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
In the Matter of U S WEST Communications Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)))))	Docket No. UT-003040

WORLDCOM'S BRIEF ADDRESSING LOOPS, NIDS, LINE SHARING, LINE SPLITTING, EMERGING SERVICES, PUBLIC INTEREST, SECTION 272 AND GENERAL TERMS AND CONDITIONS

WorldCom, Inc., ("WorldCom") submits this brief addressing impasse issues that relate to Loops, NIDs, Line Sharing/Splitting, Emerging Services, Public Interest, Section 272 and General Terms and Conditions that arose in the fourth series of workshops. WorldCom filed the Direct Testimony of T.D. Huynh (Exhibit 985-T), Direct Testimony of Don Price (Exhibit 1090-T), Direct Testimony of Michael W. Schneider (Exhibit 860-T) and Direct Testimony of Elizabeth M. Balvin (Exhibit 855-T). This brief focuses on issues raised by WorldCom. However, WorldCom also concurs in issues raised by AT&T, Rhythms and Covad throughout these workshops. Therefore, WorldCom concurs in the arguments contained in AT&T's, Rhythms' and Covad's briefs addressing impasse issues as well.

I. LOOPS

A. WA Loop-1 (a) and (c): Section 9.2.2.3.1 and 9.1.2.1.4.

(a) Whether Qwest Should Be Required to Establish Standard Intervals for ICB Loops?

WorldCom initially challenged Qwest's practice of determining pricing and intervals for provisioning high capacity loops on and ICB basis. Since this issue was first raised, however, Qwest has agreed to establish standard pricing for OCN loops and only the interval will be determined on an ICB basis. While Qwest represents that this is consistent with the way it provisions high capacity loops for its retail customers, WorldCom continues to question why Qwest is unable to establish standard intervals for the provision of OCN loops. Qwest has produced no evidence in this proceeding demonstrating why such intervals cannot be developed and standardized. Meaningful intervals are essential to assure CLECs access to UNEs in a reasonable time frame. Accordingly, Qwest should be required to establish standard intervals for the provision of OCN loops.

(b) Whether Qwest Has An Obligation To Build High Capacity Loops?

Although Qwest Section 9.2.2.3.1 states Qwest's general obligation to provide unbundled fiber and high capacity loops to CLECs, this section is insufficient and Qwest includes exclusionary language that binds it to only provide such portions of the loop "where facilities are available and existing." High capacity loops are an essential feature to the loop. Without non-discriminatory and consistent access to high capacity loops, CLECs entry into the local market, and their ability to compete with the suite of services Qwest provides to its customers is significantly hindered. The FCC supports the inclusion of high capacity lines in the definition of loop. "High-capacity loops retain the essential

characteristic of the loop: they transmit a signal from the central office to the subscriber, or vice versa."[1]

Moreover, denying CLECs access to fiber and high capacity loops because of a lack of facilities ensures CLECs are not able to meet customer needs where Qwest has failed to install adequate facilities. Qwest's rates for retail services and rates for wholesale services include revenues to allow Qwest to expand its network to account for new growth. The wholesale rates, both for recurring charges and non-recurring charges, established for interconnection services, all unbundled elements, and resold services include sufficient revenues to ensure Qwest is able to construct new network and re-enforce existing network. The SGAT states that Qwest will provide CLECs access to UNEs, including loops, "provided that facilities are available."[2] In Section 9.2.4.3.1.2.4 of the SGAT, it states, "if appropriate facilities are not available to fill CLEC's order, and a facility build that would satisfy CLEC's order is not scheduled and funded, Qwest will send CLEC a rejection notice and cancel the order." Also, in the section of the SGAT regarding construction, it is clear that Qwest will not build UNEs unless it believes, based on "an individual financial assessment," that it is in *Qwest's* interests to do so.[3]

Qwest must build loops, and other UNEs, for CLECs under the same terms and conditions that Qwest would build network elements for itself (or its retail customers) at cost-based rates.

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[1] See, FCC Decision No. 99-238, at para. 176.
[2] SGAT §§ 9.23.1.4, 9.23.1.5, 9.23.1.6 and 9.23.3.7.2.12.8. There are other sections that incorporate the notion that Qwest does not have to build UNEs, for example, SGAT §§ 9.1.2.1 and 9.19.
[3] SGAT § 9.19.

In the Thirteenth Supplemental Order, Initial Order addressing Workshop 3 issues, the Administrative Law Judge addressed Qwest's obligation to build as follows:

> Qwest must modify section 9.1.2 of the SGAT and the appropriate subsections of 9.1.2 to state that Qwest will provide access to UNEs to any location currently served by Qwest's network. Qwest must construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted.[4]

For the same reasons that the Administrative Law Judge rejected Qwest's attempt to limit its obligation to provision unbundled transport to "existing facilities," Qwest's limitation of its obligation to provision high capacity loops to circumstances where existing facilities are available must also be rejected. As the ALJ correctly concluded, the FCC's use of the term "existing network" in the UNE Remand Order is properly interpreted to mean the existing area served by the incumbent LEC.[5] Therefore, the incumbent LEC is still required to provide access to UNEs within its existing network even if it must construct additional capacity within its network to make the UNEs available to competitors.

B. Loop-2: Should Qwest be permitted to recover loop conditioning costs for loops under 18,000 feet?

Section 9.2.2.4 describes the process for "conditioning" a loop that could include removal of load coils and excess bridge taps in order to provide a CLEC with a non-loaded loop, and associated charges. As Ms. McCall testified, consistent with the revised resistance design, a long-standing BellCore standard, loops under 18,000 feet should not be loaded.[6] As such, the necessity to condition loops under 18,000 is based on a loop

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[4] Thirteenth Supplemental Order, Initial Order, Workshop 3, dated July ___, 2001, p. 18, ¶ 80.

[5] *Id.* at ¶ 79.

[6] Tr. Vol. XXX, p. 4286, ll. 5-10.

that is not in conformance with industry standards. Under these circumstances, it would be inappropriate to allow Qwest to recover conditioning costs.

C. Loop-10 1-5: Spectrum Management Issues

On the broad issues of spectrum management included as issues Loop 10-1 through 10-3, WorldCom concurs in the positions stated by Rhythms and AT&T during the Multistate Workshop as reflected in the transcript that has been made a part of the Washington record. Specifically, WorldCom supports the revised SGAT language proposed by Rhythms regarding Spectrum Management. Rhythms' proposed language best reflects competitively neutral spectrum management practices, is consistent with FCC Orders, and advances the goals of Section 706 of the Act to "encourage the deployment on a reasonable and timely basis of advance telecommunications capability to all Americans."[7] As such WorldCom joins in those parties' briefs on the issue of spectrum management.

WorldCom also makes the following general observations regarding Qwest's approach to spectrum management. Qwest's spectrum compatibility limitation contained in SGAT section 9.2.2.7 places restrictions on rolling out loop technology that inconsistent with emerging technologies and prevents CLECs from meeting customer needs. The FCC addressed the means by which an ILEC can make such restrictions.[8] This Order requires the ILEC to disclose information with respect to rejection of requests for such services based on spectrum compatibility and places the burden upon the ILEC to demonstrate significant degradation in performance of services based on spectrum compatibility issues. The FCC recognized the need to resolve such issues in order to

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[7] 47 U.S.C. § 157.
[8] See, FCC Decision No. 99-48 at paras. 70 - 91, which address Spectrum Management.

allow competitive service offerings to end user customers. Consistent with FCC requirements, WorldCom proposed the following replacement language for SGAT Section 9.2.2.7 be changed to read as follows:

> *Qwest will provision BRI-ISDN, DS1, or DS3 capable or ADSL capable Loops in areas served by Loop facilities and/or transmission equipment. In the event Qwest believes that the provisioning of such a service is not compatible with the Loop facilities and/or transmission equipment, Qwest will disclose to requesting carrier, in writing, within 10 calendar days of the request to provision such a service, Qwest's basis for believing that provisioning the requested service is not compatible with the Loop facilities and/or transmission facilities. Qwest will bear the full burden of demonstrating incompatibility with the requested order. Claims of spectrum incompatibility must be supported with specific and verifiable supporting information. Qwest will adhere to and incorporate industry standards in regard to spectrum compatibility as they become available.*
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> *If Qwest claims a service is significantly degrading the performance of other advanced services or traditional voice band services, then Qwest must notify the affected carrier and allow that carrier a reasonable opportunity to correct the problem. Any claims of network harm must be supported with specific and verifiable supporting information.*

With respect to Loop issues 10-4 and 10-5, WorldCom and Qwest have resolved their differences and have therefore closed these issues. Qwest has agreed to make the following changes to SGAT sections 9.2.2.3.2, 9.2.6.7 and 9.2.6.8 to address WorldCom's concerns:

9.2.2.3.2 If CLEC orders a 2/4 wire non loaded or ADSL compatible Unbundled Loop for a customer served by digital loop carrier system Qwest will conduct an assignment process which considers the potential for a LST or alternative copper facility.. If no copper facility capable of supporting the requested service ~~meeting the technical parameters of the NC/NCI codes as specified by CLEC~~ is available, then Qwest will reject the order.

9.2.6.7 ~~If Qwest rejects CLECS request to deploy an advanced services technology on a Qwest provided Unbundled Loop, CLEC may submit such denial for resolution under Section 5.18 of this Agreement.~~ Reserved for future use.

9.2.6.8 Qwest will not have the authority to unilaterally resolve any dispute over spectral interference among carriers. Qwest shall not disconnect carrier services to resolve a spectral interference dispute, except when voluntarily undertaken by the interfering carrier or Qwest is ordered to do so by a state commission or other authorized dispute resolution body. CLEC may submit any claims for resolution under Section 5.18 of this Agreement.

II. LINE SPLITTING/SHARING

LSplit-1: Should Qwest be required to provide CLECs access to Qwest's POTS splitters?

Line splitting involves the provision of voice and data service over a single loop by two different CLECs.[9] In contrast, Line Sharing refers to the situation where the ILEC provides the voice service and a D-LEC provides the data service on the same line.[10]

Regarding SGAT 9.21.2.1.6, WorldCom contends that Qwest must be required to provide a splitter to requesting CLECs in those circumstances where a CLEC is provisioning voice service over a UNE loop or using UNE-P. As the Texas PUC concluded in March of this year in its *Line Splitting Arbitration* and reaffirmed as recently as June 2001 in its *Line Sharing Arbitration Order*, a splitter is a part of the UNE loop and therefore must be provided in order to comply with the obligation to provide CLECs with nondiscriminatory access to the unbundled loop.[11]

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[9] In the case of line splitting the data service can also be provided by the ILEC or the ILEC's data affiliate.

[10] Application of SBC Communications, Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, *Memorandum Opinion and Order,* CC Docket No. 00-65, FCC 00-238 (Rel. June 30, 2000), ¶ 324 ("*SWBT Texas 271 Order").*

[11] *Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communicat6ions, Inc.,* Docket 22315, "Line Splitting Arbitration" at 18-19 (March 14, 2001).

At present, UNE-P is the only vehicle most CLECs have to offer voice services to residential and small business customers on a scale that will provide meaningful competition to the ILECs. However, the CLECs' ability to compete in the mass markets will be severely constrained if they are unable to also provision data services in a timely and cost effectively manner. Line Splitting will allow a voice CLEC (V-CLEC) using UNE-P to offer a full suite of features and services to its customers without having to collocate.

In its *Line Sharing Order,* the FCC concluded that the high frequency portion of the loop is a capability of the loop. The FCC has also stated that an ILEC must provide a requesting carrier access to UNEs along with all of the UNE's features, functions and capabilities, "in a manner that allow the requesting telecommunications carrier to provide *any* telecommunications service that can be offered by means of that network element."[12] However, in order to gain access to the high frequency portion of the UNE loop, line splitting is required. Such line splitting is accomplished by adding passive electronic equipment referred to as "splitters," a device that splits the low and high frequency portion of the loop and allows the high frequency portion of the loop to be routed to a DSLAM.

A Qwest furnished line splitter is the only way to allow HFPL access to be delivered in a UNE-P architecture in a manner that is efficient, timely, and minimally disruptive to the retail customer. When UNE-P is provisioned, the service to the customer (whether voice or data) should not require any more work than is necessary. Therefore, for example, if a customer has Qwest or Verizon for voice and a D-CLEC for data, then the customer should be entitled to keep its data provider if the customer chooses to have its voice service migrate to a V-CLEC who serves via UNE-Platform. Without the option of an ILEC-furnished line splitter, a UNE-P provider would have to

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[12] 47 C.F.R. §51

purchase or augment collocation space (or collocate in a common area), deploy its own splitter, and go through a provisioning process that is lengthy, cost prohibitive, and unduly disruptive to the customer.

Use of Qwest-owned splitters can eliminate unnecessary service lead times and can allow for more efficient use of resources and scarce central office and frame space, especially in the circumstance of an end user terminating service or migrating the xDSL service or voice service to another provider. CLECs and ISPs should encounter fewer competitive barriers to acquiring or migrating customers when using ILEC deployed splitter, and this is especially true when an end user exercises their choice to switch xDSL or voice providers.

Thus, failure by Qwest to deploy line splitters effectively destroys the utility of UNE-P as a viable means of competing for residential customers who want advanced services. If Qwest is not obligated at the request of a carrier to deploy the line splitters, WorldCom and other CLECs seeking to provide a bundled service of voice and data services to their customers stand to forfeit much of the benefit associated with providing local service on a broad scaled using UNE-P.

In the interest of promoting broad-based competitive entry in the State of Washington, WorldCom asks this Commission to exercise its authority to require Qwest in this proceeding to provide access to Qwest-owned splitters on a line-at-a-time basis. The FCC has clearly stated that its requirements are the minimum necessary, and that state commissions are free to establish additional requirements, beyond those established by the FCC, where consistent.[13]

Therefore, Qwest should be required to own splitters and make them available to CLECs on a line-at-a-time basis. Qwest should not be permitted to offer only CLEC-

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[13] *UNE Remand Order* at ¶¶ 154-60.

owned splitter deployment options. WorldCom agrees with AT&T regarding the highly preferable use of a Qwest-deployed, line-at-a-time splitter arrangement. This position does not mean that CLECs should not be allowed to deploy their own splitters as they so desire, but it does recognize that other options need to be made available to CLECs desiring to enter the marketplace. Qwest-owned splitters, offered on a line-at-a-time, will also promote the ability of CLECs to offer bundled voice and data service, in direct competition with Qwest.

This argument applies equally to Qwest's SGAT provisions relating to Line Sharing. Thus, WorldCom requests that the Commission adopt language in the Line Sharing section at Sections 9.4.2.1.1 and 9.4.2.1.3 that provides the option to CLECs to lease a Qwest-owned splitter. WorldCom additionally joins in the brief of AT&T on this issue.

III. PACKET SWITCHING

PS-1 - Whether Qwest should be required to unbundled packet switching in order to enable CLECs to provision data services over fiber fed loops?

WorldCom concurs with Covad and AT&T that Qwest should be required to further unbundled packet switching in order to provide CLECs with the ability to provide data services to customers served by fiber-fed loops. Therefore WorldCom joins in those parties' briefs on this issue.

IV. DARK FIBER

DF-9 - Whether Qwest should be permitted to assess a fee for Initial Records Inquiry and Field Verification and Quote Preparation Associated with Requests for Dark Fiber?

WorldCom objects to charges based on inquiry and field verification of dark fiber location. Qwest should have inventory and location for its dark fiber that does not require

investigation of location of fiber. Similarly, Field Verification and Quote preparation should not require extent of labor that warrants a charge for such service. Unlike Collocation, such information is readily available. UDF is a UNE and like other UNEs such as loop and dedicated transport, should be ordered without having to go through a time consuming, costly and unnecessary inquiry and field verification process. CLECs should not be required to pay for inefficient administration and/or lack of documentation of Qwest's own network and location of dark fiber.

V. PUBLIC INTEREST AND SECTION 272

A. The Commission Must Consider Public Interest Issues in its Evaluation of Qwest's Entry into the Long Distance Market.

State regulators are uniquely positioned to consider public interest issues. This fact was recognized by Congress in passing the Communications Act of 1934, and underscored in the 1996 amendments to the Act. For example, Section 251(d) of the Act contains limitations on the FCC's authority to preclude certain state regulations, orders, or policies that are consistent with the Act's requirements. Even more directly related to the purpose of this proceeding, the Act specifically requires the FCC to consult with the State in considering a Bell Company's application pursuant to §271 of the Act for authority to provide long distances services within its service territory.

The states are uniquely positioned to consider public interest issues because state commissions, like this Commission, have not merely observed from afar the implementation of the Act's market-opening provisions, but actively have been involved at every step of the process. From reviewing negotiated interconnection agreements, to arbitrating complex policy issues on which the CLEC and Qwest could not reach

agreement, establishing prices for unbundled network elements, and resolving disputes over interpretations of language in interconnection agreements, the Commission regularly has grappled with difficult issues of importance to the consumers of Washington. Such extensive "on-the-job training" establishes this Commission as the most qualified body to consider issues of the public interest as it impacts Washington users of telecommunications services.

Perhaps even more importantly, in recent comments before an American Bar Association antitrust enforcement panel, the Chair of the FCC signaled that he will not be as aggressive in enforcing the public interest standard, which is part of the FCC's review of ILECs' 271 applications before that agency.[14] This Commission must therefore satisfy itself that Qwest's entry into the long distance market serves the public interest in this State.

The public interest is the balance that regulators seek to achieve between the various interests as they decide complex public policy issues. No formula exists for quantifying the public interest. Rather, the public interest requires the decision-maker to qualitatively assess the pros and cons from varying perspectives in an effort to achieve a balance among the varying interests. The balancing of complex issues is required as regulators grapple with competitive issues such as are presented today in the telecommunications industry.[15]

Our society is one that typically prefers free markets over centrally-controlled markets such as existed in the Soviet Union. There are good reasons for such a

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[14] Wall Street Journal, May 1, 2001, "Politics & Policy: Powell Quickly Marks Agency as His Own" by Yochi J. Dreazen

[15] See Direct Testimony of WorldCom, Inc. witness Don Price (hereafter referred to as "Exhibit 1090-T") at 4.

preference. Competitive markets are much better at allocating society's resources and in meeting consumers' needs. This is because firms in competitive markets strive to distinguish themselves from their competitors so as to earn a higher profit for their investors relative to the rest of the firms operating in that market. Such efforts typically take one of two forms. One is for the firm to introduce efficiencies in the means of production, yielding cost savings it can pass on to customers in the form of lower prices.[16] The second way in which a firm may seek to distinguish itself from its competitors is by introducing innovative products or services that differentiate the firm from others in that market. In either case, the motive of obtaining greater profits for the firm's investors is the stimulus for innovation.[17]

A firm that operates without competition has no such incentive to seek cost savings in production, because there are no constraints on the prices it can charge for its products. Market forces by definition cannot restrain the firm's profits. Likewise, such a firm -- whether it operates only in retail markets, wholesale markets, or both -- has no incentive to introduce innovative products or services to stimulate profits, because it has no need to differentiate itself in a market where it stands alone.[18] Economists refer to this type of situation as a "market failure." It is only in such instances that our society has

[16] The advantage from the introduction of such efficiencies is typically short-lived, as other firms seek to erase or minimize the temporary disadvantage by following the market leader.

[17] See Exhibit 1090-T at 5.

[18] For example, prior to the introduction of competition for customer premises equipment in telecommunications, consumers had few choices in terms of style, colors, or features in their telephone sets. Because it would not have increased earnings, the Bell System had no incentive to introduce new styles or colors of phones. Similarly, consumer features were introduced on a timetable which suited Bell System's management, rather than the desires of consumers. It is widely recognized that the pace of such introduction by monopolies is far slower than the pace in competitive markets where firms have an obvious profit motive to be the first to market with such innovations.

imposed regulation of such a firm as a government imposed reaction to this "failure" of the market to deliver goods and services to consumers.[19]

There is no functional market for local telecommunications goods and services.[20] Rather, the telecommunications market in the U.S. has been a monopoly for virtually all of the more than 130 years since the telephone was introduced. It has been only during the past 17 years that competition has begun to exist for certain telecommunications services. The competition that does exist today is due almost entirely to the 1984 divestiture, which resolved the U.S. government's massive antitrust case against the Bell System.

Policy-makers have limited options in the absence of a "functional market." One option is simply to accept the fact of a market failure and engage in traditional regulation. That option is not consistent with the public policy exemplified in the 1996 Act, however, which is to encourage the historic local telecommunications monopolies -- including Qwest -- to open their local markets to competition in exchange for the legal right to enter the competitive long distance market in their service territories. This policy, however, presents a number of difficult and complex issues to regulators. As relates to the public interest, regulators must not only assess the competing private interests of incumbent providers and would-be market entrants, they must craft regulations designed to create conditions where competition in local telecommunications markets can flourish, and existing competition in the long distance markets is not diminished.[21]

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[19] See Exhibit 1090-T at 5-6.

[20] As discussed in more detail below, vibrant competition exists in other telecommunications markets, such as interLATA long distance and customer premises equipment.

[21] See Exhibit 1090-T at 7-8.

. In the broadest terms, regulators should enact pro-competitive measures to both encourage good behavior and discourage anticompetitive behavior by Qwest. Such measures should seek both to neutralize the enormous advantages that Qwest possesses in the local market by virtue of its market power, and to ensure that Qwest does not use that market power to monopolize downstream markets such as broadband and long distance.

"Market power," is Qwest's ability, with respect to various telecommunications services, to control the market prices for those services. Also, Qwest has the ability to foreclose competitive entry by other firms for the provision of competing services.[22] In its service territories in Washington, Qwest's undeniable market power exists by virtue of its control of local bottleneck facilities. Qwest has enjoyed a preferred status as a provider of telecommunications services in Washington. For most of its existence, it has operated with the protection of a state-authorized monopoly, such that no competitor could even obtain the legal right to operate in competition with Qwest. In addition, Qwest enjoyed the prerogative of financing the construction of its ubiquitous network over a period of decades with captive ratepayer funds.[23]

Like any for-profit concern, Qwest possesses a natural incentive to manage its operations in a way that provides the highest financial return to its investors. But because of its control of bottleneck facilities on which its would-be competitors in both the local and long distance markets must rely, it has both the incentive and the ability to exploit such control, always ensuring a competitive advantage over its competitors. If Qwest

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[22] As the Court noted in its landmark opinion approving the consent decree presented to resolve the Justice Department's antitrust action against AT&T, "as defined by the Supreme Court, monopoly power is "the power to control prices or exclude competition."" *US v. American Tel & Tel*, 552 F. Supp. 131 (1982), at 171, citing *US v. Grinnell Corp*, and *US v. duPont & Co*. In my testimony, I will use the term "market power" to mean the same thing.

[23] See Exhibit 1090-T at 8-9.

were allowed to act on this normal incentive and exploit its undeniable market power, the competitive process would suffer irreversible damage. Such a result would not be in the public interest.[24]

Adopting regulations to limit Qwest's ability to exercise its market power to the detriment of the competitive process likely would trigger a claim by Qwest that it is harmed by such regulations. In such a situation, the Commission must consider whether the public interest is better served by facilitating the development of competition in Washington's telecommunications markets even though Qwest's private business interest is diminished. That is, the Commission must prioritize the pros and cons of the potential benefits to consumers of a more competitive marketplace versus alleged harm to Qwest. The fundamental public interest challenge is how to weigh the competing private interests of incumbent versus would-be competitor in the larger context of the overall benefits to the competitive process, which is the best way to ensure that customers obtain the best possible services at the lowest prices.

As noted above, regulation is exercised in instances where one provider has market power and the market cannot "self regulate." The market power Qwest possesses in the local telecommunications market means that the market simply cannot "work right," and elimination of all regulations would simply free Qwest to exercise its market power to the detriment of both consumers and the competitive process. The public interest considerations the Commission is making in this proceeding involve two different but related questions. One is whether the market for local telecommunications services has been sufficiently open to permit new entrants (CLECs) a meaningful opportunity to compete for both traditional voice services and emerging broadband

[24] Id. at 9-10.

offerings. The other is what is the likely impact of Qwest's entry into a market for long distance telecommunications services that is already subject to robust competition.[25]

B. The Public Interest Requires that Qwest Not Be Allowed into the Long Distance Market Prematurely.

The key issue for the Commission to consider in its assessment of the public interest implications of Qwest's entry into the long distance market is the timing of that entry. There are a number of reasons why the risk to the public interest is immeasurably greater if Qwest is permitted into the long distance market earlier rather than later. As evidenced by Section 271 of the Act, Congress clearly recognized the inherent risk to consumers and to competition if Qwest is allowed to enter the long distance market prematurely; i.e., before Qwest's local market is irreversibly open to competition.

Because Qwest continues to possess market power,[26] and for the reasons discussed below, there is significant risk that Qwest could exercise its market power in such a way as to re-monopolize certain telecommunications markets. The significant barriers to entry in the consumer market should be of particular concern to the Commission. As the FCC noted:

> …BOC entry into the long distance market would be anticompetitive unless the BOCs' market power in the local market was first demonstrably eroded by eliminating barriers to local competition.[27]

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[25] Id at 11-12.

[26] The source of Qwest's market power is its control over a ubiquitous telecommunications network throughout its operating territory. As noted in the FCC's Local Competition Order, "An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches trunking and loops to serve its customers." (FCC Order 96-325 in CC Docket 96-98, released August 8, 1996, at ¶ 10)

[27] *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, Memorandum Opinion and Order in CC Docket No. 97-137, Order FCC 97-298, released August 19, 1997, at 18.

The public interest requires that the Commission look not only at Qwest's prior actions, but also must make every effort to anticipate the impact of those actions in the future. This notion was described by the FCC in the following manner:

> While BOC entry into the long distance market could have procompetitive effects, whether such benefits are sustainable will depend on whether the BOC's local telecommunications market remains open after BOC interLATA entry. Consequently, we believe that we must consider whether conditions are such that the local market will remain open as part of our public interest analysis. [28]

This passage underscores the fact that there is a forward-looking aspect of the public interest review. As described in detail in Mr. Price's testimony, from a forward-looking perspective, prospects for meaningful competition in Washington are shaky at best:

- Because of the difference between the steps necessary to transfer a long distance customer from one carrier to another and that to transfer a local customer from one carrier to another, it is far easier for a provider of ubiquitous local services to garner long distance market share than for a provider of long distance services to capture local market share.

- Because of the financial difficulties facing the CLECs, including the historic "big three long distance carriers," and the varied revenue stream of the RBOCs, the CLEC industry does not impose a significant competitive threat to Qwest's monopoly in the provision of local services in the broad consumer market over the long term.

- Because of Qwest's government-protected monopoly, guaranteed return on capital and recovery of cost in building its network, a tremendous difference exists in the situation facing a new entrant in the Washington local telecommunications market and the situation Qwest historically experienced.

- The Commission should not look to other Bell Companies as a likely source of broad-based competition for Qwest. Rather than competing with each other, the Bell Companies have merely acted to consolidate their geographic monopolies.

- Pricing flexibility plans have had the result of effectively deregulating Qwest before any competitive alternatives in the market could act as a check on its

[28] Id., at 390.

> market power. Thus, consumers face the prospect of having neither regulatory protection from, nor competitive alternatives to, the monopoly provider of local telecommunications services.[29]

Thus, a likely scenario is that of a market where consumers have only one choice: an unregulated, integrated firm providing local, long distance and broadband/internet services. Because of this grave risk, this Commission must protect against allowing Qwest into the long distance market prematurely.

C. The Public Interest Requires the Commission to Evaluate the Effect of Wholesale Prices on the Ability of CLECs to Compete.

1. UNE Rates Must Have a Pro-Competitive Effect.

The significance of the pricing of network elements to the public interest test was explained by the FCC in its Local Competition Order,[30] as follows:

> …the removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, is not sufficient to ensure that competition will supplant monopolies. An incumbent LEC's existing infrastructure enables it to serve new customers at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking and loops to serve its customers. […] Because an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market. An incumbent LEC also has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers.[31]
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> Congress addressed these problems in the 1996 Act by mandating that the most significant economic impediments to efficient entry into the

[29] See discussion in Exhibit 1090-T at 17-24.
[30] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order in CC Docket No. 96-98, FCC Order No. 96-325, released August 8, 1996.

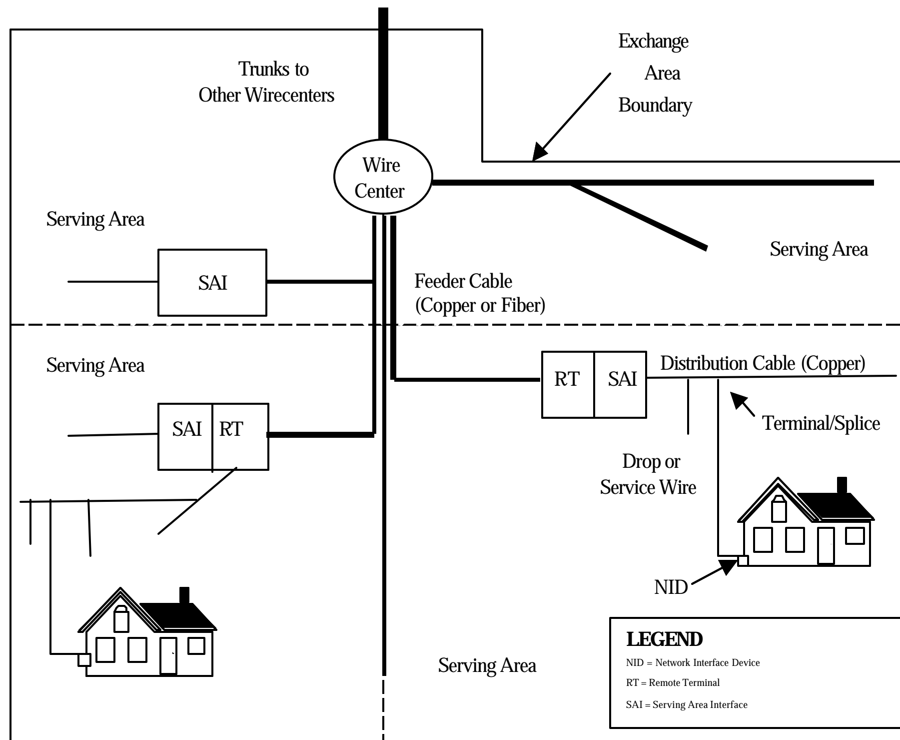
[31] Id., at § 10.

> monopolized local market must be removed. The incumbent LECs have economies of density, connectivity, and scale; traditionally, these have been viewed as creating a natural monopoly. As we pointed out in the NPRM, the local competition provisions of the Act require that these economies be shared with entrants. We believe they should be shared in such a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices.[32]

Thus, a significant barrier to entry into the local telecommunications market would exist absent the CLECs' legal and practical ability to lease components of the incumbents' networks at prices based on forward-looking economic costs.

An overview of telecommunications networks and related economics demonstrates the relationship between UNE prices and the public interest. At the most simplistic level, telecommunications networks are comprised of 1) loop plant that is used to connect customers' premises with 2) switches which are joined together by 3) interoffice transport. The diagram below depicts a typical "exchange" served by a single switch where the loop plant connects the various buildings to the "wire center" -- which is where the switch is typically located. The "trunks" represent the connections to other wire centers/switches.

[32] Id., at § 11. Emphasis added.



As discussed above, as a result of its historic monopoly in the provision of local telecommunications services, Qwest operates a loop network connecting virtually ***every home and building*** in its service territory. The fact of this existing, ubiquitous network represents a strategic asset of enormous competitive value.[33]

A CLEC wishing to compete with Qwest for local telecommunications services on a broad scale -- or an IXC competing with Qwest in the long distance market -- must have an ability to quickly connect subscribers to its network regardless of where the

[33] Exhibit 1090-T at 26-28.

subscriber's premises are located. The CLEC's choice is either to construct its own facilities or lease facilities from Qwest.[34] A CLEC opting for the first choice faces a massively expensive and lengthy task of obtaining financial backing, obtaining municipal franchise authority, securing rights-of-way, and ordering and placing such facilities in the ground. Although this process can be described in a few words, each of the aforementioned steps represents a massive undertaking in and of itself. An example would be the matter of obtaining capital funding. Based on the most recent ARMIS report to the FCC, Qwest's loop plant in Washington represents a $3,100,000,000.00 asset. Should a CLEC attempt to replicate Qwest's ubiquitous loop plant at today's materials and labor cost, the amount of necessary investment would likely be far greater. There is the significant question of how the CLEC could obtain such massive funding given that it will have to compete head-to-head with Qwest for each and every customer -- unlike Qwest whose network was constructed while it had a protected monopoly.[35]

As discussed above, the process of converting local customers from one carrier to another is much more difficult than changing a customer's long distance carrier. That fact is of critical importance in this context, as the Commission should note that it took nearly ten years for MCI to gain 20% of the long distance market from AT&T following divestiture in 1984. And even assuming the CLEC could vault such a massive financial hurdle, the CLEC could not possibly complete the other tasks of obtaining franchise authority and rights-of-way in every city, town, and village, securing the necessary

[34] Similarly, the choice for the IXC is to try and find an alternative provider of local facilities or to lease facilities from Qwest.

[35] Exhibit 1090-T at 28-29.

materials and equipment, and performing such a Herculean construction job in less than ten years.[36]

The CLEC's other option is to lease loop facilities from Qwest as unbundled network elements pursuant to §251(c)(3) of the Act. Unlike the construction option described above, this option presents the obvious advantage of being immediately available, and does not require the CLEC to prove up an impossible financial picture to obtain investment capital. Nonetheless, the lease option presents a variety of undesirable prospects to the CLEC, the foremost of which is that the CLEC is dependent upon its main competitor for a key input to the services it wishes to offer to customers. Understandably, no CLEC wishes to place its ability to meet its customers' needs in the hands of its chief competitor. The lease option places the CLEC at the mercy of its main competitor both for the price it must pay to utilize the facilities and for the terms and conditions under which it has access to and can utilize the leased facilities. Without question, Qwest has no incentive to price such facilities in a manner that would permit the CLEC to pose a real competitive threat to Qwest, particularly because Qwest knows full well that construction of a duplicative network is not a viable alternative to the CLEC.[37]

Congress noted that competitors could not possibly enter markets rapidly if they were forced to build duplicative networks "because the investment necessary is so significant."[38] It further recognized that the overall pro-competitive objectives of the Act would be frustrated if the rates the Bell Companies were allowed to charge for the use of their existing network (unbundled elements) were not set appropriately, and therefore

[36] Exhibit 1090-T at 29-30.
[37] Id. at 30-31.
[38] H.R. Conf. Rep. No. 104-458, at 148 (1996)

required that rates for the leasing of network elements be "just, reasonable, and nondiscriminatory" and "based on the cost … of providing" the network element.[39] Congress clearly recognized the incentive and the ability of the incumbent Bell Companies to preclude market entry by manipulating the prices charged for the use of portions of their existing, ubiquitous networks. Qwest and its sister Bell Companies have attacked the notion of reasonable, nondiscriminatory, cost-based pricing of the components of its network in every possible venue.[40]

This Commission represents the judge and jury as to whether Qwest will be permitted to require its would-be competitors to pay unreasonable prices for components of its network necessary to provide competitive alternatives to Qwest's local services in Washington, or conversely, whether the rates Qwest charges for the use of those components will stimulate broad-based entry and provide true competitive alternatives to the State's consumers. As WorldCom witness Bobeczko previously testified before this Commission:

> …Qwest's proposed UNE-P recurring and nonrecurring rates are so high relative to the prices of its retail product offerings, that if a CLEC sold local service to a residential customer for the same price as Qwest, it would not even make enough money to pay for the cost of the elements it leases to provide that service.[41]

Although it may be difficult to do, this Commission must ensure that prices for UNEs have the intended pro competitive effects. As demonstrated in Mr. Price's testimony, the Commission's decisions on seemingly arcane issues can have a significant

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[39] 47 U.S.C. §§251(c)(3), 252(d)(1).

[40] In Washington, although Qwest has so far not indicated that it will appeal the Commission's final pricing decision in Docket No. 960369, it has over the years appealed all the way to the Ninth Circuit Court of Appeals many of this Commission's pro-competitive arbitration decisions, including the decisions entered in both MFS's and MCI Metro's arbitrations.

[41] Direct testimony of Paul G. Bobeczko, filed December 20, 2000, in WA Docket No. UT-003013, at 8.

impact on the development of competition in Washington's telecommunications markets. Each the cost variables can be manipulated by Qwest to its competitive advantage.[42]

First and foremost the Commission must remember that Congress' intent in allowing CLECs to lease components of the incumbents' networks at reasonable and cost-based rates was to remove the huge barrier to entry represented by the massive capital costs necessary to replicate ILECs' networks discussed above. Congress expected that CLECs would lease facilities in order to compete with the incumbents, and the likelihood of such competition with the incumbent is increased as UNE rates are lower. Thus, a principled basis for the setting of UNE rates is that such rates must be no higher than necessary to compensate the incumbent for the function it is providing and earn a return on its investment. Anything above such a minimum price will frustrate Congress' intent by creating rather than removing a barrier to entry because the Act is pro-competition rather than pro-competitor.

The pricing of UNEs is one of the most important tools available to regulators to effectively open the ILECs' local markets for competitive entry. Access to UNEs at cost-based prices that encourage entry is the best way the Commission can neutralize the barrier to entry that exists by virtue of Qwest's ubiquitous, pre-existing network already paid for by its captive ratepayers. UNE rates in effect today in Washington do not allow competitors to compete with Qwest for residential local service. The Commission must critically review the effect of today's UNE rates on the ability of CLECs to compete in Washington before permitting Qwest to enter the long distance market here.

2. Special Access Rates Must Be Set at Cost.

[42] See discussion in Exhibit 1090-T at 33-35.

Beyond the issue of UNE pricing is another price-related issue this Commission should consider in its public interest analysis; namely, the Qwest's ability to engage in an anticompetitive price squeeze against other long distance carriers unless its switched and special access charges are reduced to levels reflecting their economic costs. The issue is simple. When Qwest is permitted to compete for customers' long distance services, it will provide those services using the same components of its network used by other carriers. The cost to Qwest for the use of its network is its economic cost.[43] But the cost to other carriers is the access rates charged by Qwest. To the extent that Qwest's access rates exceed the economic costs of the network components, Qwest will enjoy an artificial, but powerful, price advantage over other long distance carriers. Such an advantage would operate to the detriment of Washington consumers and the competitive process because Qwest could compete with other carriers on price even if it were the less efficient service provider.[44] Thus, the Commission must endeavor to set access at cost prior to allowing Qwest to enter the long distance market here in Washington.

D. The Public Interest Requires the Commission to Enact Measures to Protect CLECs Against Qwest's Monopoly Strength.

Qwest is a for profit entity and by virtue of that fact it possesses a natural incentive to manage its operations in a way which provides the highest financial return to its investors. After all, Qwest's management has a fiduciary obligation to do so. But because it controls bottleneck facilities on which its competitors must rely, Qwest has both the incentive and the ability to exploit such control in a way that provides it with a

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[43] This is true even if Qwest were required to "impute" its switched or special access rates to its retail long distance pricing. An imputation requirement simply results in a "right-pocket, left-pocket" transaction within the corporate family without real financial significance, and thus does nothing to prevent an anticompetitive price squeeze.

[44] See Exhibit 1090-T at 37-38.

competitive advantage over its competitors. Allowing Qwest to act on this normal incentive and exploit its undeniable market power would cause irreversible damage to the competitive process to the detriment of Washington consumers and to the public interest. Evidence of Qwest's treatment of its would-be competitors in the market for local telecommunications services is of critical relevance as this Commission considers the public interest implications of Qwest's entry into the Washington long distance market.

Qwest's track record amassed over the years since the passage of the 1996 Act is of a Qwest that continues to behave as a monopoly and exhibit a monopoly mindset. This monopoly mindset was satirized a number of years ago by Lilly Tomlin's famous telephone operator character, who stated: "we don't care. We don't have to. We're the Phone Company." As discussed above, when a firm is "the only game in town," its profitability is not contingent on its successes in meeting (much less, exceeding) customers' expectations. As a result, it has no incentive to distinguish itself in the wholesale market by such acts as providing innovative services, superior customer service, or reducing costs so as to be price competitive. The question is whether Qwest is a firm which, by its actions, demonstrates to its customers that it recognizes them as valued customers, or whether it is a firm with a "we don't care; we don't have to" attitude.[45]

Examples of this attitude are described in detail in Mr. Price's testimony. In short, Qwest :

- ignores critical planning information provided by CLECs that Qwest itself has demanded that CLECs furnish
- unreasonably discriminates against other carriers by giving preference to its retail operations

[45] See Exhibit 1090-T at 38-39.

- dictates new processes and procedures to its carrier customers rather than consulting with them

- fails to recognize terms and conditions in existing interconnection agreements[46]

Even though many of the examples were ultimately resolved, the fact that Qwest took such positions required WorldCom and other CLECs to expend management and regulatory resources to achieve resolution. Such behavior by Qwest has the effect of raising the CLECs' costs of entry -- contrary to Congress' intent to lower legal and economic barriers to entry in passing the Act. Furthermore, Qwest's behavior indicates the difficulty of anticipating each and every possible way Qwest might act to thwart competitors' efforts to enter its local markets.

Qwest's historic pattern of treating its wholesale customers as second class citizens can hardly be reconciled with the notion that Qwest's local telecommunications market in Washington is irreversibly open to competition. The likely result of prematurely allowing a competitor with this mindset into the long distance market is a Qwest continuing to exercise a tight grip on the Washington local telecommunications market. Furthermore, it is a Qwest that will utilize its market power in local telecommunications to disadvantage competitors in both the emerging broadband market and in the already competitive long distance market.[47]

For Qwest to demonstrate to this Commission that its market is open, it must do so on the basis of more than mere promises that future behavior will be different than in the past. Indeed, the Commission should require strict proof by Qwest that it has fulfilled any and all such promises.

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[46] See Exhibit 1090-T at 41-49.
[47] Exhibit 1090-T at 49-50.

When Southwestern Bell was before the Public Utility Commission of Texas seeking its endorsement of 271 relief, that Commission explicitly recognized the value of having more than mere promises as evidence of whether its market was open to competition. Thus, the Texas Commission incorporated into its order protections for the CLEC community relating to SWBT's future behavior.[48] Likewise, absent a strong stance by this Commission, Qwest has no incentive to promise anything beyond a bare minimum set of commitments toward opening its markets. Thus, WorldCom asks the Commission to impose the following requirements on Qwest:

- Qwest must demonstrate in the collaborative process by its actions that its corporate attitude has changed and that it will treat CLECs like its customers and not unilaterally change documents referenced in its SGAT and that its behavior does not reflect the statements of its attorney that it need not treat wholesale customers like retail customers;

- Qwest needs to establish better communication between its upper management, including its policy group, and its account representatives as is evidenced by the testimony of numerous CLECs about the lack of knowledge Qwest account teams have about Qwest "new" policies and the inability of account team representatives to adequately address CLEC problems and Qwest's habit of issuing product notifications that contradict interconnection agreements and even provisions in Qwest's proposed SGAT. Only recently has Qwest agreed to communicate its legal obligations to all appropriate personnel so that account teams and other internal personnel know what Qwest is obligated to perform for wholesale customers under its SGAT.

- Qwest should establish an interdepartmental group whose responsibility is trouble-shooting for CLECs engaged in interconnection, purchase of UNEs, and resale. This group should be headed by an executive of Qwest with the final decision making power;

- Qwest needs to establish a system for providing financial or other incentives to Local Service Center personnel based upon CLEC satisfaction;

[48] Exhibit 1090-T at 50-52.

- Qwest needs to commit to resolving problem issues with CLECs in a manner that will give CLECs a meaningful opportunity to compete. Qwest must recognize that its wholesale customers are as important as retail customers;

- Qwest needs to establish that it is following all Commission orders referenced in this recommendation and that it intends to follow future directives of this Commission; and

- Qwest should not be permitted to attempt to "winback" customers lost to competitors when a CLEC customer inadvertently or mistakenly calls Qwest.

E. The Public Interest Requires the Commission to Adopt Measures to Improve the Quality of Qwest's Special Access Provisioning.

Timely and accurate special access provisioning by Qwest is absolutely vital to the long-term viability of competitors in Washington. Qwest's provisioning of special access services to CLECs and interexchange carriers (IXCs) should be examined by this Commission as an indicator of what is to come when Qwest enters the long distance market.

Special access is a service Qwest historically has provided to IXCs, which involves the use of Qwest's last mile loop and transport facilities for direct connections between an IXC's network and its customer's premises.[49] Special access facilities allow Washington business customers with large call volumes to bypass the switched network and move their traffic, including high-speed data and broadband traffic, directly from their location to their long-distance carrier's point of presence ("POP"). Thus, when WorldCom wins a new business long-distance customer, it offers as part of its service the connection between WorldCom's POP and the customer's building. WorldCom and

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[49] CLECs also sometimes use special access rather than unbundled elements for use in connecting their customers' premises with their local switches, for a variety of reasons. For purposes of this testimony, however, my focus will be on the traditional usage of special access because of its importance to the question of Qwest's ability to discriminate against other long distance carriers once it has obtained the legal right to provide retail long distance services within its service territories.

other IXCs are dependent on Qwest to provide special access facilities for connections to Washington business customers. Critically, however, once Qwest is allowed to compete for the customers' retail long distance business, it will not only be WorldCom's retail competitor, but also WorldCom's wholesale supplier.[50]

Qwest's performance in provisioning special access to competitive carriers was extremely poor in 2000. This has had serious impacts on not just WorldCom and other IXCs who depend on access services furnished by Qwest, but more importantly, also the end user customers served by the IXCs. Qwest's poor performance reflects an obvious shift in corporate focus away from access services it provides as a wholesaler to the retail (and thus higher revenue) data and broadband services. Its performance also indicates Qwest's apparent recognition that its wholesale customers lack alternative suppliers for these services, and its seeming disregard for the needs of its wholesale purchasers. Absent a demonstrated change in its behavior, Qwest's performance as a provider of special access strongly suggests that allowing Qwest to compete for customers' long distance business in Washington would not be in the public interest. Rather, the public interest will only be served if the Commission addresses special access as part of its 271 public interest analysis and seeks to ensure that Qwest does not utilize its control over such last mile facilities to its competitive and strategic advantage. Including special access facilities in a performance assurance plan would be one way to provide appropriate incentives preventing Qwest from exercising control over its network in such an anticompetitive manner.[51]

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[50] Exhibit 1090-T at 55-56.

[51] See, e.g., *The Facilitation in the Matter of Qwest Wholesale Standards,* Minnesota PUC Docket No. P-421/M-00-849 (proceeding to develop Qwest wholesale service quality standards); See Exhibit 1090-T at 56.

WorldCom and other long-distance carriers rely almost totally on Qwest to provide special access services for the connections between the IXCs and their long distance customers. Competitive alternatives to the ILECs' special access services are quite clearly limited, and IXCs must therefore in the vast majority of instances rely on the ILECs for such services to reach their customers.[52]

WorldCom alone pays millions of dollars per year to Qwest for access services in Washington. Thus, when Qwest's performance is poor, that fact provides a strong incentive for WorldCom to obtain access facilities from alternate providers. And in fact, on any given customer order, WorldCom first looks to provide service over "on-net" facilities in its own network, and then searches for facilities owned by a competitive access provider ("CAP") whose rates are significantly lower than Qwest and whose performance indicates that they are anxious for WorldCom's business. Despite WorldCom's systematic attempts to find alternate facilities, however, it almost certainly must rely on Qwest to provision any given request for special access, because even those competitive carriers that have the greatest access to "lit buildings" do not reach the vast majority of business customers in this State.[53]

Although some improvements have been observed recently, Qwest's performance in completing access orders generally has been unreasonably slow, and the information on the status of such orders Qwest provides to WorldCom and other wholesale customers is often unreasonably late and unreliable. Qwest does not appear to provide wholesale services in the manner of a business with competitive concerns. The most serious problems WorldCom has experienced are Qwest's extremely poor percent on-time

[52] Exhibit 1090-T at 57.
[53] Id. at 58.

performance and its practice of amassing "held" orders.[54] Reports recently filed by Qwest with the Minnesota Commission demonstrate the poor quality of service provided by Qwest to its access customers.[55]

In any industry where true wholesale competition exists, suppliers bend over backward to provide on-time service, and to accurately report on orders delayed for any reason, with an estimated delivery date. Qwest's practices reflect an attitude toward its wholesale customers that is diametrically opposite such a customer-focused approach. Notwithstanding recent efforts by Qwest to reduce the number of held orders, problems remain when WorldCom's customers require service at a location where Qwest unilaterally determines that it has no business interest in adding capacity to its facilities.

Qwest's failures to meet its own target intervals for special access, and its practice of holding orders for lack of funding or facilities, leave customers waiting days, weeks and even months for service. This impedes the ability of the Washington businesses WorldCom serves to do business, leading to potential and real losses in their revenues. It certainly hurts WorldCom's revenues. To add insult to injury, customers blame WorldCom for Qwest's failures. Customers need to know when they can expect installation of facilities needed to turn up their service. When they choose WorldCom as their carrier, they expect WorldCom to give them installation dates and to meet them. If WorldCom cannot do that for weeks or months after the promised date, the customers blame WorldCom, not Qwest. This affects WorldCom's reputation as a provider of telecommunications services of all types. When WorldCom and other wholesale

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[54] Id. at 59.

[55] See In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against U S WEST Communications, Inc. Regarding Access Service, Minn. PUC Docket No. P-421/C-99-1183 (August 15, 2000); Exhibit 1090-T at 59-62.

customers cannot provide acceptable service because of Qwest constraints, that threatens the viability and development of a competitive market in Washington, and thereby compromises the ability of Washington consumers to enjoy the benefits of a vibrant competitive market for a variety of telecommunications services.[56]

Qwest's performance is likely to get much worse when Qwest is not only the dominant provider of special access, but is also competing against its wholesale customers to provide inter-LATA interstate long distance services. It appears that the degradation of wholesale service quality over the past few years came as Qwest was further positioning itself to enter the inter-LATA, inter-state long-distance market, and to focus on faster-growing revenue opportunities in data and broadband services.[57] Given the critical nature of access services, the necessary dependence of wholesale customers on Qwest and Qwest's poor provisioning record, this Commission should insist that Qwest demonstrate substantial improvement in its provisioning of special access. Absent such demonstrated improvements, allowing Qwest into the long distance market at this time would not be in the public interest.

For these reasons, Qwest's performance assurance plan should include performance measures or performance indicator definitions ("PIDs") that address special access in a manner similar to the PIDs that relate to the provisioning of local wholesale services. This is precisely the conclusion reached by the Texas PUC in considering this same issue relating to Southwestern Bell Telephone.[58] Those performance measures should also result in the payment of penalties to incent Qwest to improve the provisioning of special access and elimination of held orders, much like the proposed Qwest

[56] Exhibit 1090-T at 63.
[57] Exhibit 1090-T at 63-64.
[58] The Texas Commission issued an oral ruling on May 23, 2001.

performance assurance plan is intended to incent Qwest to adequately provide local wholesale services.

F. The Public Interest Requires the Commission Structurally to Separate Qwest's Wholesale and Retail Operations.

Regulatory tools typically take the form of an order by a government agency requiring some action or proscribing certain behavior. As such, regulatory tools are essentially the same as what attorneys refer to as injunctive relief. Another way to look at regulatory tools is that they are "thou shalts" and "thou shalt nots." A regulator establishes certain parameters for reasonable behavior with the hope and anticipation that the firm will act in accordance with the rules. Should the firm not do so, the question then becomes whether the regulator effectively can enforce its rules and regulations.[59]

Structural tools are vastly different. Structural tools seek to eliminate the incentive for the firm to act in a given manner, and thus get at the ***cause*** for the undesirable behavior. As noted, a natural incentive exists in a for-profit entity such as Qwest to maximize its shareholders' return. Regulatory tools would seek to identify all the means by which Qwest could act in anticompetitive and discriminatory ways to ensure a higher return for its shareholders. Conversely, structural tools would seek to remove incentives for such behavior.[60]

The best example of a structural remedy in modern telecommunications is the divestiture of the Bell Operating Companies by AT&T in 1984.[61] The concept underlying that structural remedy was to eliminate AT&T's ability to engage in

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[59] Exhibit 1090-T at 66.
[60] Exhibit 1090-T at 67.
[61] Other examples include the Section 272 requirements of the Act and the concessions obtained by the FCC in the merger proceedings between SBC and Ameritech, and between Bell Atlantic and GTE, to provide advanced services through separate affiliates.

anticompetitive actions using its control over the local bottleneck facilities operated by the Bell Companies. Thus, AT&T divested itself of the Bell Companies so that it no longer had control over the local bottleneck facilities and no financial incentive to use such facilities in anticompetitive ways. As a result of that divestiture, AT&T had to obtain use of those bottleneck facilities on an arms-length basis, in the same manner, and at the same price, as its competitors in the long distance market.

Instead of continuing the ineffective attempts to enjoin anticompetitive behavior by AT&T, the Justice Department argued for a structural solution where AT&T no longer had an incentive or ability to abuse its monopoly in the local telecommunications market to disadvantage competitors in the upstream long distance services market. In comparing the likely benefits of such a structural approach with an injunctive, or regulatory, approach, the MFJ Court stated:

> It would be difficult to formulate an order that would effectively deal with all of the different kinds of anticompetitive behavior that are claimed to have occurred over a considerable period of time, in various geographical areas, and with respect to many different subjects. There is evidence which suggests that [the Bell System's] pattern during the last thirty years has been to shift from one anticompetitive activity to another, as various alternatives were foreclosed through the action of regulators or the courts or as a result of technological development. In view of this background, it is unlikely that, realistically, an injunction could be drafted that would be both sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behavior that [the Bell System] might employ in the future.
>
> An even more formidable obstacle is presented by the question of enforcement. Two former chiefs of the FCC's Common Carrier Bureau, the agency charged with regulating [the Bell System], testified that the Commission is not and never has been capable of effective enforcement of the laws governing [the Bell System's] behavior. In their view, this inability was due to structural, budgetary, and financial deficiencies within the FCC as well as to the difficulty in obtaining information from [the Bell System]. Whatever the true cause, it seems clear that the problems of supervision by a relatively poorly-financed,

> poorly-staffed government agency over a gigantic corporation with almost unlimited resources in funds and gifted personnel are no more likely to be overcome in the future than they were in the past.[62]

What this passage suggests is that, unless this Commission can impose on Qwest regulations "that would be both sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behavior that [Qwest] might employ in the future," Washington consumers will be denied the benefits of a vibrant competitive market for telecommunications services of all types.

Regulation of utilities has proved successful only where competitive issues were absent; i.e., where the monopoly of the utility remained intact. In such instances, the focus of regulation has been to protect consumers fom monopoly abuses, largely through rate-of-return regulation of retail rates and by enforcing terms and conditions in the utility's retail tariffs. When regulation has attempted to deal with market power in the context of emerging competition on the other hand, it has enjoyed marginal success, at best. This point was made explicitly in the Court's decision in the AT&T case:

> The evidence adduced during the A*T & T* trial indicates that the Bell System has been neither effectively regulated nor fully subjected to true competition. The FCC officials themselves acknowledge that their regulation has been woefully inadequate to cope with a company of *AT & T*'s scope, wealth, and power.[63]

The regulatory approach had proven "woefully inadequate" to restrain discrimination by the Bell System in the areas of manufacturing and sale of customer premises equipment and the provision of long distance services. The complete inability of regulatory approaches to inject competition into these markets stands in stark contrast with the veritable explosion of customer choices that occurred following divestiture, in

[62] *AT&T* at 168. (footnotes omitted.)

[63] *AT&T* at 170.

both of the CPE markets and long distance services. Quite simply, the pre-divestiture Bell System was able to successfully block regulatory attempts to proscribe discriminatory and anti-competitive actions -- and thus to spur competition -- in those key markets for more than a decade.[64]

Mr. Price's testimony also discussed the FCC's Open Netowork Architecture ("ONA") concept as a more recent telecommunications example of the failure of the regulatory approach.[65] The only beneficiary of ONA was the ILECs, who quickly accomplished their objective of marketing information services on an integrated basis with their other telecommunications offerings. The intended beneficiaries of the FCC's ONA approach -- the ISPs -- soon found that ONA was of no benefit whatsoever. The ISPs were forced to look to second- and third-best choices for the services they needed. This example demonstrates yet another way in which the Bell Companies have been able to thwart the effectiveness of regulatory tools designed to foster competition in markets involving their local networks.[66]

The structural approach has proven to be the superior approach to deal with competitive issues in the presence of market power. The most obvious examples are in the customer premises equipment (CPE) and long distance service markets. Regarding the ability of government regulators to resolve the problems in both the CPE and long distance markets, the MFJ Court reasoned as follows:

> The key to the Bell System's power to impede competition has been its control of local telephone service. The local telephone network functions as the gateway to individual telephone subscribers. It must be used by long-distance carriers seeking to connect one caller to another. […] The enormous cost of the wires, cables, switches, and

[64] Exhibit 1090-T at 69-70.
[65] See discussion in Exhibit 1090-T at 70-72.
[66] Id.

> other transmission facilities which comprise that network has completely insulated it from competition. Thus, access to [the Bell System's] local network is crucial if long distance carriers … are to be viable competitors.
>
> [The Bell System] has allegedly used its control of this local monopoly to disadvantage these competitors in two principal ways. First, it has attempted to prevent competing long distance carriers and competing equipment manufacturers from gaining access to the local network, or to delay that access, thus placing them in an inferior position vis-à-vis [the Bell System's] own services. Second, it has supposedly used profits earned from the monopoly local telephone operations to subsidize its long distance and equipment businesses in which it was competing with others.
>
> For a great many years, the Federal Communications Commission has struggled, largely without success, to stop practices of this type through the regulatory tools at its command. A lawsuit the Department of Justice brought in 1949 to curb similar practices ended in an ineffectual consent decree. Some other remedy is plainly required; hence the divestiture of the local Operating Companies from the Bell System. This divestiture will sever the relationship between this local monopoly and the other, competitive segments of *AT & T*, and it will thus ensure -- certainly better than could any other type of relief -- that the practices which allegedly have lain heavy on the telecommunications industry will not recur.[67]

As opposed to the tight grip that the pre-divestiture Bell System had on the CPE market, there has been an explosion in types and styles of CPE since the structural separation implemented by divestiture. Customers are able to purchase phones from simple, almost disposable, devices to sophisticated, reasonably priced devices combining such auxiliary capabilities as Caller ID and voice mail. Once a structural, rather than a regulatory, approach toward competition was implemented, the number of choices available to consumers exploded, and prices shifted dramatically in consumers' favor.[68]

Similarly, the number of competitive choices available to consumers for long distance services has increased to levels unimaginable at the time of divestiture. Literally

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[67] *AT&T* at 222-223.

[68] Exhibit 1090-T at 72-74.

hundreds of companies provide long distance services in the U.S. Prices for consumer long distance services have declined rapidly since divestiture, and the FCC's latest report indicates AT&T's market share -- estimated at about 90% of all domestic toll revenues at the time of divestiture -- has declined to about 41%. In contrast with the total inability of regulation to restrain anti-competitive behavior from the pre-divestiture Bell System, the effects of divestiture stand as glittering examples of how structural separation can resolve the aforementioned incentive of carriers such as Qwest to exploit its bottleneck facilities to its own private gain and to the detriment of the competitive process and the public interest.[69]

These examples demonstrate the strength of Qwest's incentives to exploit its bottleneck control over its ubiquitous network to its own competitive advantage. Indeed, the history of the pre-divestiture Bell System instructs that such incentives simply are too powerful to be overcome or neutralized by regulatory tools, precisely the concern voiced by the Chairman of the House Judiciary Committee who, writing to Speaker Hastert in regard to H.R. 1542, cautioned as follows:

> The new § 251(j) contains an exemption that would eliminate [the RBOCs'] obligation to provide unbundled network elements and resale at wholesale rates for high speed data service. These obligations on incumbent local exchange carriers allow competitors the ability to provide competing local service. In short, this provision allows the incumbents effectively to leverage their monopoly control over the local exchange and exclude competition in high speed data service. That is troublesome enough, but taken together with the broad definition of high speed data service -- which could include voice as well as data -- it represents the potential remonopolization of the industry.[70]

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[69] Id.

[70] Letter from F. James Sensenbrenner, Jr. to Speaker Hastert dated May 1, 2001, at 8

By imposing an appropriate incentive structure on Qwest's wholesale operation, Qwest's ***retail*** operation could be freed of virtually all traditional regulation very quickly. That is because Qwest's retail operation would have to deal with the wholesale arm in precisely the same manner as would other CLECs. It would pay the same rates for use of the underlying network as other CLECs, and would be subject to the same terms and conditions for use of that network as other CLECs. Such an approach would 1) ensure that Qwest's retail operation has no artificial competitive advantage over other CLECs seeking to compete in the Washington local telecommunications market, and 2) rapidly eliminate the need for regulation of Qwest's retail operation. If Qwest's true objective is to avoid unnecessary regulations, the approach outlined herein provides it with an opportunity to achieve rapid deregulation of its retail operations.[71]

For all of these reasons, WorldCom requests that the Commission structurally separate Qwest's wholesale and retail operations to further the public interest in the development of competition in the telecommunications market in Washington.

G. The Public Interest Requires the Commission to Adopt Self-Executing and Behavior Modifying Remedies for Qwest Violations of Wholesale Service Quality Standards.

If the Commission chooses not to structurally separate Qwest's retail and wholesale operations, in addition to the critical issue of pricing for unbundled network elements discussed at length above, the Commission must also ensure that 1) the terms and conditions for CLECs' access to UNEs and UNE combinations permit economically viable access to those elements, 2) operational support systems (OSSs) are available to CLECs that are fully functional, stress-tested, and integratable, and 3) there exist self-

[71] Exhibit 1090-T at 75-76.

executing and behavior-modifying remedies for violations of the competitive "rules of engagement" established by this Commission.

The performance assurance plan the Commission adopts must have the effect of encouraging Qwest to "do the right thing" relative to its wholesale customers. To be effective, such a plan must contain financial penalties at a level sufficient for Qwest to view them as something other than a cost of doing business, much as FCC Chairman Powell is seeking to ensure by requesting authority to levy higher penalties for non-compliance. Looking at this as a "carrot and stick" process, an effective plan must contain a sufficient "stick" such that Qwest's a financial incentives are clear -- it must treat its competitors in a non-discriminatory manner that is at parity with how it deals with its own retail operations.[72]

Although other remedies are theoretically available to CLECs, depending on the particular remedy, it may or may not provide a sufficient incentive to encourage "good behavior" by Qwest. Other remedies that are available include the filing of an enforcement action at the FCC and the pursuit of anti-trust relief in the courts. Petitions to the FCC for enforcement have taken significant time for decision in the past. The fact that a "speedy trial" is unlikely, coupled with the absence of potentially behavior modifying penalties, renders FCC enforcement action a less-than optimal means of ensuring compliant behavior by Qwest. The threat of anti-trust action is certainly a possible remedy available to a CLEC. However, the high cost of prosecuting such a case, combined with the fact that Qwest would likely continue to receive more than $100 million in revenues each month during the pendency of the case (in Washington alone),

[72] Exhibit 1090-T at 78.

means that Qwest would be far better situated than most, if not all, CLECs to survive such a war of attrition.[73]

Consequently, WorldCom requests that the Commission institute self-enforcing, behavior modifying standards for Qwest's wholesale service quality in an effort to ensure that once Qwest is allowed into the long distance market here, it retains some incentive to provide satisfactory service quality to its wholesale customers/competitors.

VI. GENERAL TERMS AND CONDITIONS

The parties agreed during the workshop that the record on General Terms and Conditions from the Colorado Qwest Section 271 proceeding would be incorporated into the record here in Washington as Exhibit 799. Therefore the discussion of the issues in this section attempts to incorporate the discussions on the record in Colorado relating to general terms and conditions as well as the agreements reached there. However, reference to the particular issue number is to the issue numbers contained in the appropriate Washington Issue Matrices.

A. WA-G-2 Section 1.7.1.1/2, proposed 1.7.2 – Should the rates, terms and conditions for new products be substantially the same as the rates, terms and conditions for comparable products and services that are contained in the SGAT?

AT&T argued that Qwest's existing language relating to a CLEC's purchase of new products and services, which requires the CLEC to accept Qwest's proposal and pursue negotiation/arbitration as to disagreements, was an unnecessarily lengthy process. AT&T proposed instead that Qwest agree that the rates, terms and conditions of new service offerings be substantially the same as those for comparable services and products in the SGAT. Further, Qwest would retain the burden of proof that the services/products

[73] Exhibit 1090-T at 78-79.

are not comparable. For the reasons set forth by AT&T in writing and at the workshops, WorldCom concurs with AT&T's proposed language for Section 1.7.2 and asks the Commission to adopt that language.

B. WA-G-5 and WA-G-6 Sections 2.2 and 2.3 – What is the appropriate process for updating the Agreement when there is a change in law and how should conflicts between the SGAT and other Qwest documents and tariffs be treated?

In Section 2.1, Qwest incorporates "statutes, regulations, rules, tariffs, other third party offerings, guides or practices, as amended and supplemented from time to time" into its SGAT. WorldCom proposes that Qwest delete that language from Section 2.1.

Incorporating applicable law is unnecessary. Incorporating tariffs, IRRG product descriptions, technical publications and other documents outside of the SGAT into the matters set forth in the SGAT, allows Qwest to unilaterally amend the SGAT simply by its revising such documents or filing a conflicting tariff. For the SGAT to have meaningful commercial purpose, the CLEC must be able to rely on its terms and conditions and know that they cannot be unilaterally changed by Qwest through tariff filings and internal Qwest memoranda. This is an essential premise of a contractual relationship and why Congress chose interconnection agreements rather than tariffs as the basis for the ILEC/CLEC relationship under the Act.[74]

Moreover, the filing of a tariff to supercede the SGAT is fundamentally at odds with the requirement that the parties "negotiate the particular terms and conditions of agreements" to fulfill the duties described in the Act. The Act contemplates that the detailed terms and conditions will be set forth in the interconnection agreement between the parties. Section 251(c)(1) requires Qwest to "negotiate in good faith . . . particular

[74] Direct Testimony of Michael W. Schneider (Exhibit 860-T) at 5-6.

terms and conditions" of an interconnection agreement. The tariff is a document prepared by Qwest, not a product of negotiation. Any attempt to avoid obligations arising under individualized contracts by referring to non-negotiable tariffs is a clear violation of the Act. Accordingly, with regard to Section 2.1, WorldCom proposes that all language beginning with the words, "Unless the context shall otherwise require . . ." and continuing to the end of the paragraph should be deleted from the paragraph.

Section 2.3 discusses how conflicts between Qwest's internal memoranda and the SGAT should be handled. After much discussion, Qwest agreed to amend the section to state that the SGAT prevails in case of any conflict in language.[75] Section 2.3.1 continues, discussing the process to be followed if a CLEC believes a Qwest publication affects the CLEC's rights and obligations under the SGAT. It provides that during the pendency of the Dispute Resolution Process, the parties have certain rights and obligations. WorldCom proposes that such language be stricken from this section of the SGAT. The Dispute Resolution Process itself sets forth the rights and obligations of the parties during the process. Setting it out here as well injects confusion into the contract to the extent that its terms conflict in any way with that general section of the SGAT.

Sections 5.24, 5.30 and 5.31 must also be amended to conform to any Commission decision on these issues.

C. WA-G-11 Section 5.2.1 – What should be the term of the Agreement?

Qwest had proposed a two-year term for the agreement. WorldCom argued that 3 years was appropriate. WorldCom understands that Qwest has now agreed to a three-year term. Thus, WorldCom believes the issue to be resolved.

[75] See 6 Qwest 63, admitted into the record by Qwest in Colorado.

D. WA-G-13 Section 5.8 – Should liability for losses related to performance under the agreement be limited to the total charges billed to CLEC during the contract year except for willful misconduct?

Qwest's exception to its Limitation of Liability section is stated at Section 5.8.4, "[n]othing contained in this Section 5.8 shall limit either Party's liability to the other for willful misconduct." This is too restrictive as it improperly absolves Qwest of liability for egregious, grossly negligent acts and repeated breaches of the material obligations of the agreement. To avoid this problem and provide CLECs with adequate protection from potential improper conduct of Qwest, the Commission should replace "willful misconduct" with "gross negligence, willful misconduct and repeated breaches of material obligations of the Agreement."

WorldCom also concurs with AT&T's arguments as to required changes to Section 5.8.

E. WA-G-14 Section 5.9 and Exhibit 830 – What is the appropriate scope of indemnification in the SGAT?

Qwest addresses indemnification in Section 5.9. WorldCom proposes that the Commission instead adopt WorldCom's proposed language, set forth in Exhibit 861 relating to indemnification. WorldCom's language is standard contract indemnity language that is reciprocal, fair and clear. Qwest's language, on the other hand, is heavily weighted in its favor and contains many strategically placed exceptions that absolve it from responsibility for its own actions.[76]

After WorldCom filed its testimony on this section of the SGAT, Qwest amended its proposal to attempt to remedy some of WorldCom's concerns. While the changes alleviate some of WorldCom's initial concerns, not all are addressed. Thus, regardless of

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[76] See Exhibit 860-T at 20-21.

the changes to Qwest's initial language, WorldCom continues to advocate that the Commission adopt its proposed language for this section as set forth in Exhibit 861.

As stated in the testimony of Mr. Schneider, Qwest's Section 5.9.1.4 is nonstandard, confusing and unnecessary language that is already covered by the WorldCom language. As with separate facilities, separate bandwidths are completely separate and distinct and each Party is a separate and distinct service to its user on its bandwidth. WorldCom's language that each Party indemnifies the other for claims resulting from the acts or omissions of the Indemnifying Party would cover this situation. This is analogous to Parties having separate cables side by side in the same trench or cable bundle, which would not necessitate a separate section like 5.9.1.4.

Similarly, the WorldCom language regarding notice, authority to defend and settle is standard language and more clearly written than Qwest Section 5.9.2. The Qwest section seems to contradict itself by first stating that indemnification IS conditioned on prompt notice of a claim, then stating that indemnification is NOT COMPLETELY conditioned on such notice, but then again, it IS conditioned to the extent the failure to promptly notify prejudices the indemnifying Party's ability to defend the claim.

WorldCom also concurs with the issues that AT&T raised in its testimony and during the workshops relating to Qwest's proposed indemnification language and joins in its briefs on these issues.

F. WA-G-16 Section 5.12.1 and Exhibit 830 p. 48 – Should AT&T's proposed restrictions on Qwest's sale of exchanges in the Assignment Clause be adopted?

AT&T proposed new Section 5.12.2 to address the effect a Qwest sale of an exchange has on CLEC interconnection agreements. AT&T's language proposes that the

interconnection agreement be assigned for the entire term of the agreement and that Qwest would require the purchaser of an exchange to agree to such condition. AT&T proposed this language in part, based on Qwest's commitments in previous sales of exchanges. Qwest objects to AT&T's proposal.

WorldCom concurs with AT&T's position on this issue. Such mandatory assignment is necessary to provide certainty and stability to the CLEC community. Without it, CLECs are discouraged from providing service in those exchanges Qwest is likely to sell. This will further hinder competitive development in rural exchanges where competition is already hampered due to the high cost of providing service in those areas. Adopting AT&T's proposal here would be consistent with the purpose and intent of the Act, which is to encourage competition in all local markets.

G. WA-G-18 Section 5.16.9 and Exhibit 793 – Should aggregated forecasts be treated as confidential?

AT&T raised an issue with regard to whether language should be added to the SGAT to ensure that CLEC forecasts are treated confidentially. Apparently Qwest has been releasing aggregate CLEC data without protections afforded confidential data. WorldCom concurs with AT&T's concerns on this issue and joins in AT&T's brief requesting that language be added to the SGAT that protects even aggregated CLEC forecast data from unnecessary disclosure.

H. WA-G-21 Sections 17.1, 17.12, Exhibits F and I – Bona Fide Request Process, Special Request Process and Individual Contract Basis.

(a) Should Qwest provide notice of substantially similar BFRs?
(b) When Should Qwest productize BFRs?
(c) Should Qwest expand the scope of the SRP beyond those UNE and UNE combinations list in Qwest Exhibit F, paragraphs 1a-1d?

WorldCom concurs with the concerns raised by AT&T and Covad in the testimony and during the workshops on these issues. Therefore WorldCom joins in AT&T's and Covad's briefs on these issues.

I. WA-G-22 Sections 18.1.1, 18.1.2 and 18.3 – What is the appropriate scope of audits?

WorldCom concurs with the concerns raised by AT&T on these sections of the SGAT. Thus, WorldCom joins in AT&T's briefs on the appropriate contract language relating to audits.

J. CM-1 through CM-9 Qwest's CICPM process.

WorldCom addresses its concerns with Qwest's Co-Provider Industry Change Management Process ("CICMP") in the Direct Testimony of Elizabeth M. Balvin, Exhibit 855-T and Exhibit 856. Those issues remain open. The parties agreed that the concerns will be discussed in the ongoing CICMP process and brought back to the Commission during the Section 271 proceeding if unresolved. Consequently, WorldCom will not brief those issues at this time. However, Qwest cannot be found to comply with the Section 271 checklist until WorldCom's issues are satisfactorily resolved.

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