest.⁷⁹

3 While there may be some "bad apples" in the Qwest barrel, the numerosity of those
4 bad apples, and the frequency with which they seek to disparage Covad or engage in anti-
5 competitive behavior is far and away greater than with any other ILEC. The inevitable conclusion,
6 therefore, is that Qwest's paper policies are absolutely without teeth and, in fact, are regularly
7 ignored. Indeed, disparagement of Covad is rampant within Qwest, as is evidence by a recent email
8 from one Qwest employee to hundreds of her fellow employees, in the email, the Qwest employee
9 gleefully describes Covad's restructuring efforts as "the third batter down" and the "end of the
10 national DLEC game," and referred to Covad's announcement of continued operations as
11 "delusional" and the result of "drinking too much Kool-Aid." This particular Qwest employee
12 predicts that "its quite likely a judge will say they have no chance to succeed and force them to
13 immediate Ch 7 liquidation."⁸⁰

14 Qwest should be obligated—consistent with its § 271 obligation to provide
15 competitors with a meaningful opportunity to compete—to provide a verified assurance, from the
16 appropriate personnel, that corrective action has been taken for every incident reported by Covad to
17 Qwest. Further, § 271 requires an assurance from Qwest, in the form of properly authenticated
18 documentation, that it has in place both policies prohibiting this type of anti-competitive conduct and
19 a mandatory disciplinary structure to deter anti-competitive conduct in the future. Unless and until
20 Qwest commits to adhering to these requirements, its § 271 application should not be approved.

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⁷⁹ See Email from M. Cutcher to K. Beck and J. Liston, dated August 15, 2001, attached hereto
25 as Exhibit 11. To date, Qwest has provided no response to this email.

26 ⁸⁰ See Email from L. Broberg to Distribution List, dated August 7, 2001, attached hereto as
Exhibit 12.

1 11. Spectrum Management (WA Loop 10).

2 Rhythms got it right on spectrum management and Qwest got it wrong. Therefore,
3 Covad concurs in AT&T's Post-Workshop Brief on this issue, which summarizes and is consistent
4 with Rhythm's proposed spectrum management policy.

5 Additionally, Qwest's current spectrum management language is a thinly-veiled
6 attempt by which Qwest seeks to inhibit Covad's ability to compete effectively with Qwest. More
7 specifically, Qwest's currently proposed spectrum language is grounded in T1.417, which relies on
8 26 gauge equivalent working length ("EWL") which cannot be measured or effectively stored in
9 Qwest's records. Moreover, each speed of DSL service Covad offers corresponds to a different
10 spectrum management ("SM") class. In practical terms, therefore, if Covad were required to report
11 SM class, then it would have to order a different loop for every service and update the loop each
12 time a user changes speeds. Finally, T1.417 contains deployment guidelines for specific SDSL rates
13 that are higher than the class to which that SDSL rate corresponds. For example, SDSL 384 has a
14 deployment guideline of 13.5k 26 gauge EWL. However, SDSL 384 falls into SM class 2, which
15 has a limit of 11.5k 26 gauge EWL. If Qwest were permitted to restrict Covad on the basis of the
16 SM class for a particular speed of SDSL, then Covad loses 2k of EWL, thereby risking the loss of a
17 customer that wants a higher speed of service.

18 To ensure that Qwest does not use spectrum management to control or limit the
19 ability or right of CLECs to provide services and to compete with Qwest, Qwest must be ordered to
20 revise its spectrum management policy and to incorporate in its entirety Rhythm's spectrum
21 management proposal.

22 12. Qwest's Intervals for Provisioning Loops and Providing Repair Services Are
23 Inappropriately and Improperly Elongated. (WA Loop 11(b), (d), (g) and (h); SGAT,
24 Exhibit C).

25 Qwest asserts that the intervals contained in Exhibit C, taken together with the
26 inextricable link to the Performance Indicator Definitions contained in Qwest's proposed
performance assurance plan, preclude the reopening of the SGAT intervals at this time. Qwest is flat

1 out wrong. As an initial matter, there is no inextricable link between the two, because Qwest has
2 refused to abide by the intervals contained in Exhibit C.⁸¹ For example, the PID "interval" for one
3 2 wire non-loaded loop is not the five day interval for 1-8 loops ordered as reflected in Exhibit C to
4 the SGAT, but rather a generic mid-mark of six days. Likewise, there are no PIDs for line shared
5 loops because Qwest purportedly has not had enough experience in provisioning line shared loops to
6 move from a "diagnostic" status interval to a specified PID benchmark even though the Exhibit C
7 interval for line shared loops (no conditioning) is three days.

8 Covad now appreciates the substantive difference Qwest was making between the
9 PID intervals and the intervals contained in Exhibit C. Covad therefore anticipates going to the
10 Regional Oversight Committee to address these issues, as well as in its brief in the multi-state
11 proceeding on Qwest's proposed QPAP.⁸² Thus, the issue of the appropriate intervals is far from
12 closed, and Covad fully anticipates raising this issue here as well as in other jurisdictions and
13 Section 271-related proceedings.

14 Notwithstanding its intention to address the PID intervals elsewhere, Covad provides
15 the following argument regarding the intervals contained in Exhibit C.

16 First, Covad concurs in the arguments and conclusions regarding the appropriate
17 intervals for Exhibit C, Sections 1(b), (d) and (h), as set forth in AT&T's Post-Workshop Brief on
18 this issue.

19 Second, with regard to the interval for conditioned loops, *see* Exhibit C, Section 1(g),
20 Qwest's current interval of fifteen days is inappropriately and improperly elongated when examined
21 against the information provided by Qwest to Covad during the course of the emerging services

22 ⁸¹ *See* Qwest's Corporation's Responses to Z-Tel Communication, Inc.'s First Set of Requests for
23 Admission to Qwest Corporation, , dated August 28, 2001, attached hereto as Exhibit 13 ("the
24 intervals in Exhibit C to the SGAT are different in nature than the intervals in the QPAP PID . . .
The performance standard in the PIS always govern whether or not payment under the QPAP are
appropriate).

25 ⁸² Based on recent testimony provided by Michael Williams (Qwest) regarding the PID intervals,
26 it is Covad's understanding that Qwest considers those intervals open until the QPAP goes into
effect.

1 workshop. More specifically, conditioning is not a foreign or new concept to Qwest. In fact, Qwest
2 has been conditioning loops for its own services for years. Indeed, in most cases, conditioning—or
3 the removal of a bridged tap or load coil—is a fairly simple process, requiring only that: (1) the
4 requested cable pair be located in the facility database; (2) the location of the load points be
5 identified; (3) this information be placed on a work request; and (4) the work be performed.⁸³

6 It is self-evident that the first three tasks are primarily clerical in nature. It is only the
7 fourth task, which a layman typically can perform in approximately an hour, which requires any
8 significant time or effort on the part of Qwest. From a practical standpoint, therefore, a five day
9 interval for conditioned loops is eminently feasible. Indeed, Qwest's own testimony at the follow-up
10 workshop on Checklist Item 4 suggests that a fifteen day interval is excessive since, during the
11 course of the FOC trial, it was able to, and did, deliver conditioned loops before the fifteen day
12 interval had elapsed.

13 The only impediment to a five day interval for the provisioning of conditioned loops
14 are constraints imposed by Qwest on itself in the form of insufficient staffing or inefficient allocation
15 of work. These types of self-imposed constraints, however, should not be determinative of the
16 interval for conditioned loops. Because the indisputable facts demonstrate that a shorter, five day
17 interval is practically and realistically feasible, Qwest should be ordered to adopt a five day interval.

18 13. Qwest Should Redesignate Interoffice Facilities Where Loop Facilities Are at
19 Exhaust. (WA Loop 12).

20 Covad concurs in AT&T's Post-Workshop Brief on this issue.

21 **D. CONCLUSION**

22 The loops provisions contained in the SGAT and reflected by Qwest's current
23 commercial practice are insufficient to spur competitive entry into Washington. Indeed, under
24 Qwest's SGAT and in light of its current commercial practice, it is only a matter of time before
25 Qwest eliminates all meaningful competition in the xDSL market. Without competitive entry,

26 ⁸³ Exhibit 875-T, pp. 4-5.

1 Washington citizens will be denied the key benefits of competitive choice—higher quality of service
2 and lower prices.

3 Covad encourages this Commission to withhold §271 approval until Qwest corrects
4 the serious and on-going performance problems identified by Covad. Until such problems are
5 completely and finally corrected, significant barriers to market entry by CLECs will continue to
6 exist.

7 **III. DISPUTED LINE SPLITTING ISSUES**

8 **A. INTRODUCTION**

9 Although the FCC only recently confirmed the obligations of incumbent LECs to
10 permit line splitting, Qwest already has drawn up significant and improper limitations surrounding
11 the availability of that product. Initially, Qwest argued that it was only obligated to provide line
12 splitting over an UNE-P pursuant to the *Line Sharing Reconsideration Order*. Although Qwest later
13 relented and "voluntarily" agreed to permit line splitting over an unbundled loop, it continues to
14 raise-material obstacles to the ordering and implementation of line or "loop" splitting by, for
15 example, refusing to permit line splitting over fiber.

16 As the FCC recognized, line splitting "will further speed the deployment of
17 competition in the advanced services market place," particularly to residential and small business
18 customers.⁸⁴ In order to capitalize on the possibility presented by line splitting, however, this
19 Commission must require that Qwest adopt terms and conditions that will bring that possibility to
20 fruition. Thus, Qwest's SGAT must be revised consistent with the arguments set forth below.

21 **B. ARGUMENT**

22 1. Qwest Must Provide Access to Outboard Splitters on a Line-at-a-Time or Shelf-at-a- 23 Time Basis. (WA LSPLIT-1(a)).

24 Covad concurs in AT&T's Post-Workshop Brief on this issue.

25
26 ⁸⁴ *Line Sharing Reconsideration Order*, ¶ 23.

1 2. Qwest Must Provide Line Splitting Over All Its Loop-Based Products and May Not
2 Limit Its Obligations Under the *Line Sharing Order* and the *Line Sharing*
3 *Reconsideration Order* to a Mandatory Offering of UNE-P Line Splitting and a
4 "Voluntary" Offering of "Loop Splitting". (WA LSPLIT-9(including LSPLIT 6-9);
5 SGAT §§ 9.21, *et seq.* and 9.24, *et seq.*).

6 Covad concurs in AT&T's Post-Workshop Brief on this issue.

7 3. Qwest Is Obligated to Provide Line Splitting Over Both Copper and Fiber Loops.
8 (WA LSPLIT-9; SGAT §§ 9.21.1 and 9.24.1).

9 Covad acknowledges that the rationale underlying the Commission's resolution of the
10 issue as to whether Qwest must permit line sharing over both fiber and copper loops will apply
11 equally to the issue of whether Qwest is required to permit line splitting and "loop splitting" over
12 both fiber and copper loops. Covad believes, therefore, that it is appropriate to resolve issue split,
13 insofar as it relates to the issue of line or loop splitting over fiber, consistently with the
14 Commission's resolution of this issue in the line sharing context. Covad therefore refers the
15 Commission on this issue to Covad's argument contained in the section on line sharing.

16 C. **CONCLUSION**

17 Despite the lip service Qwest pays to the FCC's *Line Sharing Reconsideration Order*,
18 its conduct since the issuance of that *Order* reveals an intransigent BOC determined to make
19 competitive entry into the State of Washington as difficult as possible. Until Qwest corrects that
20 course of conduct, this Commission should not approve Qwest's § 271 application.

21 **IV. DISPUTED PACKET SWITCHING ISSUES**

22 A. **BACKGROUND: THE ECONOMICS OF NGDLC TECHNOLOGY AND LEGAL**
23 **FRAMEWORK.**

24 From a business and competitive perspective, fiber-fed loops, including loops
25 comprised of digital loop carrier facilities (often called next-generation digital loop carrier, or
26 "NGDLC") or loops served by a remote DSLAM (i.e., remote line card shelf DSLAMs), increase the
27 DSL bandwidth available to end-users supported by that system. NGDLC-type architecture, which
28 includes both NGDLC and/or remote DSLAMs, both shortens the length of the copper loop serving
29 a particular customer and takes advantage of advances in fiber optic technology to connect

1 neighborhood nodes or "gateways" to metropolitan-area optical networks. NGDLC-type systems
2 typically support the provision of both analog voice and advanced data services.

3 As a result, in the deployment of an NGDLC-type network or in a network served by
4 a remote DSLAM, an incumbent LEC has the advantages of economies of scale, scope and density
5 that new, competitive entrants do not possess.⁸⁵ In particular, when an incumbent LEC deploys an
6 NGDLC or an NGDLC functionality (i.e., a remote DSLAM) in a neighborhood where it already has
7 a substantial share of voice subscribers, it will immediately realize the cost-savings of scale and
8 density from that architecture and it will be able to immediately "bundle" the sale of advanced data
9 services to its large voice customer base.⁸⁶

10 In contrast, CLECs like Covad face an entirely different set of choices. Without the
11 luxury of an existing local voice base or existing ubiquitous copper loop plant, a CLEC's ability and
12 incentive to deploy profitably an NGDLC-type architecture or NGDLC functionality is substantially
13 lower than the incumbent LECs.⁸⁷ Consequently, the ability of CLECs to provide advanced services
14 to entire sets of customers will be impaired dramatically.

15 A public policy that simply says, "all carriers can deploy NGDLC" or "all carriers can
16 deploy NGDLC functionalities" (via a remote DSLAM), and nothing else, dramatically
17 underestimates the inherent advantages and economies incumbent LECs like Qwest possess.

18
19 _____
20 ⁸⁵ An incumbent achieves an "economy of scale" when it is less expensive to provide service to
21 multiple customers over an architecture than to a single customer. An incumbent achieves an
22 "economy of scope" when it is less expensive to sell a customer several products simultaneously
23 than to sell that customer each product individually. Finally, an incumbent is able to achieve an
24 "economy of density" when it is able to deploy a single network in a neighborhood that serves a
25 number of end-users, rather than deploying or developing a separate network connection for each
26 end-user.

⁸⁶ The cost savings of an NGDLC architecture are demonstrated in Project Pronto press releases.

⁸⁷ CLECs are often faced with the "if I build it, will they come?" decision that incumbents do not
face. Because Qwest retains an overwhelming dominance in the local exchange market, it knows
that if it deploys NGDLC technology, it will be able to cutover its captive voice customers and
immediately begin to see a return on that investment. A CLEC with zero market share does not
have that guaranteed return.

1 Fortunately, it was precisely for situations like these that the Telecommunication Act of 1996's (the
2 "Act") unbundling principles were designed to address.⁸⁸

3 **B. ARGUMENT**

4 1. The Commission's Authority under Section 251(d)(3) and FCC Rule 51.317.

5 Even if FCC Rule 51.319 does not currently mandate unbundled access to packet-
6 switched NGDLC architectures and NGDLC functionalities, like remote DSLAMs, as requested by
7 Covad, the Commission has the authority, under the Act⁸⁹ and FCC rules⁹⁰, to expand Qwest's
8 unbundling obligations beyond the minimal national requirements of the FCC. Section 251(d)(3) of
9 the Act explicitly authorizes state commissions to establish additional unbundling obligations.⁹¹
10 While the FCC in the *Local Competition Order* established the basic list of UNEs that must be
11 unbundled by all ILECs, the FCC emphasized that "section 251(d)(3) grants state commissions the
12 authority to impose additional obligations upon incumbent LECs beyond those imposed by the
13 national list."⁹²

14 It is clear that the FCC did not intend the *UNE Remand Order* to be the "final word"
15 on remote terminal access, as Qwest apparently contends. To the contrary, the FCC explicitly
16 encouraged states "to impose additional, pro-competitive requirements consistent with the national
17 framework established in this order."⁹³ The FCC thus specifically deferred to state commissions to
18 resolve technical issues related to subloop unbundling.⁹⁴ Implicit within that deferral, therefore, is
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20 _____
21 ⁸⁸ See, e.g., *Local Competition Order*, ¶ 242.

22 ⁸⁹ 47 U.S.C § 251(d)(3).

23 ⁹⁰ 47 C.F.R § 51.317(d).

24 ⁹¹ *Texas Arbitration Decision*, p. 70.

25 ⁹² *UNE Remand Order*, ¶ 154.

26 ⁹³ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC
Docket No. 98-147, Third Report and Order, 14 FCC Rcd. 20912, at ¶ 159 (1999) ("*Line Sharing
Order*").

⁹⁴ *UNE Remand Order*, ¶ 224.

1 the recognition that states, like Washington⁹⁵, are particularly well suited to take the steps necessary
2 to ensure that remote terminal access be provided in a manner that encourages competition:

3 It is impossible to predict every deployment scenario or the difficulties that might
4 arise in the provision of the high frequency loop spectrum network elements. States
5 may take action to promote our overarching policies, where it is consistent with the
6 rules established in this proceeding. We believe this approach will permit the states
7 to benefit from the informed debate on the record in this proceeding, and will
8 promote consistency in federal and state regulations.⁹⁶

9 As a nascent and developing market, regulation of advanced services, including
10 remote terminal access, must rapidly adapt to keep pace with changing market conditions. The FCC
11 explains:

12 [o]ver time, we expect carriers to develop new technologies to support new forms
13 of telecommunications services. Consistent with our rules and our obligation to
14 promote innovation, investment, and competition among all participants and for all
15 services in the telecommunications marketplace, we expect incumbent LECs to
16 provide access to the features, functionalities, and capabilities associated with the
17 unbundled network elements necessary to provide such services.⁹⁷

18 Pursuant to this FCC policy, state commissions in Illinois, Pennsylvania, Maryland,
19 Texas, New York, Oklahoma and Kansas all have either ordered unbundled access to NGDLC
20 architectures and/or functionalities like remote DSLAMs, or are currently considering taking such
21 steps. Washington should join that group, and require that Qwest provide CLECs with access to any
22 NGDLC or NGDLC functionality, including remote DSLAMs, deployed in its network.

23 The time is nigh for the Commission to take action on this issue. As Covad pointed
24 out in its prefiled and oral testimony, Qwest plans to reach 1.3 million additional homes and "more
25

26 ⁹⁵ In addition, the FCC has initiated a rulemaking proceeding to specifically address ILEC
unbundling obligations over next-generation digital loop carrier systems.

⁹⁶ *Line Sharing Order* at ¶ 225.

⁹⁷ *Deployment of Wireline Services Offering Advanced Telecommunications Capability, and
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC
Docket Nos. 98-147 and 96-98, Third Report and Order on Reconsideration in CC Docket No.
98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further
Notice of Proposed Rulemaking in CC Docket No. 98-147, and Sixth Further Notice of Proposed
Rulemaking in CC Docket No. 96-98, FCC 01-26, ¶ 24 (Rel. January 19, 2001) ("*Line Sharing
Reconsideration Order*").

1 than double the number of miles customers can live from a central office" by remotely deploying
2 DSL technology.⁹⁸ Absent the requirement that Qwest provide unbundled packet switching, it is
3 clear that Qwest can and will eliminate competition from the more distant areas of the network.

4 2. This Commission Should Require Qwest To Provide Access To Packet- Switched
5 NGDLC Architectures and NGDLC Functionalities, Including Remote DSLAMs
6 (SGAT § 9.20.2.1-9.20.2.4; WA PS-1, WA PS-2, WA PS-3 and WA PS-19;
7 WA LS-18).

8 Qwest's proposed SGAT language in Section 9.20.2 is insufficient to provide
9 Washington consumers and businesses a competitive choice of broadband DSL services. In
10 particular, Qwest has refused to provide unbundled access to packet-switched NGDLC architectures.
11 Qwest only agrees to provide unbundled access to packet-switched NGDLC in the following
12 circumstances:

13 9.20.2.1 CLEC may obtain unbundled packet switching only when all four of
14 the following conditions are satisfied in a specific geographic area:

15 9.20.2.1.1 Qwest has deployed digital loop carrier systems, including but not
16 limited to, integrated digital loop carrier or universal digital loop carrier
17 systems or has deployed any other system in which fiber optic facilities
18 replace copper facilities in the distribution section.

19 9.20.2.1.2 There are no spare copper loops available capable of supporting
20 the xDSL services the requesting carrier seeks to offer.

21 9.20.2.1.3 Qwest has placed a DSLAM for its own use in a remote Qwest
22 Premises but has not permitted CLEC to collocate its own DSLAM at the
23 same remote Qwest Premises or collocating a CLEC's DSLAM at the same
24 Qwest Premises will not be capable of supporting xDSL services at parity
25 with the services that can be offered through Qwest's Unbundled Packet
26 Switching.

9.20.2.1.4 Qwest has deployed packet switching capability for its own use.

23 ⁹⁸ See Exhibit 875-T, pp. 14-16, Exhibit 876. Similarly, within the State of Washington, Qwest
announced on May 22, 2001 its plan to deploy DSL over DLC throughout its region.

24 See <http://www.king5.com/biztech/Storydetail.html?StoryID=19573>, attached hereto as
25 Exhibit 14. In this press release, Qwest stated that its remote DSLAM deployment will "more
26 than double" the number of miles an end user can reside from the central office and still receive
DSL. Qwest also anticipates that it will lock in more than 6 million DSL customers by 4Q02 via
its CO and remote terminal DSL offerings.

1 In its prefiled and oral testimony, Covad (as well as other CLECs) proposed that
2 Qwest make virtual collocation and unbundled packet-switching available to CLECs that desire to
3 provide services over NGDLC platforms or via remote DSLAMs. Specifically, Covad proposed that
4 Qwest provide remote terminal access via "plug and play"—the insertion of a plug-in card-based
5 DSLAM functionality.⁹⁹ Qwest refused to modify its SGAT language on the grounds that
6 purportedly alternative access could be obtained by a CLEC who (1) remote deployed a DSLAM;
7 (2) leased fiber transport from the CO to the remote terminal, and (3) leased a copper loop to the end
8 user. For the reasons set forth below, Qwest's proposal is untenable and will effectively stymie
9 competition in Washington. Covad therefore requests that this Commission order Qwest to provide
10 the access requested on an unbundled basis.

11 a. The "Impair" Standard.

12 FCC Rule 51.317 prescribes the legal standard to be used by state commissions when
13 creating new UNEs. When no proprietary rights are implicated, as in this case, the state commission
14 need only find that CLECs would be "impaired" without access to the element.

15 When evaluating whether to unbundle a network element under the "impair" standard,
16 the rules establish that the "totality of circumstances" must be considered to determine whether an
17 alternative to the ILEC's network is available in such a manner that a requesting carrier can
18 realistically be expected to actually provide services using the alternative.¹⁰⁰

19 To determine whether the totality of the circumstances warrants unbundled access,
20 Rule 51.317(b) requires that the state commission consider the cost, timeliness, quality, ubiquity, and
21 impact on network operations that may be associated with any alternatives to unbundling. In
22

23 ⁹⁹ Exhibit 875-T, p. 14. Covad developed its virtual collocation NGDLC proposal initially in
24 response to SBC's planned Project Pronto and the September 2000 waiver SBC obtained from its
25 Ameritech merger conditions relating to Pronto access. Since then, the FCC Bell Atlantic/GTE
26 merger conditions imposed identical restrictions and conditions upon Verizon, and in the context
of New York, Maryland and Pennsylvania state unbundling inquiries, Verizon recently proposed
a similar product called "PARTS" (Packet-Switched Access to Remote Terminal Service").

¹⁰⁰ *UNE Remand Order* at ¶ 62.

1 addition, a state commission may consider other factors such as promotion of the rapid introduction
2 of competition; facilities-based competition, investment, and innovation; or certainty to requesting
3 carriers regarding the availability of the element.¹⁰¹

4 As Covad pointed out in its testimony,¹⁰² no commercially viable alternative method
5 to providing service to neighborhoods served by NGDLC or NGDLC functionalities, like remote
6 DSLAMs, exists absent unbundled access, for the following reasons:

7 b. Availability of Spare Copper (Section 9.20.2.1.2) is not a Viable
8 Alternative.

9 The use of spare or "home run" copper loops to provision xDSL service is far from
10 being a feasible alternative. In many cases, an NGDLC or remote DSLAM is deployed precisely
11 because available copper is not suited (e.g., too long) for xDSL service.¹⁰³ In addition, because the
12 length of the copper loop limits the xDSL bandwidth available to the end-user, CLECs would be at a
13 considerable competitive disadvantage to Qwest's deployment if CLECs were required to provide
14 service on spare loops.¹⁰⁴ For example, while Qwest might be able to provide high-bandwidth
15 VDSL service through a RT architecture (where the copper distribution subloop may only be 2000-
16 3000 feet long), a CLEC offering service over a longer, spare copper loop may only be able to
17 provide ADSL service.¹¹⁰ Thus, Qwest's requirement that CLECs go to "spare copper loops" first
18 would give it an inherent and sustainable competitive advantage for its own DSL services. The
19 consequent competitive disadvantage to CLECs could be significant enough to deter them from even
20 attempting to provide a competitive, alternative service in many neighborhoods and towns.

21 In addition, if incumbents deploy fiber fed NGDLC systems with a plug-in card based
22 DSLAM functionality at the remote terminal, it can potentially cause cross talk interference

23 ¹⁰¹ See 47 C.F.R. § 51.317(c).

24 ¹⁰² Exhibit 875-T, pp. 12-16.

25 ¹⁰³ Exhibit 875-T, p. 13.

26 ¹⁰⁴ *Id.*

¹¹⁰ *Id.*

1 problems to DSL services provided over spare copper loops to DSLAMs collocated in the central
2 office.¹¹¹ Such degradation could materially diminish a competitor's ability to effectively provide
3 service over spare copper loops. During the hearing on this issue before the Illinois Commerce
4 Commission, Ameritech's witness acknowledged that there could be degradation in throughput
5 because of SBC's Project Pronto's deployed architecture.¹⁰⁵

6 Although Qwest may argue that SGAT § 9.20.2.1 is derived from its rough FCC Rule
7 analogue 51.319(c)(3)(B), the FCC has since recognized the inherent flaws in Qwest's position. In
8 granting SBC a waiver from its merger conditions with regard to Project Pronto, the FCC interpreted
9 51.319(c)(3)(B)(ii) as permitting a competitor to "be able to provide over the spare copper *the same*
10 *level of quality advanced services* to its customer as the incumbent LEC."¹⁰⁶ In addition, Section
11 51.319(c)(3)(B)(ii) requires that, to be deemed an alternative to unbundled packet-switching, the
12 spare copper must be able to "support[] the xDSL services the requesting carrier seeks to offer."
13 Therefore, the Commission should clarify that, if a CLEC seeks to offer VDSL or high-rate ADSL
14 service to a customer, and existing spare copper does not support that xDSL service, or that DSL
15 provided over NGDLC by Qwest would potentially degrade CLEC services over spare copper loops,
16 the "spare copper" exclusion to the packet-switching element of SGAT § 9.20.2.1.3 does not apply.

17 Covad's well-founded concerns about the lack of viability of the "alternative"
18 proposed alternative to unbundled packet switching was wholly validated in the recent *Texas*
19 *Arbitration Decision*. Consistent with the arguments and facts Covad advances here, the Texas
20 Commission explicitly rejected SWBT's position that "spare copper" from the CO could or would
21 provide an adequate equivalent to a fiber fed loop with a short copper run from a remote terminal to
22 the end user's premises:

23
24 _____
25 ¹¹¹ *Id.*

26 ¹⁰⁵ Post-Hearing Rebuttal Testimony of Gentry, Exhibit C at 23.

¹⁰⁶ *SBC Kansas/ Oklahoma Order*, footnote 741.

1 Use of all-copper loops to provide xDSL services merely provides CLECs with an
2 option that SWBT itself is spending billions of dollars to avoid. As ADSL is
3 distance sensitive, provisioning over Project Pronto, where the goal for the copper
4 portion of the loops is 12,000 ft., rather than home-run copper, provides inherent
5 enhanced quality. . . . since areas include no spare copper. Furthermore, CLECs have
6 no guarantee that the spare copper will remain once Pronto is ubiquitously deployed.
7 Thus, while "home-run" copper alternative may be present in some situations, the
8 Arbitrators are not convinced that these provide the same level of service viable or
9 permanent.

6 The Arbitrators believe that SWBT has deployed DLC or NGDLC in which fiber
7 optic facilities replace copper facilities in the distribution section. . . . Where no
8 copper currently exists, the Pronto architecture will be the only available means to
9 serve a customer.

8 The Arbitrators are not persuaded by the evidence that there are spare copper loops
9 capable of supporting xDSL services the CLECs seek to offer . . . the Arbitrators
10 believe that the evidence in this record supports the finding that without access to
11 Pronto, including the packet switching functionality, CLECs will be impaired.
12 Pronto was devised to reach consumer who otherwise could not be served over the
13 existing network. By some estimates, nearly a quarter of the customers who do not
14 have access to ADSL today, will be able to obtain ADSL service after Pronto is
15 rolled-out. Because line sharing generally cannot be supported on loops in excess of
16 18,000 feet, CLECs will be denied the opportunity to provide services to customers
17 whose loops exceed that length. In other words, where spare copper is in fact
18 available, the quality of service generally between the different distribution methods
19 is somewhat disparate, especially in distance-sensitive applications such as line
20 sharing. This disparity does not meet the condition that spare copper loops should be
21 able to 'offer the same level of quality for advanced services.'¹⁰⁷

16 A difference in network architecture does not alter the findings of the *Texas*
17 *Arbitration Decision* with respect to spare copper. Thus, pursuant to this persuasive authority, the
18 Commission should find that that spare copper is not a viable alternative.¹⁰⁸

19 c. Collocation of DSLAMs (SGAT § 9.20.2.1.3) is not a Viable
20 Alternative.

21 Collocating DSLAMs in Qwest's remote terminal is not an alternative that should be
22 given any weight whatsoever under the impair analysis. In general terms, collocating DSLAMs as

23 ¹⁰⁷ *Texas Arbitration Decision*, pp. 71-72 & 76-77.

24 ¹⁰⁸ The Texas Commission also rejected another argument raised by SWBT that is identical to
25 one raised here by Qwest –namely, that CLECs can lease dark fiber transport from the RT to the
26 CO. As the Texas Commission stated, however, "dark fiber may not always be available, thus
making it impossible for the CLEC to provision xDSL service with a remotely collocated
DSLAM." *Texas Arbitration Decision*, p. 85. Thus, where a CLEC has deployed a remote
DSLAM, "it is SWBT's burden to provide the fiber subloop back to the central office." *Id.*

1 an alternative requires CLECs to collocate the equipment necessary to perform the DSLAM and
2 multiplexing functionality along with optical electronics in every Qwest remote terminal served by
3 fiber.¹⁰⁹ In addition, CLECs will need to make all the necessary cross connections and install Field
4 Connection Points ("FCPs") at each remote terminal between the end user's copper and its collocated
5 equipment.¹¹⁰ Even more egregiously, CLECs would be required to collocate an expensive DSLAM
6 to serve a mere 300 customers, even though the DSLAM has the capacity to serve up to 3,000
7 customers. When examining the burden imposed by the requirement of collocating a DSLAM in a
8 remote terminal pursuant to the factors set forth in Rule 51.317, it is demonstrably apparent that
9 unbundled access to any NGDLC or remote DSLAM in Qwest's network is required.

10 First, no CLEC is in the financial position to replicate the Qwest network and
11 collocate DSLAMs at a sufficient number of remote terminals to offer a viable competitive
12 service.¹¹¹ The FCC has stated that where lack of access to a UNE "materially restricts the number
13 or geographic scope of the customers," a CLEC's ability to provide services is impaired. The purpose
14 of unbundled access is to permit CLECs to share the economies of scale, scope and density of
15 existing incumbent LEC networks. Qwest enjoys considerable economies in deploying NGDLC
16 architectures and remote DSLAMs that CLECs do not possess, which poses a considerable and
17 sustainable competitive problem. Those economies derive from the ubiquitous nature of Qwest's
18 incumbent LEC network—a level of ubiquity no CLEC possesses. Thus, in determining whether to
19 order unbundled access, this Commission must consider whether a ubiquitous alternative can be
20 deployed on a timely and cost-effective basis. With regard to NGDLC architectures and
21 functionalities, only Qwest possesses such economies.

22
23
24 _____
¹⁰⁹ Exhibit 875-T, p. 13.

25 ¹¹⁰ *Id.*, pp. 13-14.

26 ¹¹¹ *Id.*, p. 14.

1 Second, the findings of the FCC illustrate that collocation of DSLAMs in Qwest's
2 remote terminals is far more costly than accessing NGDLC loops from the central office.¹¹² Indeed,
3 Qwest itself has acknowledged in Colorado that collocation of remote DSLAMs is extraordinarily
4 cost prohibitive:

5 Q: You explained that Qwest, for its business reasons, is coming to the
6 conclusion that it's going to place DSLAMs adjacent to FDI; is that right?

7 A: On a limited basis, yes.

8 Q: What do you mean?

9 A: A limited basis. We're not going to deploy DSLAMs to every FDI.

10 Q: Why is that?

11 A: I think I alluded to that earlier. Simply because we want to reach the most
12 customers with the shortest loop possible to provide our DSLAM.
13 Additionally, not 100 percent of the loops in all occasions for the particular
14 distribution area that's served by a remote terminal actually is served by the
15 digital loop carrier.

16 Q: You said Qwest is going to do that, that is, place its DSLAM close to the FDI
17 in a limited circumstance; is that right?

18 A: Yes. Targeted approach, yes.

19 Q: Limited because of what? Limited because -- I'll just open it that way.

20 A: Economics. In other words, where it makes sense to place a DSLAM in the
21 remote outside plant, environmentally we'll place it where we think we can
22 reach enough customers to make it viable.

23 Q: In other words, the economics from Qwest's perspective is that placing a
24 remote—placing a DSLAM adjacent to an FDI is an expensive proposition
25 relatively and thus can only be done in selective circumstances such that
26 Qwest feels like economically it can generate revenue sufficient to justify that
action; is that right?

 A: Correct.¹¹³

¹¹² *Line Sharing Reconsideration Order* at ¶ 13.

¹¹³ *See* CO Trans., 11/3/00, WS 3, pp. 46-47.

1 Of course, despite that cost, but in recognition of the ability to lock in an entire
2 category of customers if high enough economic barriers are erected, Qwest has commenced a
3 massive remote DSLAM deployment.¹¹⁴

4 Third, collocating DSLAMs in Qwest's remote terminals would materially delay a
5 requesting carrier's timely entry into the local market or alternatively delay expansion of an existing
6 carrier's line sharing service offerings.¹¹⁵ In fact, the FCC recognizes that collocation of a DSLAM
7 in a remote terminal is an inherently time consuming process.¹¹⁶ Further delays would be incurred
8 while the CLEC attempted to secure necessary access to rights-of-way, zoning, and power supply
9 that may be needed in certain instances.¹¹⁷

10 Finally, the other factors provided for by Rule 51.317(c) support unbundled access.¹¹⁸
11 For instance, the unbundling requested by Covad (1) promotes the rapid introduction of competition
12 for advanced services in the residential and small business marketplace; (2) promotes facilities-based
13 competition, investment, and innovation for new innovative xDSL services that can be offered to
14 customers; and (3) ensures the certainty requesting carriers require to provide advanced services
15 ubiquitously throughout Washington.

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¹¹⁴ Exhibit 875-T, pp. 15 & 16; Exhibit 876.

21 ¹¹⁵ See also *UNE Remand Order* at ¶ 361.

22 ¹¹⁶ *Line Sharing Reconsideration Order* at ¶ 13.

23 ¹¹⁷ See *UNE Remand Order* at ¶¶ 213 and 364. In addition, Qwest's Rights of Way Agreement
24 also threatens to remove the Commission's oversight on Qwest's management of rights of way
25 disputes. Qwest has proposed mandatory alternative dispute resolution to resolve such disputes.
26 The results of those proceedings may never become public—which means that this Commission
may never know how or why a CLEC may not have been able to obtain rights of way to serve a
particular town or neighborhood.

¹¹⁸ 47 C.F.R. § 51.317(c).

1 3. Collocation of DSL Line Cards at Remote Terminals.

2 A critical component of Covad's proposed unbundled access to Qwest packet-
3 switched NGDLC functionality is the ability to virtually collocate DSL line cards at Qwest remote
4 terminals.¹¹⁹ Qwest refused to agree to Covad's proposal.

5 Any Commission decision ordering unbundled access to NGDLC-type packet-
6 switching must be accompanied by a decision explicitly permitting the collocation of DSL line cards.
7 The line card performs the DSLAM functionality necessary to generate and receive transmissions
8 across the unbundled loop from the end-user through the remote terminal back to the central
9 office.¹²⁰ Indeed, the FCC has found that "the plug-in ADLU card is an indispensable component for
10 providing ADSL service through the manufacturer's NGDLC system; . . ."¹²¹ Different line cards
11 offer different DSL functionalities and quality of service (QoS) guarantees. The line card is
12 necessary to access the NGDLC loop UNE and to enable the CLEC to provide its desired services
13 over the loop.

14 Although a line card provides DSLAM functionality,¹²² and although Qwest claims to
15 permit CLECs to collocate "DSLAMs" at its remote terminals, Qwest nonetheless flatly refused
16 CLECs the ability to collocate the line card, even where technically feasible. Instead, Qwest
17 believes that CLECs should be required to collocate a much-larger DSLAM—a device that takes up
18 more space, is more expensive to buy and operate, and draws more power—despite the fact that the
19 similar functionality is contained on a much smaller piece of equipment. The installation of other
20 technically feasible line cards would support the other advanced services that CLECs need to
21 provide to differentiate their products in a competitive market.

22
23

¹¹⁹ See Exhibit 875-T, p. 14.

24 ¹²⁰ *Project Pronto Order* at ¶ 14.

25 ¹²¹ *Project Pronto Order* at ¶ 14.

26 ¹²² *Texas Arbitration Decision*, p. 88 ("line cards . . . are in fact a substitute for a traditional DSLAM").

1 With regard to technical feasibility, as discussed above, the Illinois Commission
2 recently ordered SBC to permit CLECs to collocate line cards at NGDLC facilities.¹²³ Under FCC
3 rules, this decision establishes a rebuttable presumption that such collocation is technically feasible
4 in Washington.¹²⁴

5 **C. CONCLUSION**

6 As set forth more fully above, it is imperative that this Commission require that
7 Qwest (1) provide unbundled access to all NGDLCs and NGDLC functionalities in its network; (2)
8 provide unbundled access to all remote DSLAMs in its network; and (3) permit the collocation of
9 DSL line cards at Qwest remote terminals. Absent such requirements, Washington citizens will be
10 deprived of any competitive choice in xDSL services.

11 **V. DISPUTED LINE SHARING ISSUES**

12 **A. INTRODUCTION**

13 Throughout the § 271 proceedings on emerging services, Qwest has focused
14 exclusively on the terms and conditions relating to line sharing contained in the SGAT in support of
15 its argument that it has met its burden of proof under § 271. Qwest's SGAT, however, is only one
16 aspect of satisfying the competitive checklist. Rather, it is an absolute prerequisite to the satisfaction
17 of the § 271 competitive checklist that Qwest demonstrate "its present compliance with the statutory
18 conditions for entry."¹²⁵

19 In rendering its order on emerging services, this Commission must take notice not
20 only of the terms and conditions contained in Qwest's SGAT regarding line sharing, but also Qwest's
21 actual commercial conduct in provisioning line sharing. Until both the SGAT and Qwest's actual
22 performance demonstrate checklist compliance, this Commission cannot give a favorable
23

24 ¹²³ *Illinois Order* at p. 27.

25 ¹²⁴ *Collocation Order* at ¶¶ 8, 45 ("[a] collocation method used by one incumbent LEC or
mandated by a state commission is presumptively technically feasible for any other incumbent
LEC.").

26 ¹²⁵ *BANY 271 Order*, ¶ 37.

1 recommendation to the FCC on Qwest's application for Section 271 relief in the State of
2 Washington.

3 **B. ARGUMENT**

4 1. Qwest Must Provide Data Continuity Testing to CLECs at No Charge to Ensure that
5 Data Continuity of the Line Shared Circuit.

6 In its prefiled testimony, Covad stated that Qwest failed to demonstrate that it is
7 currently complying with its obligations under the Act. Specifically, Michael Zulevic of Covad
8 testified that Qwest historically has been unable to properly provision line shared orders as a result
9 of poor or non-existent technician training and care. Mr. Zulevic testified that the only appropriate
10 remedy for Qwest's inability to correctly provision line shared orders was to require Qwest to
11 perform data continuity testing on all line shared circuits.¹²⁶

12 Although Qwest initially resisted providing data continuity testing, after Staff to the
13 Colorado PUC found that Qwest is obligated to provision a line shared circuit that is capable of
14 supporting ADLS service and thus that any testing to ensure such capability should be provided by
15 Qwest, Qwest agreed to provide data continuity testing on all line shared circuits region-wide
16 generally, and in the State of Washington, specifically.¹²⁷ Consistent with that Agreement, Qwest
17 proposal language for inclusion in the line sharing section that reflects this commitment. To the
18 extent that Qwest does formally incorporate that language into the SGAT, Covad agrees that this
19 issue is closed.

20 2. Qwest's Proposed Line Sharing Interval Is Too Long. (SGAT, Exhibit C; WA LS-4).

21 The work necessary to provision a line shared loop is minimal; no work must be done
22 in connection with the outside plant (except under very limited circumstances), minimal work is
23 required inside the CO, and no administrative work is required since the cable pair and central office
24 equipment information already has been ascertained.¹²⁸ Indeed, all that is required is a simple "lift

25 ¹²⁶ Exhibit 875-T, pp. 6-7.

26 ¹²⁷ See Exhibits 1016 and 1017.

¹²⁸ Exhibit 875-T, pp. 7-8.

1 and lay," pursuant to which one cross connect is replaced with two (and, on occasion, four), using
2 the same cable bearer and switch office equipment.¹²⁹

3 Despite the apparent simplicity of the process, Qwest nonetheless currently insists on
4 the same five (5) business day interval for both stand alone and line shared loops. Qwest has
5 conceded that its current line sharing interval is improperly elongated, agreeing in the last workshop
6 that the line sharing interval would drop to three (3) business days as of July 1, 2001.

7 Yet, even this interval is unduly long given the minimal amount of work required to
8 provision a line shared loop. Qwest's argument in support of this interval turns on the contention
9 that the full interval is necessary because "Qwest must perform numerous other order entry,
10 assignment and provisioning functions."

11 Qwest's argument rings hollow, when set against the fact that line sharing has been in
12 place for almost two years and Qwest has had ample opportunity to resolve and, potentially
13 automate, the line share provisioning process. Qwest also raises the feeble argument that a five
14 (5)/three (3) business day interval is appropriate because that is the parity interval for Qwest's
15 Megabit DSL service. This Commission, however, is not bound by a purported "parity" standard.¹³⁰
16 Instead, the Commission should adopt an interval that, consistent with the Act, facilitates the
17 deployment of advanced services in the State of Washington.

18 In its testimony, Covad suggested that Qwest adhere to a graduated line sharing
19 interval, beginning with a three-day interval and then dropping down to a one-day interval after six
20 months. Because a one-day interval would facilitate the entry of CLECs into the xDSL market in the
21 State of Washington, this Commission should follow the lead of other states, like Illinois, that
22 mandate a one-day interval for line share orders.

23 ¹²⁹ *Id.*

24 ¹³⁰ Note also that a parity interval is simply not appropriate here. Because there is a significant
25 difference between the provision of Megabit DSL service, which is high-speed internet access
26 plus IP, versus the provision simply of a cross connect—without the attendant provision of high
speed internet access and IP, the "parity" interval has no applicability here. *See also* CO Trans.,
11/1/00, WS 3, pp. 47-51 and 65.

1 3. Qwest's SGAT Permits It To Unilaterally Impede CLECs' Rights To Mount Splitters
2 On the ICDF (SGAT § 9.4.2.3.1; WA LS-3).

3 SGAT § 9.4.2.3.1 states that the POTS splitter will be installed either on a relay rack
4 or a main distribution frame under two circumstances: (1) where an ICDF is not available; or (2) the
5 CO has less than 10,000 lines. As Covad pointed out, Qwest has permitted other CLECs to mount
6 their splitters on the MDF in offices with more than 10,000 lines, but has unfairly refused to accord
7 Covad the same option.¹³¹

8 Setting aside the issue of Qwest's discriminatory treatment of Covad, a more
9 problematic consequence of Qwest's proposed SGAT language is the fact that it reposes in Qwest the
10 power to unilaterally, and without warning, alter Covad's rights to mount a splitter on the MDF
11 simply by redesignating an MDF as an ICDF. Covad's concern is not without basis. As Mr. Zulevic
12 testified in another jurisdiction, Qwest has taken this precise step previously.¹³²

13 Because Qwest has demonstrated its propensity to abuse the discretion implicit in
14 SGAT § 9.4.2.3.1, this Commission should affirmatively prevent Qwest from acting in such an anti-
15 competitive manner. Qwest should be required to amend this provision to eliminate the 10,000 line
16 limitation.

17 4. Qwest Improperly Limits Line Sharing To Copper Loops. (SGAT § 9.4.1.1; WA LS-
18 6; WA PS-1; PS-2; WA PS-3 and WA PS-19).

19 The FCC made clear in the *Line Sharing Reconsideration Order* that "the requirement
20 to provide line sharing applies to the entire loop, even where the incumbent has deployed fiber in the
21 loop (e.g., where the loop is served by a remote terminal)."¹³² Thus, despite its use of the word
22 "copper" in the *Line Sharing Order*, the FCC made clear that "use of the word 'copper' in section
23 51.319(h)(1) was not intended to limit an incumbent LEC's obligation to provide competitive LECs
24 with access to the fiber portion of a DLC loop for the provision of line-shared xDSL services."¹³³ As

25 ¹³¹ Exh. 875-T, pp. 8-9..

26 ¹³² *Id.*, p.9

¹³² *Line Sharing Reconsideration Order*, ¶ 10.

¹³³ *Id.*

1 the FCC explained, this clarification was necessary in order to prevent incumbent LECs from closing
2 off competition by migrating its service to fiber:

3 In the absence of this clarification, a competitive LEC might undertake to collocate a
4 DSLAM in an incumbent's central office to provide line-shared xDSL services to
5 customers, only to be told by the incumbent that it was migrating those customers to
6 fiber-fed facilities and the competitor would now have to collocate another DSLAM
7 at a remote terminal in order to continue providing line-shared services to those same
8 customers. If our conclusion in the Line Sharing Order that incumbents must provide
9 access to the high frequency portion of the loop at the remote terminals as well as the
10 central office is to have any meaning, then competitive LECs must have the option to
11 access the loop at either location.¹³⁴

12 True to the FCC's concern, Qwest expressly limits line sharing to the "copper
13 portion of the loop." SGAT §9.4.1.1. Astonishingly enough, Qwest claims that its "copper only"
14 definition of line sharing is consistent with the *Line Sharing Reconsideration Order*, arguing that
15 paragraph 12 "qualifies" the unambiguous language of the earlier paragraphs, and thus permits the
16 limitation to line sharing over the copper loop. Qwest's argument is without merit and should be
17 rejected.

18 First, nowhere has Qwest provided any evidence that line sharing over a fiber fed
19 loop is not technically feasible. To the contrary, as discussed more fully above, line sharing over a
20 fiber fed loop—via a "plug and play" card—is presumptively feasible and thus should be ordered by
21 this Commission.¹³⁵

22 Moreover, as the Texas Commission recently ruled, any argument regarding the
23 existence of "piece parts" that result in line sharing over fiber is without merit; ILECs are obligated
24 to provide line sharing regardless of what components the loops is comprised:

25 The FCC in its Line Sharing Reconsideration Order, clarified that an ILEC must
26 allow line sharing even where the ILEC has deployed architecture such as SWBT's
"project Pronto." The Arbitrators find that as the network architecture changes,

¹³⁴ *Id.*, ¶ 11.

¹³⁵ Qwest will undoubtedly argue that such an approach is not proper because it is more of a
packet switching issue than a line sharing issue. Acceptance of such an argument elevates form
over substance. To the extent that a particular type of packet switching technology provides a
technically feasible and cost-efficient method of line sharing over fiber, that technology should
be included in—or at least not specifically excluded by—the SGAT.

1 SWBT should not be relieved of obligations that are already present, namely to
2 provide CLECs access to the loop on an unbundled basis. The Arbitrators find no
3 evidence in the record to support the proposition that Project Pronto or the
4 introduction of fiber into the loop plant changes the underlying nature of the
5 transmission facility; it is still a loop . . . a loop is a loop, regardless of whether it is
6 all copper or a combination of copper and fiber.

7 The transmission facility, whether it is end-to-end copper, or a configuration of
8 copper and fiber with a remote terminal and remotely located electronics, is within
9 the definition of an unbundled loop. Consequently, SWBT must provide CLECs
10 access to the unbundled loop element from the demarcation point at the customer's
11 premises to the termination (port) on the OCD in the central office, including the
12 associated electronics at the RT and the CO.¹³⁶

13 As set forth more fully above, this Commission has the authority, under the Act¹³⁷
14 and FCC rules,¹³⁸ to expand Qwest's unbundling obligations beyond those required by the FCC and
15 "to impose additional, pro-competitive requirements consistent with the national framework
16 established in this order."¹³⁹ Therefore, it is clear that the FCC welcomes this Commission's efforts
17 to enact additional regulations that it finds warranted to promote competition and the deployment of
18 advanced services in Washington.

19 **c. CONCLUSION**

20 The Commission should not put all of its telecommunications eggs into the Qwest
21 basket. Covad has proposed line sharing policies and provisions that would, in Covad's opinion,
22 provide Washington citizens a competitive option. Covad respectfully urges the Commission to take
23 the appropriate and necessary steps in this proceeding to provide Washington citizens that option.

24 **VI. DISPUTED CICMP ISSUES**

25 Covad reserves its right to reopen all "CM" issues at the time these issues are
26 brought out of Co-provider Industry Change Management Process ("CICMP") and into this forum.

27 ¹³⁶ *Texas Arbitration Decision*, p. 74-75.

28 ¹³⁷ 47 U.S.C § 251(d)(3).

29 ¹³⁸ 47 C.F.R § 51.317(d).

30 ¹³⁹ *Line Sharing Order*, ¶ 159

1 **VII. DISPUTE DARK FIBER ISSUES**

2 Covad concurs in AT&T's Brief on Issue DF-5.

3 **VIII. DISPUTED PUBLIC INTEREST ISSUES**

4 **A. INTRODUCTION**

5 The fundamental question this Commission must answer in endorsing, or not, Qwest's
6 application for Section 271 relief is whether Qwest has fully and irretrievably opened its local
7 markets in Washington to competition for both business and residential customers. To date, Qwest's
8 evidence of an "irreversibly open" local market is grounded in disturbingly limited evidence
9 concerning the existence only of voice competitors, and expansive, repeated promises of the benefits
10 that Washington consumers will reap once Qwest receives authority to provide long distance service
11 in Washington. The flaw in Qwest's analysis is self-evident; by focusing on the purported benefits
12 flowing from its presence in the long distance market, Qwest conveniently ignores the fact that its
13 competitors have made negligible inroads in a limited number of local markets in this state and
14 continue to struggle to remain in the market at every turn. Nowhere is this issue more apparent than
15 in the subset of facilities-based DSL providers, of which Covad is the only one left. In the absence
16 of evidence demonstrating both Qwest's sustained performance in meeting its market-opening
17 obligations under the Act, and a robust competitive local market, this Commission cannot find that
18 the grant of interLATA authority to Qwest is in the public interest.

19 **B. LEGAL AND STATUTORY BACKGROUND**

20 1. The Public Interest Analysis is Separate and Distinct From the Review of Checklist
21 Compliance.

22 Section 271(d)(3) of the Act provides that the FCC shall not approve [a BOC's
23 application to provide in-region, interLATA services] . . . unless it finds that—(A) the petitioning
24 [BOC] has . . . fully implemented the competitive checklist . . . ; and (C) the requested authorization
25 is *consistent with the public interest, convenience and necessity.*" The requirement that Qwest
26 establish both checklist compliance and that the grant of Section 271 authority is in the public

1 interest is not mere recital; rather, "compliance with the checklist alone is [not] sufficient to open a
2 BOC's local telecommunications markets to competition," because "[s]uch an approach would
3 effectively read the public interest requirement out of the statute, contrary to the plain language of
4 Section 271, basic principles of statutory construction, and sound public policy."¹⁴⁰ Thus, as the
5 FCC has stated:

6 Although the competitive checklist prescribes certain minimum access and
7 interconnection requirements necessary to open the local exchange to competition,
8 we believe that compliance with the checklist will not necessarily assure that all
9 barriers to the local market have been eliminated, or that a BOC will continue to
10 cooperate with new entrants after receiving in-region, interLATA authority. While
11 BOC entry into the long distance market could have procompetitive effects, whether
12 such benefits are sustainable will depend on whether the BOC's local
13 telecommunications market remains open after BOC interLATA entry.
14 Consequently, we believe that we must consider whether conditions are such that the
15 local market will remain open as part of our public interest analysis.¹⁴¹

16 The requirement that Qwest prove both checklist compliance and that its entry into
17 the long distance market is in the public interest is not limited to "unusual circumstances." To the
18 contrary, the FCC has made clear that satisfaction of both requirements is the norm in order to
19 "foster competition in all relevant . . . markets"¹⁴²:

20 [T]he public interest analysis is an independent element of the statutory checklist
21 and, under normal canons of statutory construction, requires an independent
22 determination. Thus we view the public interest requirement as an opportunity to
23 review the circumstances presented by the application to ensure that no other relevant
24 factors exist that would frustrate the congressional intent that markets be open, as
25 required by the competitive checklist, and that entry will therefore serve the public
26 interest as Congress expected. Among other things, we may review the local and
27 long distance markets to ensure that there are no unusual circumstances that would
28 make entry contrary to the public interest under the particular circumstances of the
29 application. Another factor that could be relevant to our analysis is whether we have
30 sufficient assurance that markets will remain open after grant of the application.
31 While no one factor is dispositive in this analysis, our overriding goal is to ensure

¹⁴⁰ *In re Application by Ameritech Michigan to Section 271 of the Telecommunications Act of 1934, as amended, to Provide In-Region, InterLATA Service in Michigan*, CC Docket No. 97-37, FCC 97-298 (August 19, 1997), ¶¶ 385 & 389 ("Ameritech Michigan 271 Order").

¹⁴¹ *Id.*, ¶ 390.

¹⁴² *Application of BellSouth Corporation Pursuant to Section 271 of the Communications Act, As Amended, to Provide In-Region InterLATA Service in Louisiana*, Mem. Op. and Order, CC Docket No. 98-121, FCC 98-271 (Oct. 13, 1998), ¶ 6 ("Second BellSouth Louisiana 271 Order").

1 that nothing undermines our conclusion, based on our analysis of checklist
2 compliance, that markets are open to competition.¹⁴³

3 Like the FCC, the Department of Justice views the public interest standard as being
4 broader than an evaluation of mere checklist compliance and a critical indicator as to whether
5 interLATA authority should be granted:

6 Congress supplemented the threshold requirement of Section 271 . . . with the further
7 requirement of pragmatic, real world assessments of the competitive circumstances
8 by the Department of Justice and the Commission. Section 271 contemplates a
9 substantial competitive analysis by the Department using any standards the Attorney
10 General considers appropriate. The Commission, in turn, must find before approving
11 an application that the "requested authorization is consistent with the public interest,
12 convenience and necessity," and, in so doing, must "give substantial weight to the
13 Attorney General's evaluation." The Commission's "public interest" inquiry and the
14 Department's evaluation thus serve to complement the other statutory minimum
15 requirements, but are not limited by them.

16 The "public interest" standard . . . is well understood as giving the [FCC] the
17 authority to consider a broad range of factors and the courts have repeatedly
18 recognized that competition is an important aspect of the standard under federal
19 communications law.¹⁴⁴

20 Contrary to Qwest's apparent belief that increased competition in the long distance
21 market is the key factor in the public interest analysis, the Act's goal of the promotion of competition
22 focused on the local, not the long distance, market:

23 [C]entral to competition to the consumer in this legislation is opening the local
24 telephone market to competition.

25 ***

26 The truth is, Mr. Chairman, very little has changed since 1984. The Bells still have a
firm monopoly over the local exchange market, and if they were allowed in long-
distance without any anti-trust review, they could use their monopoly control to
impede competition and harm consumers.

23 ¹⁴³ *In the Matter of the Application by Bell Atlantic New York for Authorization Under*
24 *Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of*
25 *New York*, CC Docket No. 99-295, FCC 99-404 (Dec. 22, 1999), ¶ 423 ("*BANY 271 Order*").

26 ¹⁴⁴ *Evaluation of the Department of Justice, Federal Communications Commission, In re*
Application of SBC Communications, Inc. et al. For the Provision of In-Region, InterLATA
Services in Oklahoma, CC Docket No. 97-121 (filed May 16, 1997), pp. 38-39.

1 [T]he most difficult issue in this bill has been how the local loop is opened to
2 competition. . . . No question that is where the focus of the controversy has been.¹⁴⁵

3 Consistent with this Congressional edict, a BOC seeking Section 271 relief thus should not
4 "overvalue" the expected benefits of entry into the long distance market.¹⁴⁶ The possibility of more
5 competitive choices in the long distance market and a consequent reduction in long distance rates is
6 not determinative of the public interest analysis.

7 The burden is placed on Qwest to present a *prima facie* case that it has satisfied all the
8 requirements imposed by Section 271 of the Act.¹⁴⁷ Included within the scope of "all the
9 requirements" is the public interest standard. Because the FCC has only ninety days to review a
10 BOC's application for Section 271 relief, the FCC has neither the time nor the opportunity to
11 evaluate a "constantly evolving" record.¹⁴⁸ Thus, it is imperative that Qwest rely not on the mere
12 promise that Section 271 relief will maintain and stimulate competition in Washington, but rather on
13 conclusive and affirmative evidence that its entry into the long distance market is in the public
14 interest.

15 2. Qwest is Obligated to Include in Its Public Interest Analysis the Existence of
16 Competition in the DSL Market.

17 The FCC has made clear that the emerging services—or advanced services—market,
18 which encompasses the provision of DSL service, is equally subject to the market-opening
19 requirements of the Act. More specifically, the FCC set forth unbundling requirements in the *UNE*
20 *Remand Order*, "to facilitate the rapid and efficient deployment of all telecommunications services,
21 including advanced services."¹⁴⁹

22 ¹⁴⁵ 141 Cong. Rec. H8284 (daily ed. Aug. 2, 1995) (Fields); H8289 (daily ed. Aug. 2, 1995)
(Conyers); H8464 (daily ed. Aug. 4, 1995) (Fields).

23 ¹⁴⁶ *In the Matter of the Application of Bell South Corporation et al. Pursuant to Section 271 to*
24 *Provide In-Region, InterLATA Services in South Carolina*, Mem. Op. and Order, CC Docket No
97-208, FCC 97-418 (Dec. 24, 1997) ("*Bell South Carolina 271 Order*"), ¶ 36.

25 ¹⁴⁷ See 47 U.S.C. § 271(d)(3); *Ameritech Michigan 271 Order*, ¶ 43.

26 ¹⁴⁸ *Ameritech Michigan 271 Order*, ¶ 54.

¹⁴⁹ *UNE Remand Order*, ¶ 14.

1 Not content with the speed at which advanced services were being deployed to the
2 consumer market, the FCC issued the *Advanced Services Order* so as to "enable competitive LECs to
3 compete effectively with incumbents in the advanced services marketplace."¹⁵⁰ Consistent with the
4 course it set in these two Orders, on December 9, 1999, the FCC released the *Line Sharing Order*,
5 which states, in pertinent part, that:

6 In addition, as explained in more detail below, we strongly encourage the states to
7 issue interim arbitration awards setting out the necessary rates, terms, and conditions
8 for access to [line sharing], with any unresolved issues subject to true-up when the
9 state commission completes its arbitration. *We urge states to issue these awards as
quickly as possible after a party petitions the state for arbitration under section
252(b)(1) so that competitive carriers are actually able to begin providing advanced
services on a shared loop within 180 days of release of this order.*¹⁵¹

10 Indeed, the *Line Sharing Order* originated squarely out of the FCC's desire to foster competition in
11 the advanced services market:

12 If competitive LECs were to purchase or self-provision a second unbundled loop to
13 provide voice-compatible xDSL-based services, their provisioning of service would
14 be materially more costly, and coincidentally less efficient, than purchasing the
unbundled high-frequency portion of the loop.

15 ***

16 In addition, we adopt rules in this Order that apply to spectrum compatibility and
17 management. *These rules will significantly benefit the rapid and efficient
deployment of xDSL-based technologies.*¹⁵²

18 The FCC reaffirmed its commitment to the existence and advancement of competition
19 in the advanced services arena in the *Line Sharing Reconsideration Order*:

20 Over time, we expect carriers to develop new technologies to support new forms of
21 telecommunications services. Consistent with our rules and our obligation to
22 promote innovation, investment and competition among all participants and for all
services in the telecommunications marketplace, we expect incumbent LECs to
23 provide access to the features, functionalities, and capabilities associated with the
unbundled network elements necessary to provide such services.¹⁵³

24 ¹⁵⁰ *Advanced Services Order*, ¶ 18

25 ¹⁵¹ *Line Sharing Order*, ¶ 160.

26 ¹⁵² *Id.*, ¶¶ 6 & 39.

¹⁵³ *Line Sharing Reconsideration Order*, ¶ 24.

1 Qwest may not properly or appropriately distinguish between "qualifying" facilities-
2 based providers in its public interest case.¹⁵⁴ To the contrary, as the FCC recognized in its *Advanced*
3 *Services Order*, of all areas of the local telecommunications market, advanced services such as DSL
4 were uniquely poised to develop into a highly robust competitive market¹⁵⁵:

5 The market for advanced telecommunications is a nascent one. Today, both
6 incumbent local exchange carriers ("LECs") and new entrants are at the early stages
7 of developing and deploying innovative new technologies to meet the ever-increasing
8 demand for high-speed, high-capacity advanced services. Because it is in the early
9 stages of development, the advanced services market is ripe for competition to
develop in a robust fashion. In order to foster competition among carriers to develop
and deploy new advanced services, it is critical that the marketplace for these
services be conducive to investment, innovation and meeting the needs of
consumers.¹⁵⁶

10 Despite the fact that advanced services clearly fall within the scope of the Act, and
11 that the FCC has made clear that it fully expects and anticipates the development of robust
12 competition in the area of advanced DSL services, Qwest provided no evidence whatsoever of the
13 volume of lines over which DSL services are being provided (either via line shared loops or UNE
14 loops). Qwest's failure to provide any evidence on the existence of competition in the advanced
15 services market, and the consequent impact on the public interest, standing alone, compels the
16 conclusion that Qwest has not established a *prima facie* case that its entry into the long distance
17 market is in the public interest.

18 More critically, as set forth above and below, Qwest maintains a stranglehold over the
19 DSL market in the State of Washington. Thus, it is clear that Qwest's Washington local DSL market
20 is not now open to competition, nor will it be open to competition in the foreseeable future. From

21 _____
22 ¹⁵⁴ In the discovery served by Qwest on CLECs to determine the existence of "facilities-based
23 competition" in the State of Washington, Qwest defined such competition as "telephone exchange
24 service offered exclusively over their own telephone exchange service facilities or predominantly
25 over their own telephone exchange service facilities in combination with resale. Unbundled network
26 elements purchased or leased from a BOC, like Qwest, are included in the term facilities-based as
the competing provider's "own telephone exchange service facilities." This definition, by its own
terms, eliminates DSL providers from the scope of the definition of facilities-based providers.

¹⁵⁵ *Advanced Services Order*, ¶ 2.

¹⁵⁶ *Advanced Services Order*, ¶ 2.

1 the perspective of this Commission, therefore, which must provide a recommendation on the public
2 interest standard, it is clear that the lack of competition has and will continue to deprive Washington
3 consumers of competitive choice among DSL providers. Thus, it is premature and imprudent to find
4 that Qwest's entry into the long distance market is in the public interest.

5 c. ARGUMENT

6 1. Not Only Is There Virtually No Competition in the Washington DSL Market, but
7 Also Qwest Is Actively Working to Drive All Remaining DLECs Out of That
8 Market.

9 Like every other DLEC in Washington, Covad has expended significant amounts of
10 money to attempt to enter the Washington market. Its progress (as well as the progress of other
11 CLECs), however, has been negligible. Unlike Qwest, which has experienced an explosive 105%
12 growth in its DSL customer base in the second quarter of 2001 alone, and anticipates an additional
13 50% increase in growth (i.e., the addition of 140,000 customers) by the end of 2001,¹⁵⁷ Covad's
14 growth has slowed to a mere trickle, increasing in the first half of 2001 by a fraction of Qwest's own
15 reported growth.

16 Qwest nonetheless claims that its DSL market is "irreversibly" open to competition.
17 Yet, that assertion flies in the face of the reality described above, or even as reflected in Qwest's own
18 exhibits. More specifically, Exhibit 1056C to the Direct Testimony of David L. Teitzel, shows that
19 all but two DLECs, Covad and Rhythms, have exited the Washington market due to bankruptcy;
20 Jato, NorthPoint and DSL.Net are all gone. And as Qwest and the other parties to this proceeding
21 are well aware, the two remaining DLECs in Washington, Rhythms and Covad, have both filed for
22 bankruptcy protection in the last month.¹⁵⁸ Moreover, as AT&T pointed out in its prefiled
23 testimony, as of March 2000, the four major DLECs (Covad, NorthPoint, Rhythms and DSL.Net)

24 ¹⁵⁷ Attached hereto as Exhibit 15 is the email containing Qwest's latest earning report as it relates
25 to DSL.

26 ¹⁵⁸ See Telephony Magazine, "Two Ways to Go Bankrupt," Aug. 13, 2001 ed., pp. 10-11,
attached hereto as Exhibit 16.

1 operating in Washington had a combined market capitalization of \$21.4 billion. One year later,
2 however, that market capitalization had dropped \$21.0 billion, to \$0.4 billion.

3 The dramatic DLEC exodus cannot be blamed solely on a downturn in the economy
4 and the tightening of the capital markets. To the contrary, as Covad has pointed out repeatedly in the
5 workshops on the Section 271 competitive checklist items, Qwest's poor wholesale performance, and
6 its aggressively anti-competitive conduct, has contributed greatly to the near extinction of all of
7 Qwest's DLEC competitors. Thus, Qwest's abysmal wholesale provisioning performance, and the
8 attendant price squeeze Qwest has implemented on DLECs in pricing critical elements of DSL
9 service, *see* below, has contributed to the demise of the Washington DLEC community.

10 More critically, even as its DLEC competitors exit the market, Qwest has moved
11 quickly to capitalize on the "opportunity" created, in large part, by its own conduct. For example,
12 after NorthPoint commenced exiting the market, Qwest took out a full page advertisement in the
13 Seattle Post-Intelligencer harping on the peril of receiving DSL service from any CLEC, touting the
14 merits of its own DSL service, advising consumers that only Qwest will be around in the future, and
15 then offering 60 days free service.¹⁵⁹

16 Of even greater concern are the steps Qwest has taken as its DLEC competitors have
17 been driven out of the market on the retail front. Right after Rhythms announced its anticipated
18 bankruptcy filing (thus leaving only one DSL competitor, Covad, in Washington), Qwest
19 immediately raised its retail rates for its DSL services. More specifically, on July 23, 2001, Qwest
20 filed amendment pages to its interstate retail DSL tariff to increase its retail DSL ¹⁶⁰rates by \$2.00—
21 an almost 10% increase over the current retail rate for DSL services.

22 As a result of these and other strategies, Qwest is the monopoly provider of DSL
23 service in Washington and is acting entirely consistent with its role as a monopolist. Moreover,

24 ¹⁵⁹ *See* Exhibit 17, attached hereto.

25 ¹⁶⁰ *See* Letter (Transmittal 86) from Qwest to FCC, dated July 23, 2001, with attached tariff
26 pages and Transmittal No. 86, attached hereto as Exhibit 18. The information regarding the
increase in rates is contained in Transmittal No. 86, p. 1.

1 Qwest has trumpeted its return to monopoly power internally. After Covad announced its anticipated
2 bankruptcy filing, a Qwest employee e-mailed over 190 other Qwest employees, gleefully describing
3 Covad's restructuring efforts as "the third batter down" and the "end of the national DLEC game,"
4 and referred to Covad's announcement of continued operations as "delusional" and the result of
5 "drinking too much Kool-Aid." This particular Qwest employee predicts that "its quite likely a
6 judge will say they have no chance to succeed and force them to immediate Ch 7 liquidation."¹⁶¹

7 From a competition standpoint, two facts emerge from the evidence in this brief and
8 adduced during the workshops on the checklist items, public interest and Track A. First, Qwest's
9 performance for its DLEC wholesale providers is extraordinarily poor and has contributed to the
10 demise of its DLEC competitors. Second, Qwest successfully has driven out all but one of its
11 Washington DLEC competitors and now is seeking consciously to take advantage of the financial
12 windfall inuring to a monopoly provider. Taken together, it is clear that the prospects for competition
13 in the Washington DSL market are slim, at best, and that Washington consumers are virtually
14 assured of losing any competitive choice in their DSL providers. Thus, it would be contrary to the
15 public interest to permit Qwest to enter the long distance market at this time.

16 a. Qwest's UNE Pricing Does Not Permit Efficient Competitive Entry in
17 Washington.

18 It is a truism that "efficient competitive entry into the local market is vitally
19 dependent upon the appropriate pricing of the checklist items."¹⁶² Thus, "a relevant concern"¹⁶³ for
20 this Commission in rendering a decision on the public interest component of Qwest's Section 271
21 application is whether Qwest's UNE pricing permits entry into, and sustained competition by, a
22 CLEC. The prices of unbundled network elements ("UNEs") are key to determining whether there
23

24 ¹⁶¹ See Email from L. Broberg to Distribution List, dated August 7, 2001, attached hereto as
25 Exhibit 12.

26 ¹⁶² *Ameritech Michigan 271 Order*, ¶ 281.

¹⁶³ *Id.*, ¶ 288.

1 will be competition for advanced telecommunications services such as xDSL. The price of a UNE,
2 after all, becomes a direct cost to the CLEC, and ultimately, the consumer.

3 Here, a single example of the price Qwest seeks to recover for the high frequency
4 portion of the loop ("HUNE") demonstrates that Qwest's pricing is neither cost-based nor
5 appropriately priced. Covad urged this Commission in the costing proceeding to set the price for the
6 HUNE at the same price Qwest continues to charge itself in its retail Qwest DSL tariff filings: \$0.¹⁶⁴
7 This non-discriminatory price, which also recognizes there is no incremental loop cost associated
8 with the HUNE, will result in a more level playing field to permit real price and service
9 competition—not monopoly power—to determine how xDSL services will be deployed to
10 Washington consumers. Conversely, Qwest asked the Commission to adopt an arbitrary price for
11 the HUNE 50% of the loop rate, capped at \$10, that artificially inflates the cost of xDSL services to
12 Washington consumers, requires those consumers to pay a second time for the copper loop already
13 serving their premise, and feathers the pockets of Qwest with revenue gained from an essential
14 network element that has no incremental cost to Qwest.

15 Qwest simply cannot dispute that it seeks to impose costs on CLECs to which it is not
16 subject. As Qwest itself acknowledged in its FCC filings supporting its interstate retail rates for
17 DSL service, Qwest attributed no direct costs to the HUNE. Under clear FCC guidance, therefore:

18 In arbitrations and in setting interim prices, states may require that incumbent LECs
19 charge no more to competitive LECs for access to shared local loops than the amount
20 of loop costs the incumbent LEC allocated to ADSL services when it established its
interstate retail rates for those services.¹⁶⁵

21 Qwest ignores this plain directive.

22 There is only one reasonable explanation as to why Qwest seeks to impose costs that
23 itself does not incur—to create barriers to entry into the local DSL market, minimize the profit

24 ¹⁶⁴ Covad currently does not have the transcript from the hearings in Docket No. 99A-577T in
25 which Qwest confirmed that it does not attribute any direct costs to the HUNE. However,
attached hereto as Exhibit 5 is the ALJ's recommendation from the Minnesota Line Sharing
Investigation in which Qwest made the same admission. Exhibit 5, ¶ 9.

26 ¹⁶⁵ *Line Sharing Order*, ¶ 139 (emphasis added).

1 potential of its competitors, and implement a prize squeeze on its competitors. Whether taken
2 separately or together, Qwest's non-cost based pricing makes it difficult, if not impossible, for a
3 DLEC to enter and remain in the Washington local market. Thus, until the pricing issue is corrected,
4 it is premature and contrary to the public interest to permit Qwest to enter the long distance market.

5 DATED this ____ day of _____, 2001.

6 MILLER NASH, LLP

7
8 _____
9 Brooks E. Harlow
10 WSB No. 11843

11 Attorneys for Intervenors
12 Covad Communications Company; Worldcom, Inc.;
13 and MetroNet Services Corporation
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16
17
18
19
20
21
22
23
24
25
26

1 **TABLE OF CONTENTS**

2 **Page**

3 I. PRELIMINARY STATEMENT 1

4 II. DISPUTED UNBUNDLED LOOP ISSUES 3

5 A. INTRODUCTION 3

6 B. LEGAL AND STATUTORY BACKGROUND FOR UNBUNDLED

7 LOOPS 4

8 C. ARGUMENT..... 5

9 1. Qwest Has Failed to Provide Any Evidence that It Is Providing

10 Loops In Sufficient Quantity Consistent with CLEC Demand. 5

11 2. Qwest's New Build and Held Order Policies (WA Loop 1 and 8);

12 SGAT §§ 9.1.2). 7

13 a. Qwest Is Under an Obligation to Build Facilities for

14 CLECs. 7

15 b. Qwest's Held Order Policy Improperly Improves Its PID

16 Performance Without Any Improvement In Its Actual

17 Performance. (Washington Loop 8(a)) 10

18 3. Qwest Must Refund Conditioning Charges. (WA Loop 2). 11

19 a. Qwest Must Refund Conditioning Charges Where the Loop

20 is Less than 18K feet. (WA Loop 2(a)). 11

21 b. Qwest Must Refund Conditioning Charges Where Qwest's

22 Conduct. (WA Loop 2 (b)). 11

23 4. Qwest's Raw Loop Data Tool Fails to Provide CLECs With

24 Meaningful Loop Makeup Information. The Only Way to Remedy

25 the Inadequacy of the Raw Loop Data Tool Is To Provide Direct

26 Access to LFACs. (Loops 3 and 5). 11

5. Qwest Must Allow CLECs to Perform or Request Pre-Order MLT

(WA Loop 14(b)). 18

6. Qwest Improperly Prohibits Covad from Pre-Qualifying and

Placing Orders to Provision xDSL Service for a New Qwest Voice

End User Customer Until that Customer Receives the First Month's

Voice Bill from Qwest. (WA Loop 14). 21

7. Qwest Deliberately Impedes Covad's Ability to Provide xDSL

Service to Its End Users By Failing and Refusing to Comply With

Its Agreement to Perform Cooperative Testing. (WA Loop 15). 21

8. The Issue of Whether Qwest Fails to Provide Meaningful FOCs or

to Deliver Loops on Time Is Subject to Reopen. (WA Loop 5). 26

a. Qwest's FOC Performance. 26

b. Qwest's Loop Delivery Performance. (WA Loop 5). 27

TABLE OF CONTENTS
(continued)

		Page
1		
2		
3	9. Qwest Is Not Making Address Validation Adequately Available. (WA Loop 7).	30
4		
5	10. Qwest Fails to Take the Steps Necessary to Prevent Its Technicians from Behaving in an Anti-Competitive Manner. (WA Loop 9).	30
6		
7	11. Spectrum Management (WA Loop 10).	34
8	12. Qwest's Intervals for Provisioning Loops and Providing Repair Services Are Inappropriately and Improperly Elongated. (WA Loop 11(b), (d), (g) and (h); SGAT, Exhibit C).	34
9	13. Qwest Should Redesignate Interoffice Facilities Where Loop Facilities Are at Exhaust. (WA Loop 12).	36
10	D. CONCLUSION.....	36
11	III. DISPUTED LINE SPLITTING ISSUES	37
12	A. INTRODUCTION	37
13	B. ARGUMENT.....	37
14	1. Qwest Must Provide Access to Outboard Splitters on a Line-at-a- Time or Shelf-at-a-Time Basis. (WA LSPLIT-1(a)).	37
15	2. Qwest Must Provide Line Splitting Over All Its Loop-Based Products and May Not Limit Its Obligations Under the <i>Line Sharing Order</i> and the <i>Line Sharing Reconsideration Order</i> to a Mandatory Offering of UNE-P Line Splitting and a "Voluntary" Offering of "Loop Splitting". (WA LSPLIT-9(including LSPLIT 6- 9); SGAT §§ 9.21, <i>et seq.</i> and 9.24, <i>et seq.</i>).	38
16	3. Qwest Is Obligated to Provide Line Splitting Over Both Copper and Fiber Loops. (WA LSPLIT-9; SGAT §§ 9.21.1 and 9.24.1).	38
17	C. CONCLUSION.....	38
18	IV. DISPUTED PACKET SWITCHING ISSUES	38
19	A. Background: The Economics Of NGDLC Technology And Legal Framework.	38
20	B. ARGUMENT.....	40
21	1. The Commission's Authority under Section 251(d)(3) and FCC Rule 51.317.	40
22	2. This Commission Should Require Qwest To Provide Access To Packet- Switched NGDLC Architectures and NGDLC Functionalities, Including Remote DSLAMs (SGAT § 9.20.2.1- 9.20.2.4; WA PS-1, WA PS-2, WA PS-3 and WA PS-19; WA LS-18).	42
23	a. The "Impair" Standard.	43
24		
25		
26		

TABLE OF CONTENTS
(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Page

		b. Availability of Spare Copper (Section 9.20.2.1.2) is not a Viable Alternative.	44
		c. Collocation of DSLAMs (SGAT § 9.20.2.1.3) is not a Viable Alternative.	46
	3.	Collocation of DSL Line Cards at Remote Terminals.	50
	C.	CONCLUSION.....	51
V.		DISPUTED LINE SHARING ISSUES	51
	A.	INTRODUCTION	51
	B.	ARGUMENT.....	52
	1.	Qwest Must Provide Data Continuity Testing to CLECs at No Charge to Ensure that Data Continuity of the Line Shared Circuit.	52
	2.	Qwest's Proposed Line Sharing Interval Is Too Long. (SGAT, Exhibit C; WA LS-4).	52
	3.	Qwest's SGAT Permits It To Unilaterally Impede CLECs' Rights To Mount Splitters On the ICDF (SGAT § 9.4.2.3.1; WA LS-3).	54
	4.	Qwest Improperly Limits Line Sharing To Copper Loops. (SGAT § 9.4.1.1; WA LS-6; WA PS-1; PS-2; WA PS-3 and WA PS-19).	54
	C.	CONCLUSION.....	56
VI.		DISPUTED CICMP ISSUES	56
VII.		DISPUTE DARK FIBER ISSUES	57
VIII.		DISPUTED PUBLIC INTEREST ISSUES	57
	A.	INTRODUCTION	57
	B.	LEGAL AND STATUTORY BACKGROUND.....	57
	1.	The Public Interest Analysis is Separate and Distinct From the Review of Checklist Compliance.....	57
	2.	Qwest is Obligated to Include in Its Public Interest Analysis the Existence of Competition in the DSL Market.....	60
	C.	ARGUMENT.....	63
	1.	Not Only Is There Virtually No Competition in the Washington DSL Market, but Also Qwest Is Actively Working to Drive All Remaining DLECs Out of That Market.	63
	a.	Qwest's UNE Pricing Does Not Permit Efficient Competitive Entry in Washington.	65

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