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 . . . . . 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-003022 Docket No. UT-003040 **QWEST'S LEGAL BRIEF REGARDING DISPUTED WORKSHOP 1 ISSUES (Checklist Items 3, 7, and 13)**

INTRODUCTION

Qwest Corporation, formerly U S WEST Communications, Inc. (hereinafter "Qwest"), submits this brief to the Washington Utilities Transportation Commission ("Commission") regarding the remaining disputed issues between Qwest and participating competitive local exchange carriers ("CLECs") regarding Qwest's compliance with the requirements of 47 U.S.C. § 271(c)(2)(B)(iii), (vii), and (xiii), checklist items 3, 7, and 13. Specifically, this brief addresses the following disputed issues regarding checklist items 3 and 7: (1) the request of AT&T Communications of the Pacific Northwest, Inc. ("AT&T") for production of right-of-way and multiple dwelling unit ("MDU") agreements where Qwest does not have ownership or control to provide access (Issue WA 3-4); (2) the request of WorldCom ("WCom") to modify the schedule in Exhibit D of the Statement of Generally Available Terms and Conditions to impose a 45-day response time, regardless of the size of the request for access to poles and conduit (Issue WA-3-7) and (3) WCom's objection to the term "license" in connection with use of directory assistance listings (Issue WA-7-9).[1]

This brief also addresses the following disputed issues regarding checklist item 13: (1) "commingling" special access circuits with interconnection facilities, and the corresponding ratcheting of rates, raised by AT&T and WCom (Issue WA-13-1); (2) the definition of a tandem switch and whether CLECs should be compensated for switching traffic twice when they only switch the traffic once (Issue WA-13-2); (3) compensation to Qwest for transporting traffic

[1] The parties had a "take back" item to review the language Qwest proposed in Ex. 171, relating to checklist item 3. Qwest has not received input on those provisions from CLECs, but hopes that this issue can be resolved collaboratively.

between a host switch and its remote switch (Issue WA-13-3); (4) whether Qwest must transport traffic for CLECs across the LATA through multiple calling areas at TELRIC rates (the "interLCA/POI per LATA" issue) as well as AT&T's request for recovery of the so-called "hidden costs" of interconnection (Issue WA-13-4); and (5) WCom's request that Qwest share a portion of the cost relating to EICT, multiplexing ("MUX"), and nonrecurring charges, SGAT §§ 7.3.1.2.1, 7.3.2.3, and 7.3.3.1 (Issue WA-13-6).[2]

As set forth fully below, Qwest satisfies checklist items 3, 7, and 13. The disputed issues the CLECs raise are generally beyond the scope of this Section 271 proceeding or lack merit. The Commission should accept Qwest's position on this issues and recommend that Qwest satisfies these checklist items.

ARGUMENT

A. Checklist Item 3

1. Issue WA 3-4: Qwest Has Fully Addressed AT&T's Request For Access to Agreements.

AT&T's demand for copies of Qwest's agreements with private landowners has nothing to do with Qwest's compliance with 47 U.S.C. § 271(c)(2)(B)(iii), checklist item 3, relating to access to poles, ducts, conduits, and rights-of-way. Qwest's SGAT provides that upon the request of any CLEC, Qwest will grant access to poles, ducts and conduits over which Qwest has ownership or control.[3]

Nonetheless to ensure that Qwest extends such access, Qwest will also agree to and implement a process whereby Qwest will quitclaim a right of access to its privately-owned rights-of-way to the extent that Qwest has the right to grant such access (if any). Qwest will also obligate itself to provide (a) complete copies of its easements and other right-of-way conveyance documents to requesting carriers if such easements are publicly recorded, or (b) redacted copies of non-publicly recorded right-of-way conveyance documents in Qwest's possession identified by the CLEC, if the landowner consents to a waiver of the confidentiality of such agreement.

These processes should satisfy any legitimate concerns of AT&T. In the first place, Qwest will agree to quitclaim access to its right-of-way for CLECs' use to the full extent that Qwest has the legal power to do so. Secondly, Qwest will provide copies of the right-of-way agreements, subject only to the consent of the landowner in a form that gives Qwest protection

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[2] WCom also opposed the exclusion of Internet-bound traffic from the cost-sharing provisions of SGAT §§ 7.3.1.1.3.1 and 7.3.2.2, described in SGAT § 7.3.1.4.1.3. The parties have already briefed their positions on this issue (Issue WA-13-7), and Qwest does not reassert its arguments regarding Internet-bound traffic here. Instead, it responds only to the issue of whether these costs should be shared at all. WCom also proposed language for these provisions that would require retroactive true ups based upon traffic balance. Ex. 188. However, WCom presented no evidence or testimony regarding the need, propriety or lawfulness of this proposed language. Instead, WCom focused its dispute on the cost sharing aspect of its challenge. Accordingly, Qwest assumes that WCom does not advance its claim for retroactive true up of cost sharing, and Qwest does not respond to it further than to refer to the Rebuttal Testimony of Mr. Thomas R. Freeberg ("Freeberg Rebuttal") at 29 (Ex. 157-T). WCom has withdrawn its objection to SGAT § 7.3.7.1 (Ex. 106) relating to transit traffic pricing in an email to the parties and Staff on July 12, 2000.

[3] Ex. 106, SGAT § 10.8.1.

against misuse of the documents and the rights conveyed, if any.

While AT&T's interest is to obtain copies of MDU agreements, Qwest cannot legally provide such copies, as those agreements are protected by confidentiality provisions or the expectation of privacy. Thus, Qwest's consent to disclosure, which it will provide, is only half the picture. To complete the waiver of confidentiality with respect to a two-party agreement, the CLEC must also obtain the consent of the landowner, which has co-equal rights of confidentiality and the expectation of privacy of its agreements. If the CLEC obtains such consent, Qwest will agree to waive its right to keep the document confidential, except with respect to the dollar figures in the agreements, which are proprietary and competitively sensitive (and to which AT&T can make no legitimate claim of need).

In short, Qwest commits to do everything requested that it legally can do to satisfy AT&T's legitimate requests under the law, subject only to reasonable restrictions to ensure that Qwest will not create risk or liability for itself and will not be obligated to undertake the legwork of obtaining publicly available information and/or consent of landowners to waive confidentiality provisions. Neither the Act nor the FCC Orders impose any such obligations.

AT&T has no legitimate justification for demanding anything else. Access to MDU agreements beyond the scope of what Qwest is prepared to offer simply is not encompassed within Sections 251(b)(3) or 224 of the Act. Indeed, whether an MDU agreement creates a real property interest in the first place, let alone whether a LEC such as Qwest has the right to convey access thereto, is an issue with which the FCC is currently struggling in an ongoing proceeding.[4] As Qwest noted at the June 21-23 workshop, the FCC is struggling with many issues, including whether it has authority to compel private property owners to provide access to multiple carriers, whether requiring access would constitute a taking, and whether it should even preclude exclusive arrangements between property owners and telecommunications carriers.

Nevertheless, Qwest will agree to provide both redacted copies of such agreements, *and* will quitclaim the right to use such real property rights to the fullest extent possible, on the condition that the CLECs obtain the consent of the landowner to place the MDU agreement in the public domain and agree to other reasonable protections of Qwest's real property rights. This Commission should not step unnecessarily into this highly contentious area in the context of consideration of checklist item 3 to require Qwest to do anything further on behalf of its competitors. Indeed, the FCC recently emphasized in its *SBC Texas Order*[5] that Section 271 proceedings are not the forum in which to address "new and unresolved interpretive disputes," such as this one.

Importantly, Qwest believes that property owners—not Qwest or CLECs—should have the right to determine whether private agreements should be made public. Indeed, the process that Qwest is prepared to undertake protects private citizens from being caught in the crossfire of telecommunications competition. In sum, Qwest is prepared to do everything in its legal power

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[4] Notice of Proposed Rulemaking, *In the Matter of Promotion of Competitive Networks ion Local Telecommunications Networks et al*, WT Docket No. 99-217, 14 FCC Rcd 12673, FCC 99-141, ¶¶ 52-62 (rel. July 7, 1999).

[5] Memorandum Opinion and Order, *Application of SBC Communications, Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 ¶ 23 (June 30, 2000) ("*SBC Texas Order*").

to accommodate AT&T's requests, subject only to certain minimal and reasonable conditions intended to protect private citizens and Qwest from risk and forfeiture of legal rights. These commitments fully satisfy, if not exceed, the limited purview of checklist item 3. To give effect to these commitments, Qwest has proposed revisions to Section 10.8 and Exhibit D of the SGAT, which are attached, that satisfy fully its duty to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way.[6] Qwest is also attached a revised Exhibit A that incorporates the rate for the quitclaim process.

Qwest's position is simple, clean and complete. There can be no question that the proposed quitclaim practice satisfies its checklist item 3 obligations. The Commission should accept Qwest's revisions and position and reject AT&T's request for further access not required or contemplated by the Act.

a. Qwest Has Developed A Quitclaim Right of Access Agreement To Facilitate Granting CLECs Access To Rights-Of-Way.

Under 47 U.S.C. §§ 251(b)(5) and 224, all local exchange carriers, not just incumbent LECs, are required to provide all telecommunications carriers nondiscriminatory access to poles, ducts, conduits, and rights-of-way owned or controlled by the local exchange carrier. In the *Local Competition Order*, the FCC determined that the scope of a utility's ownership or control of an "easement or right-of-way is a matter of state law."[7] Because the scope of ownership or control varies state-to-state, the FCC refused to "structure general access requirements where the resolution of conflicting claims as to a utility's control or ownership depends on variables" intrinsic to state law.[8] Instead, the FCC reiterated that "the access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access."[9] Where a local exchange carrier, including an incumbent LEC, has neither ownership nor control over the right-of-way, the FCC is equally clear that the carrier has no obligation to obtain access on behalf of the requesting carrier.[10] In its Order on Reconsideration, the FCC stated:

> Based on the record before us, we agree with those commenters that argue that the right to exercise eminent domain is generally a matter of state law, exercised according to the varying limitations imposed by particular states. We are persuaded that neither the statute nor its legislative history offers convincing evidence that Congress intended for section 224 to compel a utility to exercise eminent domain. Accordingly, on reconsideration, we find that *section 224 does not create a federal requirement that a utility be forced to exercise eminent domain on behalf of third party attachers*.[11]

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[6] Qwest, at the request of participants in Colorado workshops, has also defined certain key terms in Section 10.8.

[7] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 ¶ 1179 (1996).

[8] *Id.*

[9] *Id.*

[10] Order on Reconsideration, *Implementation of the Local Competition Provisions of the Telecommunications Act*, CC Docket No. 96-98, FCC 99-266, 14 FCC Rcd 18049 ¶ 38 (rel. Oct. 26, 1999) ("*Order on Reconsideration*").

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

To meet its obligation to provide access to rights-of-way where it has ownership or control to do so, Qwest has developed a Quitclaim Right of Access Agreement, Attachment 4 to Exhibit D of the SGAT (the "Quitclaim Agreement"). Pursuant to the Quitclaim Agreement, which will be provided to any requesting telecommunications carrier, Qwest will quitclaim a non-exclusive right to use the applicable right-of-way, to the extent that Qwest has any such rights to convey.

A quitclaim deed, by definition, conveys the identified interest without any warranties that the granting party has either the interest purported to be conveyed, or the authority to convey the interest if it does exist. In layman's terms, if the quitclaiming party has something to convey, it conveys; if not, nothing happens, and the quitclaim is simply ineffective. Thus, the Quitclaim Agreement will operate to satisfy the precise requirements of the Act: if Qwest has the ability to provide access to rights-of-way, the Quitclaim Agreement will operate to convey such access; if not, Qwest has nevertheless taken every action within its power to grant telecommunications carriers access to its rights-of-way. This instrument, then, solves the problem of how Qwest may share a legal right that either may not exist or that Qwest may not have the right to share.

The act of conveying subordinate legal rights to real property, however, creates risk for the granting party. The largest single risk to Qwest in quitclaiming the right to use an easement is that the grantee (such as AT&T) will misuse the easement. In some circumstances, this could operate to extinguish or terminate the underlying right, i.e., Qwest's right-of-way. For example, if AT&T defaults under its subordinate right to use Qwest's easement, this may trigger a default under Qwest's easement. Qwest's obligation to provide access to rights-of-way does not include the obligation to put Qwest's own rights-of-way at risk. Therefore, Qwest has built safeguards into the Quitclaim Agreement to (a) minimize the risk that Qwest's rights-of-way will be jeopardized, and (b) ensure that Qwest will be made whole in the event that its competitor causes Qwest to forfeit its valuable property right. Specifically, to minimize the risk of jeopardizing Qwest's right-of-way, Qwest requires the carrier to obtain the property owner's agreement to give Qwest the right to cure its competitor's default that could jeopardize Qwest's right-of-way. To ensure that Qwest will be made whole in the event of loss of right-of-way, a defaulting CLEC must reimburse Qwest for all costs incurred in the event of such an occurrence. The Quitclaim Agreement also contains other terms and conditions that reasonably protect Qwest from damages or forfeiture of its rights.

As an alternative, if the CLEC would prefer to seek access to a property owners' right-of-way on its own, Qwest's process is designed to allow requesting carriers the right to opt out of the process entirely, and to simply obtain its own right-of-way directly from the property owner, if the requesting carrier so desires. However, in the event that a CLEC wishes to attempt to make use of Qwest's rights-of-way, rather than simply obtaining its own, the CLEC must undertake the due diligence and other efforts required to obtain the consent of the landowner, and may not rely on Qwest to do that work for the CLEC.[12]

This more than satisfies Qwest's obligation to provide nondiscriminatory access to rights-of-way. Qwest has agreed to convey access to the full extent it has authority to do so. AT&T or any another CLEC must choose whether to accept Qwest's offer or obtain rights-of-way on its own.

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[12] Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, 15 FCC Rcd 3696 ¶ 213 (rel. Nov. 5, 1999) ("*UNE Remand Order*").

b. Qwest Has Revised Section 10.8 of the SGAT To Incorporate the Quitclaim Process, To Provide Negotiated Language, And To Define Terms.

Qwest has proposed revisions to Section 10.8 to clarify some of the terms contained therein. For example, Qwest has defined the terms "pole attachment" (SGAT § 10.8.1.1.1), "conduit" (SGAT § 10.8.1.2.1), and "duct" (SGAT § 10.8.1.2.2) relying upon definitions in FCC rules.[13] Because FCC rules do not define "rights-of-way" or "innerduct," Qwest has proposed definitions for those terms. The term "rights-of-way" in Section 10.8.1.3.1 is based upon common law principles and upon the simple axiom that no private party has the right to convey public land—hence, the exclusion of public right-of-way granted under a permit from the definition of "rights-of-way." The definition of "innerduct" in Section 10.8.1.2.3 is based upon common industry usage.

Regarding Issue WA-3-2(a), Qwest has also proposed its definition of the phrase "ownership or control" in Section 10.8.1.4 based upon property law concepts as well as the FCC's pronouncements in the *Order on Reconsideration*.[14] However, because Qwest will quitclaim its interest in *any* requested right-of-way to any requesting telecommunications carrier, regardless of whether Qwest believes it has the right to convey any interest, the definition of "ownership or control" is largely academic. The argument over the definition has centered around the extent to which Qwest has the right to convey access to right-of-way. By definition, however, a quitclaim conveyance has the legal effect of conveying the stated interest *to precisely the extent the grantor has the right to convey such interest*. Thus, the Quitclaim Agreement, by its inherent nature, operates to eliminate the need for defining ownership and control—if Qwest has the legal power to convey, and something to convey, regardless of how that power is defined, the Quitclaim Agreement will convey the interest. In short, Qwest will quitclaim a right of access whenever it is requested to do so and the conditions precedent are satisfied—it is then up to the telecommunications carrier to determine what, if anything, was conveyed.[15]

For purposes of clarity, however, Qwest believes that AT&T's proposed definition of "ownership or control," in Ex. 221 is more cumbersome and vague than the one Qwest offers. Moreover, it adds nothing to the concept of "ownership or control," since a carrier either has "ownership or control" over property or it does not. Also, in light of Qwest's agreement to provide the Quitclaim Agreement, those terms are entirely unnecessary. Accordingly, Qwest's disagreement with AT&T's proposed definition in no way diminishes its compliance with checklist item 3.

Finally, Qwest, in collaboration with NextLink following the July 6 workshop, has proposed modest revisions to Section 10.8.4.4.4. Those revisions have been included in the attached proposed revisions.

Each of Qwest's proposed revisions is reasonable and lawful, and gives full effect to the requirements of the Act. The Commission should adopt them.

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[13] *E.g.*, 47 C.F.R. § 1.1402.

[14] *See generally Order on Reconsideration.*

[15] Nothing in the Telecommunications Act requires a LEC to undertake a legal analysis or provide legal services for other telecommunications carriers, which is the only remaining step necessary to make full use of Qwest's right-of-way after the Quitclaim Agreement has been provided to the requesting carrier. Qwest declines to undertake such legal analysis on behalf of its competitors.

c. The Commission Should Adopt Qwest's Redactions and Redaction Principles

Checklist item 3 is limited to determining whether Qwest provides "nondiscriminatory access to poles, ducts, conduits, and rights-of-way owned or controlled by" Qwest.[16] MDU agreements simply are not right-of-way or easement agreements. They grant no real property interest to Qwest, nor do they permit Qwest to convey any property interest or grant access to CLECs.[17]

The Commission should reject AT&T's arguments for the further reason that this Section 271 docket is not the appropriate forum to address AT&T's novel (and controversial) request. In its *SBC Texas Order*, the FCC expressly rejected the position that Section 271 proceedings can be used "as a forum for the mandatory resolution of many . . . local competition disputes, including disputes on issues of general application that are more appropriately the subjects of industry-wide notice-and-comment rulemaking."[18] The FCC further stated that such claims are "irreconcilable with" the 271 statutory scheme.[19]

> There may be other kinds of statutory proceedings, such as certain complaint proceedings, in which we may bear an obligation to resolve particular interpretative disputes raised by a carrier as the basis for its complaint. But the section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as precondition to granting a section 271 application.[20]

The FCC further stated:

> Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such *fast-track, narrowly focused adjudications* -- generally dominated by extremely fact-intensive disputes about an individual BOC's empirical performance -- are often *inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability*. If Congress had intended to compel us to use section 271 proceedings for that purpose, *it would not have confined our already intensive review to an extraordinarily compressed 90-day timetable*.[21]

Also, if such policy disputes were handled in this docket, the public's interest in local and interLATA competition would be irretrievably harmed. Section 271 was intended to provide an

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[16] 47 U.S.C. § 271(c)(2)(B)(iii).

[17] Notwithstanding these significant objections, Qwest nevertheless is prepared to quitclaim whatever right of access (if any) is contained in the MDUs, and will agree to waive its own claim to the confidentiality of the agreements, subject to the conditions set forth in the Quitclaim Agreement.

[18] *SBC Texas Order* ¶ 23.

[19] *Id.* ¶ 24.

[20] *Id*. (footnotes omitted).

[21] Emphasis added.

incentive to Qwest to comply with the checklist items in order to be able to enter the interLATA market. The FCC found "[t]hat hope would largely vanish if a BOC's opponents could effectively doom any section 271 application by freighting their comments with novel interpretive disputes and demand that authorization be denied unless each one of those disputes is resolved in the BOC's favor."[22]

Notwithstanding the foregoing, on the assumption that AT&T is acting in good faith, Qwest is willing to provide a Quitclaim Agreement with respect to MDU agreements or other agreements that AT&T believes may create conveyable real property interests.[23] Accordingly, if AT&T or another CLEC believes an MDU agreement grants them access, they are free to test their beliefs. As set forth above, however, this is an undertaking for the CLEC, not Qwest.

In this vein, Qwest will also provide copies of the MDU agreements, to the extent that the landowner agrees to waive its own right to confidentiality or privacy. Neither Qwest nor this Commission has the unilateral power to waive confidentiality restrictions in agreements with private landowners unrepresented in this proceeding, nor should Qwest or the Commission attempt to force private property owners to reveal their dealings with telecommunications carriers against their will. Thus, where the property owner who is a party to an unrecorded agreement declines to waive its confidentiality or privacy rights, that ends the matter for any CLEC. To give effect to this concept, Qwest has developed a process whereby a requesting carrier must obtain the consent of the property owner to waive the confidentiality provision of the applicable unrecorded agreement. If the requesting carrier obtains such a waiver, Qwest will provide a copy of the MDU agreement to the requesting carrier, subject to limited, reasonable redactions discussed below. However, if the property owner refuses, Qwest will not provide a copy to the requesting carrier, as Qwest has no legal authority to waive the confidentiality right on behalf of unrepresented third party property owners.

For those unrecorded agreements for which the CLEC obtains the consent of the property owner to waive its confidentiality/privacy rights, Qwest will also agree to waive its confidentiality rights, except for the monetary terms of the agreements. Thus, when Qwest receives a properly executed and acknowledged Consent (which is a part of the Quitclaim Agreement) Qwest will provide a copy of the unrecorded document with only the monetary terms redacted. This redaction principle is simple and reasonable. There is no legitimate need for AT&T or CLECs to know the monetary terms of Qwest's agreements to verify whether Qwest can provide access to the property, which is AT&T's stated concern for wanting these agreements in the first place. Moreover, pricing issues are both proprietary and competitively sensitive. Since CLECs have no interest in the MDUs or other unrecorded instruments beyond verifying the scope (or lack thereof) of Qwest's access to property, CLECs should not be permitted to obtain monetary or pricing terms from Qwest's agreements with private landowners.[24]

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[22] *Id.* ¶ 26.

[23] As noted above, it is the telecommunications carrier's responsibility to undertake the legal analysis of what real property rights, if any, are conveyed by the Quitclaim Agreement.

[24] Qwest has applied these principles to two MDU agreements AT&T produced at the Colorado workshop. These agreements are being provided by mail to the Commission and the parties. It also also applied them to a template MDU agreement and easement.

2. Issue WA-3-7: The Commission Should Reject WCom's Request To Revise The Schedule It Negotiated With Qwest.

During collaborative workshops in Arizona, Qwest and participating CLECs, principally WCom and AT&T spent significant time negotiating revisions to Section 10.8 of the SGAT and Exhibit D relating to checklist item 3, access to poles, ducts, and rights-of-way. Among the issues negotiated between the parties was a schedule for when Qwest would respond to requests for access (by performing record inquiries and field verifications) for what the parties agreed would be "standard" requests and what they deemed "more extensive" requests. For standard requests, Qwest agreed to perform inquiries within 10 days and to perform field verification requests within 35 days. The schedule in Exhibit D § 2.2 then establishes the slightly longer response times Qwest and Arizona participants negotiated depending on the size of the request. The schedule is not linear; in other words, a request for 200 poles does not take twice as long as a request for 100 poles. Instead, to reach consensus while permitting Qwest a more reasonable time to respond to large requests, Section 2.2 provides a slightly longer time to respond to these very large requests.

After lengthy negotiations with Qwest in Arizona, WCom, who participated heavily in those negotiations and specifically agreed to this schedule, now seeks to unravel it. Tellingly, no other CLEC joined its request at the Washington workshops. WCom's sole basis for seeking to undo the deal it brokered is that WCom believes 47 C.F.R. § 1.1403(b) grants it a blanket right to demand that Qwest respond to all inquiries for pole or conduit space, regardless of the size, within 45 days. WCom's position is untenable.

First, WCom is the only carrier at the workshop that objected to the schedule in Section 2.2 of Exhibit D. Having made its bargain, WCom should be bound by it. Second, the Schedule is imminently reasonable. Rather than insisting on twice as much time for requests as the number of poles or manholes involved increased, Qwest agreed to *shorter* time periods for responding to such requests. Third, but related, Qwest believes that given the magnitude of some requests (for example, 500 poles or 150 manholes), a graduated schedule is not only reasonable, it is necessary. For Qwest to perform a thorough inquiry and field verification on a request of such scope simply requires more time than 45 days. As Mr. Freeberg explained in his testimony, field verification is a necessary and integral part of developing an accurate estimate for access to poles or ducts. Such verifications require sending a technician into the field to inspect the manholes or poles.[25] With massive requests, this is undeniably a lengthy process. Indeed, under WCom's view, it could request access to a pole line across the state, and Qwest would have only 45 days to pull records and physically inspect that entire line. The graduated schedule in Exhibit D is reasonable and reflects the legitimate constraints Qwest faces when a CLEC places a massive request for pole or duct access.

Finally, WCom overreaches when it claims that the FCC established a flat 45-day response time for all requests, no matter the scope. The FCC simply did not address the issue.

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[25] Ex. 157-T, Freeberg Rebuttal at 11-12; *see also* 6/22/00 Transcript at 296-99.

Rule 1.1403(b) states only requests for access to poles, ducts, conduits, or rights-of-way must be in writing, and a utility must respond within 45-days of the request. It does not address the size of a request, and the rule can easily be interpreted to mean that a utility must respond to a request for access to a *single* pole or manhole within 45 days. Qwest's graduated schedule is an eminently reasonable interpretation of the rule and a practical solution to this issue.

In the *Local Competition Order*, the FCC emphasized that "the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis."[26] As the FCC recognized, hard-and-fast rules were simply not feasible to address "access to the millions of utility poles and untold miles of conduit in the nation."[27] Thus, the FCC declined to "enumerate a comprehensive regime of specific rules" to govern access to poles, ducts, and rights-of-way.[28] Qwest's negotiated schedule (a schedule negotiated with the very CLEC that seeks to overturn it) is reasonable and is consistent with the flexibility concerns the FCC recognized. The Commission should approve the schedule in Section 2.2 and reject WCom's claims.

B. Checklist Item 7

1. Issue WA-7-9: WCom's Objection To The Term "License" In The Directory Assistance Provisions Of The SGAT Is Unfounded, Unsupported, And Irrelevant To This Proceeding.

WCom, and no other CLEC, opposes the use of the term "license" in SGAT § 10.6.2.1 to refer to the grant of permission Qwest gives to CLECs to use Qwest's directory assistance ("DA") service. Specifically, WCom opposes the term "license" to denote an "intellectual property" right.

Qwest is somewhat at a loss in responding to this objection. WCom, in its prefiled testimony, opposed the term, claiming simply that it gave Qwest too much control.[29] At the June 21-23 workshop, it presented no further testimony or explanation of its objection to the term. In response, Qwest stated that "license" was the proper term to denote the grant of permission Qwest gives CLECs because under the Act, Qwest is only required to provide access to its DA information for DA purposes.[30] WCom has now seized upon a comment in the workshops in Colorado in which Qwest commented that it believed it had an intellectual property right in its DA listings. WCom apparently opposes this characterization, but has provided no explanation or evidentiary support for its opposition. Indeed, it has not even stated *why* it opposes this characterization.

Most important, WCom has not explained why the type of license granted or the characterization of that license is relevant to this proceeding. Under checklist item 7(ii), Qwest

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[26] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 ¶ 1143 (Aug. 8, 1996) ("*Local Competition Order*").

[27] *Id.*

[28] *Id.*

[29] *See* Ex. 186-T, Testimony of Michael A. Beach at 6 (adopted by Thomas T. Priday at the workshop).

[30] Furthermore, Qwest explained that "licensing" this information is necessary because Qwest has agreements with at least one local exchange carrier that it will only use that carrier's listings for DA purposes. *See* Ex. 114-T, Rebuttal Testimony of Lori A. Simpson ("Simpson Rebuttal") at 5-6.

must "provide nondiscriminatory access to 'directory assistance services to allow the other carrier's customers to obtain telephone numbers' . . . ."[31] The FCC has determined that to meet this obligation

> "the customers of all telecommunications service providers should be able to access each LEC's directory assistance service and obtain a directory listing on a nondiscriminatory basis, notwithstanding: (1) the identity of the requesting customer's local telephone service provider; or (2) the identity of the telephone service provider for a customer whose directory listing is requested."[32]

Furthermore, Qwest must permit CLECs to provide DA by reselling Qwest's services or by using their own personnel and services to provide DA.[33] For those CLECs that provide DA over their own facilities, Qwest must enable them to obtain DA listings on a "read only" or "per dip" basis, or by creating their own DA database by obtaining subscriber list information.[34]

Significantly, WCom has not claimed that Qwest fails to meet *any* of these requirements.[35] Moreover, WCom does not oppose the limitation of the use of DA information for DA purposes. Indeed, it is hard to imagine why it would: the Act only requires Qwest to provide DA list information for that purpose, and Qwest, in language for Sections 10.6.2.3 and 10.5.2.11 proposed on July 12, has imposed virtually no restrictions on a CLEC's use of such information.[36] Furthermore, at the request of WCom, Qwest proposed language in Section 10.6.2.1 and 10.5.1.1.2 that gives CLECs a chance to cure any alleged violation before the license is revoked, permits a stay of revocation while the parties arbitrate any dispute, and which defines the circumstances that would lead to revocation.[37] Thus, the license Qwest grants is broad and generous.

At the follow up workshop on July 6, Qwest clarified that the SGAT serves a limited purpose: it provides CLECs with Qwest DA list information for purposes of providing directory assistance service under Sections 251(b)(3) and 271(c)(2)(B)(vii) of the Act. If WCom wishes to use Qwest DA list information for some other purpose, Qwest stated that it will negotiate that use with WCom. Thus, whether directory assistance information is or is not "intellectual property" is irrelevant,[38] and neither Section 251(b)(3) nor 271(c)(2)(B)(vii) speaks to this issue.

In short, WCom is hard pressed to explain why this issue is relevant to whether Qwest meets the requirements of checklist item 7. Section 271 was intended to provide an incentive to Qwest to comply with the checklist items in order to be able to enter the interLATA toll market. As noted above, the FCC has found "[t]hat hope would largely vanish if a BOC's opponents could effectively doom any section 271 application by freighting their comments with novel

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[31] *SBC Texas Order* ¶ 345 (quoting 47 U.S.C. § 271(c)(2)(B)(vii)(II)).

[32] *SBC Texas Order* ¶ 346 (citing 47 C.F.R. § 51.217(c)(3)).

[33] *Id.* ¶ 347.

[34] *Id.*

[35] Ms. Simpson's testimony confirms that Qwest meets all of these requirements. *See* Ex. 111-T, Direct Testimony of Lori A. Simpson at 5-12; Ex. 114-T, Simpson Rebuttal at 3-6; *see also* Ex. 106, SGAT § 10.6.

[36] In fact, the FCC approved SBC's compliance with this checklist item, and SBC imposed stricter limitations on use of DA lists than Qwest. *See SBC Texas Order* ¶ 350-51.

[37] Ex. 122.

[38] 7/6/00 Transcript at 709-10.

interpretive disputes and demand that authorization be denied unless each one of those disputes is resolved in the BOC's favor."[39]

Qwest fully satisfies the requirements of checklist item 7(ii). WCom's concern is an academic one, at best, that it has neither explained nor tied to any requirement of Section 271(c)(2)(B)(vii). The Commission should reject it.

C. Checklist Item 13

1. Reciprocal Compensation Requirements.

Section 252(d)(2) governs compensation for transport and termination of traffic and states that reciprocal compensation for transport and termination of traffic must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" and must be determined "on the basis of a reasonable approximation of the additional costs of such calls."[40] The FCC has determined that rates for reciprocal compensation must be symmetrical – i.e., that the same rates apply to both incumbent LECs and CLECs.[41] Thus, in its SGAT, Qwest provides symmetrical rates for transport and termination.[42]

Although they tout symmetrical treatment, the CLECs' proposals violate the rule of symmetry and the Act's requirement that carriers be compensated for their transport and termination costs. Qwest provides symmetrical, reciprocal compensation that compensates each carrier for the costs they incur to transport and terminate each other's traffic. The Commission should reject the CLECs' attempts to impose non-symmetrical obligations on Qwest.

2. Issue WA-13-1: The FCC Has Prohibited AT&T And WCom's Commingling Demand.

Qwest offers CLECs a number of options from which to choose to complete an interconnection arrangement with Qwest. One interconnection option that Qwest offers is the use of an "entrance facility," which means a facility that enters a nearby Qwest central office. Qwest offers to construct such a facility, share the cost when two-way traffic is carried, and charge TELRIC rates for the entrance facility. As an alternative, however, Qwest also allows CLECs to use excess capacity on an existing private line facility as an interconnection trunk. This second option allows CLECs to use spare capacity from an existing private line to maximize the efficient use of their network in lieu of the time and expense of installing new facilities. SGAT § 7.3.1.1.2 states that "if CLEC chooses to use an existing facility purchased as Private Line Transport Service from the state or FCC access Tariffs, the rates from those Tariffs will apply."[43]

AT&T and WCom state that if they choose the private line option, Qwest should "ratchet" its rates and charge TELRIC (Section 252(d)(1)) rates for the percentage of the traffic on the private line that is local, and private line rates for that percentage of the traffic that is special access. In other words, AT&T and WCom want Qwest to convert a percentage of their special access circuits to TELRIC rates.

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[39] *SBC Texas Order* ¶ 26.
[40] 47 U.S.C. § 252(d)(2)(A).
[41] *Local Competition Order* ¶ 1085-86.
[42] *E.g.*, Ex. 106, SGAT §§ 7.3.2, 7.3.4.1.1, 7.3.4.2.
[43] *See* Ex. 157-T, Freeberg Rebuttal at 24-25.

The FCC has already decided this issue in its *Supplemental Order* to the *UNE Remand Order*. The FCC stated that:

> [I]nterexchange carriers (IXCs) may not convert special access circuits to combinations of unbundled loops and transport network elements, whether or not the IXCs self provide entrance facilities (or obtain them from third parties). This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to the exchange access, to a particular customer.[44]

In its *Supplemental Order Clarification*,[45] the FCC extended the term of this restriction, clarified the phrase "a significant amount of local exchange service," and further emphasized the restriction on conversion of special access circuits to TELRIC-rate based facilities includes "commingling" of special access services with TELRIC-rated facilities.[46]

At the June 21-23 workshop, AT&T and WCom claimed that the "commingling" that the FCC prohibited was the use of special access circuits to carry both local and toll calls in the same trunk group, mixing local and toll call-by-call.[47] Thus, AT&T and WCom claimed that the FCC did not address the type of commingling they requested: the use of spare dedicated DS-1 capacity on existing DS-3 special access circuits to provide new local service while using other existing DS-1 circuits to provide toll service.[48] The FCC, however, rejected precisely the commingling AT&T and WCom request.

In an *ex parte* submission to the FCC in CC Docket 96-98, WCom proposed the very type of commingling AT&T and WCom propose here.[49] Specifically, WCom requested that CLECs be permitted to purchase their local transport facilities at TELRIC rates instead of as special access, convert DS-1 lines used to carry local traffic to TELRIC-rate facilities, bring those facilities to an incumbent LEC end office at DS-3, and "multiplex the DS-1s onto the DS-3 they have purchased out of the ILECs' special access tariffs."[50] As AT&T argued here, WCom claimed that a prohibition on this type of commingling would be inefficient and require CLECs to operate duplicative networks.[51] As AT&T and WCom argued here, WCom also claimed that the local circuits would be segregated from toll circuits, and that ratcheting of rates should be permissible to reflect that a portion of the facilities are used to carry local traffic.[52] The FCC considered *each* of these claims and specifically *rejected* all of them as well as WCom's

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[44] Supplemental Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-370 ¶ 2 (rel Nov. 24, 1999) (emphasis added) ("*Supplemental Order*").

[45] Supplemental Order Clarification, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 (June 2, 2000) ("*Supplemental Order Clarification*").

[46] *Id.* ¶ 28.

[47] 6/23/00 Transcript at 605-06, 610, 614-15 (Wilson); *id.* at 607-08 (Argenbright).

[48] *Id.*

[49] *See* Ex. 169 at 6-8.

[50] *Id.* at 6.

[51] *Id.* at 7.

[52] *Id.* at 7.

commingling proposal.[53] Thus, the FCC has already heard and rejected the argument posed by AT&T and WCom. Indeed, the FCC stated that it was not convinced that lifting the prohibition would not lead interexchange carriers to use TELRIC-rate facilities to bypass switched access.[54]

As Mr. Owens explained at the workshop, AT&T and WCom's commingling and ratcheting request applied to interconnection facilities would lead to precisely the evil the FCC intended to prevent while it considers this issue in its ongoing rulemaking proceedings.[55] As Mr. Owens explained, if the Commission were to adopt AT&T and WCom's proposal, some portion of DS-3 facilities used to provide toll service at special access rates, thereby supporting universal service, would be converted to TELRIC rates.[56] Then, AT&T and WCom would request further "credits" based upon the traffic balance over the local facilities between the carriers and Qwest.[57] Assuming a DS-3 cost $1000/month at the tariff rate and $500/month at TELRIC, if a CLEC used half the DS-3 facility to carry local traffic, it would not pay Qwest the average of $1000 and $500 (or $750). Instead, it would pay Qwest $500 for the special access usage and virtually nothing for the local portion, since 90% of the traffic in Washington originates on or behind Qwest's network. Thus, Qwest would lose half of the contribution to universal service support that the DS-3 facility provides.[58] This is precisely what the FCC sought to prevent until it examines the issue further and completes its universal service reform proceedings.[59]

For a final reason, the Commission should decline AT&T and WCom's request to create new policy in this proceeding, especially where FCC rulings support Qwest's position. As set forth above, in its *SBC Texas Order*, the FCC clarified that Section 271 proceedings are limited proceedings.[60] Such workshops are to be streamlined examinations of whether the BOC has complied with the existing rules regarding the checklist items and other 271 requirements. They are not to drive new policy changes or interpretations.[61]

The central issue in a 271 docket is compliance with FCC rules *existing at the time of the application*. Rules arising *thereafter* are irrelevant:

> *Just as our long-standing approach to the procedural framework for section 271 applications focuses our factual inquiry on a BOC's performance at the time of its application, so too may we fix at that same point the local competition obligations against which the BOC's performance is generally measured for purposes of deciding whether to grant the application.* Nothing in section 271 or any other provision of the Act compels us to require a BOC applicant to demonstrate compliance with new local competition obligations that

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[53] *Supplemental Order Clarification* ¶ 28 & n. 79 (expressly rejecting commingling as proposed by WCom and citing WCom's April 4, 2000 *ex parte* submission submitted in this workshop as Ex. 169).

[54] *Id*. ¶ 28.

[55] AT&T and WCom may suggest that the prohibition on commingling applies only to UNEs, not interconnection facilities. The disruption to access charge and universal service that commingling causes and the ability of IXCs to subvert the moratorium on conversion of special access circuits by commingling applies equally to interconnection facilities. 6/23/00 Transcript at 615-17, 619-20.

[56] 6/23/00 Transcript at 615-16.

[57] *Id.*

[58] *Id.* at 615-17, 619-20.

[59] *See Supplemental Order Clarification* ¶ 7.

[60] *SBC Texas Order* ¶¶ 23-27.

[61] *Id*. ¶¶ 24-5 (emphasis added).

were unrecognized at the time the application was filed.[62]

Accordingly, in the *SBC Texas Order*, the FCC refused to consider CLECs' claims regarding commingling to determine SBC's compliance with the competitive checklist.[63] Instead, the FCC concluded that SBC reasonably relied upon the FCC's *Supplemental Order* and *Clarification Order* in imposing restrictions on commingling of special access circuits:

> Because the substantive interim rules we have adopted in our orders on this subject define the nature of SWBT's statutory obligations, SWBT's adherence to them cannot constitute a basis for finding noncompliance with the checklist. It would be quite unfair to a BOC applicant to deny it approval to compete in the long-distance market on the basis of conduct that, in other proceedings, we have explicitly authorized. For the section 271 process to work, potential BOC applicants must have a reasonable degree of certainty about what they need to do to bring themselves in compliance with statutory requirements, and they therefore need to be able to rely on our rules for guidance.[64]

This Commission should follow the FCC's lead and reject AT&T's and WCom's request for commingling of special access circuits with interconnection facilities used to provide local service as well as those CLECs' proposed ratcheting of rates.

3. Issue WA-13-2: Qwest's Definition Of Tandem Switch And Its Proposed Treatment Of CLEC Switches Is Consistent With The Act As Well As FCC Rules And Relevant Court Decisions.

AT&T and WCom dispute the provisions in the SGAT that define when a CLEC's switch will be considered to be a tandem switch for reciprocal compensation purposes,[65] and when either party may charge a tandem transmission rate for traffic delivered through a Qwest or CLEC tandem switch.[66] Qwest defines a tandem switch and the rates associated with tandem switching in a perfectly symmetrical manner, exactly as the FCC rules require. On the other hand, AT&T, WCom, and other CLECs seek a windfall by getting paid for switching traffic twice when they only switch it once. Qwest only requests payment for services it actually performs. Because Qwest's SGAT accurately reflects the state of the law, and because the FCC, this Commission and federal courts have approved the logic underlying both provisions, the provisions at issue should be sustained.

a. Determining When a CLEC Switch will be Considered to be a Tandem Switch

Section 252(d)(2)(A) of the Act and the FCC's rules implementing that section govern the mechanisms in interconnection agreements for reciprocal compensation. The FCC's Rule 711(a)(1), implementing section 252(d)(2)(A), requires symmetrical compensation only when carriers provide the *same services*.[67] The FCC recognized that different rates could be charged

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[62] *Id.* ¶ 27.
[63] *Id.* ¶ 227.
[64] *Id.* ¶ 228.
[65] Ex. 106, SGAT § 4.11.2.
[66] Ex. 106, SGAT § 7.3.4.2.1
[67] 47 C.F.R. § 711(a)(1).

for transport and termination where carriers provide different transport and termination services. Tandem switching and end-office switching are different services. In Qwest's network, tandem switching costs more than end-office switching because it requires Qwest to perform an additional switching function. The FCC recognizes that tandem switching requires an additional switching function and, thus, costs more.[68] Therefore, the FCC concluded that "states may establish transport and termination rates in their arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch."[69] This conclusion equates cost equivalence with functional equivalence.

Moreover, the *Local Competition Order* also recognizes that cost equivalency requires an analysis of functional equivalency. In paragraph 1090 of the *Local Competition Order*, which explains Rule 711, the FCC required that State commissions establishing transport and termination rates:

> *shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch* and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.[70]

Thus, in explaining Rule 711, the FCC mandated that state commissions consider both the functions performed by the competing carrier's switch and the geographic area served by that switch. In its submitted testimony, AT&T excerpted only the *last* sentence of paragraph 1090 to support its assertion that a comparison of geographic service area alone should determine tandem status for a given switch.[71] As a full reading of paragraph 1090 makes clear, a simple comparison of geographic areas is insufficient to establish tandem functionality or the related tandem cost structure under the FCC's rules.

This Commission as well as courts in Washington have confirmed and adopted Qwest's position. For example, in the Commission order adopting the arbitrator's report and approving the interconnection agreement between AT&T Wireless Services, Inc. ("AWS") and the former U S WEST,[72] the Commission denied AWS's request to treat its switch as a tandem switch. The Commission cited with approval the arbitrator's decision which had focused primarily on a functionality comparison, and which provided in pertinent part:

> The *Local Competition Order* ¶ 1090 states that the Commission shall consider whether new technologies perform functions similar to those

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[68] *See Local Competition Order* ¶ 824, 1090.
[69] *Id.* ¶ 1090.
[70] *Id.* (emphasis added).
[71] Ex. 201-T, Direct Testimony of Kenneth Wilson at 52.
[72] Commission Order Adopting Arbitrator's Report and Approving Interconnection Agreement, *Petition for Arbitration of an Interconnection Agreement Between AT&T Wireless Services, and U S WEST Communications,* Docket No. UT-960381, slip op. at 8 (WUTC October 6, 1997)("AWS Interconnection Proceeding").

> performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on a co-carrier's network should be priced the same as the tandem . . . In order to understand functional equivalence, it is necessary to consider all of the various elements in the context of their interconnected networks.[73]

The Commission's decision in the *AWS Interconnection Order*, and particularly its reading of the requirements of the Act and paragraph 1090 of the *Local Competition Order*, was later affirmed by the Washington federal district court. That court specifically rejected the claim AT&T and WCom assert here: that geography alone is the only consideration:

> [The language in paragraph 1090 of the *Local Competition Order*] supports two legal interpretations: (1) the rate for a wireless switch should be determined by whether it functions like a tandem switch, and geography should be considered; or (2) where a wireless switch serves a comparable area as that of a tandem switch, the rate should be that of a tandem switch. The first interpretation entails a detailed functional comparison of two technological systems. The second entails the automatic application of the tandem rate to any system that meets the geographic test.
>
> The court finds that the first interpretation is more consistent with the Act, 47 U.S.C. § 252(d)(2)(A), and 47 C.F.R. § 51.711(a)(1) which read together provide that the rates of transport and termination of traffic should be symmetrical when the same kind of service is rendered, and that the additional costs involved in call termination are relevant.[74]

This decision is consistent with the Ninth Circuit's decision in *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*,[75] in which the court held that the Commission properly considered *both* functionality and geography in determining, under the specific facts of that case, that MFS's switch functioned as a tandem switch. The great weight of authority confirms that the Act and FCC rules require that the functionality of CLEC switches be the primary factor in determining whether those switches should be considered tandem for purposes of reciprocal compensation.

The CLECs' position has also been rejected by other courts outside Qwest's territory. In *TCG Milwaukee v. Public Serv. Comm'n of Wisconsin*,[76] the district court held that the Wisconsin Public Service Commission had a statutory obligation to conduct a functional analysis of the CLEC switch in determining the appropriate form of reciprocal compensation between the incumbent LEC and the CLEC.

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[73] Arbitrator's Report and Decision, *Petition for Arbitration of an Interconnection Agreement Between AT&T Wireless Services. and U S WEST Communications*, Docket No. UT-960381, slip op. at 28 (WUTC July 3, 1997), *adopted in* Commission's Order Adopting Arbitrator's Report and Approving Interconnection Agreement, *Petition for Arbitration of an Interconnection Agreement Between AT&T Wireless Services. and U S WEST Communications*, Docket No. UT-960381, slip op. (WUTC Oct. 6, 1997) ("*AWS Arbitration Order*").

[74] *U S WEST Communications v. Washington Utils. & Transp. Comm'n*, Case No. C97-5686BJR, slip op. at 7 (W.D. Wash. 1998).

[75] 193 F.3d 1112, 1124 (9th Cir. 1999).

[76] 980 F. Supp. 992 (W.D. Wis. 1997).

> Under the [A]ct, not only must the defendant commission establish rate levels, it must insure that the levels are just, reasonable and nondiscriminatory. *The nature of plaintiff's switch was of considerable financial significance under both the rate-based and bill-and-keep compensation proposals because calls are more expensive to route through a tandem than an end-office switch*. Given this, the panel and the defendant commission could not have complied with the pricing standards, which included an obligation to make a "reasonable approximation of the additional costs of terminating [calls that originate on the network facilities of the other carrier]," 47 U.S.C. § 252(d)(2)(A)(ii), without determining the nature of the plaintiff's switch. Therefore, *as a matter of law, the arbitration panel and the defendant commission could not determine the form of reciprocal compensation and abide by the pricing standards without also determining the nature of the plaintiff's switch*.[77]

Geography, while it may be considered, is of lesser concern and the proposed language in Section 4.11.2 of the SGAT properly allows for that distinction. Therefore, that language should remain in the SGAT.

To the extent any CLEC objects to the requirement that its switch "actually" serve the "same" geographic area as Qwest's switch, that objection should be rejected. The plain language of 47 C.F.R. § 51.711(a)(3) provides that a CLEC's switch is to be accorded the tandem rate only if it actually serves the same geographic area as an incumbent's tandem switch:

> Where the switch of a carrier other than an incumbent LEC *serves* a geographic area comparable to the area *served* by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than the incumbent LEC is the incumbent LEC's tandem interconnection rate.[78]

The *Local Competition Order* also provides that the relevant inquiry is the geographic area the CLEC switch *actually* serves, not *could serve* in the future.[79] The definition of a tandem switch in Section 4.11.2 is also consistent with the holdings of several courts, which have recognized that the actual area served by the switch is the relevant factor. For example, the court in *MCI Telecommunications Corp. v. Michigan Bell Tel. Co.*,[80] held

> The FCC rule provides that where the competing carrier's switch serves a geographic area comparable to that served by the incumbent carrier's tandem switch, the rate to be charged is the tandem interconnection rate. *The rule focuses on the area currently being served by the competing carrier, not the area the competing carrier may in the future serve. To interpret the rule [otherwise] would require the state commission to*

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[77] *Id.* at 1000 (emphasis added).

[78] 47 C.F.R. § 51.711(a)(3) (emphasis added).

[79] *Local Competition Order* ¶ 1090 ("Where the interconnecting carrier's switch *serves* a geographic area comparable to that *served* by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate") (emphasis added).

[80] 79 F. Supp. 2d 768, 791 (E.D. Mich. 1999).

speculate about the future capability of a competing carrier.[81]

Particularly in the context of an SGAT, in which a party opts into its provisions without arbitration and the development of a factual record, the proposed language in Section 4.11.2 promotes certainty.

With respect to the use of the term "same" in Section 4.11.2 and WCom's insistance on the term "comparable," Qwest is not aware of any Commission or FCC definitions of the language "comparable geographic area" in 47 C.F.R. § 51.703(a)(3). However, WCom, in its February 8, 2000 comments in Arizona addressing checklist item 13, addressed this issue in the following manner:

> Section 4.11.2 should be changed to read: "Tandem Office Switches" which are used to connect and switch trunk circuits between and among LEC and IXC switches. CLEC switch(es) shall be considered a Tandem Office Switch to the extent such switch has the capability of serving the *same geographic area* as U S WEST's Tandem Office Switch.

(Emphasis added.)

Consistent with WCom's Arizona comments on the issue of geographic coverage, Qwest proposed language for its Washington SGAT that defines tandem switches with the following provision:

> 4.11.2 "Tandem Office Switches" which are used to connect and switch trunk circuits between and among other End Office Switches. CLEC switch(es) shall be considered Tandem Office Switch(es) to the extent such switch(es) actually serve(s) the *same geographic area* as U S WEST's Tandem Office Switch or is used to connect and switch trunk circuits between and among other Central Office Switches. Access tandems provide connections for exchange access and toll traffic, and Jointly Provided Switched Access traffic while local tandems provide connections for Exchange Service (EAS/Local) traffic.[82]

In addition, the terms "comparable geographic area" and "same geographic area" have been used synonymously to explain that a CLEC switch is not entitled to tandem treatment unless it both functions as a tandem switch and serves a geographic area that is the same as the incumbent LEC's tandem switch.[83] Moreover, as discussed below, CLECs can route their traffic around Qwest's tandem switches through direct trunks to Qwest end offices. Qwest, on the other hand, cannot route around the CLECs' purported "tandem" to avoid those costs.[84] Thus, Qwest's proposed definition of a tandem switch ensures symmetrical treatment.

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[81] *Id.*(first emphasis original; additional emphasis added); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, No. 97 C 2225, 1999 U.S. Dist. LEXIS 11418, *21-23 (N.D. Ill. June 28, 1999).

[82] Ex. 106, SGAT § 4.11.2.

[83] *See, e.g., MCI Telecommunications Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp. 2d at 791 ("even if the [Michigan commission] had compared the geographic area served by MCI's fiber ring with the area served by just one of Ameritech's tandem switches, MCI's lack of authority to serve every exchange would still lead to the conclusion that MCI's fiber ring does not cover *the same geographic area* as Ameritech's switch") (footnote omitted; emphasis added).

[84] Ex. 157-T, Freeberg Rebuttal at 19-20; 6/23/00 Transcript at 584, 585, 588-90, 598.

Finally, as Mr. Freeberg explained, Qwest's proposed language will simply be easier for the parties to implement.[85] For all these reasons, the Commission should accept Qwest's definition of a tandem switch.

b. Determining When Either Party May Charge Tandem Transmission Rates

Section 7.3.4.2.1 of the SGAT applies equally to Qwest and all CLECs. This section provides that in order for either Qwest or a CLEC to charge tandem transmission per-minute rates in addition to end office rates, the terminating carrier must switch the call twice -- once at the tandem switch and once at the end office switch. Where the terminating carrier only switches the call once, and the switch is a tandem as defined in Section 4.11.2, then only the tandem switch rate applies.

This provision ensures that no party, including Qwest, is allowed to charge for switching it does not perform. AT&T and WCom dispute this provision because they assert that any CLEC switch that serves a geographic area comparable to that served by a Qwest tandem switch deserves to receive tandem status, regardless of whether the CLEC switches traffic once or more. In other words, they ask this Commission to sanction a windfall – to pay for work the CLECs do not actually perform, specifically, switching traffic twice when they only switch the traffic once. As shown above, this argument is inconsistent with the Act and the FCC's rules. More significant, should this interpretation prevail, the result would be an undeserved windfall for CLECs at the expense of Qwest ratepayers since it would, under the CLECs' proposal, apply to all calls and not solely to overflow calls in an alternate routing configuration. Ironically, this position also violates the CLECs' own arguments regarding symmetrical treatment by charging Qwest for services it does not receive and paying CLECs for services they do not perform.

The touchstone for reciprocal compensation under both the Act and FCC regulations is actual cost, and reciprocal compensation must be based on a reasonable approximation of the additional costs for terminating another carrier's calls. It is precisely because tandem switching uses more elements of the network, and therefore incurs additional incremental costs of transport, that the FCC approved additional compensation for this function.[86]

This Commission acknowledged this principle in a previous order denying tandem-rate reciprocal compensation to a wireless carrier. In the AWS-U S WEST arbitration, this Commission stated:

> The components of the AWS network are comparable to the components of the [Qwest] network, and the AWS MSC is functionally the equivalent of a [Qwest] *end office*. When a [Qwest] customer calls an AWS subscriber, *the AWS MSC provides only a single switching service*. By contrast, when a call is routed through a [Qwest] tandem switch to a [Qwest] end office, two switching functions are performed . . . *Therefore, AWS does not incur the costs of both end-office and tandem switching functions.*[87]

In that proceeding, as it has in others, this Commission has noted that CLECs can design

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[85] Ex. 157-T, Freeberg Rebuttal at 17.
[86] *Local Competition Order* ¶¶ 824, 1090, 1117.
[87] *AWS Arbitration Order* at 28-29 (emphasis added).

their systems so as to avoid having to pay tandem rates to Qwest, but Qwest has no such ability if it must pay tandem rates to a given CLEC for all calls. Here, Qwest again demonstrated that CLECs can avoid Qwest's tandem switching charge, but Qwest cannot avoid the CLECs' charge.[88] Furthermore, on Qwest's network, the vast majority of CLEC calls are not subject to the tandem rate.[89] In the AWS interconnection proceeding, the arbitrator cited this cost-avoidance factor as "preeminent" in his decision, which this Commission adopted.[90] Under Section 7.3.7.1 of the SGAT, Qwest does not charge CLECs both the end office and tandem rate unless both switches are actually used on a call. To be reciprocal, CLEC switches should be treated in the same manner.[91]

Section 7.3.4.2.1 of the SGAT is necessary to ensure that CLECs are not compensated for switching services they do not perform and that no carrier pays for services it does not receive. The provision is consistent with the Act, FCC rules and principles this Commission has endorsed. The dispute over these provisions is driven by a theory hung on an inaccurate interpretation of a fragment of an FCC decision, and this theory cannot be sustained. Accordingly, the Commission should approve Qwest's proposed language in Section 7.3.4.2.1 of the SGAT.

4. Issue WA-13-3: Qwest's Host-Remote Arrangement Is Reciprocal And Lawfully Provides Qwest Cost Recovery For Transport It Provides.

As the Commission knows, Qwest currently serves many areas in Washington that are not heavily populated. These more rural communities in many instances cannot justify the purchase of a unique switch to serve the community. In these instances, Qwest installs a "host switch" in a more metropolitan area. A host has one or many "remote switches" -- small pieces of the host switch – located in the more rural communities. The remote switch has the capacity to switch calls in that rural community without use of the host; however, any call either to or from the rural community to an area not served by the remote switch must be switched and routed via the host switch. The latter calls require Qwest to transport the calls along dedicated trunks between the host and the remote. This facility is referred to as the umbilical, since the umbilical is necessary to switch calls between end users that are not connected to the same remote.

AT&T claims that it wants the opportunity to interconnect at the host switch and require Qwest to transport those calls for them along dedicated trunks to the remote calling area for free. This request is patently unfair. Qwest is legally and constitutionally entitled to just compensation. As described above regarding the tandem definition, carriers should not be compensated for switching or transport they do not provide; however, carriers should be compensated for transport they actually provide.

Qwest's SGAT § 7.3.4.2.3 states that "when CLEC terminates traffic to a [Qwest] remote

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[88] Ex. 157-T, Freeberg Rebuttal at 19-20; 6/23/00 Transcript at 584, 585, 588-90, 598.

[89] 6/23/00 Transcript at 590.

[90] *AWS Arbitration Order* at 28. This factor was also an important element in the decision by the Oregon Commission to deny tandem compensation to AWS for its MSC switch. *See* Order No. 97-290, *Petition of AT&T Wireless Services for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to the Telecommunications Act of 1996*, slip op. at 5, adopting Arbitrator's Decision at 8-9 (Or. PUC Aug. 4, 1997).

[91] If a CLEC switched traffic twice, AT&T acknowledges that these charges apply reciprocally. 6/22/00 Transcript at 492.

office, tandem transmission rates will be applied for the mileage between the [Qwest] host office and the remote." AT&T asserts that Qwest concedes that its position is not supportable because Section 7.3.4.2.3 does not also charge CLECs for tandem switching. As Mr. Freeberg explained, a tandem switching charge would be inappropriate. When traffic is brought from the host to the remote it is effectively switched once, not twice. Therefore, it would be inappropriate for Qwest to charge tandem switching.[92] Rather than harming Qwest's argument, the omission of a tandem switching rate supports Qwest's position.

AT&T's principle complaint with the host-remote arrangement is that consistent with the D.C. Circuit decision in *GTE Services Corp. v. FCC*,[93] which overturned the FCC's interpretation of 47 U.S.C. § 251(c)(6), Qwest has not permitted CLECs to collocate switching equipment, such as remote switching units, on Qwest premises. Whether Qwest must permit CLECs to collocate remote switching equipment is a subject for the next workshop, not this one. Regardless, AT&T could easily house a remote switch near a Qwest remote and connect to Qwest's host facilities.[94] In such a situation, host-remote transport charges would apply reciprocally to calls Qwest end users originate.[95]

AT&T suggested that it should not be required to compensate Qwest for the transport it provides because Qwest end users served by a remote do not pay a higher rate. Mr. Freeberg clarified, however, that the costs of serving end users via a remote are factored into Qwest's retail rates; Qwest does not "double recover" for these facilities.[96] Qwest does not recover the costs of this transport in its loop rates. The umbilical in a host-remote situation is not a loop; unlike a loop, if the umbilical were severed, the remote could still handle the calls between customers served by the remote (i.e., intraoffice calls).[97] Thus, Qwest does not recover these costs in its loop rates.

Qwest's position here is simple: it believes that it should be paid for the transport it is actually provides to CLECs. Furthermore, Qwest's position is fully supported by Sections 251(c)(2) and 252(d)(1) which collectively state that Qwest is entitled to compensation for interconnection.

5. Issue WA-13-4

a. Qwest Offers A Single Physical POI Per LATA. The Only Dispute Is One of Price.

Qwest's SGAT offers CLECs four different standard options for interconnection with the Qwest network: (1) entrance facilities; (2) collocation; (3) meet point arrangements; and (4) interlocal calling area facilities. As an initial matter, AT&T and WCom assert that Qwest does not allow interconnection at any technically feasible point. This is simply not true. SGAT

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[92] Ex. 157-T, Freeberg Rebuttal at 26-27.
[93] 205 F.3d 416 (D.C. Cir. 2000).
[94] 6/22/00 Transcript at 423.
[95] *Id.*
[96] 6/23/00 Transcript at 547.
[97] 6/22/00 Transcript at 422; 6/23/00 Transcript at 580.

§ 7.1.2 sets forth these four standard arrangements and Section 17 states that Qwest will consider any other technically feasible interconnection request.[98] Furthermore, contrary to AT&T's claims, Qwest does permit carriers to interconnect "at the top of its network."[99]

AT&T and WCom then assert that Qwest is denying CLECs the ability to obtain one point of interconnection ("POI") per LATA. AT&T and WCom assert that they won this issue in the Ninth Circuit[100] and, therefore, it must be offered. This argument again misses the mark because Qwest's fourth method of interconnection – interLocal Calling Area – offers CLECs the opportunity to interconnect at one physical POI per LATA (i.e., at one CLEC switch in the LATA).[101]

The real issue here – as AT&T admitted at the Arizona workshops -- is the price that Qwest can change for the transport of calls that it carries outside of a local calling area to a distant part of the LATA.[102] AT&T and WCom assert that Qwest should be required to build to a mid-span irrespective of where a CLEC locates its switch in the LATA. This means that Qwest could be required to, at Qwest's cost, provide facilities for CLECs that extend hundreds of miles. To make the situation even more untenable, adjustments are made for the cost of two-way facilities based on directional traffic balance. Thus, if calls going in each direction are in balance, then the parties split the actual cost 50/50. However, in Washington, 90 percent of the traffic is flowing from Qwest to CLECs (primarily due to CLECs' focus on serving ISPs).[103] This means that Qwest could be required to pay 90 percent of the cost of the facilities to any location in the entire LATA.[104] The same result occurs from a CLEC's insistance on one-way trunking. AT&T and WCom suggest that CLECs face the same type of charges as Qwest because Qwest alternately routes CLEC calls over its tandem when direct trunk connections between end offices are unavailable. However, only a small fragment of CLEC calls on Qwest's network are alternately routed over the tandem.[105] Under the CLECs' proposal, all calls would be so routed.[106]

AT&T and WCom's entire legal argument is premised on the point that one POI per LATA constitutes "interconnection" as set forth in the Act; therefore, in their opinion, Qwest must construct facilities for CLECs at TELRIC rates no matter how extensive their request. This legal argument is fatally flawed. Except for the Arizona district court decision discussed below (which supports Qwest's position), none of the cases considering whether a CLEC may establish a single POI per LATA addresses the pricing issue in dispute in this proceeding. Likewise, the *SBC Texas Order* does not resolve this issue. Instead, like the Ninth Circuit in the

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[98] 6/23/00 Transcript at 532.

[99] 6/23/00 Transcript at 541-42.

[100] *E.g., U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112.

[101] *See* Ex. 106, SGAT § 7.1.2.4.

[102] *In the Matter of U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238, Feb. 17, 2000 Transcript at p. 219, 1.16 to p. 220, 1.8; Ex. 157-T, Freeberg Rebuttal at 21.

[103] 6/22/00 Transcript at 391.

[104] Ex. 157-T, Freeberg Rebuttal at 21.

[105] 6/22/00 Transcript at 395-96; 6/23/00 Transcript at 537.

[106] 6/23/00 Transcript at 533, 535-38, 556.

MFS case and other courts, the FCC simply found that it is "technically feasible" to provide one physical POI in a LATA.[107] Since the SGAT permits a CLEC to establish a single physical POI, *SBC Texas* and the other cases the CLECs rely upon are beside the point.

Furthermore, Section 251(c)(2)(A) of the Act states that Qwest has a "duty to provide" interconnection for the "transmission and routing of telephone exchange service and exchange access." Similarly, Section 252(d)(1), the TELRIC provision, only applies to interconnection as defined in Section 251(c)(2). Therefore, Qwest need not build for CLECs or charge TELRIC rates if the one POI per LATA does not meet the definition of "telephone exchange service" or "exchange access."

There is no question that the CLECs' proposal does not constitute "exchange access."[108] Exchange access concerns toll traffic. Similarly, one POI per LATA does not meet the definition of "telephone exchange service." In a recent decision, the FCC defined "telephone exchange service" under the Act.[109] In that decision, the FCC held that "telephone exchange service must permit 'intercommunication' among subscribers within the equivalent of a local exchange area."[110] The FCC also held that private line services do not meet this definition.[111] Consistent with these statements, the FCC also stated that "the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport and termination of interstate or intrastate interexchange traffic."[112]

Section 7.1.2.4 of the SGAT requires Qwest to provide TELRIC rates for the transport of the call within the local calling area, but charges private line rates outside of the calling area. This matches the FCC's definition exactly. Transport of a call outside of the local calling area is simply not "telephone exchange service." Therefore, it is not interconnection subject to the pricing provisions of Section 252(d)(1). When Section 252(d)(1) pricing does not govern, the FCC recognizes that Qwest can charge market rates. Therefore Qwest's SGAT allows one POI per LATA and charges TELRIC rates within the local calling area; however, it charges private line rates outside of the local calling area. This is perfectly consistent with the Act.

In *U S WEST Communications, Inc. v. Jennings*,[113] the court reached the same conclusion. It held that while a state commission could order a carrier to permit a single POI in a LATA, the state commission also had authority to require more than one point. Furthermore, where a carrier requested only one POI, the court held that the state commission must, consistent with FCC rules, consider the increased costs associated with this form of interconnection.[114]

AT&T suggests that the interLCA arrangement "penalizes" it for requesting a single POI in a LATA. This is plainly incorrect. The FCC held that carriers that request a more expensive form

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[107] *SBC Texas Order* ¶ 78.

[108] *See* 47 U.S.C. § 153(16).

[109] *See* Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, FCC 99-413 (rel Dec. 23, 1999).

[110] *Id*. ¶ 23 (emphasis added); *see also Local Competition Order* ¶ 1034.

[111] *Id.* ¶¶ 25-26.

[112] *Local Competition Order* ¶ 1034.

[113] 46 F. Supp. 2d 1004, 1021-22 (D. Ariz. 1999).

[114] *Id.*

of interconnection (in this case, a single POI) must bear the costs.[115] Furthermore, the choice to establish a single POI and pay added transport costs or establish multiple POIs and incur additional switching costs mirror the decisions Qwest must make in its network as traffic grows.[116] Like any carrier designing a network, the CLEC must choose whether to extend the reach of its network or haul the traffic back to its POI at the interLCA rates.[117] If the CLEC chooses the single POI option, it avoids the cost of placing an additional switch in a different local calling area, a significant cost saving.[118] For Qwest, on the other hand, the CLECs' choice to establish a single POI has serious ramifications. Whereas in its own network it can avoid the tandem switching costs by augmenting its direct trunks between end offices, when a CLEC establishes a single POI, every single call to or from a distant local calling area is converted to a call on Qwest's tandem network.[119] In other words, a call that in Qwest's network generally would have originated, terminated, and stayed in the same local calling area always leaves the local calling area for the CLEC.[120] Qwest should receive increased compensation, as the FCC recognized, for this more costly interconnection.

AT&T further suggested that even where a CLEC has only one POI in the LATA, if two end users in the same distant local calling area called one another, the call is still between two persons in the same local calling area. This may be true from a retail perspective, but it is entirely irrelevant to the wholesale environment and reciprocal compensation. Reciprocal compensation must compensate each carrier for its costs of transporting and terminating traffic of its competitors.[121] Thus, the only issue that is of importance here is where a carrier picks up and drops off the call.[122] If a CLEC has only one POI in a LATA, Qwest must carry calls outside the local calling area, negating any claim that such a call is "telephone exchange service."[123]

AT&T and WCom have provided no justification for ignoring the local calling boundaries that exist in Qwest's network and that govern its own relationships with its customers. As Qwest explained at the hearing, if two Qwest customers wished to exchange calls across local calling areas but have that call treated as if it remained in the same area at all times, and have it priced as a local call, they would have to pay private line rates.[124] Furthermore, there is no way for Qwest to avoid incurring the increased transport costs when a CLEC establishes only one POI.[125] A CLEC, on the other hand, can avoid tandem switching and transport calls by building direct trunks and switches within Qwest's local calling areas. Qwest should not be penalized financially for the CLECs' decision to locate only one POI.

As the FCC noted in the *Local Competition Order*, these local calling areas that state commissions have established (boundaries, for example, that define when a call becomes an

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[115] *Local Competition Order* ¶ 199.

[116] 6/23/00 Transcript at 557.

[117] *Id.* at 557.

[118] *Id.* at 555.

[119] *Id.* at 557.

[120] *Id.* at 556. Furthermore, as Mr. Owens pointed out, when LATA boundaries in Washington are removed, Qwest would have to carry calls across the entire state under the CLEC proposal and treat such calls as "local." 6/22/00 Transcript at 485.

[121] 47 U.S.C. § 252(d)(2).

[122] 6/22/00 Transcript at 406-08, 415; 6/23/00 Transcript at 554-55.

[123] *Id.*

[124] 6/22/00 Transcript at 400-03. CLECs, however, are not treated like retail customers because they pay TELRIC rates for the portion of the call that remains within the local calling area. *Id.* at 404-05.

[125] 6/23/00 Transcript at 556.

intraLATA toll call) have significance in determining transport and termination costs.[126] The Commission should not ignore these boundaries and should not require Qwest to price these calls as if they never left the local calling area.

b. Qwest Offers Symmetrical Rates For Reciprocal Compensation. AT&T's So-Called "Hidden Costs" Of Reciprocal Compensation, On The Other Hand, Conflict With The Act, TELRIC Pricing, And Are Inappropriate For This Proceeding.

AT&T vaguely claims that within the reciprocal compensation arrangements this Commission has approved in Qwest's interconnection agreements, the Commission's ongoing cost docket, and which are incorporated in the SGAT, there are so-called "hidden costs" that CLECs must be permitted to recover through reciprocal compensation in order for those rates to be symmetrical. Most of those so-called "hidden" or "non-reciprocal" costs that AT&T disputes are encompassed (and refuted) in the discussion above.[127] However, in addition to these costs, AT&T also appears to want recovery of a portion of its collocation and "long loop" costs through reciprocal compensation. AT&T's proposal is inconsistent with the Act, the FCC's reciprocal compensation pricing rules, and basic notions of TELRIC pricing. In short, the problems with AT&T's proposal are numerous and manifest.

First, AT&T claims that to be truly "symmetrical," reciprocal compensation should include what its witness, Mr. Kenneth Wilson, characterized as the "hidden costs" of interconnection, such as collocation and the costs of AT&T's "long loops." AT&T's proposal fails at the outset because AT&T admits that the primary driver of a CLEC's request for collocation is *not* interconnection – the sole focus of reciprocal compensation – but, instead, access to unbundled loops, or UNEs.[128] Thus, according to AT&T's own witness, CLECs request collocation primarily to access UNEs, not to interconnect. It would be entirely inappropriate to collect collocation costs through interconnection, and require Qwest to share those costs through reciprocal compensation, where CLECs request collocation to access UNEs.

Furthermore, collocation for purposes of interconnection is optional, as Mr. Wilson readily admitted.[129] Under the FCC's rules, Qwest's interconnection agreements, and the SGAT, CLECs have options beyond collocation, such as entrance facilities and mid-span meets, to interconnect with Qwest's network.[130] The choice to collocate, and the ability to avoid those costs, rests solely with the CLEC. Thus, AT&T would require Qwest to share collocation costs with all CLECs where the CLEC alone chooses whether to collocate for purposes of interconnection. Qwest should not be required to pay for that decision.

Third, AT&T's proposal is inconsistent with FCC rules regarding pricing for transport and termination of traffic. Section 252(d)(2)(A) sets forth the standard for reciprocal

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[126] *Local Competition Order* ¶ 1035.

[127] At the workshop, Mr. Wilson drew a picture (marked as Ex. 215) that supposedly showed the alleged "hidden" or "non-reciprocal" costs of interconnection. All of the boxes on that chart relate to the other disputed checklist item 13 issues in this brief. At the bottom of that chart, Mr. Wilson also included collocation and "long loops." This section addresses these so-called costs.

[128] 6/22/00 Transcript at 464, 467.

[129] 6/22/00 Transcript at 466.

[130] *E.g.*, Ex. 106, SGAT § 7.1.2.3.

compensation cost recovery and provides for "mutual and reciprocal recovery by each carrier of costs associated with transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" on terms that reasonably approximate the additional costs of terminating such calls.[131] Under FCC rules, pricing for reciprocal compensation must be "symmetrical." That means that each carrier should be charged the same rates for the same elements.[132] Furthermore, the FCC has determined that symmetrical rates are to be based upon the incumbent LEC's costs as well as the incumbent LEC's cost studies.[133]

AT&T's proposal violates the rule of symmetry. Under it, only Qwest would absorb collocation costs, as Qwest does not have such costs to share with AT&T. Furthermore, only Qwest would pay for AT&T's "long loops" because Qwest recovers its loop costs separately when CLECs order unbundled loops.[134] Indeed, the FCC has ordered incumbent LECs to recover loop costs separately from transport and termination costs.[135] Requiring Qwest to pay AT&T's "long loop" costs is hardly symmetrical, and does not comport with the law.[136]

The FCC was equally clear that "symmetrical" rates for transport and termination should be based upon the *incumbent LEC's* costs, not the CLECs, and the *incumbent LEC's* cost studies unless a CLEC affirmatively proves by submitting its own costs study that its costs are higher or different from those of the incumbent.[137] Collocation and long loops are alleged costs AT&T alone incurs for interconnection, and these costs are found nowhere in Qwest's transport and termination cost studies. These costs are voluntarily incurred by CLECs to avoid the cost of purchasing and installing another switch. Furthermore, the FCC precludes consideration of loop costs in setting termination costs.[138] The rates for transport and termination in Exhibit A of the SGAT have already been set by this Commission based upon Qwest's costs. AT&T fully participated in those proceedings, yet it did not introduce a cost study seeking to reflect either its collocation or "long loop" costs. If AT&T or any other CLEC believes its costs are higher, then it is incumbent on that carrier to submit its own cost study to this Commission.[139] As AT&T made clear at the workshop, it has never done so,[140] despite its claims of unfair treatment at the hands of incumbent LECs and an ample opportunity to bring its claims to the Commission. This docket is not the proper one in which to test AT&T's new theory.

Fourth, AT&T's proposal violates fundamental costing principles explained in the *Local Competition Order*. The FCC emphasized that costs should be attributed directly to the each element, function, or service to which they relate.[141] The FCC views "transport and termination"

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[131] 47 U.S.C. § 252(d)(2)(A).

[132] *Local Competition Order* ¶ 1089.

[133] *Id.*

[134] *See* 6/22/00 Transcript at 491. Tellingly, AT&T's own Hatfield model does not include loop costs in the costs for transport and termination.

[135] *See id.* ¶ 1057.

[136] AT&T's claim that it has "longer" loops than Qwest is unsupported. AT&T submitted no evidence comparing loop lengths.

[137] *Id.* ¶ 1085 ("Using the incumbent LEC's cost studies as proxies for reciprocal compensation is consistent with section 252(d)(2)(B)(ii) . . . ."); *id.* ¶ 1089; *see also* 6/23/00 Transcript at 600-01.

[138] *Id.* ¶ 1057.

[139] *Id.* ¶ 1089.

[140] 6/23/00 Transcript at 464-65.

[141] *E.g., id.* ¶ 673 (the price of network elements and interconnection "should include the forward-looking costs that can be attributed directly to the provision of services using that element . . . "); *id.* ¶ 682;

under Section 251(b)(5) as separate from interconnection under Section 251(c)(2), where collocation is commonly addressed, as well as different from loops.[142] Thus, the FCC's discussion of pricing for transport and termination of traffic contains no discussion of "sharing" collocation or "long loop" costs. Not surprisingly, this Commission has determined collocation and loop costs separately from the costs of other UNEs or, as here, transport and termination costs.

AT&T's proposal, however, inserts these entirely separate costs into reciprocal compensation in a thinly veiled attempt to foist its costs of competition onto Qwest. The FCC has rejected such attempts, and so have courts. For example, the FCC holds that costs should be recovered on a cost-causative basis.[143] In the case of collocation, an admittedly optional means of interconnection, the collocating party is squarely the cost-causer, and collocation benefits princinpally the CLEC. In analogous circumstances, courts have refused to require incumbent LECs to "subsidize" costs that are legitimate costs of competition that the CLEC should bear itself. For example, in *AT&T Communications of the South Central States, Inc. v. BellSouth Telecom., Inc.*,[144] AT&T made a similar claim that BellSouth should subsidize AT&T's OSS access costs. The court rejected this claim, holding that AT&T is the only party that benefits from such access and, therefore, should absorb the costs.[145] In *U S WEST Communications, Inc. v. AT&T Corp*., Case No. A1-97-085, slip op. (D.N.D. Jan. 8, 1999), the court reached the same conclusion: "The Act and the [interconnection] Agreement mandate the provision of interconnection, again, on a non-discriminatory basis. *That does not mean that the incumbent LEC must pay a portion of the costs involved in providing the interconnection for the use of a competitor*."[146] The same rationale applies here: AT&T and other CLECs alone benefit from collocation. The Act does not require Qwest to share their costs.

Finally, AT&T's proposal lacks any support. AT&T introduced (1) no cost study supporting its "long loop" rates, (2) no language or explanation of how these so-called "hidden costs" would be shared, and (3) no mechanism for allocating the so-called "hidden" collocation and "long loop" costs between interconnection, access to UNEs, and AT&T's own network costs. Thus, even if AT&T seeks only to have the "principle" of sharing these costs incorporated into the SGAT, it has not provided sufficient information in light of its own admissions in the record for this Commission to address AT&T's concerns.

The rates in Exhibit A for transport and termination are based upon Qwest's costs and apply to both Qwest and CLECs. Qwest, therefore, provides symmetrical reciprocal compensation within the meaning of the FCC's rules. There is no support in either the law or the record for AT&T's position. Nothing in the Act requires incumbent LECs to subsidize CLEC

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see also id. ¶ 622 (costs must be recovered in the manner in which they are incurred)

[142] *Id.* ¶ 176 ("We conclude that the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. Including transport and termination of traffic within the meaning of section 251(c)(2) would result in reading out of the statute the duty of all LECs to establish 'reciprocal compensation arrangements for the transport and termination of telecommunications' under section 251(b)(5);" *id.* ¶ 820 ("The primary categories of network elements identified in this Order, other than loops and switching, are transport, signaling, and collocation"); *id.* ¶ 744.

[143] *Cf. id.* ¶ 691.

[144] 20 F. Supp. 2d 1097 (E.D. Ky. 1998).

[145] *Id.* at 1104-05.

[146] slip. op. at 20-21 (emphasis added).

collocation and loop costs. Moreover, to the extent AT&T seeks to recover these alleged costs, the proper forum for that claim is the Commission's cost docket, not this Section 271 proceeding. Accordingly, the Commission should reject AT&T's attempt to recover the so-called "hidden costs" of interconnection from Qwest.

6. Issue WA-13-6: WCom's Cost Sharing Requests Should Be Rejected.

WCom disputes Section 7.3.1.2.1 and 7.3.2.3 of the SGAT, claiming that Qwest should share the costs of EICTs and multiplexing with CLECs. WCom presented no testimony on this point, only its proposed revisions in Ex. 188. At the July 6 workshop, Qwest explained that EICT and multiplexing costs are not properly shared through reciprocal compensation because they are costs associated with collocation. Collocation expenses are properly borne by CLECs. They are also optional costs that the CLEC can avoid.[147] Accordingly, Sections properly require CLECs to bear these costs.

WCom also opposes Section 7.3.3.1, which governs recovery of non-recurring costs for LIS trunks Qwest provides CLECs. Because non-recurring costs are *one-time* costs Qwest incurs to provision trunks for CLECs, unlike the monthly recurring costs for use of facilities, these costs should not be shared. Unlike recurring costs, which can be adjusted periodically based on traffic patterns, one-time costs cannot. Also, as these charges are assessed only once, there is no reliable means of determining what percentage to use to determine traffic balance between the parties. Finally, and most importantly, CLECs should bear the entirety of these costs because they are entirely avoidable: the CLEC can build its own LIS trunks.

In conclusion on these disputed issues, it is important for the Commission not to lose sight of the fact that Qwest has paid CLECs in accordance with its interconnection agreements, and it has billed CLECs in accordance with those agreements. Despite the CLECs' claims of "asymmetrical" "non-reciprocal" treatment, Qwest has paid over $18 million in reciprocal compensation under its interconnection agreements with Washington CLECs, and it has billed CLECs roughly $700,000.[148] Thus, the debate in this proceeding centers around the CLECs' claim that this imbalance of approximately $17 million is just too small. However, were the CLECs' positions to prevail, this imbalance would only grow. Thus, the Commission should keep the CLECs' claims in context when resolving these disputed issues.

7. Issue WA-13-5: NextLink Concerns.

Following the July 6 follow up workshop, NextLink and Qwest conferred in an attempt to resolve NextLink's concerns regarding possible Qwest disputes relating to future payments of reciprocal compensation. A copy of the letter mentioned at the July 6 session is being provided by mail to the Commission and the parties. Both Qwest and NextLink agree that this letter is not a dispute letter but in the nature of a reservation of rights. Accordingly, NextLink's concerns about this letter and reciprocal compensation payments to date have been resolved.[149]

Qwest and NextLink continue to explore NextLink's concerns regarding compensation for interconnection facilities and will report to the participants and Staff upon completion of these discussions.

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[147] 7/6/00 Transcript at 837-38.
[148] Ex. 157-T, Freeberg Rebuttal at 13; 6/22/00 Transcript at
[149] 7/6/00 Transcript at 816-17 (payments made to date).

CONCLUSION

Qwest has worked diligently in the workshops on June 21-23 and July 6 to accommodate the reasonable and lawful requests of CLECs. Relatively few disputed issues remain. As set forth above, on these disputed issues, Qwest's positions are consistent with the Act and supported in the record. The Commission should adopt them.

DATED this 17th day of July, 2000

Respectfully submitted,

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ATTORNEYS FOR QWEST CORPORATION

CERTIFICATE OF SERVICE
Docket Nos. UT-003022 and UT-003040

I hereby certify that I have this 17th day of July 2000, caused the foregoing **QWEST's Legal Brief Regarding Disputed Reciprocal Compensation (Checklist Item 13) Issues** to be served upon all parties of record in this proceeding via email and first class mail.

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