BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996.	Docket No. UT-003022 and UT-003040 POST-WORKSHOP BRIEF OF COVAD COMMUNICATIONS COMPANY ON DISPUTED LOOPS, LINE SPLITTING, EMERGING SERVICES AND PUBLIC INTEREST ISSUES

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

I. PRELIMINARY STATEMENT

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

competitive checklist[1] and that the Washington local services market is fully and irreversibly open[2] to competition.

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

This Commission is fully empowered to take the steps necessary to open Washington's local services market to competition. Under both the Telecommunications Act of 1996 (the "Act")[3] and FCC rules[4], the Commission is authorized to impose additional unbundling obligations, as well as terms and conditions relating to product and service offerings to satisfy the underlying objectives of the Act. Thus, whether imposed in connection with a Section 271 review or some other proceeding, that authority—and the FCC's clear expectation that states will use that authority where appropriate—provides this Commission with the legal basis upon which to ground its rulings.

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[1] *See In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Co., 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*, Mem. Op. and Order, CC Docket No. 00-65, ¶52 (Jun. 30, 2000) ("*SBC Texas 271 Order*").

[2] *See In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Co., 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*, Mem. Op. and Order, CC Docket No. 00-65, ¶52 (Jun. 30, 2000) ("*SBC Texas 271 Order*").

[3] *See In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Co., 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*, Mem. Op. and Order, CC Docket No. 00-65, ¶52 (Jun. 30, 2000) ("*SBC Texas 271 Order*").

[4] *See In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Co., 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*, Mem. Op. and Order, CC Docket No. 00-65, ¶52 (Jun. 30, 2000) ("*SBC Texas 271 Order*").

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

II. DISPUTED UNBUNDLED LOOP ISSUES

A. INTRODUCTION

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

(1) refuse to build UNEs and facilities within its Washington service area, where facilities are at exhaust, or even under the same terms and conditions for which it would build for itself, its affiliates, its end user customers or other parties;

(2) require CLECs to pay for conditioning for loops under 18 kfeet or where Qwest's own poor provisioning performance impairs or prevents the delivery of xDSL service to a CLEC end user customer;

(3) fail and refuse to provide CLECs with accurate and reliable loop makeup information;

(4) refuse to provide CLECs with direct access to LFACs;

(5) deliberately fail to perform the necessary MLT or cooperative testing (for which CLECs pay) to ensure the delivery of a good loop;

(6) provide inadequate address validation procedures;

(7) fail to take the steps necessary to prevent its technicians from behaving in an anti-competitive manner;

(8) impose inappropriate spectrum management terms and conditions on CLECs;

(9) elongate the interval for several types of loops as well as the repair interval and the meantime to restore intervals; and

(10) refuse to redesignate interoffice facilities where distribution facilities are at exhaust.

Qwest's SGAT, and its attendant commercial conduct, discloses its intent to maintain its monopoly stranglehold over the local loops market in Washington State. The timely and adequate provisioning of loops throughout Qwest's territory is one of the most important issues facing the competitive, emerging services industry. Yet, despite the fact that the FCC ordered incumbent LECs to provide CLECs with unbundled access to CLECs to loops, Qwest continues to impede the deployment of Covad's business by making it difficult, if not impossible, to obtain loops in sufficient quantities and quality to satisfy Covad's reasonable and reasonably foreseeable demand. It is important that this Commission (and other state commissions in Qwest's territory) nip this competitive disparity in the bud. Until Qwest resolves these deficiencies, this Commission should not approve Qwest's § 271 application for a relief.

B. LEGAL AND STATUTORY BACKGROUND FOR UNBUNDLED LOOPS

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

This Commission is charged with the critical function of determining to a reasonable degree of certainty that Washington's local markets are open to competition.[8] Because the FCC relies heavily upon a state's rigorous factual investigation, review and analysis of Qwest's compliance, or

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

[6] BANY 271 Order, ¶ 37.

[7] 47 U.S.C. ¶ 271(a)(2)(B)(ii).

[8] 47 U.S.C. ¶ 271 (d)(2)(B).

not, with a particular checklist item, this Commission's review of the record before it may not be undertaken lightly. To the contrary, before approving Qwest's request for § 271 relief, this Commission must ensure that Qwest has provided sufficient evidence to prove, by a preponderance of the evidence, that it has fully implemented[9] Checklist Item 4. In this regard, the most probative evidence of checklist item satisfaction, or not, is evidence of Qwest's commercial performance in provisioning loops, as well as performance measures providing evidence of quality and timeliness of the performance under consideration.

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

C. ARGUMENT

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

Qwest must provide to CLECs, including Covad, "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[11] The FCC has defined the loop as "a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises."[12] Subsumed within the definition of a "loop" are "two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals."[13] To satisfy its obligation under §271, therefore, Qwest must prove not only that it has a

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[9] BANY 271 Order, ¶ 44.

[10] *Id.*, ¶ 47.

[11] 47 U.S.C. ¶ 271(c)(2)(B)(iv).

[12] BANY 271 Order, ¶ 268; Local Competition Order, 11 FCC Read at 15691.

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

concrete and specific legal obligation to furnish xDSL capable loops, but also that it is *providing these loops to competitors consistent with their demand and at an acceptable level of quality.*[14] Coupled with these obligations is the further requirement that Qwest condition existing loop facilities to permit CLECs such as Covad to provide services not currently provided and/or not capable of being provided over a particular loop facility.[15]

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

Tellingly, Qwest ignores the difference between unbundled loop types, distinguishing only between analog loops and all other unbundled loops (i.e., DS1, DS3, xDSL, etc.). Qwest thus provided no evidence whatsoever of the volume of xDSL loops that have been provisioned in the State of Washington. Moreover, to the extent that Qwest does rely only on the volume of loops provisioned to support its checklist case, the "volume" argument is highly suspect when looking at the category of "other" loops such as xDSL. As page 3 of Exhibit 938 shows, the volume of loops "other" than analog loops (thus presumably including xDSL loops) has dropped steadily since January 2001. Equally problematic for Qwest in light of its failure to provide this information is the

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

[15] *BANY 271 Order*, ¶ 271.

[16] *See, e.g.*, Exhibit 885-T(Direct Testimony of Jean Liston, May 16, 2001); Exhibit 889 (JML-5) and 938; WA Workshop 4 Transcript, pp. 04816.

compelling evidence provided by Covad during the course of the workshops on Checklist Item 4. As Covad pointed out in Exhibit 965-TC,[17] in Washington alone, 37% of all of Covad's Washington orders were placed in held status and, of those held orders, 26% were cancelled. Given that the demand for DSL has enjoyed extraordinary growth in that same time period, *see Section VI*, below, it is far from clear whether Qwest is provisioning xDSL loops consistent with competitors' demand.

Because the key inquiry to Checklist Item 4 compliance is not just a question of quantity, but whether that quantity is consistent with CLEC demand and of an acceptable level of quality[18], this evidence, or more correctly, the lack thereof, demonstrates that Qwest has failed to satisfy Checklist Item 4. Qwest's application for § 271 relief thus cannot be granted at this time.

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

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

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

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

> The duty to provide unbundled network elements on "terms and conditions that are just, reasonable and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and

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

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

> where applicable, they must *be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.*[19]

Qwest ignores this plain requirement, agreeing instead only to build facilities for CLECs under the extraordinarily limited circumstances enumerated in Section 9.1.2.1. Indeed, Qwest tacitly acknowledged that it refuses to build under the same terms and conditions for wholesale and retail customers when it failed to respond to a direct question on this point,[20] thus necessarily violating its parity obligation imposed under Section 251 of the Act.[21] Because Qwest's build policy violates both the plain language of the Act as well as the FCC's orders implementing the Act, Section 9.1.2.1 (and accompanying sections) must be revised to require that Qwest construct facilities under the same terms, conditions and circumstances for which it would build facilities for itself, its affiliates, its retail end user customers and all other parties.

Qwest relies on the *Local Competition Order* in support of its argument that it is not required to construct facilities for CLECs.[22] Yet, Qwest conveniently overlooks two significant points about the FCC's conclusions on the obligation to build as contained in that *Order*. First, the prohibition on imposing an obligation to build facilities was strictly limited to interoffice *transport* facilities specifically, and not unbundled loops, more generally.[23] Second, the FCC clearly limited its ruling to the category of small, rural LECs:

> Rural Telephone Coalition contends that incumbent LECs should not be required to construct new facilities to accommodate new entrants. We have considered the economic impact of our rules in this section on small incumbent LECs. In this section, for example, we expressly limit the provision of unbundled *interoffice* facilities to existing incumbent LEC facilities. We also note that section 251(f) [rural telephone companies] of the 1996 Act provide relief for certain small LECs from our regulations under Section 251.[24]

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[19] *Local Competition Order*, ¶ 315.

[20] WA Workshop 4 Transcript, pp. 04202.

[21] 47 U.S.C. § 251 (3) (Qwest must provide access to loops on "rates, terms and conditions that are just reasonable and nondiscriminatory")(emphasis added)

[22] Local Competition Order, ¶ 443, 451.

[23] Id., ¶ 451

[24] Id.

Qwest's reliance on the 8th Circuit's *Iowa Utilities Board* ruling in support of its argument that it is under no obligation to construct facilities is misplaced.[25] As Qwest itself notes, the reference to the existing network comes into play only where CLECs are requesting superior service. Here, Covad is not requesting *superior* service, but more simply parity treatment where facilities are constructed. Thus, the 8th Circuit's holding is inapplicable to the position Covad advances here.

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

> the incumbent LEC's "existing" network includes all points that it currently serves via interoffice facilities, and it is not required to extent its network to new points, based on competitors' requests. However, *the incumbent LEC is still required to provide access to UNEs within its existing network even if it must construct additional capacity within its existing network to make UNEs available to competitors*. Qwest implies that the term "existing network" only applies to actual facilities that are in place, *when in fact existing network applies to the "area" (end offices, serving wire centers, tandem switches, interexchange carrier points of presence, etc.) that Qwest's interoffice facilities serve. This same concept applies on the loop side of Qwest's network where Qwest is obligated to construct additional loops to reach customers' premises whenever local facilities have reached exhaust.*[26]

Judge Rendahl thus properly concluded that Qwest must modify section 9.1.2 of the SGAT to include that (1) Qwest will provide access to UNEs to any location currently served by Qwest's network; (2) Qwest must construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted; and (3) where locations are outside of the area currently served by Qwest's network, Qwest must construct facilities under the same terms and conditions it would construct facilities for its own end user customers.[27]

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

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

[27] Id., ¶ 80.

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

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

In May 2001, Qwest implemented a "new build policy," in which it states that it will reject all orders where there are no facilities and Qwest has no plans to build any facilities to fill that order.[28] As set forth more fully above, this "new build policy" simply is not an adequate response. Qwest should not be permitted to stymie competition by refusing to build facilities within its existing network to meet reasonable and anticipated CLEC demand.

Moreover, Qwest's new build policy has the negative effect of allowing Qwest to "self-improve" its performance under the PIDs without ever actually improving its performance. Under the policy, Qwest will reject orders if no facilities will be or are anticipated to be available. Qwest thus automatically caps the total number of delay days on any given order.[29] In so doing, Qwest circumvents its wholesale service performance obligations under the QPAP and, more specifically, PID measures OP-6B ("measures the average number of business days that service is delayed beyond the original due date provided to the customer for *facility reasons attributed to Qwest"*) (emphasis added), and OP-15B ("reports the number of pending orders measured in the numerator of OP-15A that were delayed for *Qwest facility reasons*") simply by rejecting all orders that would go into held status due to a lack of facilities. Because this Commission may not find that Qwest has satisfied Checklist Item 4 unless it is providing unbundled loops consistent with CLEC

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[28] *See* Exhibit 922 (CLEC Notification of Network Build Policy, JML-37).

[29] Qwest appears to contend that any CLEC that failed to object to this policy in the CICMP forum somehow precludes the objections raised in these Section 271 proceedings. As numerous CLECs discussed during the prehearing conference on CICMP, because the CLEC participants in CICMP typically are operational employees that review these policies for day to day impact rather than whether it impacts Qwest compliance with the competitive checklist, a failure to object to anything in CICMP is immaterial to whether Qwest passes Section 271 muster. WA Workshop 4 Transcript pp. 03945.

demand[30], Qwest may not be permitted to demonstrate checklist compliance simply by excluding orders that show it is not. Qwest thus should be ordered to revise its held order policy in order to permit this Commission to accurately review and determine whether Qwest is providing unbundled loops consistent with CLEC demand.

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

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

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

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

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

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

Historically, "because characteristics of a loop, such as its length and the presence of various impediments to digital transmission, can hinder certain advanced services technologies, carriers often seek to 'pre-qualify' a loop by accessing basic loop make-up information that will assist carriers in ascertaining whether the loop, either with or without the removal of the impediments, can support a particular advanced service." [31] Recognizing the critical role that "pre-qualification" thus plays in facilitating CLEC entry into an incumbent's local markets, the FCC requires, as part of ILEC's *prima facie* case, that an incumbent LEC provide CLECs with meaningful loop makeup information:

> Whether a prospective customer can be provided a particular advanced service often depends upon the carrier having access to detailed information about available loops, including the actual loop length and the presence of bridged taps, load coils, and digital loop carrier equipment. As the Commission previously has explained, a BOC's duty to provide nondiscriminatory access to OSS extends beyond the interface

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

[31] *See BANY 271 Order*, ¶ 140.

> components to encompass all of the processes and databases used by the BOC in providing services to itself and its customers ... If new entrants are to have a meaningful opportunity to compete, they must be able to determine during the pre-ordering process as quickly and efficiently as can the incumbent, whether or not a loop is capable of supporting xDSL-based services.[32]

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

During the course of the Colorado FOC trial, Covad undertook a contemporaneous analysis of the accuracy of the RLDT. Even a cursory review of some of the orders submitted by Covad during the course of the FOC trial[33] demonstrates that Qwest's RLDT suffers from numerous and severe deficiencies:

> (1) Covad was unable to pre-qualify 70 orders because the RLDT either did not recognize or contain information for the end user's telephone number, or the RLDT did not recognize a direct match even after that address had been validated against Qwest's address validation data base;
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> (2) no distance was available for 14 orders;
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> (3) no MLT distance was provided on 27 orders;
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> (4) for 19 line shared orders, placed on Qwest's "jeopardy list" on May 7 and May 14, 2001, the RLDT indicated no bridge tap or load coil was present when, in fact, bridged tap and load coils were on the line[34]; and
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> (5) 35% of the orders submitted resulted "in a no working telephone number response" that materially impeded CLECs' ability to use the RLDT.[35]

This itemization, standing alone, demonstrates that Qwest's RLDT fails to provide CLECs with meaningful loop makeup information. Yet, this itemization does not even begin to address the "false positive" scenario in which the information provided by the RLDT shows that an

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[32] BANY 271 Order, ¶ 141.

[33] *See* Exhibit 2, attached hereto. This Exhibit was provided by Covad to Qwest via email on June 7, 2001.

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

[35] *See* Exhibit 3.

order can be successfully placed and closed, and yet it cannot. In this regard, Covad provided Qwest seventeen examples in which there was a non-loaded loop of 12,000 feet or less and, yet, an ADSL order was cancelled.[36] Nor does this itemization include the problem of "false negatives", or the situation, of which Covad provided Qwest several examples, where a CLEC can successfully close an order even though the RLDT indicates otherwise (*e.g.*, ADSL orders closed where pair gain purportedly on the line).[37] Finally, this itemization does not include those situations in which Covad cannot pre-qualify at all a new Qwest voice customer who seeks data service from Covad until up to thirty days after that customer has begun receiving voice service from Qwest.[38]

Even as Qwest attempted to "nit pick" Covad's findings, challenging only eighteen examples provided, Covad continued to unearth additional problems with the RLDT. More specifically, Covad determined that, depending on the validation method used (*i.e.*, telephone number versus address), more or less information is provided. For example, on one particular order, the RLDT provided loop makeup information when the telephone number was used, but provided no information when the validated address was used.[39] Even more egregiously, on yet another order, the validated telephone number pulled up the wrong address, while the validated address indicated that there was no working telephone number on the premises.[40] Equally problematic are orders in which one address pulls up two telephone lines with the identical telephone number—an obvious impossibility—but with *different* loop makeup information.[41]

Moreover, there is no consistency within Qwest's RLDT. Where pair gain is on the line for one PON, no MLT distance and no segment loop length are provided. Yet, on another PON,

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[36] *Id.*

[37] *See* WA Loop 21 and Exhibit 926-T; see also AZ IWO 1119, dated May 16, 2001, attached hereto as Exhibit 4

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

[39] *Id*., Tab B.

[40] *Id.*, Tab C.

[41] Id., Tab D.

even though pair gain is on the loop, the segment loop length is included.[42] Similarly, in one screen shot for one particular loop segment, Qwest's RLDT suggests that the loop is non-loaded (as designated by the "nl" indicator in the make up description) even though load coils also are apparently present on the loop.[43]

Notably, Qwest itself has recognized that the RLDT is unreliable. At the commencement of the FOC trial, Qwest made clear that CLECs were required to use the RLDT prior to placing an order. As the trial progressed, Covad noted that Ms. Liston no longer included in her description of the FOC trial the requirement that CLECs utilize the RLDT. The explanation for Ms. Liston's curious silence became evident when she was compelled to describe, for example, orders in which Qwest was able to provision ADSL orders where pair gain was on the line.[44]Qwest likely will suggest that Covad overstates the deficiencies in the RLDT. Yet, such is not the case. As stated above, Covad provided over 100 examples of flawed RLDT information, but Qwest responded only to 18. Equally important is the fact that Qwest's responses to Covad's exhibits documenting the problems with the RLDT in this proceeding come in the form of conclusory arguments of counsel, not verified testimony or exhibits provided to the parties either during the workshop or at any time prior to the due date of these impasse briefs. Covad thus suggests that any information Qwest proffers allegedly disputing Covad's conclusions be struck to the extent it was not provided to the Commission or the other parties to this proceeding prior to the filing of Qwest's post-workshop brief.

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

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[42] *Id.*, Tab E.

[43] Exhibit 910 (JML-25).

Qwest attempts to evade its obligations to provide comprehensive and accurate information, arguing that its retail division is equally subject to any deficiency or inaccuracy in information (i.e., parity in receiving inadequate information).[45] Yet that claim is suspect, in light of a particularly telling document—later hastily corrected—that demonstrates conclusively that Qwest regularly provided itself with corrected loop makeup information that was not made available to CLECs.

In Exhibit 899 (Employee Training of LFAC Updates, JML-15), Qwest instructed its outside plant personnel to update outside plant information when they determined that the outside plant differed from the information contained in LFACs. Critically, Qwest permitted its outside plant personnel to update that information either through a *sales referral directly to Qwest's Megabit retail division* or through a database update. While Qwest purportedly changed this policy,[46] although only after its continuing attempt to give its retail side a competitive advantage was detected by CLECs and the Colorado Public Utilities Commission Staff, it does nothing to eliminate the well-founded belief that Qwest uses its control over outside plant and essential facilities to give itself a competitive advantage.

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

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

[45] *See* Colorado Exhibit 5 Qwest 73, attached hereto as Exhibit 6.

user loop is capable of supporting the advanced services equipment the requesting carrier intends to install."

It is irrelevant, despite Qwest's contention to the contrary, that LFACs is not a "searchable" database. As the FCC clarified in the *Verizon Massachusetts 271 Order*, the relevant inquiry under the *UNE Remand Order* is not whether an ILEC's "retail arm or advanced services affiliate has access to such underlying information but whether such information exists anywhere in [the ILEC's] back office and can be accessed by any of [the ILEC's] personnel."[47] Thus because Qwest's retail arm clearly does and can access LFACs, such access must be made equally available to CLECs.

Moreover, Qwest's claim that direct access to LFACs must be denied on the grounds that certain information contained in LFACs is proprietary is a sham. More particularly, Colorado Exhibit 5 Qwest 73[48] includes the form that outside plant personnel are required to complete when updating the LFACs database. This form requests that the Qwest employees provide information regarding the type of cable, pair and termination, the length of each segment, the resistance on each segment, and whether load coils or bridged taps are present. None of this information appropriately may be claimed as confidential and/or proprietary and thus fails to provide a basis on which Qwest may claim that LFACs contains confidential information to which CLECs should be denied access.

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

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

[47] Attached hereto as Exhibit 6.

Covad receives a request for DSL service from a new Qwest end user, Qwest has informed Covad that information relating to that new end user will not be included in the pre-qualification tools until after issuance of the first bill.[49]

It is equally obvious that this impediment does not pose a problem when Qwest seeks to "lock in" that DSL customer for itself. Covad learned in another jurisdiction that, rather than waiting until the first month's voice billing is issued, Qwest contacts its new voice customers within a week or two regarding their interest in DSL services.[50] Qwest uses its "loop qualification tool" to pre-qualify that customer for DSL service and then locks that customer in before Covad even has an opportunity to prequalify that customer. Given the plain time disparity between the ability of Qwest and a CLEC to prequalify for DSL service a new Qwest voice customer, Qwest is in possession of prequalification information to which CLECs do not have access.

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

Qwest suggests that, instead of straightforward and efficient access to LFACs, that CLECs check four or more prequalification tools (the RLDT, the batch wire center information that

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

[49] *See* Exhibit 4 (IWO 1119).

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

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

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

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

In refusing to provide a pre-order MLT, Qwest disregards the fundamental purpose of CLECs' request, asserting instead numerous objections to a pre-order MLT: (1) pre-order MLT is

invasive; (2) pre-order MLT may impact an customer that is currently the customer of Qwest or another CLEC; (3) MLT is not available on the retail side; (4) MLTs are a repair function; and (5) MLT is not provided by other ILECs. As set forth more fully below, all of these objections are without merit.

Qwest's objections largely were addressed by Covad during the workshops on Checklist Item 4. More specifically, Covad stated that it would only request a MLT for orders placed by its own end user customers.[49] By making this offer, Covad allayed any concerns Qwest may have that an MLT would be run for another CLEC or Qwest's end user customer. Covad's offer equally resolved Qwest's technical concern about how an MLT would be run since the loop must be connected to a switch. Because the MLT would be run for Covad's soon-to-be end user customer but before that customer's circuit was moved from the Qwest switch to Covad's DSLAM, there is no technical impediment to performing the MLT.

Qwest's objection about the invasiveness of the test is equally without merit. As Qwest itself admitted, when Qwest did its bulk loop prequalification, it used an MLT to populate the RLDT.[50] Qwest's decision to perform the test, at the alleged risk of purportedly disconnecting hundreds of thousands of customers, demonstrates, in and of itself, that the MLT is not invasive. More importantly, Qwest's purported concern over the invasiveness of the MLT is only raised when CLECs request that Qwest perform the exact same function on their behalf. Qwest cannot "take or leave" the invasiveness concern—it is either is a concern, which would have prevented Qwest from running an MLT, or it is not, in which case, Qwest may not legitimately rely on the "invasiveness" objection. Moreover, even to the extent that there is some potential for voice services exists, such potential is extremely limited and can easily be worked around; as Mr. Zulevic of Covad testified,

the MLT takes only a few seconds and Covad would agree to perform that extraordinarily brief test after hours.[51]

Qwest's purported parity-based objections are also misplaced. Because it used the MLT to populate one of the fields in the RLDT, Qwest has the capability to perform a pre-order MLT and has utilized it on a pre-order basis. Simply because Qwest currently does not do so for its Megabit retail arm or typically uses the MLT only in the repair context cannot alter this undisputed fact. As the FCC made clear in the *SBC Kansas/Oklahoma Order*, "we require a BOC to demonstrate for the first time that it provides access to . . . loop qualification information as part of the pre-ordering functionality of OSS".[52] Thus, the pertinent inquiry, for purposes of determining whether Qwest is obligated to make the MLT available to CLEC, is whether Qwest can access that information for itself.[53] Because MLT information can be accessed pre-order by Qwest, such access must be provided to CLECs.

Qwest "pooh poohs" the argument that MLT can provide useful loop makeup information. As set forth more fully both above and below, however, neither the existence of the RLDT nor the ability to order a loop with testing designed to ensure xDSL capability have resolved the numerous prequalification and service installation issues Covad faces throughout the Qwest region. Covad thus requires the ability to ensure, pre-order that the loop is xDSL capable. As Mr. Zulevic testified in Colorado, the MLT provides more than just the MLT distance; it also provides critical information regarding load coil and other electronics on the loop which are essential to the determination as to whether a loop can support xDSL services.[54] This requirement is nowhere more evident than in the circumstance where it is apparent that a customer should be able to receive DSL

[50] WA Workshop 4 Transcript, pp. 04338.

[52] WA Workshop 4 Transcript, pp. 04337

service because he, she or it lives within 18,000 feet of a central office, yet the RLDT indicates that the customer does not qualify for DSL service.[55]

The valuable information that the MLT provides to CLECs has been recognized by Verizon. Consequently, as the FCC observed in the *Verizon Massachusetts Order*, Verizon "has begun implementing access to manual loop qualification [including the MLT] as a pre-order function . . . with complete implementation expected in October 2001."[56] Qwest's final objection also is without merit.

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

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

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

[55] Exhibit 965-T, pp. 6-8

[56] Exhibit 968-C.

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

Historically and currently, Qwest regularly fails and refuses to deliver loops to Covad that are capable of supporting xDSL services. As a consequence, all orders submitted by Covad request the basic installation with cooperative testing option so that, at the time of provisioning, any problems in loop quality can be detected, identified and resolved.[51]

Despite Qwest's recognition of its seeming inability to provide adequate new service quality and the need for cooperative testing, Qwest fails to perform acceptance testing on approximately 35% of the loops delivered to Covad.[52] Compounding the problems created by Qwest's deliberate failure to conduct cooperative testing are the facts that (1) Qwest bills Covad for cooperative testing on every order it submits, even where testing was not performed, and will continue to do so until Covad can opt into the SGAT sections relating to cooperative testing; and (2) Qwest, until very recently, did not bother to track whether it did or, more likely, did not, perform cooperative testing.

Qwest attempted to resolve this issue by offering a "back end" solution; namely, that it will waive the nonrecurring charge for the basic installation with cooperative testing option for those orders on which no cooperative testing was performed due to Qwest's fault. *See* SGAT § 9.2.2.9.5.3. Although this may resolve some of the financial repercussions associated with Qwest's failure to abide by its agreement (*i.e.*, Covad paying for something Qwest failed to provide), it simply does not resolve the core issue giving rise to Covad's complaint and underlying its inability to compete with Qwest—the failure to deliver a good loop. Indeed, in its recent Arbitration Decision, the Texas Commission explicitly held that "proper provisioning is essential to providing equal opportunity for competition in the xDSL market.[53]

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[57] Petition of Covad Communications Company and Rhythms Links, Inc. against Southwestern Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration Under the

The obvious consequences flowing from Qwest's failure to perform cooperative testing are the additional costs imposed on Covad when it must open a trouble ticket to resolve a "trouble" that, in reality, was a Qwest deficiency in the provisioning process,[54] and the highly foreseeable risk that Covad likely will lose the end user customer who attributes the inability to provide DSL service to Covad, not Qwest. The possibility is not mere speculation; "[d]elays in provisioning serve to degrade the CLEC, and not the ILEC, in the mind of the customer at a time when the customer is forming first impressions about the CLEC."[55]

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

Despite the apparent simplicity and ease of this process, Qwest's technicians rarely, if ever, comply with it. Rather, as Covad described at the workshops, Covad's ACD logs, which track the number of incoming calls, the length of the hold for each incoming call, and the average length of the hold for all calls, show that no Qwest technician ever remained on hold for the entire ten minute period, but instead often hung up immediately or remained on hold an average of three minutes.[56]

Telecommunications Act of 1996 Regarding Rates, Terms and Conditions and Related Arrangements for Line Sharing, Public Utility commission of Texas, Docket Nos. 22168 and 22469 (June 2001) ("*Texas Arbitration Decision*"), p. 135, attached hereto as Exhibit 8.

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

[59] *Id.*

[61] *Id.*

Qwest's failure and refusal to adhere to the agreement to perform cooperative testing demonstrably and drastically impairs Covad's ability to compete effectively with Qwest for xDSL users and no amount of money refunded for the failure to test remedies of the problem. The FCC has made clear that Qwest must provide unbundled xDSL capable loops to Covad at a "level of quality . . . sufficiently high to permit [Covad] to compete meaningfully."[57] Stated more pragmatically, "[f]or effective competition to develop as envisioned by Congress, competitors must have access to incumbent LEC facilities in a manner that allows them to provide the services they seek to offer."[58] Here, not only does Qwest fail to provide loops of sufficient quality, but also it then fails to take the contractually required steps necessary to correct the initial deficiency, to permit Covad to provide the services it seeks to offer, and to give Covad the opportunity to compete in a meaningful manner with Qwest.

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

> Based upon the record, Staff finds that Qwest's failure to provision Covad's line sharing orders in a sufficient manner has led to unnecessary cost to Covad and Covad's loss of customer goodwill. At the Workshop, Covad stated that there is a 25% failure rate due to cross-connect problems. This is unacceptable.
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> At numerous places in the SGAT Qwest has adopted technical standards to specify the performance characteristics of an offered service. Often these technical publications adopt standards set by national standards setting bodies. *When Qwest provides a service under the SGAT to a CLEC per technical standards, the CLEC*

[62] *BANY 271 Order*, ¶ 335.

[63] *UNE Remand Order*, ¶ 13.

> *has a reasonable expectation that the service will perform as specified. Covad and other CLECs compensate Qwest to provide a service, and Qwest should assure that it is providing this service to the fullest extent possible. Therefore, in order to reasonably guarantee that line sharing orders are provisioned properly, Staff recommends that Qwest be required to provide all necessary testing to assure a reasonable level of quality assurance (including, if necessary, data continuity testing).*
>
> Covad has offered to supply Qwest with the equipment it would need in order to run the data continuity test. Staff finds that this is unnecessary because as a general matter, Qwest should have the equipment to provide testing that meets the specifications set forth in its technical publications. As Covad recognized in the Workshop, however, if Qwest or a CLEC changes technology, the same test set may not work for both. Therefore, if different test sets are required, Staff recommends that Covad (or any other CLEC) bring this matter to Qwest to modify the technical publication using the change management process ("CMP"). In addition, as a short term measure while the CMP goes forward, and at the CLEC's option, the CLEC may provide Qwest with the equipment necessary to do the continuity test if the CLEC changes technology. If Qwest changes technology, however, Qwest must provide the necessary equipment to do the continuity test.[59]

Staff to the CPUC is not alone in its reasoning. The Texas Commission also found that, if a loop that is delivered is not capable of supporting xDSL services, then "the loop was never provisioned properly in the first place" and should be counted as a "provisioning delay" or "miss" in its performance measure data.[60]

Because Qwest neither provides a loop that Covad "reasonably should expect" to perform as ordered, nor does it consistently provide the means to bring that loop up to the necessary technical parameters, such failings clearly run counter to the FCC's "commit[ment] to removing barriers to competition so that competing providers are able to compete effectively with incumbent LECs and their affiliates in the provision of advanced services."[61] Accordingly, this Commission

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

[65] *Texas Arbitration Decision*, p. 52.

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

should consider whether Qwest may properly charge CLECs for testing necessary to ensure that the loop will perform as reasonably expected.

During the workshops on Checklist Item 4, Qwest conceded that cooperative testing was a problem, that it flows from a flaw or deficiency within its own processes, and that it will be investigated, reviewed and corrected during the ROC OSS testing. Accordingly, Covad agrees to defer this issue to the ROC OSS test. If, however, Covad continues to experience this problem during or after the conclusion of the OSS testing, Covad reserves the right to reopen this issue.

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

a. Qwest's FOC Performance.

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

Qwest failed to demonstrate that its FOC performance improved in any meaningful manner, providing Covad with a FOC within the 72 hour time period a meager 75% of the time.[62] Under the FCC's most recent orders granting Section 271 relief, such performance is insufficient to establish checklist compliance:

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

> '[A]lthough [Verizon] includes xDSL orders with other loop orders in the denominator of the relevant metric, based upon our review of [Verizon's] performance data, it appears that [Verizon] returns [xDSL confirmation notices] within the stated interval almost all of the time.' For example, from September through December 2000, respectively, for 'Loop/Pre-qualified Complex/LNP' orders, Verizon timely returned 99.68, 99.82, 99.48, and 99.79 percent of confirmation notices for flow-through orders within 2 hours; 97.35, 97.35, 97.27, and 97.88 percent of confirmation notices for orders of less than 10 lines within 24 hours; and 96.90, 99.73, 100.00, and 99.74 percent of confirmation notices for orders equal to or more than 10 lines within 72 hours. Verizon likewise exceeded the 95 percent benchmark for timely return of reject notices during this period. 'Pre-qualified Complex' orders encompass orders for pre-qualified xDSL-capable loops, and include specifically orders for pre-qualified 2-wire xDSL and 2-wire digital loops. Verizon also appears to have exceeded the 95 percent benchmark for timely return of confirmation and reject notices with respect to manually qualified, 2-wire xDSL loop orders. For example, from September through December 2000, respectively, for "2 Wire xDSL Service" orders, Verizon timely returned 98.75, 98.67, 99.25, and 96.77 percent of confirmation notices, and 98.80, 98.92, 99.38, 97.75 percent of reject notices, for orders of less than 10 lines within 72 hours.[63]

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

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

The FCC has made clear that the percentage of installation commitments met/missed is one of the most probative indicators of whether an incumbent LEC, such as Qwest, is provisioning loops in a nondiscriminatory fashion. Indeed, the question of whether Qwest has opened up its local markets to meaningful competition[64] turns on Qwest's ability to demonstrate that there is no evidence

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[68] *Verizon Massachusetts Order*, n. 124 (internal citations omitted).

[69] *BANY 271 Order*, ¶¶ 194, 195 and 270.

of "systemic performance disparities that have resulted in competitive harm or otherwise denied competing carriers a meaningful opportunity to compete."[65]

As Qwest acknowledged, CLECs, including Covad, raised regular and serious concerns regarding Qwest's FOC and loop delivery performance. Consequently, Qwest implemented the Colorado xDSL UNE loop FOC Trial in an effort to implement training, processes and procedures that would improve both its ability to provide a meaningful FOC and its loop delivery performance.

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

Covad reserves its right to reopen this issue, not out of a desire to resuscitate closed issues, but rather to ensure that Qwest's OP-3 (Installation Commitments Met) and OP-4 (Installation Interval) performance be measured under accurate and realistic circumstances. As Ms. Liston acknowledged during conference call on June 18, 2001 in Docket No. 198T, the trial was just that -- a limited time period during which Qwest changed its FOC instructions, processes and procedures to determine whether such changes would facilitate delivery of a meaningful FOC.[66] Further OSS testing should confirm whether Qwest can continue to adhere to such instructions, processes and procedures on a statewide, permanent basis, and in the absence of a time limited, yet extraordinarily intense and extensive effort, on the part of Qwest to prove the trial a success.[67]

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[70] *Verizon Massachusetts 271 Order*, ¶ 122 (citations omitted).

[71] CO Trans, June 18, 2001, pp. 12-13.

[72] *See, e.g.*, CO Trans., June 18, 2001, p. 8.

Covad also reserves its right to review the OSS test results, and possibly reopen this issue, in light of the impact its assumptions regarding Qwest's loop delivery interval and OP-3 performance had on the results reported by Covad. Stated succinctly, at the time of the FOC trial, Covad does not track the "completion date" provided by Qwest, but rather calculated the order close date as that date on which Covad can verify the delivery of a loop capable of supporting xDSL services.[68] As a consequence, and to ensure even-handed treatment of Qwest, Covad assumed that Qwest met the due date contained in the FOC 100% of the time and produced its data results accordingly.

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

From Covad's perspective, this data point provided an easy compromise between the parties because cooperative testing performed during the loop provisioning process necessarily occurs simultaneously on the day the loop is delivered. Qwest nonetheless refused to use the cooperative testing date, despite its 100% reliability as a proxy for the completion date posted by Qwest on its web site.[69] Accordingly, because of Qwest's objections, Covad reverted to measuring Qwest's loop delivery performance consistent with the due dates contained in the FOC.

It was only after the conclusion of the FOC trial that Covad determined that all orders submitted via EDI were automatically populated with the due date contained in the PAP and the

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[73] Qwest suggests that there is something improper in Covad tracking a completion date that differs from what Qwest defines as the "completion date". Yet, there is nothing improper about a company tracking those data points that actually assist in its operations; namely, that date by which Covad can guarantee that Qwest has finally provided a loop capable of supporting the services Covad seeks to offer its end user customers.

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

standard interval guide for Covad's UNE loop orders throughout the Qwest region, rather than the due date specifically identified for purposes of this trial. This fact necessarily impacted Covad's OP-3/OP-4 results and, accordingly, Covad withdraws its xDSL FOC trial results at this time. Such withdrawal does not indicate that Covad believes this issue is finally and fully resolved. To the contrary, as stated above, Covad reserves its right to review Qwest's OP-3 performance at the conclusion of the OSS testing, compare that data to its own, and challenge any data disparities.

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

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

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

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

Qwest's response to this issue has focused solely on its paper policies and the claim that such policies constitute effective deterrents to the ongoing improper conduct of its technicians.[70] More specifically, the heart of Qwest's claim that its technicians are trained in and required to behave appropriately is grounded in its Code of Conduct (the "COC"). Relevant to the issues raised by Covad, Qwest's COC contains a section on "asset protection", in which its employees are instructed generally to comply with "complex[]" "antitrust and unfair competition laws," and to

[75] Exhibits 932-936.

"focus on the quality and value of [Qwest's] product and services" rather than "disparaging" those of its competitors.[71]

As an initial matter, the COC and its provisions relating to treatment of CLECs (or comparable provisions incorporated into a similar US WEST policy) have been in place the entire course of Covad's contractual and business relationship with Qwest. And it is during that same time period that each and every instance of inappropriate and improper technician conduct reported by Covad to Qwest has occurred. Consequently, the COC and associated "reminder" documents have already proven to be ineffective to deter and eliminate the anti-competitive conduct of Qwest's employees.

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

More problematic, even where Qwest incorporates information in its COC or other "reminder" documents[72] that would substantively address the improper conduct of its technicians, such language conflicts with or is confused by verbiage that permits ongoing improper technician conduct. For example, even as Qwest instructs its competitors not to "disparage" CLECs, Qwest encourages its technicians to promote its own services when interacting with a CLEC's end user

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[76] Exhibit 932.

[77] Exhibits 932-936.

customer. Such encouragement necessarily translates into incidents, such as one which was reported by Covad to Qwest, where the Qwest technician informed Covad's end user customer that if he went with Qwest he would have Megabit service within seven days whereas he would have to wait "forever" if he went with Covad.[73]

Similarly, Qwest informs its employees in the COC that they must provide non-discriminatory service to CLEC. Qwest then apparently limits that requirement to a purported prohibition on improperly using CLECs' proprietary network information. By limiting the non-discrimination directive to misappropriation of proprietary information, Qwest tacitly permits incidents, such as one that occurred in Phoenix, Arizona, in which a Qwest technician stole Covad's copper pairs for use by a Qwest customer.[74]

The fact that Qwest has a policy in place to investigate COC violations generally, either at its own initiative or in response to CLEC complaint, does not alter the conclusion that Qwest has failed to implement the policies and procedures necessary to deter anti-competitive conduct on the part of its technicians. More specifically, Qwest provided no evidence showing that it had investigated a single COC violation in Washington that pertained to the disparagement or discriminatory treatment of CLECs. Further, by placing sole responsibility for investigation into a particular incident with the individual's manager,[75] without providing that manager with (1) any meaningful guidelines regarding Qwest's obligations under the Act; (2) a specific process for investigation; and (3) guidelines regarding appropriate discipline, there is no guarantee that any substantive, effective or meaningful investigation will occur.

Covad's concerns have proven well-founded. Even after all of the "forceful" reminders provided by Qwest to its employees, on-going incidents of anti-competitive and improper

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

[79] *Id.*

80 WA Workshop 4, pp. 04385.

[82] *See* Exhibit 935.

behavior abound. For example, (1) in June, 2001, a Qwest employee(s) stole several pieces of equipment from Covad's collocation spaces in three Qwest Colorado COs;[76] (2) in August 2001, a Qwest technician at Covad's end user's premises, *while acting as a point of contact on behalf of Covad with its end user customer*, took the opportunity to solicit that end user customer's business, providing the customer with a DSL brochure and encouraging him to switch to Qwest.[77]

While there may be some "bad apples" in the Qwest barrel, the numerosity of those bad apples, and the frequency with which they seek to disparage Covad or engage in anti-competitive behavior is far and away greater than with any other ILEC. The inevitable conclusion, therefore, is that Qwest's paper policies are absolutely without teeth and, in fact, are regularly ignored. Indeed, disparagement of Covad is rampant within Qwest, as is evidence by a recent email from one Qwest employee to hundreds of her fellow employees, in the email, the Qwest employee gleefully describes Covad's restructuring efforts as "the third batter down" and the "end of the national DLEC game," and referred to Covad's announcement of continued operations as "delusional" and the result of "drinking too much Kool-Aid." This particular Qwest employee predicts that "its quite likely a judge will say they have no chance to succeed and force them to immediate Ch 7 liquidation."[78]

Qwest should be obligated—consistent with its § 271 obligation to provide competitors with a meaningful opportunity to compete—to provide a verified assurance, fom the appropriate personnel, that corrective action has been taken for every incident reported by Covad to Qwest. Further, § 271 requires an assurance from Qwest, in the form of properly authenticated documentation, that it has in place both policies prohibiting this type of anti-competitive conduct and

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[83] Exhibit 973.

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

[85] *See* Email from L. Broberg to Distribution List, dated August 7, 2001, attached hereto as Exhibit 12.

a mandatory disciplinary structure to deter anti-competitive conduct in the future. Unless and until Qwest commits to adhering to these requirements, its § 271 application should not be approved.

11. Spectrum Management (WA Loop 10).

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

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

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

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

Qwest asserts that the intervals contained in Exhibit C, taken together with the inextricable link to the Performance Indicator Definitions contained in Qwest's proposed performance assurance plan, preclude the reopening of the SGAT intervals at this time. Qwest is flat out wrong. As an initial matter, there is no inextricable link between the two, because Qwest has refused to abide by the intervals contained in Exhibit C.[79] For example, the PID "interval" for one 2 wire non-loaded loop is not the five day interval for 1-8 loops ordered as reflected in Exhibit C to the SGAT, but rather a generic mid-mark of six days. Likewise, there are no PIDs for line shared loops because Qwest purportedly has not had enough experience in provisioning line shared loops to move from a "diagnostic" status interval to a specified PID benchmark even though the Exhibit C interval for line shared loops (no conditioning) is three days.

Covad now appreciates the substantive difference Qwest was making between the PID intervals and the intervals contained in Exhibit C. Covad therefore anticipates going to the Regional Oversight Committee to address these issues, as well as in its brief in the multi-state proceeding on Qwest's proposed QPAP.[80] Thus, the issue of the appropriate intervals is far from closed, and Covad fully anticipates raising this issue here as well as in other jurisdictions and Section 271-related proceedings.

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

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

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

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

Second, with regard to the interval for conditioned loops, *see* Exhibit C, Section 1(g), Qwest's current interval of fifteen days is inappropriately and improperly elongated when examined against the information provided by Qwest to Covad during the course of the emerging services workshop. More specifically, conditioning is not a foreign or new concept to Qwest. In fact, Qwest has been conditioning loops for its own services for years. Indeed, in most cases, conditioning—or the removal of a bridged tap or load coil—is a fairly simple process, requiring only that: (1) the requested cable pair be located in the facility database; (2) the location of the load points be identified; (3) this information be placed on a work request; and (4) the work be performed.[81]

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

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

[88] Exhibit 875-T, pp. 4-5.

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

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

D. CONCLUSION

The loops provisions contained in the SGAT and reflected by Qwest's current commercial practice are insufficient to spur competitive entry into Washington. Indeed, under Qwest's SGAT and in light of its current commercial practice, it is only a matter of time before Qwest eliminates all meaningful competition in the xDSL market. Without competitive entry, Washington citizens will be denied the key benefits of competitive choice—higher quality of service and lower prices.

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

III. DISPUTED LINE SPLITTING ISSUES

A. INTRODUCTION

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

As the FCC recognized, line splitting "will further speed the deployment of competition in the advanced services market place," particularly to residential and small business

customers.[82] In order to capitalize on the possibility presented by line splitting, however, this Commission must require that Qwest adopt terms and conditions that will bring that possibility to fruition. Thus, Qwest's SGAT must be revised consistent with the arguments set forth below.

B. ARGUMENT

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

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

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

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

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

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

C. CONCLUSION

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

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[89] *Line Sharing Reconsideration Order*, ¶ 23.

IV. DISPUTED PACKET SWITCHING ISSUES

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

From a business and competitive perspective, fiber-fed loops, including loops comprised of digital loop carrier facilities (often called next-generation digital loop carrier, or "NGDLC") or loops served by a remote DSLAM (i.e., remote line card shelf DSLAMs), increase the DSL bandwidth available to end-users supported by that system. NGDLC-type architecture, which includes both NGDLC and/or remote DSLAMs, both shortens the length of the copper loop serving a particular customer and takes advantage of advances in fiber optic technology to connect neighborhood nodes or "gateways" to metropolitan-area optical networks. NGDLC-type systems typically support the provision of both analog voice and advanced data services.

As a result, in the deployment of an NGDLC-type network or in a network served by a remote DSLAM, an incumbent LEC has the advantages of economies of scale, scope and density that new, competitive entrants do not possess.[83] In particular, when an incumbent LEC deploys an NGDLC or an NGDLC functionality (i.e., a remote DSLAM) in a neighborhood where it already has a substantial share of voice subscribers, it will immediately realize the cost-savings of scale and density from that architecture and it will be able to immediately "bundle" the sale of advanced data services to its large voice customer base.[84]

In contrast, CLECs like Covad face an entirely different set of choices. Without the luxury of an existing local voice base or existing ubiquitous copper loop plant, a CLEC's ability and incentive to deploy profitably an NGDLC-type architecture or NGDLC functionality is substantially

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

[91] The cost savings of an NGDLC architecture are demonstrated in Project Pronto press releases.

lower than the incumbent LECs.[85] Consequently, the ability of CLECs to provide advanced services to entire sets of customers will be impaired dramatically.

A public policy that simply says, "all carriers can deploy NGDLC" or "all carriers can deploy NGDLC functionalities" (via a remote DSLAM), and nothing else, dramatically underestimates the inherent advantages and economies incumbent LECs like Qwest possess. Fortunately, it was precisely for situations like these that the Telecommunication Act of 1996's (the "Act") unbundling principles were designed to address.[86]

B. ARGUMENT

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

Even if FCC Rule 51.319 does not currently mandate unbundled access to packet-switched NGDLC architectures and NGDLC functionalities, like remote DSLAMs, as requested by Covad, the Commission has the authority, under the Act[87] and FCC rules[88], to expand Qwest's unbundling obligations beyond the minimal national requirements of the FCC. Section 251(d)(3) of the Act explicitly authorizes state commissions to establish additional unbundling obligations.[89] While the FCC in the *Local Competition Order* established the basic list of UNEs that must be unbundled by all ILECs, the FCC emphasized that "section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list."[90]

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

[93] *See, e.g., Local Competition Order*, ¶ 242.

[94] 47 U.S.C § 251(d)(3).

[95] 47 C.F.R § 51.317(d).

[96] *Texas Arbitration Decision, p. 70.*

[97] *UNE Remand Order*,¶ 154.

It is clear that the FCC did not intend the *UNE Remand Order* to be the "final word" on remote terminal access, as Qwest apparently contends. To the contrary, the FCC explicitly encouraged states "to impose additional, pro-competitive requirements consistent with the national framework established in this order."[91] The FCC thus specifically deferred to state commissions to resolve technical issues related to subloop unbundling.[92] Implicit within that deferral, therefore, is the recognition that states, like Washington[93], are particularly well suited to take the steps necessary to ensure that remote terminal access be provided in a manner that encourages competition:

> It is impossible to predict every deployment scenario or the difficulties that might arise in the provision of the high frequency loop spectrum network elements. States may take action to promote our overarching policies, where it is consistent with the rules established in this proceeding. We believe this approach will permit the states to benefit from the informed debate on the record in this proceeding, and will promote consistency in federal and state regulations.[94]

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

> [o]ver time, we expect carriers to develop new technologies to support new forms of telecommunications services. Consistent with our rules and our obligation to promote innovation, investment, and competition among all participants and for all services in the telecommunications marketplace, we expect incumbent LECs to provide access to the features, functionalities, and capabilities associated with the unbundled network elements necessary to provide such services.[95]

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

[99] *UNE Remand Order*, ¶ 224.

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

[101] *Line Sharing Order* at ¶ 225.

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

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

The time is nigh for the Commission to take action on this issue. As Covad pointed out in its prefiled and oral testimony, Qwest plans to reach 1.3 million additional homes and "more than double the number of miles customers can live from a central office" by remotely deploying DSL technology.[96] Absent the requirement that Qwest provide unbundled packet switching, it is clear that Qwest can and will eliminate competition from the more distant areas of the network.

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

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

> 9.20.2.1 CLEC may obtain unbundled packet switching only when all four of the following conditions are satisfied in a specific geographic area:
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> > 9.20.2.1.1 Qwest has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section.

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

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

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

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

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

In its prefiled and oral testimony, Covad (as well as other CLECs) proposed that Qwest make virtual collocation and unbundled packet-switching available to CLECs that desire to provide services over NGDLC platforms or via remote DSLAMs. Specifically, Covad proposed that Qwest provide remote terminal access via "plug and play"—the insertion of a plug-in card-based DSLAM functionality.[97] Qwest refused to modify its SGAT language on the grounds that purportedly alternative access could be obtained by a CLEC who (1) remote deployed a DSLAM; (2) leased fiber transport from the CO to the remote terminal, and (3) leased a copper loop to the end user. For the reasons set forth below, Qwest's proposal is untenable and will effectively stymie competition in Washington. Covad therefore requests that this Commission order Qwest to provide the access requested on an unbundled basis.

a. The "Impair" Standard.

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

When evaluating whether to unbundle a network element under the "impair" standard, the rules establish that the "totality of circumstances" must be considered to determine whether an

[105] Exhibit 875-T, p. 14, WA Workshop 4 Transcript, pp. 04661. Covad developed its virtual collocation NGDLC proposal initially in response to SBC's planned Project Pronto and the September 2000 waiver SBC obtained from its Ameritech merger conditions relating to Pronto access. Since then, the FCC Bell Atlantic/GTE merger conditions imposed identical restrictions and conditions upon Verizon, and in the context of New York, Maryland and Pennsylvania state unbundling inquiries, Verizon recently proposed a similar product called "PARTS" (Packet-Switched Access to Remote Terminal Service").

alternative to the ILEC's network is available in such a manner that a requesting carrier can realistically be expected to actually provide services using the alternative.[98]

To determine whether the totality of the circumstances warrants unbundled access, Rule 51.317(b) requires that the state commission consider the cost, timeliness, quality, ubiquity, and impact on network operations that may be associated with any alternatives to unbundling. In addition, a state commission may consider other factors such as promotion of the rapid introduction of competition; facilities-based competition, investment, and innovation; or certainty to requesting carriers regarding the availability of the element.[99]

As Covad pointed out in its testimony,[100] no commercially viable alternative method to providing service to neighborhoods served by NGDLC or NGDLC functionalities, like remote DSLAMs, exists absent unbundled access, for the following reasons:

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

The use of spare or "home run" copper loops to provision xDSL service is far from being a feasible alternative. In many cases, an NGDLC or remote DSLAM is deployed precisely because available copper is not suited (e.g., too long) for xDSL service.[101] In addition, because the length of the copper loop limits the xDSL bandwidth available to the end-user, CLECs would be at a considerable competitive disadvantage to Qwest's deployment if CLECs were required to provide service on spare loops.[102] For example, while Qwest might be able to provide high-bandwidth VDSL service through a RT architecture (where the copper distribution subloop may only be 2000-3000 feet long), a CLEC offering service over a longer, spare copper loop may only be able to

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[106] *UNE Remand Order* at ¶ 62.

[107] *See* 47 C.F.R. § 51.317(c).

[108] Exhibit 875-T, pp. 12-16, WA Workshop 4 Transcript, pp. 04619.

[109] Exhibit 875-T, p. 13.

[110] *Id.*

provide ADSL service.[110] Thus, Qwest's requirement that CLECs go to "spare copper loops" first would give it an inherent and sustainable competitive advantage for its own DSL services. The consequent competitive disadvantage to CLECs could be significant enough to deter them from even attempting to provide a competitive, alternative service in many neighborhoods and towns.

In addition, if incumbents deploy fiber fed NGDLC systems with a plug-in card based DSLAM functionality at the remote terminal, it can potentially cause cross talk interference problems to DSL services provided over spare copper loops to DSLAMs collocated in the central office.[111] Such degradation could materially diminish a competitor's ability to effectively provide service over spare copper loops. During the hearing on this issue before the Illinois Commerce Commission, Ameritech's witness acknowledged that there could be degradation in throughput because of SBC's Project Pronto's deployed architecture.[103]

Although Qwest may argue that SGAT § 9.20.2.1 is derived from its rough FCC Rule analogue 51.319(c)(3)(B), the FCC has since recognized the inherent flaws in Qwest's position. In granting SBC a waiver from its merger conditions with regard to Project Pronto, the FCC interpreted 51.319(c)(3)(B)(ii) as permitting a competitor to "be able to provide over the spare copper *the same level of quality advanced services* to its customer as the incumbent LEC."[104] In addition, Section 51.319(c)(3)(B)(ii) requires that, to be deemed an alternative to unbundled packet-switching, the spare copper must be able to "support[] the xDSL services the requesting carrier seeks to offer." Therefore, the Commission should clarify that, if a CLEC seeks to offer VDSL or high-rate ADSL service to a customer, and existing spare copper does not support that xDSL service, or that DSL provided over NGDLC by Qwest would potentially degrade CLEC services over spare copper loops, the "spare copper" exclusion to the packet-switching element of SGAT § 9.20.2.1.3 does not apply.

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[111] *Id.*

[112] *Id.*

[113] Post-Hearing Rebuttal Testimony of Gentry, Exhibit C at 23.

[114] *SBC Kansas/ Oklahoma Order*, footnote 741.

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

> Use of all-copper loops to provide xDSL services merely provides CLECs with an option that SWBT itself is spending billions of dollars to avoid. As ADSL is distance sensitive, provisioning over Project Pronto, where the goal for the copper portion of the loops is 12,000 ft., rather than home-run copper, provides inherent enhanced quality. . . . since areas include no spare copper. Furthermore, CLECs have no guarantee that the spare copper will remain once Pronto is ubiquitously deployed. Thus, while "home-run" copper alternative may be present in some situations, the Arbitrators are not convinced that these provide the same level of service viable or permanent.
>
> The Arbitrators believe that SWBT has deployed DLC or NGDLC in which fiber optic facilities replace copper facilities in the distribution section. . . . Where no copper currently exists, the Pronto architecture will be the only available means to serve a customer.
>
> The Arbitrators are not persuaded by the evidence that there are spare copper loops capable of supporting xDSL services the CLECs seek to offer .. . the Arbitrators believe that the evidence in this record supports the finding that without access to Pronto, including the packet switching functionality, CLECs will be impaired. Pronto was devised to reach consumer who otherwise could not be served over the existing network. By some estimates, nearly a quarter of the customers who do not have access to ADSL today, will be able to obtain ADSL service after Pronto is rolled-out. Because line sharing generally cannot be supported on loops in excess of 18,000 feet, CLECs will be denied the opportunity to provide services to customers whose loops exceed that length. In other words, where spare copper is in fact available, the quality of service generally between the different distribution methods is somewhat disparate, especially in distance-sensitive applications such as line sharing. This disparity does not meet the condition that spare copper loops should be able to 'offer the same level of quality for advanced services.'[105]

[115] *Texas Arbitration Decision*, pp. 71-72 & 76-77.

A difference in network architecture does not alter the findings of the *Texas Arbitration Decision* with respect to spare copper. Thus, pursuant to this persuasive authority, the Commission should find that that spare copper is not a viable alternative.[106]

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

Collocating DSLAMs in Qwest's remote terminal is not an alternative that should be given any weight whatsoever under the impair analysis. In general terms, collocating DSLAMs as an alternative requires CLECs to collocate the equipment necessary to perform the DSLAM and multiplexing functionality along with optical electronics in every Qwest remote terminal served by fiber.[107] In addition, CLECs will need to make all the necessary cross connections and install Field Connection Points ("FCPs") at each remote terminal between the end user's copper and its collocated equipment.[108] Even more egregiously, CLECs would be required to collocate an expensive DSLAM to serve a mere 300 customers, even though the DSLAM has the capacity to serve up to 3,000 customers. When examining the burden imposed by the requirement of collocating a DSLAM in a remote terminal pursuant to the factors set forth in Rule 51.317, it is demonstrably apparent that unbundled access to any NGDLC or remote DSLAM in Qwest's network is required.

First, no CLEC is in the financial position to replicate the Qwest network and collocate DSLAMs at a sufficient number of remote terminals to offer a viable competitive service.[109] The FCC has stated that where lack of access to a UNE "materially restricts the number or geographic scope of the customers," a CLEC's ability to provide services is impaired. The purpose

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

[117] Exhibit 875-T, p. 13.

[118] *Id.*, pp. 13-14.

[119] *Id.*, p. 14.

of unbundled access is to permit CLECs to share the economies of scale, scope and density of existing incumbent LEC networks. Qwest enjoys considerable economies in deploying NGDLC architectures and remote DSLAMs that CLECs do not possess, which poses a considerable and sustainable competitive problem. Those economies derive from the ubiquitous nature of Qwest's incumbent LEC network—a level of ubiquity no CLEC possesses. Thus, in determining whether to order unbundled access, this Commission must consider whether a ubiquitous alternative can be deployed on a timely and cost-effective basis. With regard to NGDLC architectures and functionalities, only Qwest possesses such economies.

Second, the findings of the FCC illustrate that collocation of DSLAMs in Qwest's remote terminals is far more costly than accessing NGDLC loops from the central office.[110] Indeed, Qwest itself has acknowledged in Colorado that collocation of remote DSLAMs is extraordinarily cost prohibitive:

> Q: You explained that Qwest, for its business reasons, is coming to the conclusion that it's going to place DSLAMs adjacent to FDIs; is that right?
>
> A: On a limited basis, yes.
>
> Q: What do you mean?
>
> A: A limited basis. We're not going to deploy DSLAMs to every FDI.
>
> Q: Why is that?
>
> A: I think I alluded to that earlier. Simply because we want to reach the most customers with the shortest loop possible to provide our DSLAM. Additionally, not 100 percent of the loops in all occasions for the particular distribution area that's served by a remote terminal actually is served by the digital loop carrier.
>
> Q: You said Qwest is going to do that, that is, place its DSLAM close to the FDI in a limited circumstance; is that right?
>
> A: Yes. Targeted approach, yes.
>
> Q: Limited because of what? Limited because -- I'll just open it that way.

[120] *Line Sharing Reconsideration Order* at ¶ 13.

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

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

A: Correct.[111]

Of course, despite that cost, but in recognition of the ability to lock in an entire category of customers if high enough economic barriers are erected, Qwest has commenced a massive remote DSLAM deployment.[112]

Third, collocating DSLAMs in Qwest's remote terminals would materially delay a requesting carrier's timely entry into the local market or alternatively delay expansion of an existing carrier's line sharing service offerings.[113] In fact, the FCC recognizes that collocation of a DSLAM in a remote terminal is an inherently time consuming process.[114] Further delays would be incurred while the CLEC attempted to secure necessary access to rights-of-way, zoning, and power supply that may be needed in certain instances.[115]

Finally, the other factors provided for by Rule 51.317(c) support unbundled access.[116] For instance, the unbundling requested by Covad (1) promotes the rapid introduction of competition for advanced services in the residential and small business marketplace; (2) promotes facilities-based

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[121] *See* CO Trans., 11/3/00, WS 3, pp. 46-47.

[122] Exhibit 875-T, pp. 15 & 16; Exhibit 876.

[123] *See also UNE Remand Order* at ¶ 361.

[124] *Line Sharing Reconsideration Order* at ¶ 13.

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

[126] 47 C.F.R. § 51.317(c).

competition, investment, and innovation for new innovative xDSL services that can be offered to customers; and (3) ensures the certainty requesting carriers require to provide advanced services ubiquitously throughout Washington.

3. Collocation of DSL Line Cards at Remote Terminals.

A critical component of Covad's proposed unbundled access to Qwest packet-switched NGDLC functionality is the ability to virtually collocate DSL line cards at Qwest remote terminals.[117] Qwest refused to agree to Covad's proposal.

Any Commission decision ordering unbundled access to NGDLC-type packet-switching must be accompanied by a decision explicitly permitting the collocation of DSL line cards. The line card performs the DSLAM functionality necessary to generate and receive transmissions across the unbundled loop from the end-user through the remote terminal back to the central office.[118] Indeed, the FCC has found that "the plug-in ADLU card is an indispensable component for providing ADSL service through the manufacturer's NGDLC system; . . ."[119] Different line cards offer different DSL functionalities and quality of service (QoS) guarantees. The line card is necessary to access the NGDLC loop UNE and to enable the CLEC to provide its desired services over the loop.

Although a line card provides DSLAM functionality,[120] and although Qwest claims to permit CLECs to collocate "DSLAMs" at its remote terminals, Qwest nonetheless flatly refused CLECs the ability to collocate the line card, even where technically feasible. Instead, Qwest believes that CLECs should be required to collocate a much-larger DSLAM—a device that takes up more space, is more expensive to buy and operate, and draws more power—despite the fact that the similar functionality is contained on a much smaller piece of equipment. The installation of other

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[127] *See* Exhibit 875-T, p. 14, WA Workshop 4 Transcript, pp. 04658.

[128] *Project Pronto Order* at ¶ 14.

[129] *Project Pronto Order* at ¶ 14.

[130] *Texas Arbitration Decision*, p. 88 ("line cards … are in fact a substitute for a traditional DSLAM").

technically feasible line cards would support the other advanced services that CLECs need to provide to differentiate their products in a competitive market.

With regard to technical feasibility, as discussed above, the Illinois Commission recently ordered SBC to permit CLECs to collocate line cards at NGDLC facilities.[121] Under FCC rules, this decision establishes a rebuttable presumption that such collocation is technically feasible in Washington.[122]

C. CONCLUSION

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

V. DISPUTED LINE SHARING ISSUES

A. INTRODUCTION

Throughout the § 271 proceedings on emerging services, Qwest has focused exclusively on the terms and conditions relating to line sharing contained in the SGAT in support of its argument that it has met its burden of proof under § 271. Qwest's SGAT, however, is only one aspect of satisfying the competitive checklist. Rather, it is an absolute prerequisite to the satisfaction of the § 271 competitive checklist that Qwest demonstrate "its present compliance with the statutory conditions for entry."[123]

In rendering its order on emerging services, this Commission must take notice not only of the terms and conditions contained in Qwest's SGAT regarding line sharing, but also Qwest's

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[131] *Illinois Order* at p. 27.

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

[133] *BANY 271 Order*, ¶ 37.

actual commercial conduct in provisioning line sharing. Until both the SGAT and Qwest's actual performance demonstrate checklist compliance, this Commission cannot give a favorable recommendation to the FCC on Qwest's application for Section 271 relief in the State of Washington.

B. ARGUMENT

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

In its prefiled testimony, Covad stated that Qwest failed to demonstrate that it is currently complying with its obligations under the Act. Specifically, Michael Zulevic of Covad testified that Qwest historically has been unable to properly provision line shared orders as a result of poor or non-existent technician training and care. Mr. Zulevic testified that the only appropriate remedy for Qwest's inability to correctly provision line shared orders was to require Qwest to perform data continuity testing on all line shared circuits.[124]

Although Qwest initially resisted providing data continuity testing, after Staff to the Colorado PUC found that Qwest is obligated to provision a line shared circuit that is capable of supporting ADLS service and thus that any testing to ensure such capability should be provided by Qwest, Qwest agreed to provide data continuity testing on all line shared circuits region-wide generally, and in the State of Washington, specifically.[125] Consistent with that Agreement, Qwest proposal language for inclusion in the line sharing section that reflects this commitment. To the extent that Qwest does formally incorporates that language into the SGAT, Covad agrees that this issue is closed.

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

The work necessary to provision a line shared loop is minimal; no work must be done in connection with the outside plant (except under very limited circumstances), minimal work is

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[134] Exhibit 875-T, pp. 6-7.

[135] *See* Exhibits 1016 and 1017.

required inside the CO, and no administrative work is required since the cable pair and central office equipment information already has been ascertained.[126] Indeed, all that is required is a simple "lift and lay," pursuant to which one cross connect is replaced with two (and, on occasion, four), using the same cable bearer and switch office equipment.[127]

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

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

Qwest's argument rings hollow, when set against the fact that line sharing has been in place for almost two years and Qwest has had ample opportunity to resolve and, potentially automate, the line share provisioning process. Qwest also raises the feeble argument that a five (5)/three (3) business day interval is appropriate because that is the parity interval for Qwest's Megabit DSL service. This Commission, however, is not bound by a purported "parity" standard.[128] Instead, the Commission should adopt an interval that, consistent with the Act, facilitates the deployment of advanced services in the State of Washington.

In its testimony, Covad suggested that Qwest adhere to a graduated line sharing interval, beginning with a three-day interval and then dropping down to a one-day interval after six

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[136] Exhibit 875-T, pp. 7-8.

[137] *Id.*.

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

months. Because a one-day interval would facilitate the entry of CLECs into the xDSL market in the State of Washington, this Commission should follow the lead of other states, like Illinois, that mandate a one-day interval for line share orders.

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

SGAT § 9.4.2.3.1 states that the POTS splitter will be installed either on a relay rack or a main distribution frame under two circumstances: (1) where an ICDF is not available; or (2) the CO has less than 10,000 lines. As Covad pointed out, Qwest has permitted other CLECs to mount their splitters on the MDF in offices with more than 10,000 lines, but has unfairly refused to accord Covad the same option.[129]

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

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

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

The FCC made clear in the *Line Sharing Reconsideration Order* that "the requirement to provide line sharing applies to the entire loop, even where the incumbent has deployed fiber in the loop (e.g., where the loop is served by a remote terminal)."[130] Thus, despite its use of the word

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[139] Exh. 875-T, pp. 8-9..

[140] *Id.*, p.9

[141] *Line Sharing Reconsideration Order*, ¶ 10.

"copper" in the *Line Sharing Order*, the FCC made clear that "use of the word 'copper' in section 51.319(h)(1) was not intended to limit an incumbent LEC's obligation to provide competitive LECs with access to the fiber portion of a DLC loop for the provision of line-shared xDSL services."[131] As the FCC explained, this clarification was necessary in order to prevent incumbent LECs from closing off competition by migrating its service to fiber:

> In the absence of this clarification, a competitive LEC might undertake to collocate a DSLAM in an incumbent's central office to provide line-shared xDSL services to customers, only to be told by the incumbent that it was migrating those customers to fiber-fed facilities and the competitor would now have to collocate another DSLAM at a remote terminal in order to continue providing line-shared services to those same customers. If our conclusion in the Line Sharing Order that incumbents must provide access to the high frequency portion of the loop at the remote terminals as well as the central office is to have any meaning, then competitive LECs must have the option to access the loop at either location.[132]

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

First, nowhere has Qwest provided any evidence that line sharing over a fiber fed loop is not technically feasible. To the contrary, as discussed more fully above, line sharing over a fiber fed loop—via a "plug and play" card—is presumptively feasible and thus should be ordered by this Commission.[133]

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[142] *Id.*

[143] *Id.*, ¶ 11.

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

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

> The FCC in its Line Sharing Reconsideration Order, clarified that an ILEC must allow line sharing even where the ILEC has deployed architecture such as SWBT's "project Pronto." The Arbitrators find that as the network architecture changes, SWBT should not be relived of obligations that are already present, namely to provide CLECs access to the loop on an unbundled basis. The Arbitrators find no evidence in the record to support the proposition that Project Pronto or the introduction of fiber into the loop plant changes the underlying nature of the transmission facility; it is still a loop . . . a loop is a loop, regardless of whether it is all copper or a combination of copper and fiber.
>
> The transmission facility, whether it is end-to-end copper, or a configuration of copper and fiber with a remote terminal and remotely located electronics, is within the definition of an unbundled loop. Consequently, SWBT must provide CLECs access to the unbundled loop element from the demarcation point at the customer's premises tot he termination (port) on the OCD in the central office, including the associated electronics at the RT and the CO.[134]

As set forth more fully above, this Commission has the authority, under the Act[135] and FCC rules,[136] to expand Qwest's unbundling obligations beyond those required by the FCC and "to impose additional, pro-competitive requirements consistent with the national framework established in this order."[137] Therefore, it is clear that the FCC welcomes this Commission's efforts to enact additional regulations that it finds warranted to promote competition and the deployment of advanced services in Washington.

C. CONCLUSION

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

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[145] *Texas Arbitration Decision*, p. 74-75.

[146] 47 U.S.C § 251(d)(3).

[147] 47 C.F.R § 51.317(d).

[148] *Line Sharing Order*, ¶ 159

VI. DISPUTED CICMP ISSUES

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

VII. DISPUTE DARK FIBER ISSUES

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

VIII. DISPUTED PUBLIC INTEREST ISSUES

A. INTRODUCTION

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

B. LEGAL AND STATUTORY BACKGROUND

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

Section 271(d)(3) of the Act provides that the FCC shall not approve [a BOC's application to provide in-region, interLATA services] . . . unless it finds that—(A) the petitioning

[BOC] has . . . fully implemented the competitive checklist . . . ; *and* (C) the requested authorization is *consistent with the public interest, convenience and necessity.*" The requirement that Qwest establish both checklist compliance and that the grant of Section 271 authority is in the public interest is not mere recital; rather, "compliance with the checklist alone is [not] sufficient to open a BOC's local telecommunications markets to competition," because "[s]uch an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of Section 271, basic principles of statutory construction, and sound public policy."[138] Thus, as the FCC has stated:

> Although the competitive checklist prescribes certain minimum access and interconnection requirements necessary to open the local exchange to competition, we believe that compliance with the checklist will not necessarily assure that all barriers to the local market have been eliminated, or that a BOC will continue to cooperate with new entrants after receiving in-region, interLATA authority. While BOC entry into the long distance market could have procompetitive effects, whether such benefits are sustainable will depend on whether the BOC's local telecommunications market remains open after BOC interLATA entry. Consequently, we believe that we must consider whether conditions are such that the local market will remain open as part of our public interest analysis.[139]

The requirement that Qwest prove both checklist compliance and that its entry into the long distance market is in the public interest is not limited to "unusual circumstances." To the contrary, the FCC has made clear that satisfaction of both requirements is the norm in order to "foster competition in all relevant . . . markets"[140]:

> [T]he public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. Thus we view the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public

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

[150] *Id.*, ¶ 390.

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

> interest as Congress expected. Among other things, we may review the local and long distance markets to ensure that there are no unusual circumstances that would make entry contrary to the public interest under the particular circumstances of the application. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that markets are open to competition.[141]

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

> Congress supplemented the threshold requirement of Section 271 . . . with the further requirement of pragmatic, real world assessments of the competitive circumstances by the Department of Justice and the Commission. Section 271 contemplates a substantial competitive analysis by the Department using any standards the Attorney General considers appropriate. The Commission, in turn, must find before approving an application that the "requested authorization is consistent with the public interest, convenience and necessity," and, in so doing, must "give substantial weight to the Attorney General's evaluation." The Commission's "public interest" inquiry and the Department's evaluation thus serve to complement the other statutory minimum requirements, but are not limited by them.
>
> The "public interest" standard . . . is well understood as giving the [FCC] the authority to consider a broad range of factors and the courts have repeatedly recognized that competition is an important aspect of the standard under federal communications law.[142]

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

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

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

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

> The truth is, Mr. Chairman, very little has changed since 1984. The Bells still have a firm monopoly over the local exchange market, and if they were allowed in long-distance without any anti-trust review, they could use their monopoly control to impede competition and harm consumers.
>
> ***
>
> [T]he most difficult issue in this bill has been how the local loop is opened to competition. . . . . No question that is where the focus of the controversy has been.[143]

Consistent with this Congressional edict, a BOC seeking Section 271 relief thus should not "overvalue" the expected benefits of entry into the long distance market.[144] The possibility of more competitive choices in the long distance market and a consequent reduction in long distance rates is not determinative of the public interest analysis.

The burden is placed on Qwest to present a *prima facie* case that it has satisfied all the requirements imposed by Section 271 of the Act.[145] Included within the scope of "all the requirements" is the public interest standard. Because the FCC has only ninety days to review a BOC's application for Section 271 relief, the FCC has neither the time nor the opportunity to evaluate a "constantly evolving" record.[146] Thus, it is imperative that Qwest rely not on the mere promise that Section 271 relief will maintain and stimulate competition in Washington, but rather on conclusive and affirmative evidence that its entry into the long distance market is in the public interest.

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

The FCC has made clear that the emerging services—or advanced services—market, which encompasses the provision of DSL service, is equally subject to the market-opening

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[154] 141 Cong. Rec. H8284 (daily ed. Aug. 2, 1995) (Fields); H8289 (daily ed. Aug. 2, 1995) (Conyers); H8464 (daily ed. Aug. 4, 1995) (Fields).

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

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

[157] *Ameritech Michigan 271 Order*, ¶ 54.

requirements of the Act. More specifically, the FCC set forth unbundling requirements in the *UNE Remand Order*, "to facilitate the rapid and efficient deployment of all telecommunications services, *including advanced services*."[147]

Not content with the speed at which advanced services were being deployed to the consumer market, the FCC issued the *Advanced Services Order* so as to "enable competitive LECs to compete effectively with incumbents in the advanced services marketplace."[148] Consistent with the course it set in these two Orders, on December 9, 1999, the FCC released the *Line Sharing Order*, which states, in pertinent part, that:

> In addition, as explained in more detail below, we strongly encourage the states to issue interim arbitration awards setting out the necessary rates, terms, and conditions for access to [line sharing], with any unresolved issues subject to true-up when the state commission completes its arbitration. *We urge states to issue these awards as quickly as possible after a party petitions the state for arbitration under section 252(b)(1) so that competitive carriers are actually able to begin providing advanced services on a shared loop within 180 days of release of this order*.[149]

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

> If competitive LECs were to purchase or self-provision a second unbundled loop to provide voice-compatible xDSL-based services, their provisioning of service would be materially more costly, and coincidentally less efficient, than purchasing the unbundled high-frequency portion of the loop.
>
> ***
>
> In addition, we adopt rules in this Order that apply to spectrum compatibility and management. *These rules will significantly benefit the rapid and efficient deployment of xDSL-based technologies*.[150]

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

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[158] *UNE Remand Order*), ¶ 14.

[159] *Advanced Services Order*, ¶ 18

[160] *Line Sharing Order*, ¶ 160.

[161] *Id.*, ¶¶ 6 & 39.

> Over time, we expect carriers to develop new technologies to support new forms of telecommunications services. Consistent with our rules and our obligation to promote innovation, investment and competition among all participants and for all services in the telecommunications marketplace, we expect incumbent LECs to provide access to the features, functionalities, and capabilities associated with the unbundled network elements necessary to provide such services.[151]

Qwest may not properly or appropriately distinguish between "qualifying" facilities-based providers in its public interest case.[152] To the contrary, as the FCC recognized in its *Advanced Services Order*, of all areas of the local telecommunications market, advanced services such as DSL were uniquely poised to develop into a highly robust competitive market[153]:

> The market for advanced telecommunications is a nascent one. Today, both incumbent local exchange carriers ("LECs") and new entrants are at the early stages of developing and deploying innovative new technologies to meet the ever-increasing demand for high-speed, high-capacity advanced services. Because it is in the early stages of development, the advanced services market is ripe for competition to develop in a robust fashion. In order to foster competition among carriers to develop and deploy new advanced services, it is critical that the marketplace for these services be conducive to investment, innovation and meeting the needs of consumers.[154]

Despite the fact that advanced services clearly fall within the scope of the Act, and that the FCC has made clear that it fully expects and anticipates the development of robust competition in the area of advanced DSL services, Qwest provided no evidence whatsoever of the volume of lines over which DSL services are being provided (either via line shared loops or UNE loops). Qwest's failure to provide any evidence on the existence of competition in the advanced services market, and the consequent impact on the public interest, standing alone, compels the

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[162] *Line Sharing Reconsideration Order*, ¶ *24*.

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

[164] *Advanced Services Order*, ¶ 2.

[165] *Advanced Services Order*, ¶ 2.

conclusion that Qwest has not established a *prima facie* case that its entry into the long distance market is in the public interest.

More critically, as set forth above and below, Qwest maintains a stranglehold over the DSL market in the State of Washington. Thus, it is clear that Qwest's Washington local DSL market is not now open to competition, nor will it be open to competition in the foreseeable future. From the perspective of this Commission, therefore, which must provide a recommendation on the public interest standard, it is clear that the lack of competition has and will continue to deprive Washington consumers of competitive choice among DSL providers. Thus, it is premature and imprudent to find that Qwest's entry into the long distance market is in the public interest.

C. ARGUMENT

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

Like every other DLEC in Washington, Covad has expended significant amounts of money to attempt to enter the Washington market. Its progress (as well as the progress of other CLECs), however, has been negligible. Unlike Qwest, which has experienced an explosive 105% growth in its DSL customer base in the second quarter of 2001 alone, and anticipates an additional 50% increase in growth (i.e., the addition of 140,000 customers) by the end of 2001,[155] Covad's growth has slowed to a mere trickle, increasing in the first half of 2001 by a fraction of Qwest's own reported growth.

Qwest nonetheless claims that its DSL market is "irreversibly" open to competition. Yet, that assertion flies in the face of the reality described above, or even as reflected in Qwest's own exhibits. More specifically, Exhibit 1056C to the Direct Testimony of David L. Teitzel, shows that all but two DLECs, Covad and Rhythms, have exited the Washington market due to bankruptcy; Jato, NorthPoint and DSL.Net are all gone. And as Qwest and the other parties to this proceeding

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[166] Attached hereto as Exhibit 15 is the email containing Qwest's latest earning report as it relates to DSL.

are well aware, the two remaining DLECs in Washington, Rhythms and Covad, have both filed for bankruptcy protection in the last month.[156] Moreover, as AT&T pointed out in its prefiled testimony, as of March 2000, the four major DLECs (Covad, NorthPoint, Rhythms and DSL.Net) operating in Washington had a combined market capitalization of $21.4 billion. One year later, however, that market capitalization had dropped $21.0 billion, to $0.4 billion.

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

More critically, even as its DLEC competitors exit the market, Qwest has moved quickly to capitalize on the "opportunity" created, in large part, by its own conduct. For example, after NorthPoint commenced exiting the market, Qwest took out a full page advertisement in the Seattle Post-Intelligencer harping on the peril of receiving DSL service from any CLEC, touting the merits of its own DSL service, advising consumers that only Qwest will be around in the future, and then offering 60 days free service.[157]

Of even greater concern are the steps Qwest has taken as its DLEC competitors have been driven out of the market on the retail front. Right after Rhythms announced its anticipated bankruptcy filing (thus leaving only one DSL competitor, Covad, in Washington), Qwest immediately raised its retail rates for its DSL services. More specifically, on July 23, 2001, Qwest

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

168 *See* Exhibit 17, attached hereto.

filed amendment pages to its interstate retail DSL tariff to increase its retail DSL [158]rates by $2.00—an almost 10% increase over the current retail rate for DSL services.

As a result of these and other strategies, Qwest is the monopoly provider of DSL service in Washington and is acting entirely consistent with its role as a monopolist. Moreover, Qwest has trumpeted its return to monopoly power internally. After Covad announced its anticipated bankruptcy filing, a Qwest employee e-mailed over 190 other Qwest employees, gleefully describing Covad's restructuring efforts as "the third batter down" and the "end of the national DLEC game," and referred to Covad's announcement of continued operations as "delusional" and the result of "drinking too much Kool-Aid." This particular Qwest employee predicts that "its quite likely a judge will say they have no chance to succeed and force them to immediate Ch 7 liquidation."[159]

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

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

[170] *See* Email from L. Broberg to Distribution List, dated August 7, 2001, attached hereto as Exhibit 12.

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

It is a truism that "efficient competitive entry into the local market is vitally dependent upon the appropriate pricing of the checklist items."[160] Thus, "a relevant concern"[161] for this Commission in rendering a decision on the public interest component of Qwest's Section 271 application is whether Qwest's UNE pricing permits entry into, and sustained competition by, a CLEC. The prices of unbundled network elements ("UNEs") are key to determining whether there will be competition for advanced telecommunications services such as xDSL. The price of a UNE, after all, becomes a direct cost to the CLEC, and ultimately, the consumer.

Here, a single example of the price Qwest seeks to recover for the high frequency portion of the loop ("HUNE") demonstrates that Qwest's pricing is neither cost-based nor appropriately priced. Covad urged this Commission in the costing proceeding to set the price for the HUNE at the same price Qwest continues to charge itself in its retail Qwest DSL tariff filings: $0.[162] This non-discriminatory price, which also recognizes there is no incremental loop cost associated with the HUNE, will result in a more level playing field to permit real price and service competition—not monopoly power—to determine how xDSL services will be deployed to Washington consumers. Conversely, Qwest asked the Commission to adopt an arbitrary price for the HUNE 50% of the loop rate, capped at $10, that artificially inflates the cost of xDSL services to Washington consumers, requires those consumers to pay a second time for the copper loop already serving their premise, and feathers the pockets of Qwest with revenue gained from an essential network element that has no incremental cost to Qwest.

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[171] *Ameritech Michigan 271 Order*, ¶ 281.

[172] *Id.*, ¶ 288.

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

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

> In arbitrations and in setting interim prices, states may require that incumbent LECs charge no more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services.[163]

Qwest ignores this plain directive.

There is only one reasonable explanation as to why Qwest seeks to impose costs that itself does not incur—to create barriers to entry into the local DSL market, minimize the profit potential of its competitors, and implement a prize squeeze on its competitors. Whether taken separately or together, Qwest's non-cost based pricing makes it difficult, if not impossible, for a DLEC to enter and remain in the Washington local market. Thus, until the pricing issue is corrected, it is premature and contrary to the public interest to permit Qwest to enter the long distance market.

DATED this ____ day of September, 2001.

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[174] *Line Sharing Order*, ¶ 139 (emphasis added).

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996.	Docket No. UT-003022 and UT-003040 POST-WORKSHOP BRIEF OF COVAD COMMUNICATIONS COMPANY ON DISPUTED LOOPS, LINE SPLITTING, EMERGING SERVICES AND PUBLIC INTEREST ISSUES

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

September 12, 2001

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DATED this 12th day of September, 2001.

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